Collateral K: Hawrish and Bauer no collateral oral K if it frustrates written K

Damages (talk about remoteness p27 and mitigation p28 and punitive 29)

- Reliance
  - **Sunshine Vacation Villas Ltd. v. Governor and Company of Adventurers of England Trading into Hudson's Bay** (p. 813) – Protect against double recovery, reliance or expectation and how to rebut p15
  - **McRae v. Commonwealth Disposals Commission** (1951 HCA) – reliance damages if expectation damages incalculable P8
- Boundaries
  - **Chaplin v. Hicks [1911] Eng CA** (p. 826)Fidler v Sun Life Assurance **(2006, SCC)**
- Proportionality and Efficiency p15
  - **Groves v. John Wunder Co. (1939) Minn. SC** (p. 829) – preference for SP, Minority says consider inefficiencies and proportionality of remedy p15
  - **Peevyhouse v. Garland Coal** (1963, Okla SC) – small breaches don't yield large damages p15
- Remoteness p27
  - **Hadley v Baxendale [1854]** Exchequer Court EWHC (Basic Rule) p16
  - **Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949]** 2 KB 528 – can claim because foreseeable but can't claim extravagant damages. Analogous to Hadley with different result because of foreseeability and unusually lucrative K p16-17
  - **Scyrup v. Economy Tractor Parts** (1963, Man. CA) – applies Hadley and Victoria, Diss: must be so so specific if you want to claim for special circumstances p17
  - **Koufos v. Czarnikow (The Heron II)** (1969, Eng. HL) – sugar tour, reasonable person approach to foreseeability and remoteness p17
- Loss of Enjoyment or Other Intangible Interest
  - **Jarvis v Swans Tours** (1973, Eng. CA) – damages for loss of enjoyment p18
  - **Fidler v Sun Life Assurance** (2006, SCC) – damages for loss of psychological benefit **p18**
- Liquidated damages, deposits, forfeitures
  - **Supersave Disposal Ltd. v. Blazin Auto Ltd.** (2011) BCSC – court can bring equitable injunction if unconscionable liquidation damages. Needs proportionality to what it's supposedly covering for (Δ's work) p19
- Specific Performance
  - **John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd**. (2001, ONSC) – specific performance if special or unique property p19
- Injunctions
  - **Warner Bros. Pictures Inc. v. Nelson** 1936 KB – no specific performance for personal service K, but legislative injunction possible p20

Duress:

- **Greater Fredericton Airport Authority Inc. v. NAV Canada** (2008) NBCA
  - TEST for duress/coercion p11

Exclusion Clause: Rent-a-car, ski form, no ship, destroyed car, faulty resin PAGE 4

- **Tercon Contractors Ltd. v. British Columbia – TEST** for interpretation P4
- **Tilden Rent-A-Car Co. v. Clendenning** – must bring extraordinary exclusion clauses to the attention of the signer. P4
- **Karroll v. Silver Star Mountain Resorts Ltd. (1988) BCSC** (p. 502) no general rule that you must bring exclusion clause to attention of signer. P4
- **McRae v. Commonwealth Disposals Commission** (1951 HCA) – if one person promised the subject matter and its non existent, they're liable (reliance damages here) P8

- **Karsales (Harrow) Ltd. v. Wallis** P4 (original) exclusion clause can't cover fundamental breach P4
- **Plas-Tex Canada Ltd. v. DOW Chemical of Canada Ltd. (2004)** – exclusion clause can't cover unconscionability PAGE 6

Frustration: wartime tenant, show space burnt down, building not useful

- **Paradine v. Jane** (1647 Eng. KB) tenant assumes risk and benefit no matter what p10
- **Taylor v. Caldwell (1863)** (Eng Q.B.) frustration of subforce majeur or implied limitation p10
- **KBK NO. 138 Ventures Ltd. v. Canada Safeway Ltd.** (2000) BCCA essential quality frustrated voids p10

Fundamental Breach: destroyed car, shitty resin, rigged tender process

- **Karsales (Harrow) Ltd. v. Wallis** (original) exclusion clause can't cover fundamental breach
- **Plas-Tex Canada Ltd. v. DOW Chemical of Canada Ltd. (2004)** – exclusion clause can't cover unconscionability PAGE 6
- **Tercon Contractors Ltd. v. British Columbia**: TEST interpretation of exclusion clauses (1) must apply to circumstances (2) unconscionable at time of formation? (3) public policy that should override freedom of K?

Mistake p6 AND 22

- **Smith v. Hughes (1871)** Eng. Div. Ct. General rule: caveat emptor P7
- **Staiman Steel v. Commercial & Home Builders** (1976, Ont. HC) intention: objective (RP) standard first, subjective if that fails (more about snapping up) P6

↳ Mutual mistake

- **Sherwood v Walker** (Mich 1887) fundamental mistake re: essential quality voids K P7
- **Bell v. Lever Brothers Ltd** (1932) Eng. HL: CL mistake is bilateral, goes to root of K, vitiates consent, void ab initio P8
- **Solle v. Butcher (1950)** Eng. CA **equity** (common mistake re: rights, didn't change subject matter, π not at fault, NOT void ab initio but at time of contract) P8
- **Miller Paving Ltd. v. B. Gottardo Construction Ltd** mistake not an essential quality and π's fault → no recovery P9
- **Great Peace Shipping v. Tsavliris Salvage** (2002) Eng. CA – impossibility TEST, π not at fault and wants to continue, can, does (adopts Bell, not Solle) P8

↳ Mistaken identity

- **Shogun Finance Ltd. v. Hudson (2003) UK HL** rogue actor voids K, nemo dat P9

↳ Non est factum

- **Saunders v Anglia Building Society (1970) UK HL** (p. 608) Ordinary literate people should know what they're signing P9

↳ Unilateral mistake: Saunders, Staiman, Shogun,

Parol Evidence: Zell, Hawrish, Bauer, J.Evans, Gallen PAGE 3-4

- **Zell v. American Seating Co**: parties intentions are what matter. If oral warranty intended to bind, it'll bind **P3**
- **Hawrish v. Bank of Montreal** Parole evidence limits oral collateral contract which contradicts written K P4
- **Bauer v. Bank of Montreal** affirms Hawrish, can't contradict, modify, or vary P4
- **J. Evans & Son (Portsmouth) Ltd. v. Merzario (Andrea Ltd.)** (1976) Dick Bentley over heilbut. Term must have effect if reasonable person would've thought binding P4

- **Gallen v. Allstate Grain Co (1984)** reduces parol evidence rule to a presumption, admissible if shows intention of the parties. Trade Practice Acts.29 P4

Power
- Duress
  - **TEST: Greater Fredericton Airport Auth. Inc. v. NAV Canada (2008) NBCA** p11
- Undue Influence
  - **TEST: Geffen v. Goodman Estate [1991] SCC** p11
  - **Royal Bank of Scotland Plc. v. Etridge (No. 2)** – Δ bank must prove no undue influence p12
- Unconscionability
  - **TEST: Morrison v. Coast Finance Ltd (1965)** p12
  - **Lloyds Bank v. Bundy (1974)** – Determining undue influence unconscionability and inequality in bargaining power p12
  - **Harry v. Kreutziger (1978) BCCA** – Morrison and Lloyds lead to same result here p13
  - **Plastex v Dow** P6
- Illegality and Public Policy
  - **KRG Insurance Brokers (Western) Inc. v. Shafron** [2009] SCC – unfairly restrictive no compete, ambiguous and against public policy p13
  - **Still v. Minister of National Revenue** [1998] FC – Modern effects based approach to stat. illegality (considers purpose of leg.) p13
  - **Holman v. Johnson** (1775, Eng.) – CL Illegality (no illegal Ks) p13-14
  - **Rogers v Leonard** (1973) Ont. H.C.J. – Stat illegality K void contrary to Lord's Day Act p14

Signature
- **L'Estrange** (Eng. CA, 1934) - **Signature Rule**
  Presumption that signed contract is binding
  - Common law traditionally accords high degree of deference to the written contract.

Policy considerations: Finality, certainty, predictability reasonable expectations versus unfair surprise, free market, contract efficacy, business efficacy, market ordering, criminality, fraud, abusive conduct, person shouldn't benefit from their wrong, uphold the law, uphold statute

TERMS
Contra proferentem – Ambiguities in a contract are likely to be construed **against** the party that drafted the contract. (Scott v Wawanesa Mutual)
Nemo dat quad non habet: Can't transfer to another something you don't not have
- Legislated by statute in most provinces and Sale of Goods Act, s. 26(1)
- However, this conflicts with policy of protecting bona fide purchasers for value

Factors a court will consider in deciding whether or not to enforce a written contract:
- **Importance of the assumption** and effect on the **economics of the transaction**
- Is the risk **allocated**?
- **How obvious** is the risk?
- Who is the **best risk avoider**?
- Price is sometimes used as a risk premium
- **Bona fides and reasonableness of the expectations**

PAROL EVIDENCE

Zell v. American Seating Co

- ↳ Parol evidence rule is based on **party intention**. If written K wasn't intended to be the authority, then it won't be. (reasonable intelligent person standard)

Important factors affecting strength of presumption of completeness

- Nature of the writing, its form and contents
- Signature (strengthen)
- Party status
- Circumstances surrounding preparation of the document
- Subsequent conduct of the parties
- Standard form contracts (weaken)
- Nature and effect of parol testimony
- Presence of merger clause or entire agreement clause in the writing

Hawrish v. Bank of Montreal (p. 418)

any collateral oral agreement may not stand in face of written guarantee

- ➢ A distinct collateral agreement that doesn't contradict main instrument may be admissible

Bauer v. Bank of Montreal (p. 421)

Supports Hawrish

Parol evidence inadmissible if directly contradicts K

J. Evans & Son (Portsmouth) Ltd. v. Merzario (Andrea Ltd.) (1976) (p. 423)

- ❖ Applies Bentley over Heilbut. If reasonable person would think warranty→binding
- ❖ A promise essential to the agreement overrides exempting conditions
- ❖ Court accepts that K was partly oral, partly written, partly by conduct

Gallen v. Allstate Grain Co (1984) (p. 428)

Reformulates parol (after Hawrish had made the written document almost absolute).

Rule→presumption (even if contradiction between oral and written, look for intention. The rule is <u>not absolute</u>)

Trade Practice Act 1996 (p. 437)

s.29

Parol evidence is admissible where:

- The written agreement is not the whole contract.
- Interpretation: Extrinsic evidence can be introduced to clear up an **ambiguity** in the contract.
- Invalidity: Extrinsic evidence can be introduced to show that the contract is **invalid because of** lack of intention, consideration or capacity
- **Misrepresentation**: Extrinsic evidence can be introduced to show there was a misrepresentation that was either innocent, negligent or fraudulent.
- **Mistake**: Extrinsic evidence can be introduced to show that there was some mistake as to the nature or effect of the agreement.
- **Rectification**: Extrinsic evidence can be introduced to correct an error/mistake in putting the agreement in writing.
- Condition precedent: Extrinsic evidence can be introduced to show that there was a **condition precedent to the agreement taking effect**.
- Collateral Contract/Warranty/Agreement: Extrinsic evidence can be introduced to show that there was a **separate agreement** along with the written agreement.
- **Unconscionability**: Extrinsic evidence can be introduced to show that the transaction was brought about through unconscionable means.

- **Modifications and discharge**: Extrinsic evidence can be introduced to show that the contract has been modified or terminated.
- **Equitable remedy**: Extrinsic evidence can be introduced in support of a claim for an equitable remedy.

Once it has been decided that the oral rep. was a warranty

a) Evidence accepted on the bassi that there would be a subsequent ruling on admissibility becomes admissible
b) Oral warranty and doc must be interpreted together (harmoniously if possible) w/ K effect to each
c) If no contradiction becomes apparent, then principle in Hawrish, Bauer, and Carman has no application
d) If there is contradiction, the principle in Hawrish, Bauer, and Carman is that there is a strong presumption in favour of written document, but that rule is not absolute, and if on evidence it is clear that the **oral warranty was intended to prevail, it will prevail.**

EXCLUSION CLAUSES

Tercon Contractors Ltd. v. British Columbia (p. 539)
Test: interpretation exclusion clauses, does the clause have effect?

1. Exclusion clause must apply to the circumstances
    - Includes court assessment of party intention
2. Was the exclusion clause unconscionable at time of formation?
    - Obviously about formation, not breach
3. Overriding public policy outweighing freedom of K?
    - Last chance to override clause.
    - Criminality? Fraud? Abusive conduct?

Tilden Rent-A-Car Co. v. Clendenning

- ❖ Extraordinary clauses must be brought to signer's attention. Signature doesn't overrule rule bc Δ knew π was unaware of onerous clause and did not attempt to correct or inform him. Not applied broadly
- ❖ Is it justified to rely on someone else for information if: dependence, influence, vulnerability, trust, confidence. You must prove the relationship suggested an entitlement to not be self-reliant

Karroll v. Silver Star Mountain Resorts Ltd. (1988) BCSC (p. 502)

- ❖ No general obligation to inform of exclusion clause. Limits Tercon, onus on π to show fraud/misrep or prove that Δ knew/had reason to know of π's misunderstanding.

EXCLUSION CLAUSE - FUNDAMENTAL BREACH

Karsales (Harrow) Ltd. v. Wallis (p. 512) (original, now it's **Tercon**)

- ❖ An exclusion clause doesn't automatically allow a party to commit fundamental breach

Distinction (doctrine of fundamental breach is about control of exclusion clauses, while we talk about fundamental breach in respect of breaches of contract that allow a party to repudiate its fundamental obligations.

- ➢ Repudiatory Breach: Breach of contract (i.e. a fundamental breach, a breach of a condition/innominate term) that **entitles** the innocent party to treat the contract as at an end (to **repudiate** the contract)
- ➢ Doctrine of Fundamental Breach: **is the contracting party permitted to rely on the exclusion clause** where its conduct results in a fundamental breach of contract?

Fundamental Breach: The Rule of Construction Approach
It's about interpretation of the exclusion clause. No absolute rule of law that says you can't rely on exclusion clauses just bc you have committed breach of contract

FUNDAMENTAL BREACH – UNCONSCIOUNABILITY

Plas-Tex Canada Ltd. v. DOW Chemical of Canada Ltd. (2004) (p. 536)

- An exemption clause doesn't auto exclude a company acting unconscionably
  1. Majority (Cromwell J): Characterization of context: Misconduct: "One must not lose sight of the fact that the trial judge found that the **Province acted egregiously** by "ensuring that [the true bidder] was not disclosed" and that its **breach "attacke[d] the underlying premise of the [tendering] process""**.
  2. Special commercial context of tendering: public procurement, **need for transparency and integrity** of the bidding process (paras. 67-71)
  3. No other effective remedy (para. 72)
  4. Province could have drafted a clearer exclusion clause (para. 73)
  5. Interpretation

MISTAKE

1. Contract formation: is there a contract? Sufficient certainty about the K subject, the price, and the parties? Objective reasonable person test (Hobbs/majority in Staimain Steel)? Is this a *Raffles*-type case where parties were contracting over two different ships or a *Staiman* type case where the court can impute a definite agreement between the parties.

2. Is this a snapping up the offer type of situation where the offeror might be seen to be taking advantage of the offeree by not disabusing the offeree of a mistake (*Hartog v. Colin & Shields).*

3. *Caveat emptor* generally applies in business-business sales: risk of mistakes as to fact rest with party making the mistake.

4. If a problem arises with respect to contract, typically a question of the terms of the contract – was there a representation or warranty? What are the terms of the contract? Did the contract allocate the risk? Did the contract exclude liability for the risk?

5. Apply common law mistake analysis: mistake about a fundamental underlying assumption? If so, contract is void. If the contract allocated the risk of the relevant mistake, then mistaken party bears risk.

6. Apply equitable mistake analysis: fundamental mistake, no fault, one party taking advantage of other, would it be unconscientious to enforce contract? If yes, contract is voidable (court can rescind). If the contract allocated the risk of the relevant mistake, then mistaken party bears risk.

Contextual Factors to Consider

- **Price**: Price may be relevant in determining the reasonable expectations of the party.
- **Knowledge and skill of the parties**: The court is less likely to protect a mistake made by a person who possesses, or should possess, substantial knowledge or skill.
- **Ease of Avoidance**: Who is in best position to avoid the mistake – who can avoid it the cheapest?
- **Common usage of the trade**: The common usage of the trade may be another way in which the court can get a sense of what the parties probably expected. Also, trade usage indicates normal allocation of risk
- **Knowledge of ambiguity - snapping up**: If one party is aware of the ambiguity they should presumably be bound to clear up the ambiguity. Often times expressed as the "snapping up" point: taking an advantage that leads to inequitable results.

Staiman Steel v. Commercial & Home Builders (1976, Ont. HC) (p 552)

- ❖ Objective test for mistake (reasonable person → words and conduct of parties).
- ❖ Subjective test backup (if impossible to determine what reasonable person would have concluded)
  - ↳ Note: more about "snapping up"

Decision:

- Objective approach (Hobbs v. London & South Western Railway): what would a reasonable person understand as the meaning taking into account all the circumstances?
- **Distinguishes and narrows the subjective test from Raffles v. Wichelhaus (1864) Exch. Ct.** wherein it was impossible for the Court to impute any definite agreements to the parties – Raffles only available when reasonable person couldn't infer any common intention between contracting parties

Court:

- ➢ That separate steel not included should have been obvious
- ➢ Binding contract for used steel exists, but Δ breached by not delivering
- ➢ Damages to π for amount of used steel

Unilateral Mistakes as to Terms

Mistakes as to Terms v Mistaken Assumptions

Smith v. Hughes (1871) Eng. Div. Ct. (p. 554)

- ❖ Should have put it in the contract. Caveat emptor, no recovery.
- ❖ Starting point for mistaken assumption.

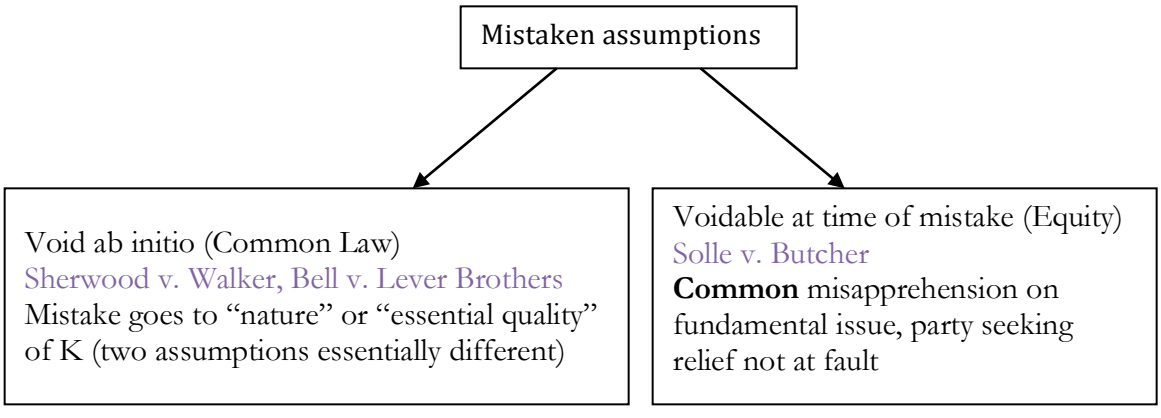
Four exceptions to caveat emptor:

1. Res extincta – subject matter of K didn't exist at the time of formation
2. Res sua – purchaser already owns the item in question
3. Mistaken assumptions re: identity of parties
4. . Mistake as to nature (not mere quality) of the item – major common law exception

Agreements Made Under Mistaken Assumptions

Great Peace: the law is Bell not Solle

But, Great Peace not adopted by Canadian Courts, prefer Solle for fairness



Sherwood v Walker (Mich 1887)

- ❖ Maj: Fundamental misapprehension about an essential quality breaks up a contract
- ❖ Min: Mutual mistake (two ~different mistakes, not common mistake) – caveat emptor
  sale of fancy cow to hobby farm, rancher thought she was barren, turns out she wasn't and

her value as a breeding cow was 10 times higher.
Majority: no K – fundamental misapprehension re: an essential quality
Minority: yes K – mutual mistake, not common mistake (rancher thought she was barren, buyer didn't know either way) but they weren't necessarily making the same mistake, so *caveat emptor*.
Difference is whether the parties made the same factual assumption, or different assumptions (common or mutual mistake). Affects whether there actually was a K

Bell v. Lever Brothers Ltd (1932) Eng. HL (p. 567)

- ❖ Mistake: subject of contract essentially different, bilateral assumptions
- ❖ CL Mistake: K is void ab initio (from the beginning)

sufficient mistake → can't give full/informed consent → K not voluntary → void ab initio
Mistake as to nature will void a contract
Mistake as to quality will void a contract when (Lord Atkins Test):

- o Both parties are mistaken re: quality – mutual/bilateral/common mistake AND
- o Subject matter of K is/becomes essentially different from what the parties believed it to be at the time of formation (courts have power over this assessment)

The Atkins Test has been **very narrowly construed** by subsequent courts

McRae v. Commonwealth Disposals Commission (1951 HCA) Δ's fictional oil tanker

- ❖ If one party has knowledge, makes a promise or guarantee, the other relies, and the info is false, promisor is in breach
- ❖ If mutual misunderstanding re: existence of the subject matter → K void for failure of condition precedent, parties restored to original position.

Damages: Impossible here to give usual expectation benefits (subject matter nonexistent and Δ did not promise specifics) **Damages measured in reliance**. (all expenditure incurred by π in reliance on promise)

Solle v. Butcher (1950) Eng. CA – Mistaken assumption in **equity**
π rented apartment from Δ (7yr lease). High rent, rent increases. π finds out Rent Control Act applies and current rent is in violation, seeks reimbursement for overpayment. Wants to continue lease at correct (lower) price
Denning: K not void

- o Mistake did not fundamentally change the nature of the thing contracted for.
- o So Sherwood/Lever Brothers/McRae CL remedy of void *ab initio* not applicable
- o If void ab initio here, landlords could kick out tenants who learned about the Act and then keep leasing at high price to those ignorant of the Act

Equity can intervene if:

- o Mutual misapprehension re: facts or rights and
- o Misapprehension goes to fundamental issue and
- o Party seeking relief not at fault (and couldn't have found by due diligence)

Comment: today, negligent misrepresentation by tenant, but not available in 1950

Great Peace Shipping v. Tsavliris Salvage (2002) Eng. CA

- ❖ Impossibility test for mistake: does mistake make it **impossible to perform** the K?
- ❖ If mistake means K essentially different→K void
- ❖ If K specifies who bears the risk of the relevant mistake, that will rule.

K to salvage boat, included cancellation clause. Both parties thought π was 35 miles away from damaged boat, but was actually 410miles. Δ got someone else to go to damaged boat, Δ cancelled K. Court said still possible to perform and not essentially different (odd)
Analysis from Miller Paving:

Great Peace not yet adopted in Canada for good reason, eliminating equitable common mistake would mean loss of flexibility needed to correct unjust results in widely diverse circumstances. "a step backward."
Policy reasons for not adopting:

1. Too restrictive: Test for mistake in Great Peace (i.e. fundamental mistake/impossibility of performance) is too restrictive. Too high a standard.
2. Ignores 3Ps: Common law mistake doesn't allow flexibility for third parties who may have relied on the contract. The impossibility test may not be considerate of those interests if always pushing performance – how do we balance their interests?
3. Reduces remedial flexibility: Very important! Without remedial flexibility, the mistaken assumptions doctrine is in an unsatisfactory state.

Miller Paving Ltd. v. B. Gottardo Construction Ltd. (p. 587)

- ❖ Common mistake, but mistake didn't change essential quality (only payment scheme)
- ❖ Mistake was π's fault (and K allocated responsibility for that to π)
- ❖ To engage Solle, π would have to not be at fault
- ➢ Even if Great Peace were law in Canada, π would not prevail (needs to change subject matter)
- ↳ Especially important that π signed off that the payment was proper, communicated that, checked 3 times

Mistaken Identity

Shogun Finance Ltd. v. Hudson (2003) UK HL (p. 600)

- ↳ Rogue is basis for K rescission

Principle (3:2 maj.) Contract void here (and elsewhere if identity is of key importance purchaser lies about their identity (from **Cundy v Lindsay**)
Did not apply face-to-face exception (est. **Phillips v Brooks Ltd**) because the seller was not the dealer but the finance company.

- ➢ *Phillips v. Brooks:* π contracted with rogue, Inference that plaintiff intended to contract with the rogue and not with the person whose identity the rogue had assumed. 3P that rogue sold to holds title.

Dissent:

Lord Nicholls and Lord Millett: Should overrule, not simply fail to apply the face-to-face distinction from Phillips (better policy, protects good-faith purchaser in all cases) Whatever the medium, two people dealing with each other means contract. So contract with rogue, but voidable bc of fraud. Overrules Cundy

Criticisms of Shogun:

- o Financing company should have assumed risk (could have avoided this by doing better due diligence)
- o What else could Hudson have possible done? (Registration was there with Patel's name, etc)
- o Some consumer protection legislation has arisen to deal with this (car dealers of the world should assume the risk – it's the cost of doing business)
- o Still, strong common law presumption to protect the *Shoguns* of the world

Documents Mistakenly Signed

Non Est Factum

Saunders v. Anglia Building Society (1970) UK HL (p. 608)

- ❖ π has burden to demonstrate they weren't negligent in making mistake
- ❖ The plea of non est factum cannot normally be claimed by a person of full capacity

Denning: Grown literate people cannot simply get away with signing things, and not being bound.
House of Lords: upheld CA, though disapproving of the strength of Lord Denning's criticisms.

- Lord Reid: must be a radical difference between what he signed and what he thought he was signing ("fundamental," "serious," or "very substantial"). Will depend on all the circumstances.

FRUSTRATION

Paradine v. Jane (1647 Eng. KB) tenant can't occupy through no fault of their own
Caveat emptor, no frustration. Lessee takes profits and risks. You take the land no matter what. (Historical rule of absolute promises)
Decision: Tenant liable for rent

- **Caveat emptor** (parties must assign all risks in contract) no doctrine of frustration.
- Lessee had benefit of casual profits (ie. if land turns out to be more fertile than thought) so they take the risk of it being less advantageous (notion of reciprocity)

Problem with this approach is it assumes parties are omniscient.
After 150 years, absolute rule is relaxed↓

Taylor v. Caldwell (1863) (Eng Q.B.)
Destruction of subject matter → frustration (if express (force majeur) or implied limitation)
Paradine (absolute obligation caveat emptor) is starting point **subject to**:

- Express limitations in K (documented anticipation/allocation/limitation of future risks)
  - Force majeur ("Act of God") clause: event beyond reasonable control (i.e. war, insurrection, strike) NOT failure caused by negligence or deliberate action/inaction of a contracting party
  - Modern: When an event couldn't be controlled/reasonably foreseen (and parties could not have prepared)
- Presumed intent test (implied limitation): parties knew (at time of signing) that K couldn't be performed unless specified thing continued to exist (as in this case)
  - Conditions subsequent – new condition that arises subsequent to the formation of the K

Comment: subjective presumed intent test replaced by objective (reasonable person, higher bar here) standard (term can be implied if reasonable)

Consider:

- Undue hardship – if one party suffers inordinately, may grant relief
- Risk allocation – are the risks fairly balanced?

KBK NO. 138 Ventures Ltd. v. Canada Safeway Ltd. (2000) BCCA (p. 656)
Facts: Δ sells land to π, turns out to be unusable, π sues to get first installment back
Holding: K is frustrated
Braidwood J TEST for unforeseen events

1. must have occurred after formation
2. must not have been induced by either party
3. must not have been foreseeable
4. impact of event must create more than inconvenience
5. must create radical change in K

6. change must be permanent

Cites:
Capital Quality Homes - rule on frustration and land
- Notes that land used to be exempt from frustration
- For now, frustration will be granted for land very rarely due to land's special status
- caveat emptor

Victoria Wood
- analogous case from Oakville
- purchaser buys for industrial development, zoning designates it to agricultural
- purchaser gets no relief
- purpose of purchase was not found to be fundamental to K
- vendor's knowledge of purchaser's intent does not trigger frustration

Braidwood distinguishes Victoria Wood conclusion re: vendor's "mere" knowledge
- here, property was advertised as 'to be developed'
- contract itself included terms to that effect

Control of contractual power

Duress

Greater Fredericton Airport Authority Inc. v. NAV Canada (2008) NBCA (p. 688)

❖ TEST for duress/coercion

1. Promise extracted as a result of an exercise of pressure (demand or threat)
2. Pressure made it that coerced party had no practical alternative but to agree
3. If coercion, did coerced party legitimately consent?
    a. Was promise supported by consideration?
    b. Did coerced party made promise "under protest" or "without prejudice"?
    c. Did coerced party take reasonable steps to disaffirm promise ASAP?

Undue Influence

Geffen v. Goodman Estate [1991] SCC (p. 702)

❖ TEST for undue influence + (manifest disadvantage for commercial parties only)
1. Relationship of dependence?
2. Manifest disadvantage?
3. Shift onus

If parties in a recognized special relation → automatic *presumption of undue influence

↳ If special relationship, "perpetrator" needs evidence to rebut presumption of undue influence

↳ If no special relationship/presumption, "victim" must prove influence/domination

1. **Relationship of dependence?** Recognized relationships of dependency (*de jure* – solicitor/client, parent/child, guardian/ward), and other relationships which defy easy categorization (*de facto* relationships) (run both)
2. **Manifest disadvantage?** Must this be shown as a required element of UI? (HOL says yes)
    - SCC says not always – depends on context
    - With **gifts/bequests**, makes no sense to insist that the donor prove their generosity placed them at a disadvantage (person may have materially less after giving a gift, but may have wanted to anyway out of generosity)

- However, in **commercial transactions**, the plaintiff should be required to show, in addition to the required relationship between the parties, that the contract was manifestly disadvantageous (either plaintiff unduly disadvantaged by it, or defendant was unduly benefited by it). Makes sense because parties act in their own self-interest in most commercial exchanges.
- La Forest's minority view also supports that UI need not always involve undue disadvantage or benefit, even in a commercial transaction. The focus on UI is on the use of **influence** – UI is just as concerned with the *process* as it is with the *result*
- UI can thus exist without a manifest disadvantage (e.g. doctor abuses relationship of trust & convinces patient to sell house, patient gets better than market price, no manifest disadvantage – but still sold something they didn't want to sell due to UI)
- **Policy considerations:** Protecting abuses of trust, confidence or power, on the one hand, with the idea that the law should not interfere with reasonable bargains on the other (freedom of K)
- **NB**: Court was split on the manifest disadvantage test, so can argue it either way – **unsettled area of the law**

3. **Onus then shifts**: "Influencer" must show the transaction was entered into as a result of "full, free and informed thought." The presumption is thus **rebuttable**.
   - Show no actual influence was deployed in the transaction
   - Independent legal advice obtained?
   - The **magnitude** of the disadvantage or benefit is evidence going to the issue of whether influence was exercised (so, even if manifest disadvantage isn't a required element, the extent of the unfairness will still be relevant – if a really unfair transaction, then will be much harder to rebut the presumption)

Royal Bank of Scotland Plc. v. Etridge (No. 2) (p. 710)

❖ Banks are put in "inquiry" in every non-commercial relationship. Must then take four steps to protect themselves (in case UI is being exercised) so they can rely on the guarantee.

❖ Banks must ensure customers have independent legal advice (liability for ind. lawyer)

↳ leading case for English land law/English contract law (actual/presumed undue influence and vitiating consent to K)

Unconscionability

The Traditional Doctrine

Morrison v. Coast Finance Ltd (1965) (p. 719)

❖ TEST Relief against unfair advantage from unconscionable bargain.
if **proof of inequality** b/w parties arising out of ignorance, need, or distress, and **proof of substantial unfairness → presumption of fraud** (stronger party must rebut)

❖ An unfair deal between parties of unequal power (de jure or de facto) raises a presumption of unconscionability (burden on stronger party to rebut)

A Wider View

Lloyds Bank v. Bundy (1974)

❖ LIST: Separate ways to prove inequality of bargaining power:

1. Duress of goods (voidable)
   a. If, when one person who has goods is in stronger position, another needs the goods and the stronger demands more than is justly due
   b. Colore officii – deals with someone who has an official position

2. Unconscionable transaction (transaction set aside)
    a. If a weakness is exploited by another, far stronger person
3. Undue influence
    a. 2 classes/types:
        i. Stronger is guilty of some fraud or wrongful act
        ii. Stronger is not guilty of fraud, but got advantage for himself because of power disparity (as in here)
            - Presumption of undue influence, with certain kinds of relationship (e.g. parent child, doctor patient)
4. Undue Pressure – special relationship abused
5. Salvage agreements – only void if manifestly unjust
    a. When vessel sinking and needing help, rescuer in stronger position

Harry v. Kreutziger (1978) BCCA (p. 732)

- Combines Morrison and Lloyds tests for unconscionability (same conclusion)

1. Inequality (of both circumstances and process) plus substantial unfairness leads to presumption of unconscionability which the stronger party must rebut (McIntyre J **using Morrison** test)
2. Community standards of commercial morality (Lambert J using simplified **Lloyds** test)

Illegality and Public Policy

KRG Insurance Brokers (Western) Inc. v. Shafron [2009] SCC – strict & ambiguous no compete

- A restrictive covenant is prima facie unenforceable unless shown to be reasonable re: the parties and re: the interests of the public (**Nordenfelt** test).
- An ambiguous restrictive covenant can only be enforced if the ambiguity can be resolved.

π attempts to enforce 'no-compete' clause (restrictive covenant) which restricted Δ's work for 3 years at any insurance brokerage within Metropolitan City of Vancouver"
The trial judge: restrictive covenant unenforceable b/c not clear, certain, or reasonable because "Metropolitan City of Vancouver" ambiguous.
BCCA: restrictive covenant enforceable, even with ambiguity. Rewrote covenant, substituting the term "City of Vancouver, the University of British Columbia Endowment Lands, Richmond and Burnaby"
SCC: Rothstein L (for unanimous maj.): restrictive covenant uncertain and ambiguous.
Rectification could not be invoked to resolve the ambiguity in this case. BCCA erred by rewriting geographic scope to what it thought was reasonable.

Effects of Illegality

Still v. Minister of National Revenue [1998] FC - Modern approach to stat. illegality

- A court **may** refuse to grant relief for a K that is impliedly or expressly prohibited by statute if it is contrary to public policy to do so (here it was not).
- Factors: consequences of invalidating the contract, objective/ purpose of statute, social policy reasons for the prohibition, and determination of the class of persons for whom the prohibition was enacted.

Usually where K prohibited by CL or statute, Courts will not give it effect. But here there's a distinction b/w a contract **illegal in formation** and (as is the case here) a contract illegal as performed.

Illegality and Public Policy

1. **Common law illegality**

Holman v. Johnson (1775, Eng.)

No court will lend its aid to a man who found his cause upon an immoral or illegal act.

Categories traditionally recognized as contrary to public policy/common law:

(i) Contracts injurious to the state
(ii) Contracts injurious to the administration of justice
(iii) Contracts involving immorality
(iv) Contracts affecting marriage (restricting right to whom you can marry)
(v) Contracts to benefit from a crime
(vi) Contracts to commit a tort/common law wrong

Contracts in restraint of trade

- public interest in free trade
- restrictive covenants *prima facie* unenforceable; restrictions must be reasonable: by activity; time and geography
- stricter scrutiny applied to employment contract (inequality of bargaining power)
- notional (read down provision to avoid illegality) v. blue pencil severance (scratch out individual words to avoid illegality)

Shafron v. KRG: reference to "Metropolitan City of Vancouver"

- ambiguous restrictive covenant is *prima facie* unenforceable

Baby M, 1988 surrogacy contract found to be contrary to public policy

Assisted Human Reproduction Act (Canada), re: Payment for surrogacy

6. (1) No person shall pay consideration to a female person to be a surrogate mother, offer to pay such consideration or advertise that it will be paid.

2. **Statutory illegality** when K

- expressly/ impliedly prohibited by statute
- entered into w/ the object of committing an act prohibited by statute
- requires performance contrary to statute
- confers benefits in violation of a statute

Easy cases:

1. Criminal law: drugs, crime etc. – contracts will not be enforced.
2. Cases where the statute specifically states that "*no contract shall be entered into*…" or where the statute provides that unlicensed persons may not maintain an action for fees (*Real Estate Act*).

Hard cases:

Administrative infractions, trivial illegality, or regulatory regimes which do not address specifically the effect in contract of the non compliance. Perhaps determined that it's an offence and there's some sort of fine for certain conduct, but that doesn't necessarily mean that the contract is unenforceable.

Classical Approach

Rogers v Leonard (1973) Ont. H.C.J.

- ❖ Contract void because contrary to Lord's Day Act

Sale and purchase of a cottage. Agreement signed on a Sunday contrary to the *Lord's Day Act*. Vendor knew of Act but was willing to ignore it as she was dealing with friends. When the vendor refused to complete (and presumably was no longer a friend), the purchasers sued.

Modern Approach

Still v Minister of National Revenue (1998, F.C.A.) – immigrant may apply for employment

- Still acted in good faith, not an illegal immigrant

"Where a contract is expressly or impliedly prohibited by statute, a court **may** refuse to grant relief to a party where, in all the circumstances of the case, including regard to the objects and purposes of the statutory prohibitions it would be **contrary to public policy**, reflected in the relief claimed, to do so."

Courts will factor in the consequences of invalidating the contract, the social policy reasons for the prohibition, and the determination of the class of persons for whom the prohibition was enacted.

Reliance Damages

McRae v. Commonwealth Disposals Comm. [1951] Aus. HCA (p. 805)

- ❖ Impossible to determine expectation damages (lack of specifics), so reliance instead

Sunshine Vacation Villas Ltd. v. Governor and Company of Adventurers of England Trading into Hudson's Bay (p. 813)

- ❖ Avoid double recovery (expectation and reliance damages are alternatives. Can't usually award both)
- ❖ To rebut reliance damages: show that party would have lost money in any event.
- ❖ To rebut expectation damages: show that party would not have earned as much or would have lost money

Damages: The Boundaries of Recovery

Circumscribing the Zone of Protected Interests

Chaplin v. Hicks [1911] Eng CA (p. 826)

- ❖ π entitled to recover damages for **loss of a chance** to gain employment. She didn't have to demonstrate that she would've been successful at interview.

Vaughan Williams LJ: "the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages for his breach of contract."

Cost of Completion v. Difference in Value

Groves v. John Wunder Co. (1939) Minn. SC (p. 829)

- ❖ Preference for specific performance despite inefficiencies
- ❖ Min: inefficiencies should rule, damages possible

K breached deliberately by Δ midway
Specific performance = $60 000. Work already done = $12 260
Maj: Specific performance (hold to K) regardless of inefficiencies (unless economic waste)
Dissent: Shouldn't fulfill K when economically inefficient

- giving π more money goes beyond what parties had in mind = overcompensation.

Peevyhouse v. Garland Coal (1963, Okla SC)

- ❖ Minor detail breach doesn't earn large damages

Majority: if the provision breached was incidental to main purpose, and the economic benefit from full performance would be grossly disproportionate to the cost of performance (here), damages are limited to reduction in value resulting to premises from non-performance

Dissent: π entitled to specific performance, ∴ proper cost is specific performance. Any other measure would:

- devalue K
- give benefit to party in breach over conforming party
- (favours maj. in Groves v. John Wunder)

Jackson - Majority (5): diminution in value granted ($300)

- cost of performance **out of proportion** to value gained
- windfall
- will not remediate
- reclamation clause incidental

Irwin - Minority (4): cost of performance

- sanctity of contract
- reclamation clause essential
- unjust enrichment
- fair: not a surprise

Remoteness

Hadley v Baxendale [1854] Exchequer Court EWHC (Basic Rule)

TEST: Damages not too remote if (1) damages arose naturally from breach, (2) the damages were in reasonable contemplation of the parties as a probable consequence* of breach (forseeability + probability) *Special circumstances communicated?

Ratio: Damages from breach should be what was known/communicated

- Nonbreaching party is entitled to damages naturally arising from the breach itself (or those that are in the reasonable contemplation of the parties at the time of contracting)
- ➢ Evade this situation by specifying damages in K or informing of special circumstance.

Effect of Hadley v Baxendale:

- Changed the law on damages (previously, a factual matter determined by juries, now a **rule** for more certainty/predictability)
- Danzig: A Study of Industrialization of Law (re: **Hadley v Baxendale**)
    - Economic context (1854): industrialization, emergence of rail transport, liability of **carriers** (i.e. Baxendales of the world) was of considerable economic significance
    - Baxendale as a defendant is *personally liable* (not a company) – concerns here
    - Concern with protection of capital and promotion of investment
    - No insurance – limited ability for people to insure against risks
    - Judiciary: thinking about classical liberalism, protect yourself from risks by contracting in the market
        - Floodgates concern: economic losses from large damages claims
    - Danzig's thesis: this is a judicial innovation in an age of industralization
        - Standardization of law (ensuring same standard to be applied by juries)
        - Centralization of power (elite, central, London-based judiciary taking power away from local juries – who would have been composed of local merchants like Hadley) – idea of controlling juries
        - Mass production of judicial products – lots more cases are coming through

- This was an innovation – not based on any authority

Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 528
Δ supposed to deliver boiler to π, but delivery five months late → π lost lucrative K
sued for ordinary profit lost from delay. Can it claim whole lucrative (extraordinary) profit?

- Asquith LJ (Court of Appeal): compensation for ordinary profits (Δ had knowledge of π's situation/need), NOT extraordinary loss. Normal contracts could reasonably be assumed, but the extraordinary loss is only recoverable if Δ had sufficient knowledge of that possibility (then reasonable to attribute to him acceptance of liability for such losses)
  - ↳ Court can "slice and dice" losses

Reasonably foreseeable loss (at time of contract) is recoverable.
↳ To recover, Δ must have had to know details at time of contract
imputed – 1st branch of Hadley test
or **actual** – 2nd branch of Hadley test

Very analogous case to Hadley with different result because of foreseeability/remoteness
↳ **Sellers/buyers** (here, had knowledge of situation & expertise) generally have better knowledge of each other than general **carriers** (Hadley) would (they are simply transferring something from A to B)

– pick which ones are in the reasonable contemplation of the parties, and which ones are not

Lost profits are usually awarded (Victoria Laundry (expertise re: boilers, knew use) v where they usually aren't awarded (e.g. if defendant is just a carrier – Hadley)

Scyrup v. Economy Tractor Parts (1963, Man. CA)
π purchased tractor attachment from Δ. Made it obvious he needed it in a hurry for an upcoming job. Attachment delivered broken, job lost. π sues for lost profits.

Majority: applies Hadley (two branch test) and Victoria Laundry (reasonable foreseeability/knowledge emphasis

- Plaintiff satisfies on both branches of test
- Breach would in the ordinary course of events result in loss of profits, plus plaintiff actually communicated the special circumstances about the upcoming job

Dissent: Says that reasonable foreseeability of lost profits is *not* made out

- **Policy:** To saddle the defendant with liability for lost profits, the information communicated must be VERY specific
  - Not sufficient to simply say "I need it for a contract"; must specify the type of work, magnitude of operation, etc (e.g. K worth only $100 or $100,000?)
  - Thus concerns about **sufficiency of information** communicated
  - Defendant didn't know enough about the job that the plaintiff needed the attachment for, didn't know the scope of liability, had no way to contract out of the liability if it didn't want to be subjected to it
  - Raises **proportionality** concerns

Koufos v. Czarnikow (The Heron II) (1969, Eng. HL) – sugar tour

- ❖ No special information communicated; however breaching party Δ was aware that π was waiting for lucrative market for sugar in Basrah. Claim for lost profits upheld.
- So, carrier situation (like *Hadley*) but court DID award lost profits here
- **NB**: Lord Reid takes issue with the **terminology** used in *Victoria Laundry*: they used language like "reasonably foreseeable", but he says this is too loose a formulation (not every type of damage that is "reasonably foreseeable" should be recoverable). The crucial question is whether, on the information available, whether such a loss was **sufficiently likely** to result from breach of K to make it **proper** to hold that the loss flowed naturally form the breach, or that loss of that kind should have been within his contemplation
- **Tort versus K**: remoteness in contract is a **higher standard** than it is in tort
  - In contracts, a party can protect himself against risk in the K – but a party cannot do the same thing in tort, so it is fair to have a lower, broader in tort to allow easier recovery
  - Something might be "reasonably foreseeable", but might not meet the standard of being "sufficiently likely"
  - Can't use language that confuses damages in contract with damages in tort
- A **maze of semantics** (likely, highly likely, reasonably foreseeable, etc) – Lord Reid wants to set a single standard to make it clear
- However, Newcombe says this is all rhetoric. The more important issue is the **policy concerns** which drive these questions. See summary below.

Loss of Enjoyment and Other Intangible Interests

Jarvis v Swans Tours (1973, Eng. CA)

- ❖ Considers ruined expectation, loss of entertainment/enjoyment
  - Lonely solicitor goes to Swiss Alps for Christmas holiday, (brochure makes representations and warranties about high quality of experience), promises fall through, holiday sucks.

Denning granted double cost of holiday for contract of pure enjoyment: the cost of the vacation plus money for "disappointment, the distress, the upset and frustration caused by the breach."– i.e. he got back what he paid & another 63 pounds– i.e. he got back what he paid & another 63 pounds

- Another way of thinking about this is he lost his two week holiday – so we should let him take another (might've been based on his weekly salary as well – seen as a **lost opportunity**)
- Trial judge had given difference in value (i.e. difference in what he paid for and what he got)

Principle: Takes a broader approach to damages, taking loss of entertainment/enjoyment (i.e. ruined expectations) into account. Analogizes to tort law (just as damages for shock can be recovered in tort, so too can damages for mental distress be recovered n tort).

Often said that breach of K damages cannot be given for mental distress.

- Hamlin v. Great Northern Railway Co. (1856), Pollock CB: damages cannot be given "for the disappointment of mind occasioned by the breach of contract."
- Hobbs v. London & South Western Railway Co. (1875) Mellor J: "for the mere inconvenience, such as annoyance and loss of temper, or vexation, or for being disappointed in a particular thing which you have set your mind upon, without real physical inconvenience resulting, you cannot recover damages."

BUT, Denning: I think that those limitations are out of date. In a proper case damages for mental distress can be recovered in contract, just as damages for shock can be recovered in tort.
Still, must avoid double compensation – cant formulate it in a way where you get expenses and profit.

Fidler v Sun Life Assurance (2006, SCC)

- ❖ TEST for damages from psychological suffering or loss of psychological benefit

1. **An** object of the K was to secure psychological benefit, and mental distress occurred upon breach within the reasonable contemplation of the parties; and
2. The degree of mental suffering caused by the breach was of a degree sufficient **to warrant compensation.**

- ↳ Need not be the dominant purpose or essence of the K – the question is whether: is it part of the bargain?
- ↳ Typical frustration or mental distress that goes along with a contract breach will usually not be sufficient.

- General rule for compensatory damages for breach of K: Hadley v Baxendale

Comment: Part of an insurance contract is a psychological benefit – can rest easy knowing you will be taken care of. Insurance companies *sell* insurance that way. Significant evidence of mental distress on the part of Fidler.

Liquidated Damages, Deposits and Forfeitures

Supersave Disposal Ltd. v. Blazin Auto Ltd. (2011) BCSC

- ❖ Enforceability of liquidated damages (determined at time of signing) is an issue of (1) freedom of contract versus (2) the right of courts to intervene in a given case to relieve against an oppressive or unconscionable liquidated damages term.
- ❖ More enforceable if genuine pre-estimate of expected loss that a party will sustain in the event of a breach of contract. Oppressive penalty clause may mean equitable intervention (if extravagant in comparison with greatest loss that could conceivably be proved to have followed from breach)
  - o Though the parties may use the words "liquidated damages" or "penalty" in the agreement itself, the parties' characterization of the clause in the contract as one or the other is not conclusive
  - o π has onus to establish that stipulated sum is a penalty rather than a genuine pre-estimate of damages
  - o Relationship between parties and type of contract may be relevant. More damages if the product is custom (ex. hand painted sign not resalable) and less if generic (can be sold to next customer)

The length of the contract, the length of the term remaining on the contract when the breach occurs, whether the breach occurred during a renewal period automatically engaged by the customer's failure to give the required notice of termination, any notice period provided for in the contract for termination, and the precise terms of the liquidated damages clause are among the factors that a court may determine to take into account in deciding in a particular case whether the clause is a genuine pre-estimate of damages or a penalty.

Specific Performance

John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd. (2001, ONSC)

- ❖ Specific performance if K is unique or damages inadequate (or incalculable)

π (hotel builder/manager) agreed to purchase vacant lot from Δ. Agreement req'd severance approval (condition precedent) from city before proceeding. City granted approval subject to possibility that Δ may have to build an extension to a nearby road & dedicate it to city. Cost was set b/w $350-500k.

- o Building the road would not have benefited π or Δ, only other property owners.
- o Δ tries to breach, π sues for specific performance.

- Legal Issues: Specific performance – is performance of the K unique? Since Sopinka's dissent in Semelhago, courts don't assume that about land Ks anymore.
- Held: SP awarded
- Reasons:
    - This particular transaction merited SP, damages would be inadequate.
    - Land was right next to a mall and Wonderland, so that was a specific attribute.
    - Evidence that they had tried and failed to find a substitute that replicated all the features of the desired land.
    - Note: It would be highly speculative to calculate the damages in a monetary sense
    - SP is granted where damages are inadequate (i.e. it's not just about money), but also where it is all about money but damages are too difficult to calculate.

Injunctions

Contracts of Personal Service

Warner Bros. Pictures Inc. v. Nelson 1936 KB

- ❖ Courts may enforce negative covenant by inunction, but won't enforce specific performance for personal service, nor will they grant injunctions when it is the basis of someone's livelihood.

Δ actress signs K for her exclusive services. Term that if Δ does not fulfill, π can extend contract. Δ left country, signed contract with another company. π brings injunction to restrain her from working for someone else, so she would work for them

Ratio: If K for personal service contains negative covenants (and no specific performance or decree requiring Δ to remain idle) Court will enforce negative covenants by injunction.
The contract might have run for six years, but injunction granted for max three years because least amount that would reasonably protect π against consequences of Δ breach

CHECKLIST

- Are there _____ issues, yes/no. Move to next

Then say okay I've identified x number of issues, then figure out what the best argument is

1. **Formation** (is there a K?) Objective reasonable test (Smith and Hughes)
2. **Terms** (if there's a K then what are the terms of that K?)
    a. Interpret, use contra proferetum interpretive principle for standard form contracts
    b. Issue about recording terms of the contract? (parol evidence? Gaalen v. allstate says strong presumption for written but oral can trump if reasonably relied upon and consistent with parties intentions)
    c. Did parties have **reasonable notice** of terms (in particular onerous provisions)?
    d. Were terms added after K was concluded? (more like a going transaction adjustment issue
    e. If exclusion clause, apply Tercon analysis. If applies, is unconscionable? If not unconscionable is it contrary to public policy?
3. **Defences/Excuses/Control** (are there any defences/excuses to get me out?)
    a. Is this a situation where contract was frustrated (by events after formation which destroyed commercial purpose of contract). Frustration occurs **after** contract was concluded. Not dependent upon when the thing is discovered, but when it happens.
        i. Ex. we thought we were contracting for 1965 ford on day one, found out on day three that it's a 1964. This is **not frustration**. Nothing happened. It's mistake.
        ii. If there was a fire on day 3 and the car gets fucked up, **that is frustration**. EXTERNAL EVENT HAPPENING AFTER K FORMED
    b. Mistake
    c. Illegality
    d. Duress
        i. Focus on consent of parties
    e. Undue influence
        i. Abuse of trust confidence, relationship of dominance/dependence
    f. Unconscionablility
        i. Inequality in bargaining process and bargain
    g. Does contract violate law or public policy?
    h. Are there consumer protection issues?
    i. Dishonest performance? (duty of good faith?)
4. Remedies (well if nothing else what is the remedy?)
    a. If no K, should be restitution of benefits
    b. Equitable mistake (broad remedial discretion)
    c. If frustrated, relieved of further performance obligation (generally split costs)
    d. If undue influence, unconscionability, etc give everyone their stuff back
    e. Damage (how measured (generally expectation measures) are there limiting principles that apply remoteness mitigation)

What are the grounds that you would 1st look for to get D off?
First Fraud - Non est Factum – Misrepresentation - Then move to unconscionability

MISTAKE NOTE

it's easy to see mistake in every situation but **it's a residual category** that you apply when nothing else is available. Discuss mistake if pertinent but address others first
Re: content of contract and formation
CL mistake: parties being so out of sync that no K formed
Mistake as to facts generally caveat emptor
Mistake as to terms of contract

- Recap of issues in 1st term re: sufficient certainty over terms of K
- Staiman steel
- Raffles and wicklehouse (two ships both named peerless, parties were fundamentally mistaken about what the terms of the K were (re: which ship))
- Hypo I own a chevy and a ford, I contract to sell ford, uyou think you're buying a chevy, two different Ks complete misunderstanding as to fundamental terms of K

Diff types of CL (mistake as to identity of parties, nonexistence of subject matter, mistaken assumptions (both parties mistaken about certain quality that without the quality the K is fundamentally different)

CL mistake (the bar is very very high) = no K

- Assumption that if parties are contracting commercially that they intend to do so
- Remember: especially re: mistaken assumptions, **both** parties have to be mistaken
- Ex. we both think we're contracting for a 1965 limited edition ford mustang but it turns out to be a 1966 (fundamentally different because not as valuable, not limited edition)
- Fundamental common assumption that makes what we think we're buying/selling a completely, fundamentally different agreement
- If we thought the gas tank was not rusted but then we found out it is rusted, there's not CL mistake. Not fundamental enough. (potential remedy in misrepresentation or warranty if said "perfect condition," but no CL mistake)

No CL mistake = perhaps equitable mistake (more flexible test)

- If material/fund misapprehension, court may seta side K w/ its equitable discretion
- Doesn't have to be common
- Generally involve one party taking advantage of another because they know something the other does not. If court says that knowledge was really fundamental to the deal then perhaps K void

Consumer Protection

Policy behind Consumer Protection

- "Seller beware", rather than buyer beware
- Idea that challenges the **liberal assumption** that rational, autonomous individuals enter contracts to maximize self-interest
- Targets **information failures** and **enhancing truth** in marketing
- Idea that if we provide consumers with *more* info, they'll make better/rational decisions
- Addresses market failure and disparities between sellers/consumers in knowledge, bargaining power and resources
- **Economic rationales for govt interventions in the consumer marketplace:**
    - Prevent monopoly (ensures competitive marketplace)
    - Regulation of product safety hazards/pollution
    - Addresses information failures (prohibits fraud/deception, mandatory disclosure requirements, etc)
    - Supply consumer education
- **Non-economic rationales:**
    - Paternalistic concerns (transactions may not be in a consumer's long-term interest: capacity issues, protecting vulnerable/gullible consumers, unconscionability, etc)
    - Redistributive concerns (interest rate regulation, rent controls, etc)

Sale of Goods Act

- Focuses on **substantive rights**
- Examples: that a good is fit for purchase and is of merchantable quality
- Consumers thus have a statutory right that a good is **fit for its intended purpose**
- However, only applies to goods, not services
- **s. 20: No waiver of warranties or conditions**
    - Does *not* apply to primarily business/commercial purposes
    - These rights cannot be waived
    - Any term/contract that tries to waive these rights is void

Sale of Goods Act

↳ Implied conditions with respect to description (s. 17), quality and fitness (s. 18), and samples (s. 19) [all warranties conditions under 17-20 cant be negative or diminished per 20(2)]

↳ **20** (1) For the purpose of this section, retail sale or lease includes every contract of sale or lease made by a seller or lessor in the ordinary course of the seller's or lessor's business but does not include a sale or lease of goods
…
(b) to a purchaser or lessee who intends to use the goods primarily for business purposes,
(c) to a corporation or an industrial or commercial enterprise, or

↳ (2) … in the case of a retail sale or lease of goods, other than goods that on reasonable inspection appear to be used goods or goods that are described or represented by the seller or lessor to be used, any term of a contract of sale or lease, or any collateral or contemporaneous contract or agreement, that purports to negative or in any way diminish the conditions or warranties under sections 17, 18 and 19 of this Act, is,
(a) if a term, severable from the contract and void, or
(b) if a collateral or contemporaneous contract or agreement, void.

Nemo Dat: Sale by person not owner

26 (1) Subject to this Act, if goods are sold by a person who is not the owner of them, and who does not sell them under the authority or with the consent of the owner, the

buyer acquires no better title to the goods than the seller had, unless the owner's conduct precludes the owner from denying the seller's authority to sell.

56: if there's a breach of warranty by the seller, the buyer may maintain an action against the seller for damages for the breach of warranty.

Business Practices and Consumer Protection Act

- Focuses on **procedural rights**
- Very wide definition (consumer, consumer transaction, supplier)
- **Reversed burden of proof** is on supplier for any allegation of deception or unconscionability
- Like the Sale of Goods Act, these rights cannot be waived
- The BPCPA also deals with door-to-door sales, unsolicited goods, internet sales, credit/debt collection, contracts for gym/dance memberships and weight loss (areas where people have historically been taken advantage of)
- **Remedies:** Can bring an action for damages or an injunctino
- **NB:** Make sure to distinguish between a **consumer situation** and a purely **business to business situation**

Definitions (s. 1)

- Applies to **consumers** (i.e. an individual participating in a consumer transaction), NOT business to business transactions, or profit-making ventures
- **Consumer transaction:** Supply of goods/services/real property for purposes that are primarily personal, family or household
    - Or a solicitation, offer, advertisement or promotion by a supplier with respect to a consumer transaction
- **Supplier:** A person who supplies goods, services or real property to a consumer, or solicits, offers, advertises or promotes material regarding a consumer transaction
    - This relationship is not dependent on privity of contract

Waiver (s. 3)

- These statutory rights CANNOT be waived

Deceptive acts or practices (s. 4)

- **Definition:** Any a) oral/written/visual *representation* made by a supplier, or b) *conduct* by a supplier, that has the effect or capability of deceiving or misleading a consumer
    - **Representation** includes any term in a contract (or any document used in connection with a consumer transaction)
- **Timing:** Can occur before, during, or after the consumer transaction
- **List of what constitutes a deceptive act or practice:**

(a) a representation by a supplier that goods or services

(i) have sponsorship, approval, performance characteristics, accessories, ingredients, quantities, components, uses or benefits that they do not have,

(ii) are of a particular standard, quality, grade, style or model if they are not,

(iii) have a particular prior history or usage that they do not have, including a representation that they are new if they are not,

(iv) are available for a reason that differs from the fact,

(v) are available if they are not available as represented,

(vi) were available in accordance with a previous representation if they were not,

(vii) are available in quantities greater than is the fact, or

(viii) will be supplied within a stated period if the supplier knows or ought to know that they will not;

(b) a representation by a supplier

(i) that the supplier has a sponsorship, approval, status, affiliation or connection that the supplier does not have,

(ii) that a service, part, replacement or repair is needed if it is not,

(iii) that the purpose or intent of a solicitation of, or a communication with, a consumer by a supplier is for a purpose or intent that differs from the fact,

(iv) that a consumer transaction involves or does not involve rights, remedies or obligations that differs from the fact,

(v) about the authority of a representative, employee or agent to negotiate the final terms of a consumer transaction if the representation differs from the fact,

(vi) that uses exaggeration, innuendo or ambiguity about a material fact or that fails to state a material fact, if the effect is misleading,

(vii) that a consumer will obtain a benefit for helping the supplier to find other potential customers if it is unlikely that the consumer will obtain the benefit,

(viii) that appears in an objective form such as an editorial, documentary or scientific report if the representation is primarily made to sell goods or services, unless the representation states that it is an advertisement or promotion, or

(ix) to arrange for the consumer an extension of credit for a fee, unless the fee is deducted from the advance, as defined in section 57 *[definitions]*;

(c) a representation by a supplier about the total price of goods or services if

(i) a person could reasonably conclude that a price benefit or advantage exists but it does not,

(ii) the price of a unit or installment is given in the representation, and the total price of the goods or services is not given at least the same prominence, or

(iii) the supplier's estimate of the price is materially less than the price subsequently determined or demanded by the supplier unless the consumer has expressly consented to the higher price before the goods or services are supplied;

(d)a prescribed act or practice.

Unconscionable acts or practices (s. 8)

(1) Unconscionable act by supplier may occur before, during or after the consumer transaction

(2) In determining unconscionability, court must consider *all* surrounding circumstances that the supplier knew or ought to have known

(3) Lists circumstances that a court must consider (undue pressure, taking advantage of physical or mental infirmity, ignorance, illiteracy, age, or inability to understand the transaction, whether price grossly exceeded what would be charged elsewhere, if there was no reasonable probability that full payment would be made by the consumer,or if terms or conditions were inequitable).

s. 9, Prohibition and burden of proof

(1) A supplier must not commit any unconscionable acts or practices in a transaction.

(2) If unconscionability is alleged, the burden of proof to disprove allegation is on the supplier

s. 10, Remedy for an unconscionable act or practice

(1) Subject to sub 2, an unconscionable transaction is not binding

(2) Gives specific remedies in respect of unconscionability in the context of a mortgage loan

Guiding principles:

- True intention
- A contract is an *agreement*. Written piece of paper is *evidence* of that agreement.
- Courts will look at: the whole K, the context, its commercial purpose
- Courts will look at **literal meaning** of words (courts only depart from this if an unreasonable result, or if clearly goes against purpose of K/parties' intentions) – ***Consolidated-Bathurst***
- If there is no ambiguity, then must give it plain meaning (cannot interpret for a more "fair result" or a "sensible commercial result"). Must presume that parties intended the legal consequences of their words – ***Eli Lilly v. Novopharm Ltd***

1. Courts use an **objective** approach to determine parties' intentions.

- Inquiry into subjective intentions is usually not allowed
- **Policy**: K law is to protect *reasonable expectations*. The test is thus how the promisor's conduct would strike a reasonable person in the position of the promise.

2. Surrounding circumstances are almost always relevant.

- Ks not made in a vacuum. The factual matrix, commercial context, genesis of the K, market etc will be considered

3. If there is no ambiguity in the written document, there is no need for extrinsic evidence.

- If intention is clear, courts cannot stray beyond the "four corners" of the agreement.
- Majority in ***Scott v. Wawanesa*** – when the wording is unambiguous, courts cannot take a different meaning

4. Evidence of prior negotiations is inadmissible.

- However, might be included to show the general aim or genesis of the transaction

5. No redundancy. Interpretation must give effect to all parts/provisions of the agreement.

- Doctrine of **effectiveness** – must give effect to every word of the agreement
- General terms are often seen as qualified by specific terms

6. Subsequent conduct is not relevant

- Canadian courts have been flexible here – to resolve ambiguity, courts may look to see if a party behaved as if they were in a K

7. Related agreements may be considered if components of one larger transaction.
8. Words given their natural or ordinary meaning.

- Evidence may be admitted to prove the word has a special/technical meaning.

9. ***Contra Proferentem***

- Ambiguities construed in favour of the non-drafting party.

Ambiguity	No Ambiguity
- *Contra proferentum* (authority: minority in ***Wawanesa***) - Subsequent conduct can be relevant if two reasonable interpretations (*Re Canadian National Railways*) -	- Objective approach - No need for extrinsic evidence if no ambiguity (majority in ***Wawanesa***) - Give words their natural/ordinary meaning - Per majority in ***Wawansa***: judiciary can only give effect to a different meaning if it is a) unreasonable or b) clearly contrary to the intention of the parties

Remoteness

Summary and Factors

General Policy: fair balance between reasonable expectations and unfair surprise to the defendant re: unexpected liability. Contractual Provisions will rule. SCC has affirmed that Hadley is the proper test. Categorizing the loss in specific v general terms will vastly change the implications of the result. Remoteness is a question of policy more than law.

Remoteness factors:

- Degree of probability/foreseeability of loss - what would ordinarily be expected in the circumstances.
- Communication of special circumstances - fact of communication plus particulars: clarity, specificity and timing.
    - Scyrup v. Economy Tractor Pasts Ltd.: plaintiff made known to the defendant that the attachment was for a tractor needed for a job. Specific type of work not communicated.
    - Munroe Equipment Sales: no specificity in communication of circumstances that tractor needed to keep road clear from timber removal during winter.
    - Was there an assumption of responsibility? (Cornwall Gravel). It will not be conclusive - but may be an important factor nonetheless.
- Defendant's knowledge - generally and of plaintiff's business in particular.
    - Hadley v Baxendale (carriers) versus Victoria Laundry (expertise re: boilers, knew use). As a general rule if the defendant has only a transitory relationship with the plaintiff, then scope of liability might be reduced. If there is an established relationship between the parties then defendant's knowledge of plaintiff's business is likely to be greater. However, where consumer expectations are reasonable and created by the defendant, then liability might result even where the relationship is transitory (Cornwall Gravel).
- Nature of Defendant's business - expertise and what is being offered to the plaintiff.
- Nature of the product or service – second hand or the top of the line
- Sophistication of Parties - generally the more sophisticated/knowledgeable the parties, the more likely the damages in question will be foreseeable.
- Ordinary allocation of risk - understandings or expectations in the marketplace (custom of the trade).

Insurance: In cases such as Hadley, it may be more efficient for businesses to get business interruption insurance to cover lost profits than for carriers to have to carry third part liability insurance to cover claims of lost profits.

- **Proportionality**: comparison of contract price and nature of the service with risk (ultimate loss claimed).

Anomalous to impose extensive liability for a breach of an ordinary service, low price contract

like remoteness, it's a doctrinal tool to limit recovery of damages.

1. **General rule: Claimant must take reasonable steps to avoid loss.**
   Reasonable steps: What is reasonable for claimant to do and the time within the claimant must do it are <u>questions of fact</u> dependent on the circumstances of the case.
2. **Rationales**
   - avoid hardship and unfairness
   - fair allocation of risk
   - avoid economic waste/promote economic efficiency
3. **In the commercial context, often reasonable to require continued dealings with contract breaker (**Payzu Limited v. Saunders (1919, ENG CA)**).**
   Exception: Personal services contracts.
4. **Claimant is required to mitigate within reasonable time of breach. Timing is context dependent on facts.**
   Where there are unique circumstances, damages can be measured at a later time, including the date of the trial/judgment or some time in between the breach and trial (Asamera).

Principle of mitigation: a π cannot recover for losses that it could reasonably have avoided.
The "duty to mitigate" suggests that a plaintiff has a "duty" to take **reasonable steps** after a breach of contract to minimize damages. While the phrase "duty to mitigate" is commonly used, technically it is inaccurate because the plaintiff is not **liable** for not mitigating (there is no legally enforceable duty to mitigate), rather the principle is that the plaintiff cannot recover for losses that could reasonably have been avoided.

The burden of proving that the plaintiff ought to have taken steps to avoid losses is on the person who breaks the contract (the defendant). The person claiming damages must take reasonable, but not extraordinary, actions:

- what steps must be taken will depend on the facts and context;
- the court might ask what a reasonable business person would have done in the plaintiff's position;
- the standard tends to be relatively low since it is understood that the plaintiff is responding to an unexpected event (breach of contract) and may be facing difficult circumstances; as a general rule, courts are reluctant to second guess efforts to avoid loss.

Rationales:

- <u>**Avoidance of hardship and unfairness**</u> **Contract liability is absolute:** the plaintiff does not need to prove intention or negligence. Even innocent reasons for a breach provide no excuse for contractual liability. **Quantum:** the normal measure of damages – expectation damages – is quite high and can lead to overcompensation. **Unfair surprise versus reasonable expectations:** it is said to be unfair to make the defendant liable for losses that the plaintiff could have avoided.
- <u>**Fair allocation of**</u> **risk:** Often the plaintiff is in the best – or indeed the only – position to deal with the consequences of the breach. The requirement to mitigate provides a fair way to allocate post-breach risks. For example, consider a contract for the sale of crates of oranges. The purchaser breaches the contract and refuses to accept the oranges. While the vendor will want to sue for damages and the law allows such a claim, mitigation requires the vendor to take reasonable steps to resell the oranges in the market place. If the vendor is able to resell, the vendor will only be able to recover damages for the difference between the contract price and the market price, plus any additional costs the vendor may have incurred to resell

the oranges. It would be unfair to permit vendors to sit on their hands and let the oranges spoil and then claim for the entire amount. The vendor is the only person who can minimize the costs of breach. The rule of mitigation, requiring the innocent party to take steps to keep the costs of breach low, promotes efficiency. The plaintiff is expected to take reasonable measures to salvage the transaction and minimize the resulting damage. It is not efficient to allow crates of oranges to spoil simply because the vendor is indignant that the purchaser breached its contract. If the vendor does so, the purchaser will have a defence to any claim of damages: the vendor failed to mitigate.

Additional Costs: π may recover additional costs reasonably incurred in taking steps to avoid a loss – for example, the costs to resell the oranges. These costs are recoverable even if the attempt to avoid the loss is fruitless. The vendor tried to sell the oranges, but could not because the market was flooded. Costs are not recoverable if the actions taken to avoid losses are not reasonable. The vendor cannot hold a caviar and champagne reception to entice purchasers to buy the oranges.

4. What is reasonable?
Payzu Limited v. Saunders (1919, ENG CA) What is reasonable for a person to do in mitigation is a question of fact. In some cases it may be unreasonable to expect a person to deal with a contract breaker, for example in a personal services contract (housekeeper). In commercial circumstances, it is reasonable to accept an offer from a party in default.

Courts may award pre-judgment interest on amount of damages, and may take into account the cost of inflation

Date of Assessment of Damages

- ↳ the time at which damages are to be measured and how gains and losses subsequent to breach are treated.

General rule: assessment of damages is made at the time of the breach. So, in a contract for the sale of goods, a disappointed purchaser is expected to go into the market and make a substitute contract at the time of the breach. **Additional losses result not from the breach, but from the failure to mitigate.** Justification: risk allocation. After the breach, the defendant is generally powerless to reduce the plaintiff's losses. The decision to avoid losses is solely the plaintiff's, so the risk of further losses should also be on the plaintiff. The time of breach rule is efficient because it gives the plaintiff an incentive to avoid loss and prevent waste. A corollary of the rule is that gains subsequent to breach should not be subtracted from damages. The reason is that if the risk of loss from not making a substitute contract is allocated to the plaintiff, the gains should also be allocated to the plaintiff.

Exceptions to the General Rule: "date of breach" rule is not literal, courts usually only require that a π mitigate within a reasonable time of breach. (considering nature of transaction and circumstances). Exceptions extending the time: if the good contracted for is unusual or unique, if π exposed to risk from mitigating, if π has inadequate funds, if the nature of the good means it cannot be resold instantly.
Common alternative: award damages calculated at the **time of trial [**Asamera Oil Corp v. Sea Oil, it was unreasonable to require the plaintiff to mitigate immediately.]

Punitive Damages: Whiten v. Pilot

Focus on Δ misconduct

Imposed from perceived need to condemn the behaviour that led to the loss suffered by the plaintiff. The leading case is Whiten v. Pilot Insurance Co. [2002] SCC

Consider:

- **Proportionality to blameworthiness of Δ's conduct** (deliberateness, motive, length of time during which it continued, whether Δ knew he was doing something wrong, whether Δ profited from the misconduct)
- **Proportionality to the degree of vulnerability of the plaintiff**: consider relative positions of both parties and whether stronger party abused its position or exploited a vulnerability, financial or otherwise, of the weaker party.
- **Proportionality to the harm or potential harm directed at the plaintiff:** Jury is free to assess both the actual harm and the likely harm that occurred. The defendant is to be punished not necessarily for the outcome of his actions, but for the nature of his conduct, including what could have happened but did not.
- **Proportionate to the need for deterrence:** The jury should arrive at a sum that will serve to deter both the wrongdoer and future wrongdoers from contemplating similar misconduct, but should not be calculated so as to "sting" the pocketbook of the defendant. Generally, the award should be what is rationally required as deterrence. Anything more exceeds the bounds of rationality and undermines the principled framework of punitive damages.

Policy Framework for punitive damages

A. Exceptionality: Punitive damages, it is stressed, are the exception to the general rule of compensatory damages for breach. Their award **must in all respects be a rational response** to the circumstances of the case, driven by the highly reprehensible behaviour of the defendant.
B. Rationality: punishment, deterrence, and denunciation. A decision to impose punitive damages must be linked to one of these three goals, ensuring that the award serves a rational purpose.
C. Proportionality: must be proportionate after taking into account the penalties that have already been assessed for the same misconduct. Punitive damages should not be awarded if compensatory damages and criminal penalties are adequate to meet the policy objectives.

Contract Drafting - Building Blocks

Form

3 kinds of form requirements

1. legally required
2. customary
3. aesthetic

Legally Required

- Execution
    - Capacity
    - Signature blocks
    - Original signatures or e signatures?
        - Interesting law around e signatures, original works always though
- Notarization (not always necessary but can be helpful)
- Witnesses(not always necessary but can be helpful)
- By statute
- Sale of Goods Act
- Business Practices and Consumer Protection Act

Customary

- Title
- Cover page/table of contents (discretionary)
- Date
    - Performance/representations and warranties
- Recitals
    - 'background' at beginning of contract, who parties are, what they do, why they're signing contract., not binding component but aids in interpretation
- Headings
- Numbering

Aesthetics: Font, Spacing, Margins, Page Breaks

Definitions

- Purposes of definition
- Location of definitions
    - Throughout, 'as you go'? (usually for shorter contracts)
    - Definitions section? (usually for longer contracts)
    - Don't mix
- How to define (the "Buyer") ← keep capitalized throughout (specific person)
- Nesting definitions
    - Using words in your definitions that themselves require definitions, wild goose chase (try to reduce)
- Legislation
    - Specific meaning of "goods" in sale of goods act. If you define "goods" differently than the act in a contract governed by that act, you're gonna have a bad time

Operative Provisions

- Provisions that give effect to the contract ("if I only had this, would my intentions still be carried out?" be thorough)
- Differ in each fact scenario
- Payment
- Terms
- Conveyance or Performance
- Organization of op. provisions (usually first in document)

Representations and Warranties

- Statements of fact made in contract by one party to another at particular point in time
- Terms used synonymously often but different
- Representation - Statement of fact upon which a party is meant to rely
- Warranty - Assurance as to fact coupled with implicit indemnification
- Ascertain certain facts
- Allocate risk
- Categories
    - Rep's as to contract (capacity, authority)
    - Subject matter rep's (ownership no liens)
    - Rep's as to parties (financial condition)

Covenants

Ongoing promises by party to take/not take certain actions

3 general types

1. Affirmative covenant (promise to take certain action)
2. Negative covenants (promises not to take certain actions)
3. Financial covenants (promises to maintain certain financial conditions)
    a. "we promise not to borrow any further money"
    b. When you have a lending contract as business (especially small business) and borrow from bank, most times it will say you can't borrow any further money from anyone. Businesses ignore this and breach it. Banks will usually call them on that and enforce

Conditions Precedent

- To be performed before agreement becomes effective
- Calls for happening of some extent or performance of some act after terms ocf contract
- Commonly referred to as "outs"
- Can be waived
- Common conditions
    - Authority to purchase
    - third party consents
    - all reps and warranties true
    - subject clauses
    - etc

Extras:

Undue influence

1 . Class 1 – Actual undue influence: Claimant must prove the wrongdoer exerted UI.

- No pre-existing relationship of trust/confidence, thus claimant must prove UI

2. Class 2 – Presumed undue influence: A relationship of persuasive influence.

2(a) *De jure*: Relationships that raise the presumption of dependence

- Trust/confidence between parties = **dependence is presumed** (claimant need not prove it), and this, coupled with a suspicious transaction, gives rise to a presumption of UI; onus then shifts to the other party to show the transaction was entered into freely and voluntary
- Shifting in the **evidentiary burden**
- Examples: fiduciary relationships, trustee/beneficiary, solicitor/client, doctor/patient, priest/worshipper, parent/child, guardian/ward
- Example: If you enter into questionable real estate deal with your psychiatrist, a relationship of influence is presumed and the onus shifts to your psychiatrist to show that you entered into the deal freely and voluntarily

2(b) *De facto*: Other special relationships of trust or confidence

- Relationship of trust/confidence must be *proven*, unlike in 2(a) – e.g. sexual relationships, bank/client, professor/student, etc
- Husband/wife – not presumed – must actually show that there is a relationship of trust, confidence, or dependence, and further that the transaction is one where the fairness is called into question (see ***Royal Bank v Etridge***)

Unconscionability

Equitable doctrine to control contractual power in cases where there is:

(a) Inequality in bargaining power (*procedural* unconscionability)

- **Contextual factors:** economic resources, knowledge, need, disability that falls short of legal capacity, etc
- **Common categories:** unlike UI, no express categories of relationships here. However, cases often involve pre-existing relationships where there is potential for an inequality of bargaining power (e.g. familial relationships)

(b) Substantial unfairness in the resulting contract (*substantive* unconscionability)

- Mere inequality of bargaining power is insufficient; claimant must also prove that the bargain was substantially unfair (no clear cut-off for what meets this threshold)

Traditional Doctrine:

- Narrower view – uncontroversial
- If there is a relationship where a person can take undue advantage of the other, whether by distress, recklessness, wildness or want of care, a transaction resting on such unconscionable dealing will not be allowed to stand; if parties are not on equal terms, the party who gets a benefit cannot hold it without proving that everything has been fair & reasonable on his part
- ***Morrison v. Coast Finance***

Wider (Modern) View:

- Contracts may be avoided if there is unequal bargaining power or if community expectations are offended
- Departs from traditional narrow view (which was limited to unconscionability if a person's severe physical or situational disadvantage was taken advantage of)
- Time of expanding consumer protection legislation; pushing back against traditionally strict doctrines
- ***Lloyd's Bank v Bundy, Harry v Kreutziger***
- **NB:** Denning's attempt to create a unified principle of unfairness (in ***Bundy***) has NOT been accepted in Canada. We still have the triumvirate of unfairness (undue influence, duress, and unconscionability).
- **NB**: Lambert's attempt in *Kreutziger* to create an overarching principle based on **community standards of commercial morality** has been applied by the courts, but usually along with an unconscionability analysis (thus has a more supporting role than replacing the actual unconscionability test)
    - Criticisms of the community standards test as being too subjective (based on that judge's specific views, etc)
    - Some say it is better to have the two-step test which focuses both on the *procedural* unconscionability (unfairness in the bargaining process itself) while also considering the resulting unfairness in the bargain

<u>Legislation:</u>

- The test for unconscionability in the *Consumer Protection Act* is more beneficial to consumers
- **Timing:** Says unconscionability can occur before, during or after the transaction
    - Whereas the doctrine of unconscionability only looks *at the time of K formation* (problem raised by minority in ***Tercon*** – what if an exclusion clause becomes unfair over time?)
- **Burden of proof:** This shifts to the supplier (i.e. if unconscionability is alleged by consumer, then leads to a *prima facie* presumption of unconscionability which must be disproved by the supplier)

***Laesio enormis* (enormis loss)**: Roman law concept – rescission available if sale of land for less than half market value (Louisiana Civil Code)

Business Practices and Consumer Protection Act

s. 8, Unconscionable acts or practices

(1): Unconscionable act by supplier may occur before, during or after the consumer transaction

(2): In determining unconscionability, court must consider *all* surrounding circumstances that the supplier knew or ought to have known

(3): Lists circumstances that a court must consider (undue pressure, taking advantage of physical or mental infirmity, ignorance, illiteracy, age, or inability to understand the transaction, whether price grossly exceeded what would be charged elsewhere, if there was no reasonable probability that full payment would be made by the consumer,or if terms or conditions were inequitable).

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(2) Gives specific remedies in respect of unconscionability in the context of a mortgage loan

Illegality and Good Faith

When will the court decline to enforce a transaction because it is "illegal"? **When does public policy trump private ordering**?

- Either the K itself may be illegal, or performance under the K may be illegal
- What can parties consent to under contracts?
- Boundaries of K law and public policy
- **Policies in support of freedom of K:**
    - Agreements made by rational individuals should be enforced
    - Promotes individual freedom and security of expectations
    - 19th century law of K – libertarian state encourages liberty & self-reliance
- **When can public policies override freedom of K?**
    - Borderline between "public" and "private" realms
    - When do private rights injure the public interest?
- ***Tercon***: Courts retain the ultimate power to decide when to enforce K, taking public policy into consideration
- **Strict test:** Usually, freedom of K will be respected. Public policy should only override in rare and clear cases where harm to the public is "substantially incontestable" (not based on the opinion of just a few judges)
- **Terminology:** "Illegality" here means a transaction that a court will refuse to enforce for public policy reasons – doesn't necessarily mean unlawful (statutory/criminal penalties may also apply, but that isn't our focus here)
- **Categories:**
    (a) Common law illegality
        (i) Contrary to public policy (courts have long recognized power to set aside a K in this case – *Holman*)
        (ii) Contrary to common law (e.g. contract to commit a tort)
    (b) Statutory illegality

Common law illegality

***Holman v Johnson* (1775, Eng.):** No court will lend its aid to a man who found his cause upon an immoral or illegal act.

Categories of contracts traditionally recognized as contrary to public policy/common law:

(i) Contracts injurious to the state
    - E.g. K with enemy

(ii) Contracts injurious to the administration of justice
    - E.g. K not to testify in criminal proceedings

(iii) Contracts involving immorality
    - E.g. frequently K's involving prostitution

(iv) Contracts affecting marriage (restricting right to whom you can marry)
    - K's affecting who you can marry based on race/religion

(v) Contracts to benefit from a crime
(vi) Contracts to commit a tort or a common law wrong

Contracts in restraint of trade

- Courts took very restrictive approach here due to general laissez faire attitudes (that it is in everyone's best interest to have freedom of K)
- Liberal economic thinking = should not limit ability to engage in commerce
- Thus **restrictive covenants** are *prima facie* unenforceable, since free trade/freedom of K is in the public interest
    - **Exception**: restrictions can be allowed if they are reasonable (by time, activity and geography)
    - Stricter scrutiny applied to **employment contracts** because of disparity in bargaining power, as opposed to restrictive covenant in the sale of a business, for example (***KRG v Shafron***)
    - **Notional v blue pencil severance:**
        - Notional = reading down the provision so that it isn't illegal
        - Blue pencil = scratch out individual words in order to avoid illegality

Statutory Illegality

Statutory illegality can arise in various ways, such as where contract:
- is expressly/impliedly prohibited by statute
- is entered into with the object of committing an act prohibited by statute
- requires performance contrary to statute
- confers benefits in violation of a statute

Easy cases:
- Criminal law (drugs, crime)
- Cases where the statute specifically states that "*no contract shall be entered into*…"

Hard cases:
- Administrative infractions, trivial illegality and regulatory regimes where the statute does not address the effects of non-compliance
- E.g. in a regulatory regime, it may be an offence with a fine/prohibition attached – but this doesn't necessarily mean a K would be unenforceable

Classical approach:
- Such a K would be void since it is **contrary to statute**
- ***Rogers v Leonard* (1973, Ont. HC):** Sale & purchase of a cottage. Agreement signed on Sunday, contrary to statute (*Lord's Day Act*). Vendor knew of the Act but was willing to ignore it as she was dealing with friends. When the vendor refused to complete (and presumably was no longer a friend), the purchasers sued.
    - Held: Contract was illegal & void – contrary to statute.

Modern approach:
- More **contextual** view (look to the purpose of the statute, etc)
- See ***Still v Minister of National Revenue***

- To determine the **effects of illegality**, courts must balance the gradations of offensiveness and the relative innocence of parties

Good Faith

1. **A traditional reluctance to recognize a duty of good faith in common law**
   - English common law has been resistant to recognize a general duty of good faith in performance of contracts
   - ***Interfoto v Stiletto***: Most other legal systems recognize overriding principles of good faith; common law, instead, has developed **piecemeal solutions** in response to problems of unfairness (rules around exclusion clauses/signed documents – also, doctrines of unfairness like duress, UI, unconscionability)

2. **The principle of good faith in contracts is well established in other legal systems**
   - Civil Law – e.g. Civil Code of Quebec (everyone bound to exercise civil rights in good faith)
   - US, Uniform Commercial Code (obligations of good faith)
   - US, Restatement of Contracts (duty of good faith & fair dealing)
   - UNIDROIT Principles of Int'l Commercial Contracts: requirement of good faith & fair dealing in international trade – parties *cannot* exclude/limit this liability

3. **Canadian law reform bodies have recommended that Canadian jurisdictions adopt the principle**
   - Ontario Law Reform Commission

4. **The Academic Debate**
   - Most debate has been *for* the imposition of a duty of good faith
   - <u>For:</u>
     - Many common law doctrines already recognize the doctrine, although not in name (i.e. courts imply terms that parties use "reasonable efforts")
     - Adoption of the doctrine will bring Canadian jurisdictions into line with expectations of contracting parties
     - Adoption of doctrine will bring Canadian jurisdictions into line with law in other jurisdictions (e.g. trading partners in the US/Quebec – reasoning in ***Bhasrin***)
   - <u>Against:</u>
     - Uncertainty: good faith is too nebulous
     - Common law already has discrete rules to address particular forms of bad faith; piecemeal approach is *better suited* to the common law – preferable to a vague general standard
     - Comparative law analysis suggests the doctrine of good faith is problematic and there are dangers in incorporating doctrines from other jurisdictions

5. **The Content of Good Faith in Canadian Case Law pre-*Bhasin***
   - Pre-*Bhasrin*, there was some (limited) acceptance by Cdn courts of a duty of good faith in performance of contracts

     (i) <u>Good faith imposes a duty to cooperate in achieving the objectives of the agreement</u>

- E.g. **conditions precedent**: general duty that they be satisfied in order to achieve objectives of the agreement
- ***Dynamic Transport v. OK Dealings* (1978, SCC)**: Agreement for sale of land subject to CP of subdivision approval being obtained. Court implied a term that the vendor "use best efforts" to obtain approval (i.e. duty to act in good faith)

(ii) Good faith as limiting the exercise of contractual discretionary powers

- If discretionary powers are conferred by a K, courts have implied terms that discretion is to be exercised reasonably, honestly & in light of the purposes for which it was conferred (not **arbitrarily** or **opportunistically**)
- E.g. ***McKinlay Motors v Honda Canada* (1989, Nfld**)

(iii) Good faith applied to preclude a party from evading contractual obligations

- E.g. avoiding a **restrictive covenant** or **rights of first refusal** by incorporating related corporate entities
- ***MDS Health v King Street Medical* (1994, Ont)**

6. **Categories of contractual relationships where good faith requirements are recognized**
   - **Insurance:** Contracts of utmost good faith (*uberrima fides*) – insured must disclose all relevant info & insurer must assess claims in good faith
   - **Franchisor-franchisee:** Addressed by statute in some provinces (e.g. Alta – *Franchise Act* – imposes duties in fair dealing in franchise agreements)
   - **Employment**: Duty of good faith and fair dealing in termination
   - **Summary**: Limited categories of contracts where courts have recognized good faith
7. ***Bhasin v Hrynew* – Recognition of Duty of Honest Performance** (see below)

Commercial Practice & Contract Drafting

- Will be either **issue spotting** – i.e. someone comes to you with a draft contract
- Or, someone comes to you with a K and is asking your advice regarding to a *particular provision* and you are reacting to that in the context of the contract
- Or, a couple of contractual provisions where there are *fairly obvious errors* based on the facts, and you are asked to identify those errors (again, issue spotting)
- E.g. huge ambiguity – the limitation of liability clause covers limits for physical injuries, but doesn't say anything about economic injury
  - Problematic: *Tercon* says we interpret this, will use *contra proferentum*, so I will advise my client to tighten up the language here

John McLeod

- Representing tenant in a commercial lease agreement
- Sophistication of parties is important
- Market conditions are important in commercial lease agreements: lots of space, lots of options for rent and more leverage to **negotiate**
- From the landlord's perspective in the lease, they want as many **rights** as possible

- Big danger for the landlord is tenant's business not going well (cash flow problems – might leave in the middle of the night with all the stuff so landlords can't claim the inventory)
- Add phrases like "acting **reasonably**" *except* where there is:
    - a breach by the tenant (don't want to be told be reasonable in this case)
    - usage of common areas in the mall (landlord doesn't want to be told how to run the mall)
- This agreement had a **restrictive covenant** (you aren't to operate another store that competes with the store within a certain radius of the malls. Dropped from 4 to 2 km, for 5 years). Time, nature of business and area specified.
- **Minimum rent** (per square foot), **additional rent** (insurance, taxes, maintenance), **percentage rent** (extra money paid to landlord if business is going well)
- Be specific – i.e. business days, instead of just "days"
- "General prohibitions" – things you can't do (e.g. fancy mall doesn't want a pawn shop)
- "Alterations/fixtures" – tenants' ability to mess around with the premises, and landlord's ability to change the shopping mall. **Fixtures:** Landlord can seize fixtures to reduce liability of tenant if lease is terminated prematurely, etc
    - **Alterations:** Adds conditions for what happens if the landlord is doing work to the premises (can't impair access/visibility to the premises, affect tenant's business, etc. If tenant can't reasonably operate its business for 9 months due to interference, it may terminate the lease).

Michael Litchfield

- 5 Cs of drafting:
    - Clear – plain language/short sentences
    - Concise – No redundancies/repetition
    - Comprehensive – everything important is expressed/legal requirements met
    - Consistent – defined terms are used properly/consistently
    - Connected – logical order, deal with each topic only once
- Don't mix up "will/shall/agrees to" – courts might interpret them to mean different things
- Form:
    - **Legal form:** are signatures always required? Think about evidentiary rules
    - **Statutory form:** BPCPA has form requirements
    - **Customary form:** title, cover page, table of contents, etc
- **Operative provisions**: payment, and root of contract – what is the K trying to do?
- **Representation**: A statement of fact upon which a party is meant to rely
    - Meant to ascertain facts & allocate risk
    - Rep's as to the contract, subject matter, and parties ($ condition, etc)
- **Warranty**: A party's assurance as to the fact, coupled with an implicit indemnification
- **Covenants**: Ongoing promises by a party to take or not take certain actions (affirmative, negative, and financial – to maintain certain financial conditions)
- **Condition precedent:** Must be performed before the agreement becomes effective, calls for the happening of some event/performance after K has been agred on but before it becomes binding on the parties
    - CP must be clear, precise and objective (otherwise the K will still basically be in the "offer" stage, i.e. not certain enough
    - These can be waived

    - Basically a way for a party to get out of a deal if something doesn't happen (common CPS are authority to purchase, third party consent, all reps/warranties being true, etc)
- **Remedial provisions:** Usually set out a triggering event (e.g. breach of warranty) and a remedy (termination of K, indemnification, damages)
    - Not required, but a good idea
- **Limitation of liability:** Reduces/eliminates a party's liability for damages / **Indemnity clause** commits one party to compensate the other in case of loss arising from the agreement
    - Key elements to include are the party *receiving* the benefit, the party *agreeing* to the limitation, and the *liability* being limited, as well as the *categories of damages* (i.e. not just physical) and the *amount* of limitation
    - **Example:** Under no circumstances is the company liable to the client or any 3P for claims, losses, costs or damages, including damage to persons or property, arising from performance of this agreement. Not liable for ANY DAMAGE WHATSOEVER arising from the contract.
    - ***Tercon***: these clauses are enforceable (unless unconscionable or overriding public policy reasons)
    - Anticipate possible conditions to limit, use plain language, specifically address negligence (use clear language if you want to limit liability for negligence), be aware of exceptions to enforceability
    - Courts are less harsh towards **indemnity clauses**, but will still narrowly construe them in favour of the indemnifying party
- **Specificity:** "It" – who does this refer to?
    - Refer specifically to periods of time (or "as soon as is reasonably practicable"), business days versus non business days, etc
    - Delete unnecessary words, use the active voice, be consistent

Laylee Rohani

- Investigation about the business (due diligence):
    - Any risks involved?
    - Authorization forms to get information regarding the business
    - Document list (checklist of due diligence searches)
        - CRA searches (assets clear of any charges?)
        - Worksafe BC (unsafe working conditions?)
        - Corporate search (business in good standing?)
        - Municipal searches
- Drafting/negotiation of terms:
    - **Buyer's lawyer almost always drafts contract**
    - Definitions section
    - Section describing assets (i.e. what is actually being bought?)
        - Restaurant plus all equipment/machines/furniture, for example
        - Business licence included
        - **Good will of the business** – value attached to the name of the franchise (separate from the purchase price itself: not taxable, plus this amount goes to the franchisee itself, not the seller, who just has a *licence* to use name)
    - **Inventory:** Take stock on last day and include value in the purchase price
    - **Representations/warranties:** Make sure all seller's obligations are paid off, no charges on assets, no actions/proceedings ongoing – wants to make sure buyer

takes business on a clean slate – does searches for this, but ALSO puts in a warranty to that effect, to protect the buyer
    - **Franchise:** Certain requirements before buying (2 week training course, financial obligations, licence and payment to use the name)
    - **Covenants:** Another way to protect buyer – rely on covenants to ensure seller maintains business and all assets being sold intact until buyer takes them
    - **Employees:** Ensures buyer is taking employees on clean slate (no unpaid obligations re: severance, holiday etc)
    - **Conditions:** Usually, big section with **conditions precedent** before buyer is willing to pay the purchase price (lease agreement, franchise agreement, want to make sure all representations/warranties made in the agreement are *just as true* on closing date). All CPs must be satisfied or waived by closing date. Protects buyer in case big chain refused franchise agreement at the 11th hour (buyer is protected and doesn't have to go through with the agreement)
    - **Closing:** Provision on what is involved on closing the transaction
    - **Restrictive covenants:** Very normal in business transactions – "non-competition agreements" (wouldn't help buyer if seller opened competing business next door)
        - Can be difficult to enforce
        - Must pay attention as to what is "**fair and reasonable"**
        - Can't restrain seller's ability to earn a living – needs to be limited
        - *What* is being restrained (e.g. trade), what is the *area* (e.g. city of Victoria – must be clearly defined), what *time* limit (e.g. 2 years)
        - Reasonableness varies, depending on nature of transaction
- Closing of transaction: **Closing agenda** (checklist of documents required to convey title)
    - **Officer's certificate** – representations/warranties guaranteed as of closing date, agrees covenants/conditions have been complied with
    - Lays out the consideration, the conveyance of title, the actual breakdown of money owed and paid, do all the math

Working with Contracts: *What Law School Doesn't Teach You*

The Lawyer's Functions

- Usually the party with the most to lose will draft the contract (e.g. buyer in a deal – wants to have a lot of conditions/representations as to the business)
- Make sure client carefully reads/confirms all representations and warranties
- Add exceptions to the representations, if need be
- Covenants: make sure client understands the scope and practical effect of the covenant
- Conditions precedent: make sure they are not too onerous/difficult to satisfy, or the deal will never close
- Use words like "reasonably" to avoid a purely subjective standard (i.e. to their "reasonable" satisfaction)
- Use "best efforts" language (for things like third party deliveries) so the deal can close even if the delivery wasn't made, as long as best efforts were made

Principles of Effective Drafting

- Should be clear and simple. Contracts are about determining what two parties agreed to, and boiling it down to words.
- **Precision:** Weaknesses/ambiguities can lead to litigation (remember, *contra proferentum*)
    - **Antecedents:** Be careful! Who does "it" refer to? Repeat the party (say "buyer", instead of "it") just to be extra clear

- **Time references:** Specify days (business or non), even hours, or "as soon as is practicable" if actual days can't be specified
- **Legalese** is sometimes necessary, but avoid wordiness
- **Simplicity:** Avoid undue complication
- Keep sentences short, use the active voice
- Delete unnecessary words
- Be **consistent** (love the hobgoblin!). There is no such thing as too much consistency. Otherwise, there is space for ambiguity and differing interpretations.

Remedies

Principles of Remedies and Damages

Remedy for breach of K = **damages**, and nothing else (exception: equitable remedies sometimes available, e.g. injunctions/specific performance).

Assumptions:

1. There is a contract
2. A term has been breached
3. There is no excuse/defence to that breach

Remedy:

- Common law damages based on **economic losses** (usually expectation damages - $)
- Can also be **intangible losses** (e.g. promised vacation, wasn't great, psychological suffering)
- Limiting principles: **remoteness** and **mitigation**
- The goal is **compensation**, not **punishment**
- Money remedies: left to plaintiff to effect judgment (may need to try to seize assets, etc)
- Coercive remedies: enforced by power of court (e.g. specific performance of contractual obligations, or prohibiting behaviour through an injunction)

Holmes, *The Path of Law (1897):* "The duty to keep a contract at common law means you must pay damages if you do not keep it – and nothing else."

- It is **morally neutral** – either perform or pay (usually not infused with ethics)

Posner, *Economic Analysis of Law (2003):* It may often be *uneconomic* to require performance once a K has been broken (wasting resources, etc).

- Instead of requiring performance, K law usually just requires damages
- Idea of an **efficient breach** (i.e. the profit of a party's breach actually exceeds profit from completing the K)

Categories of damages: restitution, reliance, and expectation

Interest	Purpose	Measure	Justice
Restitution	Prevent unjust enrichment to Δ (gives back to π	Benefit to Δ	Corrective

	whatever they transferred to the Δ)		
Reliance	Prevent harm to π (puts π in position as if they had not entered into K)	Loss to π	Restorative
Expectation	Secure benefit to π (puts π in position as if K had been completed)	Expected π benefit	Distributive

Expectation Damages: These are the default measure in K law.

Definition: "The party complaining should, so far as it can be done by money, be placed in the same position as it would have been *if the contract had been performed*."

Fuller & Perdue, *The Reliance Interest in Contract Damages (1936):*

- Expectation damages protect reliance *interests* of non-breaching parties
- Most effective sanction
- Easier to calculate expected *benefit* than measure *reliance* (difficult to quantify)
- **Policy**: favours promoting/facilitating reliance on business arrangements
    - Promotes market ordering – gives future entitlements present value
    - We want people in a free market to plan into the future, invest, allocate future risk

Cost of performance: This is the normal measure of expectation damages

- Example: seller fails to supply goods –measure difference between the contract price and the (higher) current market price, plus any incidental costs/losses
    - If buyer can buy substitute which is same as contract price, damages will be **nominal** (no actual losses suffered). This is the **mitigating** aspect of damages.
- If no faulty performance, expectation damages are measured by the **difference in value** between what was contracted for and what was received
    - Must measure the difference between what was promised and what was actually obtained (can be very hard to measure)

Remember, when we are talking about damages, **REMOTENESS** and **MITIGATION** are always at issue. Defensive arguments; the breaching party usually claims damages are either too remote, or the plaintiff didn't properly mitigate.

Reliance Damages

Used when expectation damages are too speculative/uncertain.

Shifting burden of proof: Plaintiff proves *prima facie* case

Loss of a Chance

- Must be some degree of certainty to award expectation damages (*McRae*)
- However, an element of **guesswork** won't always prevent expectation damages (*Chaplin*)
- If loss of a chance can be quantified to an extent, then not too speculative (*Chaplin*)
- **Modern application:** Often in land development contracts (level of uncertainty about obtaining rezoning or development permission). Example: defendant is required to do

everything to obtain sub-division approval, fails to make best efforts, and plaintiff sues for loss of chance. No 100% guarantee that approval will be obtained (discretionary), but evidence can be adduced re: probability of success (e.g. expert says this type of subdivision is approved 70% of the time).

Folland v. Reardon (2005, Ont. CA)

Principle: If a contract is breached, you are entitled to damages (**strict liability**, in this sense – you simply need to prove the breach. Though if no real loss, then damages may be nominal).

- Court identifies four requirements for obtaining damages for **loss of chance**:
  1. Plaintiff must show that it lost a chance due to defendant's conduct;
  2. Chance must be *sufficiently real and significant* to rise above mere speculation (no specific percentage of probability. *Chaplin* was only 1 in 7);
  3. The outcome did not depend on plaintiff's own conduct;
  4. The loss of chance must have some *practical value*.

Cost of Completion v. Difference in Value

Two different approaches to award expectation damages:

1) **Cost of Completion:** The cost of buying substitute performance, including undoing any defective performance.
2) **Difference in Value:** The market value of the performance the contract breakers undertook, minus that actually given.
3) Possible middle ground – **compensation for consumer surplus** (see *Ruxley Electronics*)

Loss of Enjoyment

Historical Development

Phase 1: Early times to 1974

- Historically, general rule: no damages for mental distress/non-economic interests (*Addi v. Gramophone*)
- Why? Commercial transaction, **stiff upper lip**, these are the rules of the game!
  - Tough luck. This is the commercial world. K is about the pursuit of self-interest
  - Maintain distinction between K and tort – i.e., if my conduct causes you mental distress, there is a tort for that. My duty of care to you is in the *tort* realm.
- Exceptions (as per *Addis*) – very few
  - Breach of promise to marry
  - Failure to pay on a cheque
  - Vendor failure to make title
  - Or *physical discomfort* (old railway cases – train didn't come, and I had to walk 10 miles to get to the next station)

Phase 2: 1974-2005

- Development of **pigeon holes** – categories where damages would be granted
  A. K for pleasure/enjoyment/entertainment/peace of mind
     - Damages in these areas tend to be small/unprincipled
     - Holidays (***Jarvis***)
     - Weddings (***Jamshidi***): loss of enjoyment – photos, music, venue
     - Disability insurance (***Warrington***)

- Need not be "essence of the contract", sufficient if it is a "major or important part of the K" (***Farley***, 2001, Eng. HOL)

B. Pets
   - ***Newell***: Dogs died in CP Air Hold – damages awarded
   - ***Ferguson***: Kennel looses dog, $1000 in damages
   - ***Weinberg v Connors***: Connors absconds with cat, $1000 in mental distress damages.

C. Physical inconvenience & discomfort caused by a sensory experience
   - ***Wharton***: Family up in Tofino, buy a Cadillac for $60,000, radio makes irritating buzzing sound – take it back to dealer 6 times to get it fixed. Eventually make a claim for pecuniary damages re: car, but also for loss of enjoyment
   - They relied on railway cases here. They were awarded damages.

D. Employment (per ***Volvis***): Where there is an independent actionable wrong (such as intentional infliction of mental distress, defamation, fraud)
   - Old rule: you can't get damages simply from being fired (still the case today). Employers have a common law right to terminate employees.
   - Exception is if there is an **independent actionable tort** (e.g. if the *way* in which they were fired amounted to intentional infliction of mental distress)

<u>Phase 3: 2006 onwards</u>

- So, up until 2005, simply had these **pigeon-holes**. This changed in 2005.
- ***Fidler v Sun Life Assurance***: See case brief.
- On an exam, the proper case to apply is ***Fidler***

"Aggravated" Damages: Was used in context of mental distress – don't confuse this term.

- Term used in tort context: manner of breach of duty may *exacerbate* or *aggravate* the harm in the sense that it imposes an additional intangible harm – i.e. not just a breach, but the way in which it was done causes additional injury
- Avoid using this term in contracts damages cases
- This is a DIFFERENT CONCEPT than mental distress damages
- **Mental distress** damages are simply another kind of damages that can be recovered in K, based on rule in *Hadley*

Mental Distress and Employment:

- Traditionally, no mental distress damages available here (i.e. from simply being fired)
- Exception where there is an independent actionable wrong (i.e. a tort such as intentional infliction of mental distress, defamation)
- ***Keays v Honda* (2008, SCC):**
  - No damages for loss of employment other than reasonable notice (i.e. three months and then no job) or payment in lieu (three months wages);
  - As a general rule, no mental distress damages merely for being fired: mental distress not ordinarily in the contemplation of parties as employer has the right to terminate; and
  - There is a duty of good faith and fair dealing in the *manner* of termination, breach of which is compensable under damages principles (*Hadley v Baxendale*): Examples:

attacking employee's reputation; misrepresentations regarding the reason for dismissal; dismissal to deprive an employee of pension benefits
    - Yes, employer has a right to fire you, but the manner must be done in good faith & in a fair way
- **NB:** Won't be examined on this.