Types of Agreement

1. Roles served by formalities

a. Evidentiary role - need for evidence of the existence of a contract (Fuller)

b. Cautionary role - ensure that parties deliberate before they contract (Fuller)

c. Channelling role - ensures that there is a simple, external test of enforceability (Fuller)

i. Transformation - changes an informal exchange into a legally binding agreement. Therefore, one can use the law of contracts to lend fortitude to an informal or private exchange (such as a gift for nominal consideration). (Thomas)

2. Enforcement of promises

a. General - Reasonable expectations should be fulfilled, and the courts must interpret contracts so as to ensure avoidance of unfair surprise. This is done in accordance with background policy factors:

i. Evidence - is there evidence of an agreement? What is the nature of that agreement?

ii. Deliberation - what was considered by the parties? What intentions were formed?

iii. Unjust enrichment - did a party benefit through breach or other undesirable action?

iv. Reliance - heavy influence by reasonable reliance; where one relies on a promise to detriment, Court will often compensate.

v. Private ordering / utility of exchange - promotion of commercially viable agreements, but not illegality / unconscionability

3. Bargains

a. *Definition* - agreement formed through offer/acceptance paradigm. Tension is between the need to enforce promises of parties and avoiding unfair surprises. Analyzes formation of the contract in order to perform this balancing; must determine which agreements are elevated to the status of legally enforceable agreements.

4. Promises under seal / covenants

a. Binding without consideration - promises under seal are binding without consideration. Enforceable because of the form in which they are made. Must be in writing, signed, sealed, and delivered.(Brudner)

b. *Form is critical to enforceability of promises under seal* - the nature of the formalities involved create the necessary implication that the nature of the agreement has been deliberated by all parties, was not made under duress, is not unconscionable, etc.

c. *Seal not consideration itself* - this would imply that consideration is merely any good reason to enforce a contract, of which a bargain is only one. Not the case - promises under seal are enforced only as executed transfers of possessory title, and unsealed promises for consideration are enforced as promises. (Brudner)

d. *Seal itself not as important as intention to be sealed* - essential factor is showing that the document was intended to be sealed (or not, as the case may be). Was this understood to be a binding document? Did both parties comprehend the implications of sealed agreement?

e. *Enforceable only upon delivery* - promises under seal are only enforceable upon delivery of the seal to the donee. In this way, they are not executed promises, but executed *gifts* (even where mutual). (Brudner)

f. *No title passed until delivery* - Gifts do not pass title to the donee until delivered; however, the delivery of a sealed deed is a symbolic delivery of possessory title. (Brudner)

g. *Necessarily binding* - even given implied and express language holding that the document under seal is not legally enforceable, this language is necessarily incompatible with the nature of the solemnities of such documents. (Crompton)

5. *Gifts*

a. *General* - Courts have been reluctant to enforce gift promises. Gifts generally are an area of property law, not an area of contract law; not mutually enforceable agreements. For instance, a person pledges to donate a certain amount, and later reneges; this cannot be considered an enforceable agreement, due to the lack of consideration from receiver. (Dalhousie)

b. *Great reliance* - according to the authorities, there are circumstances in which gift promises have been enforced; generally involved great reliance on the part of the receiver, or extensive negotiations with other subscribers. (Dalhousie)

c. *Reliance is not consideration* - mere basis of reliance on a promise not sufficient; could possibly support a claim where reliance specific to the nature of the promise (eg. gift to university from RCI, university buys "RCI Building" sign - implies relation between promise and reliance). (Dalhousie)

d. *Promissory estoppel* - Generally, promises made without consideration fall within the realm of promissory estoppel; that is, that they are not actionable themselves, but where they were intended to be legally binding, will prevent the promisor from acting inconsistently with the promise. (High Trees)

6. *Unilateral contracts*

a. *General* - occur where the offer is accepted by performance; performance does double duty, constituting both acceptance and consideration. Only one relationship of right and duty, as promisor under duty to perform, promisee has a right to performance promised.

b. *Relationship* - only one relationship of right and duty between parties; promisor is under a duty to perform promise (eg. pay reward), and promisee has a right to that performance.

c. *Motive and knowledge irrelevant* - does not matter if one acted as if one *intended* to fulfill the contract; enough that the requested act fulfilled. {*Carwardine*-Brother}

   i. *Not so in Australian jurisprudence* - performance of a unilateral contract is only acceptance of that contract where the performance is tendered with the intention to accept the contract. So, if one performs unaware of the offer, performs accidentally, or otherwise lacks intention. (Clarke)

   ii. *Quebec statute accords with UK position* - performance is acceptance of a unilateral contract, even if the performer is unaware of the offer, or does not perform intending to fulfill contract.

d. *Notification not required for unilateral contracts* - notification of acceptance not required in unilateral contracts; performance without notification is considered sufficient to constitute acceptance. (Carbolic Smoke Ball)

   i. *Notification need not precede performance* - where an offer is continuing in nature, notification does not need to precede performance / acceptance; notification of acceptance does not need to be made so long as the offer is unrevoked. {Dale-ACCESS}

e. *Revocation of unilateral offer* - common law rule is that offer can be revoked at any time before the acceptance is *complete*; defeasible through three means:

   i. *Implied contract not to revoke* - the court can imply a promise not to revoke the bargain; this is a two-contract approach. (Errington)

      1. ITC, Father says that the house will belong to the son once the mortgage is paid. Contract #1 - once mortgage paid, the house will belong to the son. Contract #2 - so long as the mortgage is being serviced, the son may remain in possession of the house; implied contract not to revoke. (Errington)

   ii. *Implied bilateralism* - court looks at situation, and implies bilateral deal where it is required by language used, or to give contract business efficacy. Bilateral contract is preferable where there are contemporary promises. (Dawson)

iii. Commenced performance - once performance commences, party no longer entitled to revocation; perhaps due to reliance / unjust enrichment. (Hydro One)

1. ITC, Hydro not permitted to revoke offer for payments under energy efficiency program once performance commenced. (Hydro One) / {*Errington*-House}

2. *Unilateral promises revoked if performance abandoned* - while such promises cannot be revoked once performance was begun, although cease to be binding if left incomplete or unperformed. {*Errington*-House}

3. *Obligation contemporaneous with performance initiation* - in unilateral contracts arises as soon as the offeree starts to perform. Until that time, the offeror can revoke the offer, but once the offeree has embarked upon performance, too late to revoke. (Baughman)

Formation of Bargain Contracts

7. Offer

a. Must be complete and comprehensive - check for vagueness / uncertainty.

i. Cannot be mere quotation of prices - Quotation of prices is not offer to sell; rather, it is merely setting out terms for which a potential sale could occur, pending agreement of both buyer and seller. {*Johnston*-Flour}

1. *Binding obligations* - ads directed at public can create binding obligations where performance promised in positive terms in return for something requested. {*Lefkowitz*-Fur}

b. Offers are continuously made until revoked - when an offer has been made, it must be consider as being continuously made until it has been made known to the receiver of the offer that it has been withdrawn. (Henthorn)

i. Modification - advertiser can modify offer *previous* to acceptance, but cannot impose new/arbitrary conditions *after* acceptance; "house rule" invalid. {*Lefkowitz*-Fur}

c. Revocation of offer must be communicated - State of mind not notified cannot be regarded, so that a revocation uncommunicated to the offeror is no revocation at all for legal purposes. (Byrne)

i. Obstacle to commerce - this position accords with public policy, as offeree would not know position until passage of time precluded revocation, which would pose an obstacle to commerce. (Byrne)

ii. Unjust consequences - to allow an offer to be revoked without notice could create unjust consequences; party may have acted upon offer, having sent acceptance, without

knowledge of revocation. (Pollock)

iii. *Reasonable time limit* - Where an offer is made in terms which fix no time limit for acceptance, the offer must be accepted within a reasonable period of time in order to form a contract. Presumed that offer is refused. {Manchester}

iv. *Expiry of offer is a nudum pactum, not binding on offeror* - not enforceable absent consideration; ergo can be retracted at any moment before acceptance. {*Dodds*-Land}

d. *Electronic transactions* - offer and acceptance can be validly constructed and delivered in electronic form. (Electronic Transactions Act)

e. *Objective test when interpreting offers* - not what the party intended or meant in making an offer or acceptance, but rather what a reasonable person in the position of the parties would have thought it to mean. {*Grant*-Potato}

8. Acceptance

a. *Acceptance must be unequivocal, and offeror must be given notice* - acceptance is only acknowledged to be in force when the offeror has received explicit notice of unequivocal acceptance of the offer. (Henthorn)

i. *Notification is not required when accepting unilateral contract* - Where a particular mode of acceptance is expressly or impliedly required by the contract (as in all unilateral contracts), then it is required that the party accepting follow this mode. In such circumstances, performance of the condition is sufficient acceptance, notification is not required. {Carbolic}

ii. *Acceptance w/ modification* - qualification or departure from terms of offer in acceptance by offeree invalidates the offer, unless these changes are agreed to by the offerer. {Henshaw}

iii. *Acceptance immediate once fulfilled* - Where offer is made including some request (express or implied) to be fulfilled to signify acceptance, the offer is accepted as soon as the receiving party fulfills. {*Larkin*-Land}

b. *Postal exception rule* - where explicit or reasonably implied that acceptance could be delivered by post, *acceptance without notice* allowable. Offer is accepted as soon as acceptance is posted, regardless of whether post ever reaches its destination. (Henthorn)

i. *Post office is agent of offeror* - post office is the agent of the offeror for purposes of receiving notice of acceptance; at law, once letter placed into possession of carrier, it is property of addressee (Henthorn)

ii. *Ordinary usage of mankind guides reasonable implication* - that acceptance by post is authorized by contract can relate to distance between the parties, governed by the

ordinary usages of mankind. (Henthorn)

iii. *Offer does not have to be made by post* – for postal exception rule to apply, merely must be reasonable implication according with ordinary uses of mankind. (Holwell)

iv. *Does not apply where negatived explicitly* - for instance, negatived where *notice* is specifically required; postal exception is specifically acceptance *w/o notice,* as it also applies where posted notice is not delivered (Holwell)

v. *Does not apply where where it would create manifest absurdity.* (Holwell)

vi. *Does not apply to revocation by offeror* - postal exception does not apply to revocation of an offer by the offeror, but only to acceptance of the offer by the offeree. (Byrne)

vii. *Communication lag* - rule is meant to promote commercial expediency where means of communication is not immediate; allows parties to make immediate reliance on acceptance, even where there is a lag in communication. Instantaneous means of communication follow general rule, not postal exception as a result. (Eastern Power)

c. *Rejection of an offer* - if an offeree rejects or counter offers by post, and then subsequently sends acceptance of the original offer, the order in which the communiques are received is the determining factor:

   i. *Valid acceptance if acceptance arrives first* - if acceptance arrives first, in spite of having been posted after the rejection or counter offer, it is considered valid acceptance of the original offer. (Restatement of the Law of Contracts)

   ii. *Merely counter offer if rejection arrives first* - If the rejection or counter offer arrives first, then the subsequent acceptance of the original offer is considered merely a counter offer. (Restatement of the Law of Contracts)

d. *Electronic transactions* - offer and acceptance can be validly constructed and delivered in electronic form. (Electronic Transactions Act)

e. *Unilateral acceptance* - occurs where the offer is accepted by performance; performance does double duty, constituting both acceptance and consideration (from the offeree to the promisor)

9. *Consideration*

a. *General* - must be an exchange of mutual promises between the parties; benefits and detriments. Cannot be illusory - must have *some* value. Consensual bargain, promises pass mutually between parties; consideration must move from promisor to promisee. (GFAA)

b. Mutuality of consideration - requirement for valid, enforceable bargains. Consideration must flow from one party to the other in mutual fashion. (Tobias)

i. ITC, agreement granting exclusivity to sell machines, without a promise or obligation on part of party receiving exclusivity is not mutual; no consideration given by that party. Not always the case - see Lady Duff-Gordon. (Tobias)

c. Consideration can be implied - Courts can construct consideration by implying terms of contract, for instance if Plf. promises to forbear from firing D. for reasonable period of time after agreement formed. (GFAA)

d. Forbearance not sufficient; needs promise - cannot merely forbear on a right in order for this to constitute consideration; must also *promise* to forbear. So, where an employment contract modified to include non-compete clause, not sufficient that employer forbore on right to terminate, must have promised not to do so in exchange for clause. (Kelcher)

e. Exclusivity agreement can constitute consideration - implies reasonable efforts to market and sell products; this is valid consideration, and lack of formal words to this effect in contract does not void contract; can be implied re: business efficacy. (Lady Duff-Gordon)

i. ITC, Ancillary components of contract imposed in formal terms in K, such as requirement to account for sales, pursue patents; supports idea that Plf. did forbear as consideration. (Lady Duff-Gordon)

f. Consideration must have some value - agreement that son will stop complaining in return for forgiveness of debt is not binding; Court holds that 'not complaining' is not consideration; no market value. Do not inquire into whether *adequate*, however. (White)

i. Benefit is immaterial - sufficient that one restricts one's lawful freedom of action on the faith of an agreement to form valid consideration; benefit of consideration to one party or another is immaterial to the validity or enforceability of the agreement. (Hamer)

ii. Adequacy of consideration immaterial - Courts do not inquire into the adequacy of consideration. This is the duty of the parties in deliberating and negotiating commercial agreements. Courts will not correct the poor bargains created by private citizens. (Thomas)

g. Forbearance of a legal right is good consideration – Valuable consideration, may consist in some interest, profit, benefit accruing to one party, or detriment / burden / suffering forbearance received by the other. (Hamer)

h. Forbearance on right to sue – or make another type of legal claim is regarded as good consideration, regardless of whether there is a valid or feasible claim; this relates to the idea that in any case, there was a loss of a chance, and so enforceable consideration. (Fairgrief)

i. ITC, the waiver of a right to sue under a claim which was invalid, and would not thereby have succeeded was found to be good consideration. (Fairgrief)

ii. Waived claim must be in good faith - waiver of the right to pursue a meritless / mala fide claim is not good consideration. Zellers' lawyer engaged in an unethical abuse of process, bullied mother with an unenforceable claim. Waiver of such a claim cannot constitute consideration - follows doctrine of *mistaken assumption*. (Arkin)

iii. Waiver of spurious / vexatious / unreasonable claims is not consideration - must be a reasonable claim with an arguable cause of action, good faith belief in the chance of success, serious intent of pursuing claim, and no concealment of facts; only in these circumstances can a waiver of claim constitute good consideration. (Stott)

iv. Meaningless / non-binding waiver not consideration - agreeing to waive the right to sue in divorce court is not good consideration, as the promise would not bind - one would still be able to sue. However, *actually* forbearing to exercise that same right *is* good consideration. (Combe)

i. Consideration is not motive - the reason underlying a promise is not consideration, although previously synonymous at law (*causa*). What the *law* considers to be a benefit to the party, and not what the parties consider beneficial forms the basis for consideration. (Thomas)

i. Familial duty previously considered causa, but no longer consideration - however, under reformulation of contract in industrial revolution, consideration became market exchange, so must have commercial value or detriment (Thomas).

j. Past consideration is not valid - consideration must be contemporaneous to the promise; things that are done in the past are not good consideration. Cannot rewrite history, take a past act and use it as consideration for promise ex post facto. (Roscorla)

i. FE, if I gave you $20 last week, and then this week, I need a pen, and you give me one, this is not a mutually enforceable agreement; they are two separate gifts.

ii. Payment and delivery are concurrent conditions - unless otherwise agreed, delivery of the goods and the payment price are concurrent. Inability to provide consideration concurrent with delivery, without other arrangements made for in the contract, allows the other party to repudiate and sue for damages.

iii. Policy rationale:

1. *Lack of deliberation* - as initial act was done gratuitously, this precludes deliberation / negotiation contemporaneous with both promises.

2. *Lack of reliance* - initial act was done gratuitously, so reliance has no domain (cannot have relied on gratuity)

3. *No unjust enrichment* - benefit was not requested, so enrichment was just.

4. *Morality* - perhaps a moral obligation to pay, but no legal obligation.

5. *Fraud* - concern that creditors could be defrauded; that gifts from the past could be re-characterized as loans, so that future creditors could not get $.

k. *Past consideration valid if invited by promisor* - doctrine of past consideration does not apply if the past act was done at the request of the promisor. (Lampleigh)

   i. ITC, D. slays a person; asks the Plf. to arrange for a pardon from the King, on a promise to pay him one hundred pounds. The Plf. does so. D. reneges. (Lampleigh)

l. *Partial performance* is *good consideration* - moving beyond *Foakes*, agreement to accept partial payment now enforceable *if expressly accepted by creditor* in satisfaction, in accordance with *Law and Equity Act / Mercantile Law Amendment Act*.

   i. *Previous rule* - from *Foakes / Pinnel / Wane* - lesser sum cannot be good consideration for a greater sum. Gratuitous contract which would require solemnity of seal in order to be enforceable. (Foakes)

   ii. *Previous rule w/ multiple creditors* - if several creditors agree with the debtor to accept a proportion of their claim in satisfaction, these agreements are enforceable; each creditor's promise is consideration for the promises of the other creditors. (Foakes)

   iii. *Partial performance only good consideration if true accord* - No person can insist on a settlement by intimidation; there needs to be true accord and understanding between parties to allow for the substitution of a lesser sum for a greater sum. (Rees)

m. *Reliance is not consideration* - mere basis of reliance on a promise not sufficient; could possibly support a claim where reliance specific to the nature of the promise (eg. gift to university from RCI, university buys "RCI Building" sign - implies relation between promise and reliance). (Dalhousie)

Issues in Contract Formation

10. Intention to be bound

a. *General* - contract requires, beyond offer and acceptance, that there must be manifestation of an intention to be bound by the terms of the contract. This is determined objectively, not subjectively; reasonable person standard. (Jones)

b. *Intention of the parties* - Parties can agree that business arrangement will not give rise to legal relations; effectively, parties can create familial relationships outside of the reach of the formality of law. (Crompton)

c. *Intention to be bound can be implicit* - contract law does not encroach on familial / mutual trust agreements absent the formalities and intention for this to apply. Can be implied from the subject matter of the agreement; can also be explicit from language of agreement. (Crompton)

d. *Some relationships imply formal legal rights* – while certain exchanges may prima facie be the domain of natural love / affection / mutual trust, the nature of relationships (eg. spousal) may imply formality in legal rights; supported by statute and common law. (*Balfour*, commentary)

11. Consent

a. *Signature rule* – in contract, if one signs, one is bound. This is proof of acceptance. Person of full capacity, age, and understanding, who can read and write, is bound by their signature on a legal document. (Saunders)

   i. *Nature of agreement* - the paper document itself is not the agreement; the agreement is the abstract understanding which passes between the parties.

   ii. *Entire agreement clause* - Certain paper agreements have "entire agreement" clauses, which preclude other clauses being considered within the contract (eg. there are no oral clauses or implications)

   iii. *Documents designed to be unread / not understood* - Document not meant to be read, nor understood by those signing it - standard form agreements with fine print, for instance Signatures in such circumstances no more significant than handshakes. (Tilden)

b. *Consensus ad idem – can be bound by unsigned document also* - signature of the contract is only one way of manifesting assent. If one party believes the set of terms to be one thing, while the other party believes them to be another, there is no contract, unless circumstances preclude one of the parties from denying agreement to the terms of the other. (Tilden)

   i. *Objective, not subjective* – regardless of one's actual intentions, if one conducts oneself in a manner so that a reasonable person would believe that he had assented to the terms proposed, then there is *consensus ad idem* regardless of whether contract signed. (Tilden)

   ii. *Estoppel* – on the ground of estoppel, *consent* makes contracts binding except for where the party denying the obligation proves, on balance of probabilities (Tilden):

      1. That the other party knew that at the time that the contract was made, that the mind of the denying party did not accompany the expression of intent; (Tilden) or

      2. It was not reasonable and natural for the other party to suppose that the denying party was giving real consent, and real consent was not in fact given. (Tilden)

iii. Standard form contracts - are not designed to be read or understood; therefore, signature known not to represent true intention of signer. In such circumstances, party seeking to rely must take reasonable measures to bring stringent and onerous provisions to the attention of the other party. (Tilden)

1. This is limited, however, in that only applies where one party *knows* that the other party is unaware of an onerous or stringent term. {Tilden} Test is whether reasonable person would believe that signer was assenting.

c. Reasonable notice - if one has reasonable notice of a condition, one is bound to that condition regardless of knowledge; test is whether reasonable person would believe there to be notice. The more onerous the condition, the more notice is required. {*Parker*-Lost Bag}

12. Battle of the forms

a. *Traditional* - consideration of sequence of: offers / rejections / counteroffers / acceptances. {*Butler*}

i. *First shot approach* (first offer sets terms which underly subsequent negotiation). Applied ITC at trial. {*Butler*}

1. BUT, this approach appears to be out of date, overturned on appeal, either the last shot or the modern approach are preferable. {*Butler*}

ii. *Last shot / performance approach* (last offer sets terms of contract). Usual common law approach; counteroffers kill original offers. Any change or alteration to an offer effectively constitutes a new offer, invalidating all previous offers. {*Butler*}

1. BUT, this approach favours the seller; they will often have last shot, requiring buyer to sign a form in order to take delivery of goods In response, buyers refuse to sign, instead stamp w/ "goods accepted on buyer's terms". {*Butler*}

b. *Harmonious reconciliation - modern* - looks at all documents passing between parties, glean from documents and conduct of parties the nature of understanding and agreement which took place between them. If reconcilable harmoniously, good. If not, *reasonable implication* used instead of contradictory provisions. {*Butler*}

i. ALSO, Provisions such as the "*privilege clause*" must be read in harmony with other documents in the tender to ensure consistency with understanding of parties. {MJB}

1. ALSO, ITC, Rejection of lowest bid does not imply that tender could be accepted on basis of undisclosed criterion; clause simply allows for more nuanced view of "costs". {MJB}

13. Uncertainty

a. *General* - sufficient certainty required in agreements for these to be considered formed and enforceable. Cannot be an agreement if some vital component is undetermined. Agreements involving significant vagueness or ambiguity, or mere agreements to agree are too uncertain to be enforceable (eg. "shall be agreed upon"). (May)

    i. *Contract to enter a contract* - where there is an agreement between two parties to enter into a *subsequent* agreement, and some *critical component* of the latter agreement is *undecided*, then there is no contract at all. (May)

        1. *Enforceable where complete* - There can be a contract to enter into a subsequent contract, where the latter is whole and complete. (Hillas)

        2. *Unenforceable where incomplete* - if incomplete on some vital point, then becomes an unenforceable agreement to negotiate, subject only to nominal damages. (Hillas)

b. *Affixation of terms* - that is certain which can be *made* certain. There must be sufficient machination in the agreement to *affix* undetermined matters for a contract to be valid. (May)

    i. *Silence concerning price affixation* - if there is silence within the contract concerning the affixation of the price, then provisions concerning reasonable price from *Sale of Goods Act* concerning apply. (May)

    ii. *Failure of machination for affixation* - if parties agree on certain machination for price fixing which *fails*, then the agreement is void; reasonable price provisions from *Sale of Goods Act* do not apply. (May)

    iii. *Third party affixation* - there is no difference between appointing a third party to affix some component of an agreement and having that component affixed by negotiation of the parties themselves. (May)

    iv. *Market price affixation* - where market price invoked as clause, requires that parties *negotiate in good faith* to reach agreement on what the market rate is, and further, that reasonable agreement on market rate will not be unreasonably withheld. (Empress)

    v. *Lease renewal affixation approaches* - there are three categories of renewal options in lease agreements:

        1. *To be agreed* - not usually enforceable; where the rent and the means through which it will be determined are not specified; effectively a contract to negotiate. (Empress)

        2. *Formula* - rent to be established through application of formula, but no machinery provided to produce the rate; Courts tend to apply machinery. (Empress)

3. *Defective formula* - machinery and formula provided, latter defective, principles of the former used to correct defect in the latter by the Courts. (Empress)

c. *Court will imply terms where necessary for construction* - The Court will imply terms to give the contract an appropriate business effect. (Hillas)

i. Approach to construction and interpretation:

1. *Expertise* - business terminology may seem imprecise to outsiders, but not to those in industry, owing to their expertise. (Hillas)

2. *Idiographic* - each case must be decided on the construction of the particular agreement binding the parties. (Foley)

3. *Deference to contractual terms* - Interpretation of commercial agreements requires preserving, not destroying, subject matter within understanding of those who use and rely on it. (Hillas)

ii. *Limitations* - Courts will not go beyond the words in order to make a contract for parties, or modify an agreement beyond words used, except for where this is implied by law and intention. (Hillas)

iii. *Constructive agreement* - where parties act as if there is a contract, this implies that the parties believed that they had a business agreement, and not merely an agreement to negotiate. When parties act as if there is a contract for a significant period of time, then to void that contract would constitute unfair surprise. (Foley)

1. ITC, one party purchased petrol from the other for a period of three years before repudiating agreement for lack of certainty (price not affixed in agreement).

iv. *Dispute clause* - clauses which appear to have been put in place specifically to mediate disputes concerning price affixation imply that variable price of sale was intended and anticipated by the parties in creating the agreement. Therefore, not uncertain. (Foley)

14. Good faith negotiations

a. *General* - at common law, one *should* not withhold information, bargain with no intent to achieve agreement, renege on promises in negotiation, refuse to make reasonable efforts, or breaking off negotiations to pursue better offers. (Empress)

i. *Good faith required by clauses concerning market price affixation* - where market price invoked as clause, requires that parties *negotiate in good faith* to reach agreement on what the market rate is, and that reasonable agreement on market rate will not be withheld. (Empress)

b. *But there is no duty to treat in good faith* - given the competitive and adversarial nature of commercial negotiations - purpose of treating is to gain advantage. Cannot be under duty to negotiated in good faith as a result. (Walford)

c. *No tort duty of care in commercial context* - the purpose of such negotiations is to gain commercial advantage; no compensation for pure economic loss. Of course, this does not extend to *fraud*. (Martel)

15. Jurisdiction

a. *General rule* - contract is made in the location *where the offeror receives notification* of the offeree's acceptance. However, where the postal acceptance rule applies, the contract is made in *the place that the acceptance is posted from*. (Eastern Power)

b. *Instantaneous communication* - where this means of communication is employed, the contract is made in the place where acceptance is received by offeror, and further must be received and not merely sent by offeree. (Eastern Power)

Modification of existing agreements

16. Common law approach to modification

a. *Was there duress?* Where there is duress, there can be no modification. Presence of duress, and not the actual passing of consideration should be focus of courts - tinkering with the content of consideration is not necessary. (Chen-Wishart)

   i. *Modification under duress unenforceable* - Court refuses to enforce modification of contract, where to do so would be to encourage sailors to employ duress as bargaining advantage in pursuing modification of contract. (Harris)

   ii. *Economic duress* - subcontractor guilty of securing promise by taking advantage of difficulties caused by non-completion of work, in underbidding on contract; agreement *voidable* because entered into under duress. (Williams)

b. *Was there new consideration?* Duress policy rationale given in *Harris* is not correct; rather, the agreement in that case was not enforceable because of the lack of consideration - duress not relevant (Stilk)

   i. *Modification without consideration unenforceable* - cannot contract to do for increased consideration what one has already contracted to do for valid consideration; ITC, the sailors have nothing more to sell. (Stilk)

   ii. *Promise to give a "good price" not sufficient* - such a promise on a subsequent bargain is not valid consideration (although that increase bargained for was indeed smaller in proportion than the increase in price of steel); too vague and uncertain. (Gilbert)

iii. Preexisting obligations not consideration - performance of a preexisting obligation / forbearance from breach does not qualify as fresh or valid consideration, and therefore such an agreement to vary an existing contract remains unenforceable. (GFAA)

iv. Consideration requirement is inappropriate - both *overinclusive*, in that agreements under duress present consideration are enforceable, and *underinclusive*, in that agreements not under duress absent consideration are unenforceable. (GFAA)

v. Consideration is important, but not required - Presence of consideration important such that it evidences the consent of the promisor to the variation, and implies that duress was not a factor in formation. Neither necessary nor sufficient, however. (GFAA)

c. *Was there rescission?* Some claimants attempting to enforce modification of contract will hold that the original contract was rescinded, replaced with modified contract. (Gilbert)

i. Rescission should be express - while change in price is a fundamental term of contract, this is not sufficient to imply a rescission of the original agreement. (Gilbert)

ii. Rescission should not be constructed - while there is a need to move away from formalist approach, this should not be accomplished through legal fictions (eg. rescission where this is not express or mutual). (GFAA)

iii. Rescission must be mutual - existing contract rescinded by mutual agreement of parties, replaced with new agreement in toto. (GFAA)

d. *Was there detrimental reliance?* In spite of formal rules to the contrary, detrimental reliance can create an enforceable variation on a bargain (GFAA).

i. Promissory estoppel - allows a person to make an additional payment for services which are bound to be rendered under existing contract; promisor is thereby estopped from claiming that there was no consideration for promise (Williams)

ii. Estoppel is not relevant to plaintiff - Detrimental reliance not a basis for enforcing otherwise gratuitous promise; reliance on such a promise is of no consequence to a plaintiff, as estoppel is a sword, and not a shield. (GFAA)

iii. This approach is unfair - Notion that detrimental reliance is only a shield and not a sword is unfair, and will create unjust results in circumstances where promisor not under duress (GFAA)

e. *Was there a practical benefit*? If the modification renders a practical benefit to one party, consideration to the other, and was not made under duress, then the modification is enforceable. (Chen-Wishart)

i. Not binding in Canada - not considered a valid means of contract variation by the SCC. "Fresh consideration" no longer required in *English* courts to vary contract, in

accordance with *Roffey* - sufficient that there be a practical benefit, no duress. (GFAA)

1. ITC, Main contractor who negotiates too low a price with a subcontractor is acting contrary to own interest; will never get job finished without furnishing further sums. Ergo, there is a practical benefit - getting job finished. (Williams)

2. ITC, in modifying a contract, if there is a benefit to be obtained by one party (even if this is the same benefit bargained for initially), consideration is offered, and there is no economic duress or fraud, the promise is binding. (Williams)

ii. *Global shift* - UN Convention on Contracts for the International Sale of Goods and UNIDROIT Principles of International Commercial Contract hold that contract may be modified or terminated through the mere agreement of the parties; shows that the traditional approach is out of date. This approach will probably win out at the SCC.

17.Promissory estoppel

a. *Two types of estoppel*:

i. *Common law estoppel* - Notion akin to fraud; where a person makes a statement, and the other party relies on that statement, the party which made the statement is barred from denying or alleging different facts from statements made.

ii. *Equitable estoppel* – Also called promissory estoppel; relates to promise concerning future action (as opposed to promise concerning state of facts). If one promises not to do something, then one is estopped from doing that thing. This would normally be considered a contract modification without consideration, ergo not enforceable. (High Trees)

1. FE, vendor tells a buyer that the good will be delivered late, and the buyer says that this will not be a problem, then the buyer is estopped from pursuing the strict legal rights of the contract vis a vis the late delivery thereafter.

b. *Is consideration still required*? Question is whether consideration still matters if promissory estoppel can be used to enforce promises? Dangerous to the notion of contract, as wholesale acceptance of this doctrine would undermine the idea of consideration, and remerge contract law with its tort law roots (contorts!)

i. *Consideration is too central to the law* – not overthrown by promissory estoppel; cardinal necessity of the formation of contract, although not of modification / discharge (although consideration remains necessary for modification until practical benefit developed). (Combe)

ii. *Limitation of estoppel* - issue evaded by limiting estoppel to use as a "shield" rather than as a sword - cannot be used by a plaintiff, but rather only by a defendant. For instance, there is no cause of action for the breach of a promise made without consideration; but

the promising party cannot act inconsistently with the promise. (High Trees)

1. *Pointy shield* - in Australian law, promissory estoppel can be used as a sword, basis for cause of action; where a party acts egregiously, and there is significant detrimental reliance, it would be unfair to not provide a remedy. (Waltons)

c. *Estoppel in negotiation* - Central concept of equity; if a party enters into negotiation such that it leads another party to suppose that strict rights will not be enforced (eg. viz. deadlines), then the first party will be restricted from being able to enforce these rights. (Hughes)

   i. ITC, Plf. demanded repairs from tenant, giving six months notice. The parties agree to negotiate the matter. The negotiations break down after the notice expired, and the Plf. attempted to assert right following notice lapse. (Hughes)

d. *Intention to create obligations* - promises made which are intended to create legal relations, which, according to knowledge of promisor will be acted upon by promisee, and which have been acted on in fact by the promisee are enforceable. (High Trees)

   i. ITC, Agreement to reduce rent during WW2, as people are leaving London for the safety of the countryside. (High Trees)

   ii. *Granting of indulgences is not intention* - not sufficient to establish an expectation that the strict rights of the contract would not be enforced. Must be evidence that both parties expected alteration of the terms of the contract; estoppel must be the product of negotiations to change legal relationship. (Burrows)

e. *Business practices relevant to estoppel* - for instance, additional requirements for contract imply extension of negotiation deadline; sufficient to imply that nature of legal relationship changed. Does not require explicit statements, can be inferred objectively. (Owen Sound)

f. *Clean hands required* - creditors are barred from legal rights when inequitable to insist on them; must be a true accord, intended to create legal relations, which is acted on by the debtor. cannot be made in a circumstance in which one party is held to ransom. (Rees)

   i. ITC, D. was threatening to break contract, pay nothing whatsoever; else, the Plf. would have to accept partial payment. This cannot be a true accord. (Rees)

Privity of Contract

18. Overview

a. *General* - non-party to contract has no rights under contract, even when the purpose of the contract is to create a benefit for a third party; the third party in this case is effectively the receiver of a gift.

b. *Privity not followed in US / Scotland* - no stranger could take advantage of a contract, even a contract made for one's own benefit, but rule overthrown in US / Scotland (Tweddle)

c. *Right as executor* - if third party beneficiary is also executor of estate which is party to contract, may still sue as executor, but not as stranger to contract (Beswick)

d. *Rule of procedure* - The rule that a third party cannot sue is a rule of procedure; goes to the form of the remedy, not the underlying right. Where a third party beneficiary has a legitimate interest in enforcing a contract, sensible to allow them to sue. (Beswick)^

e. *Consideration* - as third parties have not provided any consideration in exchange for performance, they have no right to enforce the contract. Prevents unfair surprise, and preserves freedom of contract - right to modify without fear of third party liability.

f. *Subrogation* - allows insurer to take place of the insured with respect to claims against third parties (but does not alter style of cause). So, insurer pays beneficiary, and then sues the third party that caused the payout.

g. *Himalaya clause* - risk allocation mechanism, if one is shipping an object on a carrier's ship, one will take out one's own insurance concerning the loss of the object; effectively a waiver of right to sue concerning these goods.

19. *Types of privity*

a. *Vertical privity* - buyer within the distributive chain who did not buy directly from the defendant; unfortunately, chain may be broken through bankruptcy, exemption clauses, limitation periods, etc.

    i. FI, production of the sales brochure by the parent company was sufficient to bring them into the realm of liability, in spite of the fact that they weren't strictly privy to the contract between dealer and purchaser. (Murray)

b. *Horizontal privity* - not buyer within distributive chain, but who consumes / uses / is affected by the product.

    i. *Buyers vs. users* - for the purposes of the *Sale of Goods Act*, buyers are differentiated from users. This distinction is deliberate, designed to differentiate between those who have an action in contract and those whose actions are limited to tort.

        1. *Direct participation required* - to be a buyer under the *Sale of Goods Act* would have required that the Plf. contribute some portion of the purchase price, to the vendor directly, at the time of sale. (Resch)

        2. *Ex post facto participation insufficient* - However, this does not mean that merely contributing money after the fact renders one a party to the original contract; this smacks more of a second sale, in which son purchased part or full ownership from

his father. (Resch)

3. *Indirect participation insufficient* - giving the Plf. a gift certificate in order to compensate for lost time due to a recall / repair of the bicycle does not mean that the D. has recognized the Plf. as the *buyer*; owner or user, perhaps, or more likely, the person who was inconvenienced by the recall. (Resch)

20.Avoidance of privity

a. *General* - contractual box can be avoided through trust, assignment, and agency. Third party becomes beneficiary or assignee; or alternately, one party in contract is agent for third party, so that there is a direct contractual relationship for the third party.

i. *Statutory - Insurance Act* ensures that insurers are obliged to pay the beneficiary of insurance policies, regardless of whether they are a party to the insurance contract.

ii. *Special circumstances* - where a party cannot give evidence (eg. because the primary witness is also the executor of the estate which is a party to the contract), the third party beneficiary can sue on contract, although not a party (Dutton)

iii. *Trustee->beneficiary - settlor* transfers property to the *trustee*, who holds the property for the benefit of another party, the *beneficiary*. Vests a legal interest in the trustee, and a beneficial/equitable interest in the beneficiary. Binds trustee to hold property for the benefit of the beneficiary.

1. *Rights* - contracts made in trust; right to sue vested in trustee on behalf of beneficiary. Contract only rescindable / variable with permission of the beneficiary; third party allowed to sue in equity, although as a rule should join the trustee as a party.

2. *Enforceability* - While there may be contracts between trustees and third parties concerning the trust property, third party beneficiaries can enforce these contracts via trust law.

iv. *Assignor->assignee* - transfer of right from one person to another usually through sale. For instance, A has a contract with B, who assigns those rights to C. C can enforce the contract against A - like the sale of debt (collection agency, for instance).

1. *Origin* - first espoused by Denning's ruling in Beswick, eventually overturned. Would allow third party beneficiaries to sue in name of the contracting party. (Beswick)^

2. *Absolute assignment* - passes the legal right to debt / chose in action from the date of the notice, along with all accordant legal remedies.

3. *Damages not nominal* - while could be argued that contracting party has not suffered the damages, therefore damages should be nominal, this is not the case. Contracting party can recover full amount of breach, but must pass this money to third party beneficiary. (Beswick)^

v. *Agent->principal* - most common of assignor/trust/agency. Consists of principal and agent, where the latter has the authority to act on the former's behalf.

1. *Requirements* - for *agency agreement* to be enforced by the courts:

   a. *Intention* - parties must have intended for third party to benefit from the contract (Eurymedon)

   b. *Agency* - contracting party must be expressly acting as agent for third party (Eurymedon)

   c. *Authority* - contracting party must have had authority to act as agent (Eurymedon)

   d. *Consideration* - must be consideration flowing from third party to contracting party. Unilateral consideration accepted (eg. if you agree to unload goods, I accept that you are protected by limitation clause). (Eurymedon)

vi. *Employer->employee* - Limitation of liability between employer and third party applies where it expressly or impliedly extends this benefit to employees (London Drugs)

1. *Requirements* - for limitation of liability between contracting party and employer to extend to employees: (London Drugs)

   a. *Limitation* - there is a contractual limitation of liability between employer and contracting party. (London Drugs)

   b. *Benefit* - the contract expressly or impliedly extends this benefit to employees. ITC concerning implication, the contract referred to a "warehouseman." Could refer to a juridicial person (eg. the company) - but this entity has no corpus, and therefore could not move the transformer / perform the contract. Ergo, contract must have implied to give this benefit to employees. (London Drugs)

   c. *Context* - the employee seeking the benefit of the limitation of liability clause must be acting in the context of employment, providing the very services provided in the contract when the loss occurs. (London Drugs)

2. *Relationship* - there is a special relationship between employers and employees such that employees carry the responsibilities related to the obligations of the employers; this is within the knowledge of contracting parties. (London Drugs)

3. *Not limited to contract for services - London Drugs* relationship can apply anywhere, if it meets the conditions set out below.

    a. *Intention* - did the contracting parties intend to extend the benefit to a third party? ITC, insurance contract referred to persons chartering the boat specifically. (Fraser River)

    b. *Scope* - are the activities performed by the third party the very activities contemplated as coming within the scope of the contract? ITC, this is the case; chartering the boat and using it is the very activity contemplated. (Fraser River)

    c. *Revocation* - limitation of liability clause between these parties only extends to third party if the agent / employer enforces the clause; contends that the agent / employer can waive this protection if they see fit, allow for contracting party to sue third party beneficiary; but this cannot be done unilaterally once this right has crystallized / developed into actual benefit. (Fraser River)

Contractual terms

21.Interpretation of contracts

a. *General* - To interpret contracts; must look at the whole of the contract in view of the true intent of the parties. Literal meaning should not be applied where result unrealistic, or inappropriate to commercial atmosphere; inquire beyond language (Prenn)

b. *Most reasonable construction* - more reasonable of two constructions, that which produces fair result, must be taken. However, absent ambiguity, fair result or sensible commercial result is not determinative.

c. *Courts will not renegotiate agreements* - intend the legal consequences of their words, and so courts must not renegotiate contracts on behalf of parties.

d. *Construction of words* - words are given ordinary or normal meaning, unless evidence admitted which shows that the word has a special or technical meaning. To be understood in light of circumstances prevalent at the time. (Novopharm)

e. *Courts will imply terms only when necessary* - furtherance of rule respecting the terms of the agreement. Only where an implication is necessary will the Courts leap beyond words of document. {*Errington*-House}

f. *Presumption against drafter - contra preferentem*, provisions which suffer from ambiguity are to be construed against the preference of the person who drafted or proffered the ambiguous provision.

g. *Presumption against redundancy* - every provision is given a unique meaning if possible. {Checo}

h. *Fundamental breach lives on as a rule of construction* - fundamental breach prevents breaching party from continuing to rely on an exclusion clause; question is whether the parties *intended* for the exclusion clause to apply in circumstances of breach, regardless of whether breach was fundamental. (Gordon)

i. *Objective test when interpreting offers* - not what the party intended or meant in making an offer or acceptance, but rather what a reasonable person in the position of the parties would have thought it to mean. {*Grant*-Potato}

j. *Bilateral interpretation preferred* - bilateral rather than unilateral construction is preferred when the language can be fairly construed to that end, so as to lend maximum possible business efficacy to agreements. {*Dawson*-Helicopter}

22.Evidence

a. *Only required if ambiguity present* - No need for extrinsic evidence in contract interpretation where there is no ambiguity in the agreement.

b. *Surrounding circumstances admissible* - Evidence concerning surrounding circumstances, object and aim of transaction, mutually known facts, and the trade / technical meaning is admissible. (Prenn)

c. *Matrix of fact admissible* - the background of the contract, includes anything which would have affected the way in which the language in the document would be understood; ergo, evidence admissible if it meets this definition. (Bromwich)

d. *Subsequent conduct admissible* - Subsequent conduct is restricted evidence in English view, but taken flexibly in Canadian view. May be admitted, has legal relevance if additional evidence will determine which of two reasonable interpretations is reasonable (CNR/CP)

e. *Related agreements admissible* - other agreements may be taken into account where they are components of a larger transaction.

f. *Prior negotiations admissible* - evidence from prior negotiations is not admissible for the purposes of establishing subjective intentions, but is admissible for understanding trade / technical meanings; can also show the business object of the transaction; but only final document records consensus. (Prenn)

23.Parol evidence

a. *General* - oral evidence used to support contention that there was an oral agreement / collateral warranty in addition to written contract; usually occurs where there is an oral representation that conflicts with the written contract; non-contractual portions can be

excluded through "exclusion clause" or "entire agreement" clause. Common law traditionally accords a high level of deference to the written terms of the contract. (L'Estrange)

i. *Rule is procedural, but operates substantively* - in the face of a written agreement, the prior representation or statement has no contractual effect.

ii. *Collateral agreement* - one which is distinct from but related to the main agreement. Effectively a legal fiction, where the consideration for collateral agreement is acceptance of the main agreement, for instance. (Hawrish)

1. *Collateral agreement can be independent or supplementary* - consideration for such agreement can be the entering into of another contract (eg. the terms of contract X are that A will give B one hundred pounds if B agrees to enter into contract Y). (Hawrish)

2. *Supplementary* - Collateral agreements can add to written agreements; nothing wrong with supplementary agreements. CAs which subtract from or vary WAs represent a halfway stage between adding to (wholly reasonable) and contradicting (wholly unreasonable). (Gallen)

b. *Parol evidence generally not admissible* - extrinsic evidence of nature of contract, presumptively inadmissible, for the purposes of altering the contract. Parol evidence is only admissible where it evidences the existence of a distinct collateral agreement which did not contradict / was not inconsistent with written instrument. (Hawrish)

i. *Harmonious interpretation* - oral warranty (eg. parol evidence) and document must be interpreted together, harmoniously if possible, to attach effect to each. If there is no contradiction, then the Hawrish principle has no application. (Gallen)

ii. *Contradictory outcomes* - if an oral representation is a warranty, then it and document must be read together, harmoniously if possible; if no contradiction, then everything is fine; if there is a contradiction, the written document is favoured; however, if it is shown that the oral clause was intended to prevail, then it will prevail. (Gallen)

iii. *Requirements for parol evidence* - independent agreement, capable of being made without writing (eg. not a lease), which does not contradict and is consistent with written agreement. (Hawrish)

iv. *Rebuttable presumption against admissibility* in parol evidence- principle concerning admissibility of parol evidence is not absolute; cannot be made a tool for the unscrupulous to dupe the unwary, for instance. (Gallen)

1. FE, contract induced by misrepresentation or by oral representation inconsistent with the written contract would not stand, could not bind party to whom

representation had been made. (Gallen)

v. *Must not contradict or vary main agreement* - unreasonable to contemplate that between same parties, at same time, two contradictory contracts would be made. The written contract was clearly and demonstrably made, and so reason requires court to conclude that oral contract was not. (Gallen)

vi. *Specific vs. general clauses* – presumption against parol evidence weaker where the a specific oral representation was held against a general written clause, than where a specific oral representation held against an equally specific written clause. (Gallen)

vii. *Document which looks like contract to be treated as entire contract* – Parol evidence inadmissibility based on a further presumption, that a document which looks like a contract is to be treated as the entire contract. (Gallen)

viii. *Evidence of collateral agreement admissible* - evidence of distinct collateral agreement that *does not contradict the main instrument* is admissible. (Hawrish)

ix. *Evidence of subjective intentions admissible* – Parol evidence can be used to provide evidence of subjective intentions of the parties, and to provide evidence of collateral agreement where this does not contradict primary agreement. (Hawrish)

x. *Inadmissible if language of written contract is unambiguous* - no parol evidence will be admitted to alter or vary the way the words are used in the writing if the language unambiguous (however, may still be admissible for the purposes of interpretation)

xi. *Evidence which is inconsistent with written agreement sometimes admissible* - under certain circumstances - inexhaustive: (Gallen)

1. Evidence of invalidity due to fraud, misrepresentation, mistake, incapacity, lack of intention; (Gallen)

2. Dispelling ambiguities, establish meaning of trade terms, demonstrate the factual matrix; (Gallen)

3. Supporting a claim of rectification; (Gallen)

4. Establish a condition precedent to the agreement; (Gallen)

5. Establish a collateral agreement; (Gallen)

6. Support allegation that document was not intended to constitute whole agreement; (Gallen)

7. Support of claim for equitable remedy; (Gallen)

8. Support of claim in tort concerning breach of a duty of care. (Gallen)

24.Exculpatory / exclusionary / exemption clauses

a. *General* - cannot dupe someone into contract by making oral representations, and then excluding liability for these representations in written agreement - unless otherwise acknowledged specifically by highlighting exclusion clause, specifically drawing attention (Zippy Print) - although this is more of a parol evidence / collateral warranty thing.

i. *Doctrine of fundamental breach* - rule of law which limits freedom of contract. Exemption clause cannot be construed so as to exclude liability for a fundamental breach of contract, one which goes to the root of the contract. No longer a live doctrine. (Securicor)

1. FE, contract for purchase of car; *item* delivered extremely damaged. D. refused delivery, vendor sues, relying upon exclusion clause. (Karsales)

2. *Fundamental breach must be laid to rest* - as Dickson attempted to do in *Hunter*. Only of historical interest going forward. (Tercon)

3. *Problem with doctrine of fundamental breach* - is that it requires the Courts to determine, ex post facto, whether the breach was factually and legally fundamental. (Securicor)

4. *Risk allocation favours laying fundamental breach to rest* - exclusion clauses act as litigation risk management, allowing corporations to apply the clauses where they feel that a claim is spurious / fraudulent, or to avoid the clause where it would be bad press to litigate / the claim is meritorious. (Tercon)

5. *Court should not disturb the bargain that the parties have struck* - fundamental breach doctrine must be replaced with rule that holds parties to the terms of their agreements, provided that these are not unconscionable. (Syncrude)

6. *Fundamental breach live as a rule of construction* - as a matter of construction (not law) fundamental breach prevents breaching party from continuing to rely on an exclusion clause; question is whether the parties *intended* for the exclusion clause to apply in circumstances of breach, regardless of whether breach was fundamental. (Gordon)

7. *Should apply where one party deprived of substantially whole benefit* - in such circumstances, breaching party cannot seek to benefit from the exclusion clause, as to do so would be to abuse the freedom of contract. (Syncrude)^

8. *Must look at both pre and post breach factors in enforcing agreements* - favours not just pre-breach unconscionability in considering whether to avoid an exclusion clause, but also post-breach analysis concerning the subsequent actions of the parties (eg.

deprivation of substantially the whole benefit. (Syncrude)^

9. *Doctrine of fundamental breach should be kept alive* - reformulated, holding that Court cannot refuse to enforce exclusion clause unless the Plf. can point to some paramount consideration of public policy sufficient to override interest in freedom of contract. (Tercon)^

ii. *Repudiatory breach* – a breach of a condition of a contract which entitles the innocent party to treat the contract as if it is at an end - not the same as fundamental breach; a fundamental breach is an example of a repudiatory breach. (Securicor)

b. *Standard form contracts* - When a contract of a common type contains special onerous or unusual provisions, it is the duty of the party in whose interests these provisions are made to see that they are brought to the attention of the other party; otherwise, they will not be held binding. (Tilden) - limited - only where other party had reason to know of mistake concerning terms.

i. Where written document contains conditions, but the document is unsigned and party was not aware of those conditions, evidence must be adduced to show consent, whether this be subjective knowledge on part of the party alleged to consent, or reasonable steps taken to provide notice concerning conditions. {*Parker*-Lost Bag}

25. Warranties

a. *General* - warranties form part of the contractual relationship; establish present facts (eg. the car is five years old) or allocate risk for future facts (eg. guaranteed rust-proof for two years). (Gallen)

i. *Onus* - is on Plf. to prove that there was a warranty, a contract collateral to the main contract in which the D. made some promise to the Plf. in addition to the obligations of the contract. (Buckleton)

ii. *Intention* – to constitute a warranty, there must be evidence that the representation was intended to have legal effect; must not simply be a reply to a request for information. Must be sufficient to evidence the existence of intention to create a collateral agreement. (Buckleton)

1. *Representations made for purpose of inducement* - if a representation is made in the course of dealings for purpose of inducing other party to act on it, and if the other party acts on it, then this is intended as a warranty prima facie. (Bentley)

b. *Actionability*

i. *Innocent representations not actionable* - to be innocent requires an honest belief, with no ability or capacity to obtain better knowledge. Not sufficient to show that they were not

dishonest to equate with innocence. (Bentley) To determine if innocent

1. Timing - earlier statement made, less likely that it was a warranty.

2. Importance - to what extent did it induce formation of contract?

3. Foreseeable reliance - was the importance of statement clear to its maker?

4. Expertise - is there a knowledge imbalance between parties?

5. Opinion or fact - is statement made as opinion, or as fact?

6. Specificity - is statement specific or vague?

7. Context - formality or casualness surrounding statement?

8. Disclaimers - was statement conditional / contingent?

9. Consideration - is the statement accounted for in the price?

ii. Knowledge by party making representation that it is false not necessary - don't need to prove that the faulty party knew that the representation was false. Faulty party ought to have found out that representation was false before making it. (Redgrave)

iii. Due diligence not required by innocent party - faulty party cannot say that the innocent party should have used due diligence to uncover the falsehood. Only faulty party has obligation. (Redgrave)

iv. Legal / constructive fraud is not a recognized doctrine - cannot hold that because one *could have* obtained correct knowledge, that one obliged to do so; honest mistake cannot be made equal to fraudulent misrepresentation (this would make one liable for forgetfulness). Must be fraudulent, or made recklessly w/o care for truth. (Buckleton)

v. Reliance not required, if calculated to induce - not required to prove that the false representation was relied upon; if it was calculated to induce the party to enter the contract, the Court must infer that the innocent party was so induced. (Redgrave)

vi. Timing not determinative - that an affirmation is made in the course of dealing, before or at the time of sale, does not mean that it is a warranty or a collateral agreement. Can yet be mere information; relevant is whether there is *intention* on the part of either or both parties that there should be contractual liability re: the info. (Buckleton)

vii. Subject matter of warranty - mistake about quality of subject matter can be fundamental / essential. However, this does not always avoid the contract, eg. if there is no mistake about the type (not character) of subject matter itself. (Leaf)

1. ITC, this was still an oil painting of the offered subject material; that it was not by Constable amounts to an attribute, not a different "type" of good. Therefore, damages available, but rescission not. (Leaf)

viii. *Consideration for collateral warranty of third party* - is entering into of the main contract in relation to which the warranty is given. Therefore, warranty is enforceable on this basis; warranty between A and B supported by consideration that B should do some other act for benefit of A - for instance, enter into a contract with C. {*Murray-*Grass}

1. In this case, while the manufacturer (A) was not privy to the contract itself, it provided collateral warranties to the Plf. (B) to buy from the dealer (C). {*Murray-*Grass}

ix. *Sale of Goods Act* - there are implied statutory conditions from legislation which are imported into any sale of goods agreement; these can be expressly excluded in contract.

1. s.17(1) - goods must comply with description as provided by the vendor in a sale of goods bargain.

2. s.18 - goods must be reasonably fit, of merchantable quality, durable for a reasonable period of time, etc.

c. Term of the contract could be a condition or a warranty; to differentiate between types of representation: (Leaf)

i. *Puffery* - offers no remedy, protecting the *caveat emptor* interest. eg. "this car is a real beauty"

ii. *Innocent misrepresentation* - statement is false, unknown to the speaker. remedy is rescission (in view of restitutio in integrum); if contract performed or executed, right to rescind is limited. Protects reliance interests. Caveat emptor is weighed against unjust enrichment. (Redgrave)

1. *Remedy* - remedy available for avoiding a contract due to *innocent misrepresentation* is rescission (and cannot sue for damages thereafter, as there are no contract damages on a rescinded contract). (Redgrave)

a. *Rescission* - only available if the contract has not been executed (eg. purchaser has demonstrated *acceptance*), and *restitutio in integrum* is possible (eg. parties can be returned to original state). (Leaf)

b. *Rejection* - must intimate rejection to the vendor within a reasonable period of time, otherwise the Court will infer that the goods have been accepted.Time period is itself subject to *restitutio in integrum*. (Sale of Goods Act)

iii.Negligent misrepresentation

1. *General* - essentially a tort which is occasionally relevant to contract - given special relationship between speaker and person relying on content of speech (eg. advice). If one in such a relationship gives wrongful information without meeting the standard of care, this information is relied upon deleteriously, this gives rise to a cause of action. (Hedley)

    a. *Concurrence* - Can be claimed concurrently in both torts and contracts, as established in the case - however, not where there is a specific allocation in contract concerning tort. Consider a barrister-client relationship; there is the contractual expectations of performance, as well as expectations in tort through negligent misrepresentation. (BG Checo)

    b. *Liability* - must have special knowledge, make negligent representation with the intent of inducing other party to enter contract, which that party does to their detriment. (Hedley)

    c. *Strictness* - Contract imposes more stringent obligations than tort; allows for tort duties to be excluded, inclusion of warranties for performance, etc.

2. *Remedy* - reliance damage remedy; protects reliance interests.

    a. *Damages* - while expectation includes lost profits, and reliance does not, the deficit in the latter can be made up for using the concept of lost opportunity; will effectively be the same. (Esso)

iv.Fraudulent misrepresentation

1. *General* - protects reliance interests. There is a difference between dishonesty and negligence in making representations in sale of goods contracts; negligent statements are *not* fraudulent misrepresentations. (Peek)

2. *Remedy* - rescission and reliance remedies.

v. Condition

1. *General* - term which goes to the root of the contract, the breach of which gives rise to a right to repudiate and expectation damages.

    a. *After execution* – once goods have been accepted and the reasonable inspection period has passed, conditions may be treated as warranties, but only where there is a term of the contract, express or implied, to that effect.

2. *Remedy* – rescission / repudiation - requires rejection at or before time of acceptance of goods; available only within reasonable period of inspection (*innocent*

misrepresentation), but sometimes granted on executed contracts (in case of *material* misrepresentation). (Leaf)

vi. Warranty

1. *General* - representation which is elevated to being a term of contract (intended to be binding). If a warranty is untrue, then the contract is breached, and the remedy is expectation damages.

2. *Remedy* - goods cannot be rejected, but allows for claim in damages (expectation) if goods do not meet contractual requirements re: risk allocation. (Leaf)

vii. Innominate term

1. *General* - Protects reasonable expectations. Terms of contracts which are neither strictly warranties nor conditions; can give rise to a right to repudiate depending on the seriousness of the breach of contract.

2. *Remedy* - damages or repudiation remedy, depending on whether the result of the breach goes to the *root* of the contract;

d. To differentiate between warranties and bare representations (left to trier of fact): (Gallen)

i. Essential - the recipient should make clear that the disputed matter is so important that the contract would not have been made without the assurance of the warranty; (Gallen)

ii. Knowledge - the maker of the warranty must be stating a matter which is within knowledge, and of which the recipient is known to be ignorant. (Gallen)

iii. Allocation - essence of warranty is that it becomes plain by words of vendor that responsibility of soundness will rest upon the vendor (Gallen)

26. Penalties

a. General - Penalties involve the extraction of extravagant sum through legal appropriation; claimant relies on the letter of the contract to support demand, but the Courts do not assist in act of oppression. {*Stockloser*-Repo} Penalty is money paid *in terrorem* of the offending party, while liquidated damages are genuine, covenanted estimates of damages. {*Dunlop*}

i. Penalty where grossly excessive - Penalty, not liquidated damages - this is a grossly excessive and punitive in proportion to the problem it addressed; while the Plf. was foolish to agree to such terms, should not be left to rue its unwisdom. {*Clarke*-Compete}

ii. Treated as limitation - absent oppression, should enforce penalty clauses; if actual loss *exceeds* the penalty, then only the agreed sum can be recovered. Therefore, functions as

limitation on damages recoverable, but cannot increase damages above the actual loss sustained when loss is less than the stipulated amount. However, will be given effect where it is a liquidated damages clause, regardless of relation to the actual damage sustained. {*Elsley*}

iii. Substance, not form required - While prima facie contract clause stipulating as "penalty" or as "liquidated damages" means what is says, this does not end the analysis for the Courts, who must determine on the basis of proportionality, etc. the true nature of the clause. {*Dunlop*}

iv. Disproportionateness key to liquidated damages v. penalty - held to be penalty if sum extravagant and unconscionable in comparison with the greatest loss that could have occurred through breach. {*Dunlop*}

1. *If breach is sum of money* - if the breach is merely omission of payment of sum of money, then penalty is found where breach is greater than sum of money which would have been paid. {*Dunlop*}

2. *Lump sum* - where lump sum payment is made payable as compensation for occurrence of one or more events, some of which are serious, but others trifling in damage - likely to be penal. {*Dunlop*}

3. *Genuine estimates of damage will be upheld* - allowable where the clause is a genuine pre-estimate of damage, particularly where it is difficult to estimate what actual damage would be ahead of time. {*Dunlop*}

v. Not penalty if merely retaining what is already owned - keeps money which already belongs to him in part payment of the purchase price. Not obtained through extortion or oppression or the like; there is also no express clause, making this more of a claim for restitution by buyer than of penalty exaction by seller. {*Stockloser*-Repo}

1. *Absent forfeiture clause* - money handed over as part of purchase price with default in the balance, so long as the *seller* keeps the contract open for performance, the buyer cannot recover the money. However, on repudiation of contract by seller, the buyer can cross claim for damages. {*Stockloser*-Repo}

2. *Present forfeiture or deposit clause* - the buyer in this case cannot recover the money at law; can recover at equity where the forfeiture clause is *penal* in that it is disproportionate to the damage, and where it is unconscionable for the seller to retain the money. Not so here, so no claim. {*Stockloser*-Repo}

Defences

27.Mistaken identity

a. *General* - Rogue passes himself off as a well-known person, or a person with means; A sells property to Rogue, who takes property. Rogue sells to B. Rogue's cheque to A bounces. Rogue's fraud is discovered. A sues B to recover property / damages.

   i. *Presumption - Nemo dat quod non habet* – one cannot give what one does not have. Generally, there is a strong bias in protecting the property owner; the *bona fide* purchaser for value is often defeated as a result, as the Rogue cannot pass a good title which the Rogue does not have.

   ii. *Sale of Goods Act* - s.26(1) - Rogue cannot pass good title unless the conduct of the original seller is such that it precludes the owner from denying the Rogue's authority to sell. Buyer would receive no more or better title than the Rogue owned.

   iii. *Rebuttal* - presumption is eventually defeated following *Denning's* decision in *Lewis v. Averay.* Follows economic analysis, favours the purchaser, as the owner is usually in the best position to absorb the loss. Opposes the common law analysis, which favours the original owner. Easier for the seller (who has the asset) to obtain security; would be difficult for 3P to determine the truth concerning the title of the good.

b. *Void. vs. voidable*

   i. *Void ab initio* – contract void if the offer was made specifically to the person that the Rogue purported to be, and not the *very* person of the Rogue; would not have been made to that person, offer was specially tailored to the Rogue's purported, not actual identity. Owner retains title.

      1. FE, consider *Ingram* - does not matter that contract was not concluded when the man made the fraudulent statements; property would not have passed to the man unless cash was paid, but for the representations that he was a prominent business owner. (Ingram)

   ii. *Voidable via fundamental mistake* - mistake concerning the identity of a contracting party; rather than using offer-acceptance to avoid contract, uses *doctrine of mistake*. Contracts cannot be formed accidentally; there was never any meeting of the minds, and this misapprehension undermines certainty. Owner regains title unless BFPV.

      1. *Voidable and avoided* - fraudulent misrepresentation undermines contract; however, seller cannot show that offer would *only* have been made to the person that the Rogue purported to be; the contract is based on fraud, and so can be avoided (*equitably*), but only *before* a third party purchaser has acquired rights. Further, as equitable, only applicable where just. Owner regains title.

2. *Voidable but not avoided* - fraudulent misrepresentation undermines contract; seller cannot show that offer would only have been made to the person that the Rogue purported to be; where a third party acquires rights under the contract, the contract cannot be rescinded. Bona fide purchaser obtains title.

    a. FE, consider *Phillips* - sale was by rights completed before Rogue identified self as Sir George Bullough; therefore, cannot be said that vendor was only willing to sell to SGB. Ergo, Rogue acquired voidable title, which became good title when passed to the D. (Phillips)

    b. FE, consider *Averay* - whether the sale had been concluded or not when the fraudulent misrepresentations were made is immaterial; property did not pass until the seller let the Rogue *have* the goods, which in both circumstances was *after* the misrepresentations had been made. (Lewis)

c. Factors to consider in evaluating mistaken identity

i. Agency - Where parties are negotiating, and there is no question of one purporting to act as agent for another party, the conclusion would be to have no doubt as to identity of parties. (Ingram)

ii. Physical presence – of an individual is not conclusive of the fact that the contract negotiated by that individual is for that *very* person, and not a party that they purport to be. No authority to say that merely because an offer is presented to a physical person that the offer is intended for that person. (Ingram)

iii. Knowledge of purported party - one can pretend to be a party unknown to the other contracting party (eg. Brown instead of Smith, when the other party has no knowledge of either Brown or Smith) - ergo, cannot say that the contract was made and intended to be with someone other than the physical person present. (Ingram)

iv. Personal knowledge – cannot be an essential feature; merely a strong factor. There are claims which can be made purporting to be a person unknown which would nonetheless raise the level of confidence sufficiently so that the contract was intended for that unknown person, and not the person physically present. (Ingram)

v. Belief – if the vendor is under the belief that they are contracting with a certain party; the purchaser is aware of this belief; but for the identity of the purchaser the vendor would not have entered the contract; in this circumstance, there can be no K. (Ingram)

vi. Interpretation - of the promise is essential; reasonable man, reasonable position would place on contract; but where promisor knows that promisee has put a particular interpretation on words, this is the binding interpretation. (Ingram)

vii. Timing of misrepresentations - whether the sale had been concluded when the fraudulent misrepresentations were made is immaterial; (Lewis)

viii. Identity vs. attributes – differentiation between mistake in *identity* vs. mistake in *attributes* (eg. who is this person, versus what is this person's creditworthiness?) However, it is not clear that this distinction is meaningful - consider party's *name*, which is both attribute and identity. Fine distinction does no good for the law. (Lewis)

ix. Remedy – mistake of identity does not mean that there is no contract, but rather that the contract is merely voidable - it is liable to be set aside by the mistaken party so long as this is done before third parties acquire rights under it in good faith. (Lewis

28. Non est factum

a. *General* - it is not my deed; originally would have been available where the person had not in fact signed the document (forgery) or a blind / illiterate person did not know what they were signing. In such circumstances, the contract would be void.

b. *Requirements for plea - non est factum* is available to persons who, for permanent or temporary reasons, are not capable of reading / sufficiently understanding the document. Absent such a deficit in capacity, documents signed are binding. (Saunders)

   i. *Negligence precludes non est factum* - does not avail where the signature of the document was brought about by the negligence of the signer in failing to take precautions which ought to have been taken (eg. reading the document). Negligence for this purpose not technical, but rather relates to common usage - carelessness. (Saunders)

      1. *Negligence in tortious sense* - only when a duty of care exists in the signor and his act is the proximate cause of the loss by the third party can it bar a successful plea of non est factum. In all other cases, negligence is irrelevant (Marvco)

   ii. *Incapacity* - Must be capable of understanding the deed; must be able to detect fundamental difference between the actual document and the document as signer believed it. (Saunders)

   iii. *Document must be fundamentally different - non est factum* does not avail where the document was not fundamentally different from the document that she believed it to be (no fundamental mistake about nature of document. (Saunders)

      1. ITC, was a transfer of property; identity of transferee not *character*, but *content*. (Saunders)

   iv. *Ascertainment of intention* - determination of the signer's intention (eg. what they believed the document to be) involves subjective, rather than objective test; relevant is the intention which is in the man's own mind, rather than the intention exhibited to

others. (Saunders)

v. *Standard higher where document affects legal rights* - where one is signing a document which, on its face, affects one's legal rights. (Saunders)

vi. *Protects capable party where document does not purport to affect legal rights* - Doctrine applicable where one is signing a document which does not, prima facie, affect one's legal rights (eg. so, if document fundamentally different from what one thought vis a vis legal rights, doctrine protects capable party - if you think you're signing a petition, and in fact it's a transfer deed, the doctrine applies). (Saunders)

vii. *Whether party can avail from plea depends on objective test* - if one with ordinary amount of intelligence and caution would have been deceived, then one is entitled to be relieved under this plea; (Saunders) penetrable by ordinary diligence. (Marvco)

viii. *Does not protect capable party where document purports to affect legal rights* - Where a person of full age/understanding who can read and write signs a legal document which has prima facie legal consequences, does not take the trouble to read it, takes the word of another as to its contents or effect, then it is that person's document. (Saunders)

ix. *Law presumptively protects innocent purchasers* - between innocent party and mistaken party, law must take into account that one party was completely innocent of negligence; the other by its carelessness made it possible for rogue to inflict a loss. Need for certainty and security in commerce is best protected by ensuring that parties take all caution before entering into agreements. (Marvco)

29. Improvident bargains

a. *General* - with any of these findings, the Court will rescind the contract (equitably) due to the unfairness of the bargain. Comes down to a single question - is the transaction, viewed holistically, sufficiently divergent from community standards of commercial morality such that it should be rescinded (Harry)

30. Unconscionability

a. *General* - focus is the overall commercial morality of the bargain in light of the inequality of bargaining power and resultant bargain. If divergent substantial from community standards of commercial morality, will be overturned. {*Kreutziger*}

b. *Burden of proof* - Investigation is first whether parties were on equal terms; if not, them the party of greater power must show that the price given was not unfair. {*Marshall*-Stroke}

c. *Requirements for unconscionability* - (1) *capacity*, one party is incapable of adequately protecting own interests, (2) *improvidence*, other party has made some immoderate gain as

a result. {*Marshall*-Stroke}

i. Inequality of bargaining power / capacity- must have been an inequality in bargaining power between the two parties. {*Marshall*-Stroke}

1. Awareness - The party taking advantage does not have to be aware of the incapacity of the other party; sufficient that incapacity exists, and resulting transaction is not for appropriate value. {*Marshall*-Stroke} - conflicts with *Cain,* which holds that other party knowingly taking advantage of this imbalance. {*Cain*}

2. Contextual factors - economic resources, knowledge, need, disability (short of legal incapacity). {*Marshall*-Stroke}

3. Common categories - unlike undue duress, there are not express categories of relationship used in unconscionability. However, tends to follow preexisting relationships where there is a potential for inequality in bargaining power (eg. employment, family).

4. Lack of independent legal or other advice. {*Cain*}

5. Timing - Analysis is based on facts *at time of contract being made*. (Lidder)

ii. Substantial unfairness - mere inequality in bargaining power not sufficient, as claimant must also prove that the bargain was substantially unfair. Unfair advantage (substantial unfairness) gained by the unconscientious use of power by a stronger party against a weaker party. (Morrison) - the immoderate gain. That gain was not unequal/ immoderate must be proven by stronger party. {*Marshall*-Stroke}

d. Legislation concerning unconscionability

i. Timing - unconscionability can occur before, during, or after transaction; considers undue pressure, inability to protect one's own interest due to infirmity, ignorance, illiteracy, etc.

ii. Advantage - total price must not grossly exceed price for similar transactions by similar consumers.

iii. Unreasonable to expect full payment - no reasonable probability of payment of total price by consumer (eg. consumer would never be able to repay full amount of good due to accrual of interest); terms were so harsh so as to be inequitable, ergo unconscionable. Consider widow in *Williams*.

iv. Burden of proof - is on the vendor to show that the unconscionable act / practice was not engaged in by the supplier.

v. Remedy – is rescission of the contract.

31. Undue influence

a. General - improper exercise of influence by someone in a *relationship* of trust and confidence. Relationship between parties is the key. Common law version of equitable duress. Such transactions are voidable, and can be rescinded by the Court. (Re Craig)

i. FE, Caregiver on whom elderly person has become dependent threatens to abandon person. Elderly person provides gift or enters into a transaction. (Re Craig)

b. Burden of proof in indue influence - proof that the complainant placed trust and confidence in the other party concerning financial affairs, coupled with a transaction which calls for explanation is normally sufficient absent evidence to the contrary. On this basis, court can infer that transaction was procured by undue influence. {*Etridge*-Notice}

c. Requirements

i. Unfair bargain and unequal capacity – agreements will only be set aside if unfair. Fair bargains will not be altered; nor, if the parties were of equal capacity, will an improvident bargain be set aside. only where inequality and improvidence coincide will equity intervene. {*Mundinger*-Adultery}

1. Disadvantage is not essential in undue influence - the transaction need not have been improvident financially or in other means to be set aside, but merely must have been procured or exacted through inappropriate means. {*Etridge*-Notice}

2. Concerning insurance settlements - one question to ask is whether any practicing lawyer would have approved the settlement; if the answer is in the negative, then the agreement is improvident. If it was exacted through inequality in bargaining power, then must be set aside. {*Pridmore*-Settle}

ii. Capacity must be limited – in a situation where there is no autonomy, unable to defend self, then that party will be protected not from own folly or carelessness, but against being taken advantage of by other parties due to incapacity. {*Mundinger*-Adultery}

1. Can be evidenced by naivete, lack of acumen, lack of experience, education, etc, as well as presence of these elements on the other side. {*Pridmore*-Settle}

iii. Undue influence must occur at time of contract - not sufficient that one party have been incapacitated or subordinate to another at other times; must be shown that this is the case at the time that the improvident contract was made. Not applicable if outside of the "orbit of influence" of the contracting party. {*Williams*-Orbit}

iv. Must not have received independent lay or legal advice. {*Bundy*-Yew}, although this factor is not determinative. person may entirely understand implications of proposed

transaction, and yet still be acting under the influence of another person. Outside advice does not preclude exercise of undue influence. {*Etridge*-Notice}

d. Relationships

i. Actual undue influence - claimant must prove that the wrongdoer exerted undue influence. Improper pressure, similar to duress.

1. Will must be overborne - influence exerted by the stronger party must have been such that the weaker party had no more autonomy; will was effectively that of the strong party due to influence. {*Lidder*-ICBC}

ii. Presumed undue influence - relationship of trust and confidence exists, either de facto or de jure. Onus of proof in undue influence - in such a circumstance, onus on donee to prove that gift/settlement was a voluntary and deliberate act, understood consequences, not the result of undue influence. {*Mundinger*-Adultery}

1. 2(a) - *de jure relationships* - categorical, raise presumption of undue influence. Includes fiduciary relationships, trustee/beneficiary, solicitor/client, doctor/patient, priest/worshipper, etc. Doesn't include spouse.

2. 2(b) - de facto relationships - are those which also involve trust and confidence. Could be any relationship where trust and confidence is involved.

a. Spousal relationships - may fall within 2(b) if there is a relationship of trust and confidence re: financial affairs, or, sexual and emotional ties provide a ready weapon for undue influence; interests overborne by fears of damaging the relationship (Deguid)

b. No presumption - there is not a presumption of undue influence in all spousal guarantees; just because a spouse enters into a guarantee does not raise a presumption of undue influence.

i. However, this is a relationship where undue influence often arises - In breakdown of marriage uniqueness of the negotiating environment meant that the principles governing commercial contracts negotiated between parties of equal strength were inapplicable. {Brandsema}

ii. Contract not set aside where the spouse had appreciation of financial and business matters. The lack of independent legal advice did not affect the outcome, as the D. already knew of the rights and obligations concerning surety transaction. {*Courtney*}

e. Transaction subsequent to undue influence - transactions which occur after a gift given through undue influence may be set aside where there is constructive notice of undue influence. This occurs where the spouse is a bank agent (rare), or the bank has actual /

constructive notice of the risk of undue influence. (Etridge)

f. *Notice of undue influence* - separate inquiry re: constructive notice from whether there was undue influence. {*Etridge*-Notice}

i. *Constructive notice of the risk of undue influence* – occurs where (1) spouse / cohabitant signs for another's debts, (2) the transaction on its face is not to the financial benefit to the spouse / cohabitant and, (3) parties are in a relationship which raises the suspicion of undue influence, such as spouses / other cohabitants.

1. Securing of husband's debt by wife may not be manifestly disadvantageous, in that this may secure some benefit for the family unit as a whole. {*Etridge*-Notice}

ii. Failure of bank to fulfill O'Brien criteria not sufficient - Transaction not automatically set aside by failure to satisfy O'Brien (Etridge) requirements. Surety must establish legal entitlement to set aside the transaction (eg. must actually have been the result of undue influence, presumed or actual). {*Van der Ros*}

iii. *Requirements for bank discharging constructive notice (O'Brien)* - must insist that spouse seeking to act as surety: (1) attend private meeting with bank representative where she is (2) apprised of liability, (3) warned of risks, and (4) urged to take independent legal advice (5) from solicitor she nominates herself, (6) must provide solicitor with necessary financials for explaining transaction, (7) obtain written confirmation of inquiry from solicitor. Bank and solicitor do not have to determine whether undue influence present. {*Etridge*-Notice}

iv. *Requirements for solicitor conducting inquiry into undue influence* - must ensure (1) understanding of documents, (2) seriousness of risk, (3) that spouse knows that there is a choice, (4) whether spouse wishes to proceed, (5) in face to face meeting, (6) in absence of husband, (7) in non-technical language. Can be solicitor for husband as well so long as there is no conflict of interest in discharging duty of inquiry. {*Etridge*-Notice}

32. Duress

a. *General* - a coercion of will which vitiates consent. Not mere commercial pressure, but more of the equivalent of the "gun to the head" - contracting party no longer has freedom to exercise own will. {*Pao On*}

i. Assistance of tug boat required to prevent collision, tug signals for extortionate amount, and contract set aside as inequitable, extortionate, unreasonable {Caledonia}

ii. Consider D&C / Rees, where Plf. would have gone bankrupt if some sum not received, and effectively held to ransom to collect lesser sum. This vitiated consent. {Rees}

b. Modern test {*Universe Tankships of Monrovia*}

i. *Pressure amounting to the compulsion of the will of the victim* - not the lack of will to submit, but the intentional submission arising from realization that there is no other practical choice available.

1. Factors: did the party protest? Were there other courses of action? Was there independent legal advice given? Were steps taken to avoid the contract?

ii. *Illegitimacy of the pressure asserted* - pressure must be considered in light of its nature (eg. an illegal threat? or mere economic pressure?), and the nature of the demand. Fairness of the bargain is not relevant.

1. Criticized as difficult, vague, unruly.

2. If there is a bona fide claim to the thing being demanded, then the pressure may not be illegitimate. {Roebuck}

iii. *Timing* - pressure must have been contemporaneous with the formation of the contract for relief to be granted.

c. Types

i. *Duress to person* - threats to person or family (eg. violence)

ii. *Duress of goods* - where one party is in a strong position due to possession of the goods of another by virtue of a legal right (eg. a pawn or pledge taken in distress). The owner of such goods is in urgent need of the goods, and so the stronger party demands more of the weaker than is justly due - this is a voidable transaction. Even where made in good faith, without fraud or misrepresentation, differentiation in strength in conjunction with urgency of need renders improvident bargains as a result voidable. {*Bundy*-Yew}

iii. *Economic duress* - not mere economic pressure; obviously most commercial agreements will involve this circumstance. Coercion of the will test is required.

33. Illegality

a. *General* - courts will not enforce contracts or lend aid to those who found causes on illegal or immoral acts {*Holman*-Tea}

b. Types

i. *Public policy contrariness* - Central tension is balancing between public policy concerning restraint of trade on one hand, and the economic concept of freedom to contract on the other. {*Shaffron*-MetroVan}

1. *Example policy considerations*

    a. While D. had knowledge of Plf.'s purpose, this does not mean that the contract itself is immoral; was merely a sale of goods agreement for tea. Vendors are not guilty of offence, have not transgressed. {*Holman*-Tea}

    b. Do not want to encourage employers to include unreasonable, vague restrictive covenants and then leave it to the courts in order to interpret them in a reasonable manner. {*Shaffron*-MetroVan}

    c. Moral disapprobation is a reasonable policy consideration, however, this sentiment should not be considered determinative, nor be used to unjustly deny benefits to persons acting in good faith, necessarily. There is no concern from the solvency of the fund, as even during illegal employment both employer and employee made necessary contribution to the fund. {*Still*-UI}

2. *Categories*

    a. Injurious to state

    b. Injurious to admin of justice

    c. Immoral contracts

    d. Injurious to marriage

    e. Restraint of trade

        i. *Restraint on trade clauses are enforceable where justified* - and this justification is allowable where the restriction is reasonable; must be considered in view of interests of the parties, interest of the public, affording protection etc. {*Shaffron*-MetroVan}

            1. Person seeking to sell business might find commodity unsaleable commodity if denied the right to assure the purchaser that he, the vendor would not later enter into competition (could steal existing clientele, or wield expertise re: weaknesses of previous business to unfair advantage). {*Shaffron*-MetroVan}

            2. Where covenant is ambiguous, in that does not clearly define what is prohibited, then it is not possible to demonstrate reasonableness Only where ambiguity can be resolved is it possible to determine whether covenant is reasonable. {*Shaffron*-MetroVan}

f. Benefit from crime

ii. *Common law illegality* – contracts that involve contravention of common law obligation.

iii. *Statutory illegality* – where contract is prohibited by statute, or entered into with object of committing statutorily prohibited act, requires performance contrary to statute, or confers benefits in violation of a statute.

1. *Classic approach* - agreement signed on Sunday contrary to *Lord's Day Act*, agreement void as a result. {*Rogers*}

2. *Modern approach* – severance. Where severance is effected, the resulting set of legal terms should retain the core of the agreement; if agreement disturbed at core, then severance cannot apply; contract is void. However, the only agreement that parties can be said to have entered into is the one they *did* enter into; therefore, severance will often fundamentally alter bargain. {*NewSolutions*-Interest}

a. Blue pencil approach - only distinct promises can be struck out of the contract. Using the blue pencil approach, this means that distinct promises which are not legal are struck out in order to make agreement legally compliant (eg. where s. 347 re: criminal interest is involved). {*NewSolutions*-Interest}

b. Notional severance approach - discretionary approach, allows for contract to be rewritten / illegality severed without having to identify a particular provision of the contract to be struck out. ITC ruled as apt solution for s.347 contract cases. {*NewSolutions*-Interest}

c. Spectrum of illegal contracts - those which have a criminal *object* are void ab initio, while at the other end are contracts which are otherwise not objectionable but offend a statute. Severance applies in such cases. {*NewSolutions*-Interest}

34. Fundamental mistake

a. General – can arise in formation (terms), assumptions (tacit consideration) and in recording (reduction to document inaccurate).

i. Mistake in assumption - can relate to identity of contracting parties (see mistaken identity defence), existence of subject matter (eg. Music Hall) and quality of subject matter (eg. distance of salvage ship, Great Peace).

ii. Rectification of inaccurate contracts - while generally written contract takes precedence, this is not the case where there is a transcription error. {*Sylvan* -Golf}

1. Plf. must prove existence and content of prior oral agreement, *convincingly* (more than BOP, less than BRD); rectification must be provided in precise wording, and

D. knew or ought to have known of mistake - in other words, must be inequitable and unconscionable to not provide relief. {*Sylvan*-Golf}

b. Categories (Great Peace not followed in Canada, would have done away with equitable mistake). {Miller-Paving}

i. Mutual mistake - misunderstanding, parties are at cross purposes concerning the mistake. No consensus ad idem, contract *void*. {*Gled*-LOC}

1. Painting is not a Da Vinci. Buyer believes that it is; seller believes that it is not. Neither party is aware that the other is mistaken.

2. D. arranges to purchase cotton delivered on ship "Peerless"; claims mistake about which ship "Peerless" contract referred to, as there are two such ships. Contract void ab initio due to lack of consensus ad idem. {*Raffles*-Peerless}

3. Requirements - (1) mutual assumption as to a state of affairs, (2) no warranty concerning the existence of the state of affairs in the contract, (3) nonexistence of state of affairs can not be attributed to either party's fault, (4) performance of the contract is impossible, (5) the nonexistent state of affairs must be vital attribute of consideration to be provided *or* circumstances which must subsist for performance to be possible. {*Great Peace*-Distance}

ii. Common mistake - both parties make the same mistake.There is consensus ad idem, and therefore equity required. Fundamental or substantial mistake going to the root of a contract will render that contract *voidable*. {*Gled*-LOC}

1. Painting is not a Da Vinci. Buyer and seller believe it is.

2. Contract signed with outward certainty on same subject matter is enforceable unless there is the failure of some condition on which the existence of the contract depends, or fraud, or equitable grounds. Applies regardless of whether one party or neither party were aware of mistake. {*Solle*-Rent}

3. Not a party's subjective intention that matters - but rather the intention manifested by words and actions of the parties, as they would be perceived by a reasonable person. {*Staiman*-Steel}

a. Plf. should have made separate inquiries concerning what was included; should also have been clear from the circumstances that the new steel was not included (reasonable person would have concluded thus). {*Staiman*-Steel}

iii. Unilateral mistake - one party makes mistake, and the other *knows or ought to know* of the mistake. Mistake does not need to go to essential substance, so long as it relates to a material term of the contract and is inadvertent / honest, will afford relief. Equity

required, renders contract *voidable* {*Gled*-LOC}

1. Painting is not a Da Vinci. Buyer believes it is. Seller knows that it is not, and knows of the buyer's erroneous belief, but seeks to carry out contract anyways.

2. *Requirements* - (1) true ambiguity concerning (2) fundamental term where there is (3) no reason to prefer one party's understanding over the other.

3. Contract will be set aside if induced through material misrepresentation, though not fraudulent or fundamental; or if one party knowing that the other is mistaken about the terms of the offer, or the identity to the person to whom it is made, lets him remain under delusion, signing under mistaken terms rather than pointing out mistake. {*Solle*-Rent}

4. Cannot be fault on part of party - provided that this misapprehension was *fundamental* and that the party seeking relief was not itself at fault. {*Solle*-Rent}

5. Follows policy considerations concerning which party should bear the assignment of risk. Must balance reasonable expectations against unfair surprise, reliance against the doctrine of caveat emptor.

    a. Mere fact that Bell did not disclose full state of affairs does not render the contract voidable. While this was a material fact, the principle of caveat emptor applies (even though this is not a contract of sale). While certain contracts must be of the utmost good faith, this is not one such contract. Consider the butler's raise. {*Bell*-Cocoa}

35.Frustration

a. *General* - not the same as mistake, which involves existing facts. Frustration involves *future* facts. Frustration occurs where supervening event so significantly changes the contractual adventure (not merely expense or onerousness) that it would be unjust to hold them to the literal stipulations of new circumstances. Supervening event cannot have been self induced. Difference must be that between complete fruitlessness and mere inconvenience. {*KBK*-Rezone}

    i. *Historically, absolute promises* - where contract creates a duty or charge on oneself (assumpsit), one is bound to make it good, regardless of whether there are accidents or other issues which prevent him from doing so. If one is to have the advantage of casual profits, one must run the risk of casual losses. {*Paradine*-Rupert}

    ii. *Frustration does apply in contracts for purchase and sale of land* - No distinguishable difference between these transactions and others. {*Colwyn*-Rezone}

iii. Remedies - historically, loss lay where it fell; in BC, can seek claim in reliance (independently compensable) or unjust enrichment.

b. Requirements - three considerations:

i. What was the foundation of the contract? {*KBK*-Rezone}

1. Mere disappointed expectations are not sufficient.- mere knowledge of one party that the other party intends a certain use is not sufficient to bring into operation the doctrine of frustration; this only applies where there is a common venture - deal must be structured with a view to such intentions for there to be frustration. {*KBK*-Rezone}

2. Sale of land for redevelopment {*KBK*-Rezone} vs. promise to seek new position of employment in exchange for payment {*Rickards*-Dead}

3. Rent of room for viewing of coronation ceremony. Coronation cancelled, Plf. able to get deposit back re: frustration, because coronation was foundation of contract. {*Krell*-Coronation}

ii. Was the performance of the contract prevented? {*KBK*-Rezone}

1. Plf.'s promise was to seek a position of employment with a new employer; this cannot be undertaken now that he is dead. Therefore, contract is frustrated. {*Rickards*-Dead}

2. *More than mere inconvenience* - legal effect of frustration does not rely on intention of parties or their knowledge, but rather whether the intervening event is inconsistent with further prosecution of the adventure. {*Colwyn*-Rezone} Mere expense, delay, or onerousness is not sufficient, has to be effectively a break in identity between the old and new agreements. {*Sea Angel*}

3. *Delay in frustration* - often will be a question of degree as to whether the delay suffered will be such as to bring about frustration of the *adventure* in question. {*Sea Angel*}

iii. Was the event of such a character that it can't be said to have been in contemplation of the parties at the time of formation? {*KBK*-Rezone}

1. *Did the event occur after formation?* {*Colwyn*-Rezone}

2. *Was the supervening event the fault of either party?* {*Colwyn*-Rezone}

3. *Was the event foreseeable?* {*Colwyn*-Rezone}

a. *Foreseen* events will usually exclude operation of frustration (eg. because will have been accounted for in risk allocation of contract). {*Sea Angel*}

b. *Foreseeability* reduces likelihood of frustration - not determinative; issue which must be considered is whether one of the parties has assumed the risk for that event. Foreseeability only supports risk assumption where this would be reasonably foreseen as a real possibility by the parties. {*Sea Angel*}

4. *Would it be just to relieve the party of its burdens in all the circumstances?* Reality check used to determine whether frustration should be raised. {*Sea Angel*}

*36.*Consumer Protection Legislation

a. Will apply to consumer purchases in order to fulfill two governmental goals:

a. *Economic goals* - avoiding monopoly, regulating safety hazards & pollution, resolving consumers' information deficit, reducing transaction costs, and supplying public goods.

b. *Public Policy:* paternalistic concerns for consumers and redistributive concerns (e.g. controlling interest rates, rent controls, statutory warranties, etc.)

b. Sale of Goods Act (consumer): conditions include description* s.17), quality, fitness (s.18) , and samples (s.19); these cannot be waived (s.20).

c. Business Practices and Consumer Protection Act - protects against deceptive acts (s.5), unconscionable transactions (s.9). Burden on supplier to disprove. 10 day return period; courts can rescind if necessary (s.10). Does not apply to business transactions.

d. Cannot rely on puffery to protect when expressing opinion which in an important respect may very well be wrong (Rushak).

37.Unilateral Contracts Cases

- *Williams v. Carwardine (UKCA 1833)*

- Brother of D. goes missing, later discovered murdered. D. offers reward for information leading to conviction. Plf. believed she was going to die, and in apprehension of death offered information leading to conviction. D. holds that no claim can stand, as Plf. did not intend to perform contract, but rather only to ease conscience.

- D. liable to Plf. for performance of contract, must pay reward; Plf. brought herself within the terms of the advertisement; motives are irrelevant (although may not be if these were specifically stipulated).

- *Carlill v. Carbolic Smoke Ball Company* (QBCA 1893)

    - Reward offered by manufacturer of influenza deterring device; take out advertisement to this effect, deposit money in bank to cover potential claims. Plf. uses ball, contracts influenza, claims reward. Company defers, saying no acceptance without notice.

    - Offer was not mere puff, because of the fact that D. claimed to have made deposit in bank to cover potential claims, which evidences sincerity.

    - While generally, notification must accompany acceptance, this need not *precede* performance, and further, nature of transaction is such that the offeror does not require notice of the acceptance apart from the notice of performance.

    - Where a particular mode of acceptance is expressly or impliedly required by the contract (as in all unilateral contracts), then it is required that the party accepting follow this mode. In such circumstances, performance of the condition is sufficient acceptance, notification is not required.

- *Dale v. Manitoba* (MBCA 1997)

    - Students offered access to affirmative action program; government attempts to change content of that program after the terms had been accepted through unilateral performance of the Plf., eg. by entering the program.

    - Where an offer is continuing in nature, notification does not need to precede performance / acceptance; notification of acceptance does not need to be made so long as the offer is unrevoked.

- *Grant v. New Brunswick* (NBCA 1973)

    - Plf. participated in potato purchase program put on by the PG to stabilize price in year of overproduction. However, after fulfilling the terms of the agreement as per the application, the D. informed the Plf. that he was ineligible for the program. Plf. did meet all eligibility requirements, and now D. holds that payment was a subsidy, ergo not legally enforceable.

    - *Objective test when interpreting offers* - not what the party intended or meant in making an offer or acceptance, but rather what a reasonable person in the position of the parties would have thought it to mean.

    - *Express intention not required concerning nature of contract* - in interpreting whether an offer allows for unilateral performance, express intention not required. Can be implication - judged on objective standard.

        - Information does not explicitly state that all potatoes will be purchased, nor all applications approved. Reasonable person in position of plaintiff would conclude

that if conditions applied with, would have legally binding agreement.

- Errington v. Errington (UKCA 1952)

    - Father buys house in own name, holds that house will belong to children when the mortgage is paid.

    - Courts cannot imply terms unless it is necessary to do so.

    - Unilateral promises irrevocable if performance begun - cannot be revoked once performance was begun, although cease to be binding if left incomplete or unperformed.

- Dawson v. Helicopter Exploration Co. Ltd. (SCC 1955)

    - Plf. attempted to arrange for funding to pursue mineral deposit claim in BC. Over course of correspondence states that "your offer is acceptable, provided there is a definite arrangement to this effect in near future"; D. responds with unilateral offer, "take us to the showings and if they warrant staking, we will give you a 10% interest." D. did not accept explicitly, nor did he perform.

    - Offer revocable at any time until every element required for acceptance had been completed. Offer was unconditional, but contemplated a performance requirement,

    - Bilateral rather than unilateral construction is preferred when the language can be fairly construed to that end, so as to lend maximum possible business efficacy to agreements.

    - Silence can *evidence* repudiation, but is not determinative, and its weight must depend upon the circumstances.

38.Offer Cases

- *Denton v. Great Northern Railway Co.* (QB 1856)

    - Facts

        - D. no longer offers service to Hull, fails to amend printed timetables to that effect before publishing them. Plf. relies on timetable, and incurs lost business costs as a result. Sues for damages.

    - Issue

        - Can a contract be formed between a train company and a passenger based on a printed timetable?

- Rule

    - Plf.'s actions met the requirements for contract formation, which D. then breached through misrepresentation. Ergo, Plf. due compensation.

- Principles

    - Representations made by companies, such as a train timetable, cannot be treated as mere waste paper; they are relied upon by the public, ergo have more meaning

    - Company promised carriage to Hull to anyone who rendered the cost of a ticket, and therefore there is a good contract between the parties. Publication of tables amounts to a promise to public to provide certain services in exchange for a fee.

    - Person who has made arrangements based on D.'s representations is due damages when this contract is breached through D.'s misrepresentation. The making of these arrangements, and prejudice received is Plf.'s consideration.

    - That D. did not own the entirety of the railway line is irrelevant; it is incumbent on the D. not to make promises which they are unable to fulfill. Should have been in D.'s mind when making claims, not Plf.'s mind when purchasing.

    - There are exceptions in contracts for common carriers, eg. for merchantmen from perils of the sea; but that exception is not relevant to these facts. The provision on the tables protects against such perils, not cancellation of service.

    - Where a person makes an untrue statement, knowing it to be untrue, to another who is induced to act upon it, an action lies for damages incurred as a result.

    - Differentiated from cases involving claiming of reward, as in reward the effort all on part of Plf., where in this case, most of the effort came on part of D. *But*, any consideration (price of ticket, going to station) sufficient to support a promise.

- *Johnston Brothers v. Rogers Brothers* (Div. Ct. 1899)

    - Facts

        - Plf. bakers; receive letter from D. merchants stating that the latter wish to secure the patronage of the former; quote prices for purchase of flower. Hold that the prices are advancing rapidly, and so to contact as soon as possible so as to avoid further increase. Plf. telegraphs following morning, accepting offer at price offered previous day. D. responds saying that the price had since increased. Plf. sued, holding that D. must honour original price, as the contract had been accepted.

- Issue

    - Did the D.'s price quote constitute an offer, and therefore result in the creation of a contract when the Plf. notified the D. of acceptance?

- Rule

    - The D.'s price quote is not an offer to sell, but merely a provision of the general state of market conditions relevant to a potential commercial transaction between the parties.

- Principles

    - Quotation of prices is not offer to sell; rather, it is merely setting out terms for which a potential sale could occur, pending agreement of both buyer and seller.

    - The D., in mentioning that the Plf. must respond quickly so as to avoid further price increase, was suggesting that the price given was not an offer to sell. This implies that the price is not fixed, which it would be if it had been offer to sell.

        - eg. if this had been an offer to sell, there would be no need to mention the potential of price increase, as the buyer would have the contractual advantage of the price denoted in the offer.

- *Lefkowitz v. Great Minneapolis Surplus Store* (MNSC 1957)

- Facts

    - D. advertises two sales of fur coats. One advertisement for 3 fur coats, worth up to $100 each, selling for $1 each to the first customer on Saturday. Subsequent ad the next week, fur coat for $1, worth $139.50. On each occasion, Plf. was the first person in the store as required by the ad, but was refused sale - "house rules" not mentioned in add hold that sale only for women purchasers.

- Issue

    - Is the offer by the advertisement unilateral, so that it may be withdrawn without notice by the D.? Or, by fulfilling the requirements of the ad, is the offer bilateral and accepted by the Plf.? Further, can the D. limit the requirements for sale beyond what is in the ad (eg. restrict to women only?)

- Rule

- There was a contract created between the parties, and this could not be altered after acceptance by the D.

- Principles

- *Binding obligations* - ads directed at public can create binding obligations where performance promised in positive terms in return for something requested.

- ITC, fulfilled something requested - $1, being first come / first served; and performance promised was rendering of fur coat; meets criteria.

- *Modification* - advertiser can modify offer *previous* to acceptance, but cannot impose new/arbitrary conditions *after* acceptance; "house rule" invalid.

- ITC, Plf. accepted by being "first come, first served" and offering $1.

- *Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd.* (UKCA 1953)

- Facts

- Pharmacist supervision required for sale of certain substances which contain small amounts of poison. D.'s pharmacy allows for customers to select these items themselves, place them into a shopping basket or other receptacle, and then purchase them from the cashier; cashier can refuse sale if required. Plf. holds that this is a violation, contending that the "purchase" occurred when a shopper placed the item into the receptacle. D. contends that the purchase is only completed when money changes hands.

- Issue

- When is a contract formed between a shopper and a merchant - when the item is removed from the shelf, or rather when the items are paid for?

- Rule

- Sale is not completed until merchant accepts the offer; could refuse if they wanted to, therefore no contract can be said to have formed between parties at this point in time.

- Principles

- Shoppers placing items into receptacles is not a contract; can put items back, exchange them for different items, etc; this is just organizational convenience.

- Contract is not completed until the customer has indicated the articles desired to be purchased, and the merchant or agent accepts that offer.

- *Manchester Diocesan Council Education v. Commercial & General Investments, Inc.* (Ch. D, 1969)

- Where an offer is made in terms which fix no time limit for acceptance, the offer must be accepted within a reasonable period of time in order to form a contract.

- Two views might underly this; (1) that offer is presumed *withdrawn* if not accepted within reasonable period of time, or (2) that offer is presumed *refused* if not accepted.

- Presuming offer to be withdrawn is complicated, requires consideration of offerer and offeree understanding, which may vary in spite of identical knowledge re: circumstances.

- Presuming offer to be refused is simpler; involves objective assessment of facts and determination of fairness with a view to both parties. This is therefore the preferable approach.

- Post offer conduct is relevant to "deeming an offer refused" - allows us to take into account the communications of the party subsequent to the offer.

- Eg. if one party says "I'm still thinking about it" and the other party does not object, then it is a reasonable implication that the offer is still open.

- No one party is in greater need of protection in such circumstances; until offer accepted, open to the offeror to withdraw, modify, or put a limit on the time for acceptance. Offeree can, for their part, refuse the offer, accept the offer, or make a counter offer.

- *Larkin v. Gardiner* (Div. Ct. 1895)

- Facts

- Plf. sues for specific performance, holding that D. had contracted to purchase a parcel of land from her through an intermediary, Nesbitt. Nesbitt was not authorized to sell directly, and so prepared an "agreement to purchase" which the D. signed. Nesbitt took the agreement to the Plf., who also signed. Then, the next day, the D. gave notice to Nesbitt of intention to withdraw offer to purchase. Nesbitt had not yet informed D. that Plf. had accepted the offer.

- Issue

- Did the D.'s "agreement" constitute an offer to purchase, or was it in fact a contract which had completed in formation on Plf.'s acceptance? Is the formation of contract precluded by the fact that the D. withdrew offer prior to

notice of its acceptance?

- Rule

    - Defendant, not having been made aware of acceptance, and absent "irrevocable" steps concerning notice of acceptance to D. by the Plf., was within rights to withdraw the offer.

- Principles

    - Where offer is made including some request (express or implied) to be fulfilled to signify acceptance, the offer is accepted as soon as the receiving party fulfills.

    - Unless expressly stipulated otherwise, must assume that the offeror must be notified of offeree's decision with regard to an offer (accept/reject/counter).

    - Until the offeree does something irrevocable towards communicating acceptance of offer, it is at liberty to be withdrawn. Offeror is not bound by the offeror until the offeree has taken an irrevocable step (giving agreement to agent = revocable).

- *Dickinson v. Dodds* (UKCA 1876)

    - Facts

        - D. makes offer to sell lands to Plf., with offer expiry given later that week. Plf. tenders acceptance of offer in writing twice previous to the expiry date, but D. had already sold the property.

    - Issue

        - Where an offer has an expiry date, is the offeror bound to abide by that expiry date absent consideration concerning the expiry date specifically?

    - Rule

        - The expiry date of an offer is a naked promise, not enforceable absent consideration for that promise; the parties were not of the same minds at the time of contract formation, due to awareness of third party purchaser. Contract ergo never formed, D. wins.

    - Principles

        - No consideration given to keep the property unsold until the expiry date. Therefore, this was only an offer, and could not be yet considered a contract.

- Offer made by the D. was a *nudum pactum* (naked promise); not enforceable absent consideration; ergo can be retracted at any moment before acceptance.

- Offeror does not have to assert freedom only through express declaration amounting to retraction. Constructively withdrew by selling to other party.

- To constitute a contract, minds must be one at same moment in time; offer continuing up to time of acceptance; but, not the case, as both offeror and offeree knew that there was another party likely to purchase the property.

- Existence of the same mind between the two parties at the point of making a contract is essential to the integrity of that contract. Absent here, ergo invalid.

- *Eliason v. Henshaw* (SCOTUS 1819)

- *Obligations of offer*- Offer of bargain imposes no obligations on offerer until it is accepted by the offeree according to the terms in which the offer was made.

- *Acceptance w/ modification* - qualification or departure from terms of offer in acceptance by offeree invalidates the offer, unless these changes are agreed to by the offerer.

    - This is effectively a counteroffer, and so requires consideration and acceptance by the original offeree in order to form part of valid agreement.

- In this case, Plf. offered to purchase flour, required answer by specific means (message by cart), received answer by alternate means (letter by post), and ergo contract invalid.

- *Henthorn v. Fraser* (UKCA 1892)

- When an offer has been made, it must be consider as being continuously made until it has been made known to the receiver of the offer that it has been withdrawn.

- Generally, acceptance is only acknowledged to be in force when the offeror has received explicit notice of unequivocal acceptance of the offer.

- Postal exception rule - where it is explicitly or reasonably implied that acceptance could be delivered by post, that acceptance without notice allowable; offer is accepted as soon as acceptance is posted, regardless of whether it actually reaches its destination.

- The post office is the agent of the offeror for the purposes of receiving notice of acceptance; at law, once letter placed into possession of carrier, it is property of addressee

- Implication that acceptance by post is authorized by contract can relate to distance between the parties, governed by the *ordinary usages of mankind.*

- *Byrne & Co v. Leon Van Tienhoven & Co. (Wales, 1880)*

  - State of mind not notified cannot be regarded, so that a revocation uncommunicated to the offeror is no revocation at all for legal purposes.

  - The postal exception rule does not apply to revocation of an offer by the offeror, but only to acceptance of the offer by the offeree; this is held in accordance with public policy, as offeree would not know position until passage of time precluded revocation, which would pose an obstacle to commerce.

- *Pollock* (Principles of Contract at Law and in Equity, 1876)

  - To allow an offer to be revoked without notice could create unjust consequences; party may have acted upon offer, having sent acceptance, without knowledge of revocation.

- *Restatement of the Law of Contracts* (1981)

  - If an offeree rejects or counter offers by post, and then subsequently sends acceptance of the original offer:

    - If the acceptance arrives first, in spite of having been posted after the rejection or counter offer, it is considered valid acceptance of the original offer.

    - If the rejection or counter offer arrives first, then the subsequent acceptance of the original offer is considered merely a counter offer.

39.Acceptance Cases

- *Holwell Securities Ltd. v. Hughes* (UKCA 1974)

  - The parties contemplated that the postal service might be used for the purposes of forwarding the acceptance of an offer, therefore the act of posting constitutes acceptance

  - The postal exception rule applies where there is explicit or reasonable implication of contemplation that postal service might be used; offer does not have to be made by post.

  - The postal exception rule does not apply where it is negatived by the language of the agreement, for instance where *notice* is specifically required; postal exception is specifically acceptance *w/o notice,* as it also applies where posted notice is not delivered.

  - The postal exception rule does not apply when the express terms of the offer require that the acceptance must reach the offeror (as ITC, re: *notice*), or where it would create

manifest convenience or absurdity.

- *Eastern Power Ltd. v. Azienda Cumnale Energia & Ambiente* (ONCA, 1999)

  - General rule is that a contract is made in the location where the offeror receives notification of the offeree's acceptance, except for where the postal acceptance rule applies, where the contract is made in the place that the acceptance is posted from.

  - The postal exception rule is meant to promote commercial expediency in circumstances in which the means of communication is not immediate; allows parties to make immediate reliance on acceptance, even where there is a lag in communication.

  - Fax and other instantaneous means of communication follow general rule, not postal exception, because there is no lag in communication affecting commercial expediency.

  - Instantaneous communication, the contract is made in the place where acceptance is received by offeror, and further must be received and not merely sent by offeree.

40.Consideration Cases

Roscorla v. Thomas (UK 1842)

- Facts

  - Horse sold; afterwards, promise made that horse not over five years old, was sound and free of vice. Latter promise breached, as horse was vicious, restive, ungovernable, ferocious.

- Rule

  - There was no consideration for the secondary promise that the horse was not over five years old, sound and free of vice.

  - This was effectively a modification of the contract without consideration (or practical benefit, to apply the modern doctrine).

  - Consideration past and executed will support no other promise than such as would be implied by law, as in no other promise than that which it was originally exchanged for.

White v. Bluett (KB 1853)

- Facts

  - Executor of estate attempts to collect on promissory note after father passes away; son had made deal with father that he would stop complaining of unfair

treatment should the father forgive the debt.

- Issue

  - Is an agreement to "stop complaining" valid consideration sufficient for the purpose of establishing an enforceable bargain?

- Rule

  - Agreement that son will stop complaining in return for forgiveness of debt is not binding; court holds that 'not complaining' is not consideration; no market value.

- Principles

  - Agreement that son will stop complaining in return for forgiveness of debt is not binding; court holds that 'not complaining' is not consideration; no market value.

  - Forbearance on a legal right is considered good consideration; ITC, the Court held that there was no legal right to complain (perhaps erroneously), and so there was no right forborne.

- *Hamer v. Sidway* (NYCA 1891)

  - Facts

    - Promise by uncle to pay nephew $5k if does not smoke, drink, gamble, or swear until age 21

  - Issue

    - Is a promise to forbear right to drink, smoke, gamble, and swear good consideration such that an enforceable bargain can be formed on this basis? Estate is attempting to say that it is not bound; there is no consideration because there is no benefit to the promisor, to the uncle.

  - Rule

    - Consideration is a benefit to one party, or a detriment / forbearance to another party. Sufficient consideration that the nephew suffered a detriment.

  - Principles

    - Valuable consideration, may consist in some interest, profit, benefit accruing to one party, or detriment / burden / suffering forbearance received by the other.

- Sufficient that one restricts one's lawful freedom of action on the faith of an agreement to form valid consideration; benefit of consideration to one party or another is immaterial to the validity or enforceability of the agreement.

- *Eleanor Thomas v. Benjamin Thomas* (QB 1842)

  - Facts

    - Agreement which gives a widow a life interest in property in return for one quid per annum and promise to retain property in good condition.

  - Issue

    - Is this agreement valid and enforceable? Is one quid per year and the burden of maintenance sufficient consideration? Also, is the motive of the contractor sufficient to form *causa* / consideration?

  - Rule

    - There was a promise - life interest in the house. There was consideration, the pound per annum plus the maintenance of the property; this is what makes the contract enforceable. Motive and consideration are not interchangeable, and are irrelevant to consideration.

  - Principles

    - There must be some detriment to the plaintiff, or some benefit conferred to the defendant for consideration to be constructed in the agreement.

    - Not a bargain, per se, but rather a gift which has been dressed in the garb of the bargain. However, formality ITC sufficient (pays rent to executors, who pay landlord, thus two agreements) to make this a binding bargain; contract is the imprint of formality.

    - *Consideration vs. motive* - Cannot confound consideration with motive; the reason underlying a promise is not consideration (had previously been synonymous at law: *causa*). It is what the *law* considers to be a benefit to the party, and not what the parties consider beneficial that forms the basis for consideration; that which has market value.

      - Contract law formed through common law writs (assumpsit - an assumed promise). The concept of consideration formed as a part of the standard pleadings in a write of assumpsit. What one would show in such pleadings was the *reason* for making promise; that it was not a *nudum pactum*, but served some purpose.

- Familial duty, love, affection were considered a basis for the motive / consideration of a promise. Under the reformulation of contract in the industrial revolution, the concept of consideration began to be viewed as an area of market exchange; consideration had to have a market value (commercial benefit or detriment).

- This led to the creation of a public/private distinction between market goods, which had commercial value, and other items, which had a private value and were not part of the market exchange. The latter were not viewed as a valid component or means of providing consideration.

- *Adequacy* - courts do not inquire into the adequacy of consideration. This is the duty of the parties in deliberating and negotiating commercial agreements. The Courts will not correct the poor bargains created by private citizens - therefore, a peppercorn is considered good consideration.

    - When one engages in a formality such as the creation of a contract, one has transformed an exchange into a legally binding agreement. Therefore, one can use the law of contracts to lend fortitude to an informal or private exchange (such as a gift for nominal consideration).

- *Tobias v. Dick and T. Eaton Co.* (MBKB 1937)

    - Mutuality of consideration is a requirement for valid, enforceable bargains. Consideration must flow from one party to the other in mutual fashion.

    - Agreement granting exclusivity to sell machines, without a promise or obligation on part of party receiving exclusivity is not mutual; no consideration given by that party.

    - Consideration could have been established if D. had some control over machines after Plf. purchased them for resale, or appointment of sales agents, etc. This would have been a detriment or burden or forbearance such that value would have been delivered.

- *Wood v. Lucy, Lady Duff-Gordon* (NYCA 1917)

    - Exclusivity agreement *implies* reasonable efforts to market and sell products; this is valid consideration, and lack of formal words to this effect in contract does not void contract.

    - Policy supports reasonable implication, owing to the fact that absent such efforts, there would be no *business efficacy* to the agreement; without sales, there is no purpose to K.

    - Ancillary components of contract imposed in formal terms in K, such as requirement to account for sales, pursue patents; supports idea that Plf. did forbear as consideration.

- *Fairgrief v. Ellis (BCSC 1935)*

- D. promised to will house to two sisters, Plf.. in exchange for "keeping his house" until the time of his death. His wife returns, and the agreement is broken. D. offers the Plf. $1000 in lieu of the house.

- The original agreement between the D. and the Plf. would not have been legally enforceable, as it was an oral agreement, and agreements involving land must be written in accordance with the *Statute of Frauds* (s.4).

- Original agreement could not have been enforced, as transfers of land contracts have to be in writing (this was an oral agreement); however, in spite of the fact that their claim was thus invalid, they had nevertheless waived right to pursue it, good consideration.

- Even though the D. was not bound in law to perform the first agreement, he yet made the second agreement; there was good consideration, in that the Plf. dropped a suit which they believed in good faith to have merit. Therefore, the $1000 is owed.

- *B. (D.C.) v. Arkin (MBCA 1996)*

- Child steals $50 worth of goods from Zellers, is caught, store recovers goods. Zellers' counsel writes mother, claims $1000 restitution; mother pays $225.

- Mother later obtains legal advice, and sues to recover restitution (as no grounds to claim it). Zellers holds that they forbore on their right to sue, and therefore had enforceable agreement - $225 was payment within the context of this agreement.

- Zellers' claim against the mother was completely without merit; Court relied on the doctrine of *mistaken assumption*, mother paid under mistaken assumption that she was liable for damages claimed by Zellers. That was a mistake, because she was not liable.

- Waiver of the right to pursue a meritless / mala fide claim is not good consideration. ITC, Zellers' lawyer engaged in an unethical abuse of process, bullied mother with an unenforceable claim. Waiver of such a claim cannot constitute consideration.

- *Stott v. Merit (ONCA 1988)*

- Stockbrocker to cover the losses incurred by client. Client bought stock options, sold at a loss. Firm said that broker had to pay the client in order to cover the loss.

- If the claim is completely spurious, vexatious, or unreasonable, it will not be upheld, at least insofar as its waiver constitutes consideration in a contract.

- There must be a reasonable claim with an arguable cause of action, good faith belief in the chance of success, serious intent of pursuing claim, and no concealment of facts; only in these circumstances can a waiver of claim constitute good consideration.

- *Foakes v. Beer (HL 1884)*

    - Plf. promises to pay the sum of a judgment obtained against him by D.; pays amount down, plus additional amount per month, and in exchange there is no interest incurred. D. repudiates this agreement after last payment received, sues for interest; holds that lesser sum cannot be good consideration for a greater sum.

    - Follows precedent from *Pinnel, Wane* that held that payment of a lesser sum for a greater sum is not good consideration (eg. to pay $1000 instead of $2000).

    - Plf contends: may be more advantageous in some circumstances for creditor to obtain immediate payment of part of debt rather than to wait for payment to be enforced by other means; these could force a bankruptcy, in which case only a small dividend will be recovered.

        - If the creditor feels that acceptance of part of the payment is for his benefit, then who is to say otherwise? The Court should strive to give efficacy to contracts, rather than attempting to find ways to undermine them.

        - It is not for the Court to inquire as to whether consideration is reasonable; the saving of trouble or receipt of immediate payment could be considered consideration itself.

    - There is a difference between agreements under seal and agreements by parol (eg. bargains); may seem arbitrary, but long established; the law has long required particular solemnities to be observed in order to give legal effect to gratuitous contracts.

    - While the law might be improved by allowing for a lesser sum to act as consideration for a greater sum, regardless of whether the agreement is under seal, the Court is unwilling to render such an improvement into the law at this point.

    - Payment of debt / part of a debt by a third person is a discharge of the original debtor; this may be to avoid abuse of process, or rather due to actual extinction of the debt.

    - Where several creditors agree with the debtor to accept a proportion of their claim in satisfaction, these agreements are enforceable; each creditor's promise is consideration for the promises of the other creditors.

- Mercantile Law Amendment Act

    - s.16 - part performance of an obligation, where expressly accepted as satisfaction, though without new consideration, extinguishes the obligation.

- *Dalhousie College v. Boutilier Estate (SCC 1934)*

- According to the authorities, there are circumstances in which gift promises have been enforced; generally involved great reliance on the part of the receiver, or extensive negotiations with other subscribers.

    - eg. if A and B each pledge to donate $10k in context of a bilateral gift, and B reneges, A and may pursue claim - however, there is no claim for university on this basis - only A and B have an agreement (each forbearing $10k, mutuality).

- *Reliance is not consideration*. The D. cannot claim against the Plf. on the mere basis that they relied on a promise made by the Plf. Reliance could possibly support such a claim where it was specific to the nature of the promise (eg. gift to university from RCI, university buys "RCI Building" sign - implies relation between promise and reliance).

41.Battle of the Forms Cases

- *Butler Machine Tool Co. Ltd. v. Ex-Cell-O Corporation (England) Ltd.* (UKCA 1979)

    - Facts

        - Plf. provided terms for initial offer, including emphatic provision re: price variance in case of changes in production costs. During negotiation process, Plf. signs documents which agrees to accept Plf.'s terms, which do not include this variance. D. refuses to pay difference, Plf. sues.

    - Issue

        - Which terms prevail - the first terms offered (D.), the last terms offered (Plf.), or, on consideration of totality of documentation and communication, should a reasonable determination of parties' understanding prevail?

    - Rule

        - Under either paradigm, the D.'s prevail; their counter offer constituted a rejection of the Plf.'s previous offer which had included price variance (traditional).

    - Principle

        - There are two approaches deemed relevant to consideration of prevailing contract terms; *the battle of the forms*:

            - *Traditional* - consideration of sequence of: offers / rejections / counteroffers / acceptances. Counteroffers kill original offers. Therefore, any change or alteration to an offer effectively constitutes a new offer, invalidating all previous offers.

- Could be *first shot* approach (first offer sets terms which underly subsequent negotiation), or *last shot* / performance approach (last offer sets terms of contract). Last shot is the usual common law approach as applied in this case, however.

- *Modern* - looks at all documents passing between parties, glean from documents and conduct of parties the nature of understanding and agreement which took place between them. Holds that traditional view is out of date. If reconcilable harmoniously, good. If not, reasonable implication used instead of contradictory provisions.

- *M.J.B. Enterprises v. Defence Construction (1951)* (SCC 1999)

- Facts

- D. invited tenders for construction contact, received four; inadvertently awarded winning bid to *Sorochan*, which had violated the rules of the proposal (req. lump sum, *Sorochan* variable sum given). Plf. holds that D. was contractually obligated to award contract to lowest bidder, and to disregard noncompliant bids. D. relies on "privilege clause" which allows for selection of bid at discretion.

- Issue

- Is there a contract between an organization inviting tenders, and the companies which make tender accordingly? Was the D. obligated to select the lowest compliant bidder, or alternately can they rely on the "privilege clause"?

- Rule

- By accepting noncompliant bid, breached duty to other bidders; ergo, D. liable.

- Principles

- There may be contract between tenderers and those inviting tender, arising on the submission of the tender, with terms of contract defined in tender documents. Not automatic, depends on terms and conditions of tender call.

- ITC, party inviting tenders offers consideration (to consider bids for construction), in exchange for tenders offered; governed by complex terms. This is a contract.

- There can be no custom in opposition to an actual contract, therefore the special agreement of the parties must prevail.

- Provisions such as the "*privilege clause*" must be read in harmony with other documents in the tender to ensure consistency with understanding of parties.

    - eg. ITC, should not be read in this case as allowing the D. to accept noncompliant bids, as this runs contrary to intention of Contract A

- Rejection of lowest bid does not imply that tender could be accepted on basis of undisclosed criterion; clause simply allows for more nuanced view of "costs".

- Acting in good faith or misinterpretation of contract are not valid defences to action for breach / do not alleviate obligations of contracting parties.

- *Ron Engineering*
    - established two-contract approach to tenders/bidding process. Contract A governs the tendering process, and Contract B is the actual contract being bidded for.

        - Contract A does not arise in all circumstance; depends on the nature of the call for tender, and the tender documentation associated with this.

        - Interesting issue with the two contracts: in breach of Contract A, the Plf. is entitled to damages from Contract B (eg. profits from the performance of the second contract).

- *Double N Earthmovers* (SCC 2007)

    - Contract A has two implied terms, to treat all bidders fairly and to accept only a compliant bid; absent express contractual intention, the test for compliance is *substantial compliance*.

        - Mere technical error in bid, which does not change the realistic meaning of the bid in view of its compliance with the requirements of the tender, insufficient to render bid noncompliant.

42.Intention Cases

- *Jones v. Padavatton (UKCA 1967)*

    - Mother agrees to pay daughter certain amount of money to become barrister. Daughter has not succeeded after five years (should take three). Over time, have a falling out, mother wants to evict the daughter.

    - Different from the case of a mother promising a daughter an allowance; if the mother had left the daughter destitute after 6 months, we would not think that the mother had no legal obligation to her.

- Agreement between mother and daughter enforceable; while there was an intention to be bound legally.

    - However, the Court had to imply significant detail to complete the contract. The implied term of a reasonable time period to complete the legal studies had lapsed, and therefore the contract was *no longer* enforceable.

- ITC, formality of agreement sufficient in order to take it out of the realm of mere familial promise, and into the realm of enforceable contract law. However, agreement had been breached due to time lapse, so daughter's claim failed.

- *Rose and Frank Company v. J.R. Crompton & Bros. (UKCA 1923)*

- Parties agree that business arrangement will not give rise to legal relations; effectively, parties can create familial relationships outside of the reach of the formality of law.

- Family ties of mutual trust and affection governs certain relations, and contract law does not encroach on these agreements absent the formalities and intention for this to apply.

- Absent intention to form contractual relationships, contract does not apply to agreement between parties. Requires explicit formality.

- Whether an agreement intends to form legally binding relations or not can be implied from the subject matter of the agreement; can also be explicit from language of agreement.

- Dicta, holds that an agreement under seal is necessarily binding; even given implied and express language holding that the document under seal is not legally enforceable, this language is necessarily incompatible with the nature of the solemnities of such documents.

- *Balfour and Balfour*

- Agreements such as these are outside of contract law; natural love and affection binds agreements between family relations, unless otherwise specified through formality.

- Problematic, as the idea that there are no "legal rights" between spouses is archaic. This approach has been, to some degree, replaced through statute and common law.

43.Uncertainty Cases

- *May and Butcher Ltd. v. The King (KB 1929)*

- Where there is an agreement between two parties two enter into a subsequent agreement, and some critical component of the latter agreement is undecided, then

there is no contract at all.

- Cannot contract to agree at some later date upon some matter which is vital to the agreement and is not yet determined; this is an unenforceable agreement.

- Incomplete agreements, agreements involving significant vagueness or ambiguity, or agreements to agree are too uncertain to be enforceable (ie. "shall be agreed upon")

- That is certain which can be made certain; so only if there is sufficient machination in the agreement to affix undetermined matters can such a contract retain its validity.

- The *Sale of Goods Act* provision that reasonable price should be affixed where undetermined requires silence on the part of the parties within the contract concerning machinations for fixing the price; if parties agree on certain machination for price fixing, which fails, then the agreement is void, and the *Sale of Goods Act* does not apply.

    - This also usually requires that the contract has been *executed*, ie. the sale has actually been carried out; this requires the minimum substance of the contract necessitating that the law attempt to generate the remainder of the agreement.

- If some component of an agreement is to be decided by a third party, and that party cannot or does not do so for some reason, then the agreement is voided.

- There is no difference between appointing a third party to affix some component of an agreement and having that component affixed by negotiation of the parties themselves.

- The clause to arbitrate disputes arising out of an agreement is only effective if there is an agreement; and there cannot be an agreement if some vital component is undetermined.

– *Hillas and Co v. Arcos Ltd. (HL 1932)*

- Businesspeople use modes of expression which are sufficiently clear and meaningful to them, owing to their expertise, which seem imprecise to outsiders. Interpretation of such agreements requires preserving, not destroying, subject matter.

- Courts will not go beyond the words in order to make a contract for parties, or modify an agreement beyond words used, except for where this is implied by law and intention. The Court will imply terms to give the contract an appropriate *business effect*.

- There can be a contract to enter into a subsequent contract, where the latter is whole and complete. However, where the latter is incomplete on some vital point, then the former becomes an unenforceable agreement to negotiate on the matter of the second. Generally, this is subject only to nominal damages.

– *Foley v. Classique Coaches Ltd. (KB 1934)*

- Facts

    - Land conveyed in exchange for agreement to purchase petrol from conveyer in addition to other consideration. Purchaser eventually repudiates petrol agreement, holding that as price of petrol had not been fixed, this was an unenforceable agreement to negotiate.

    - Land would not have been conveyed in this circumstance unless the petrol agreement was in place; formed a vital part of the negotiation for sale of land.

    - There was an arbitration clause concerning the sale of petrol. Both parties acted as if the agreement were in force for three years.

    - D.'s contend that the petrol contract was an agreement to make an agreement, ergo unenforceable. Further, absent a contract, arbitration clause does not apply.

- Issue

    - Does the lack of a fixed price in the petrol agreement mean that it is merely a contract to enter into a contract? Does the arbitration clause apply?

- Rule

    - Each case must be decided on the construction of the particular agreement binding the parties. In this case, the agreement is binding and enforceable.

    - Where parties act as if there is a contract, this implies that the parties believed that they had a business agreement, and not merely an agreement to negotiate.

    - When one relies on the contract, and the parties act as if there is a contract for a significant period of time, then for the Courts to void that contract would constitute unfair surprise. ITC, also unjust enrichment, due to land sale.

    - The arbitration clause appears to have been put in place specifically to mediate disputes concerning price of petrol, implying that the variable price of sale was intended and anticipated by the parties in creating the agreement.

- *Empress Towers v. Bank of Nova Scotia (BCCA 1990)*

    - There are three categories of renewal options in lease agreements:

        - *To be agreed* - not usually enforceable; where the rent and the means through which it will be determined are not specified; effectively a contract to negotiate.

- *Formula* - rent to be established through application of formula, but no machinery provided to produce the rate; Courts tend to apply machinery.

- *Defective formula* - machinery and formula provided, latter defective, principles of the former used to correct defect in the latter by the Courts.

- Courts must accept terms of the contract; if rent to be set by landlord, lease agreement must specifically state that this is to be the case. That is not to say that the landlord is compelled to accept a renewal at a rate which it *does not accept to be the market rate*.

- Agreements which set a price at the *market rate* for the item carry the implication that the parties will *negotiate in good faith* to reach agreement on what the market rate is, and further, that reasonable agreement on market rate will not be unreasonably withheld. However, as seen in *Walford / Martel,* this is *not* a universal feature of contracts.

- *Writ of possession* - a court order in the vein of an eviction notice which effectively flips possession of property from current occupier to the owner. ITC writ was denied.

- Dissent (Wallace)

    - The original lease had provided for binding arbitration for determining renewal rent; the current agreement held that the lease was terminable by either party at their option with sufficient notice. As BNS agreed, and there was no agreement between the parties, therefore Empress Towers should be given possession.

- *Walford v. Miles* (HL 1992)

    - There can be no duty to carry on negotiations in good faith, given the competitive and adversarial nature of commercial negotiations; purpose of treating is to gain advantage.

- *Martel Building v. Canada* (SCC 2000)

    - There is no tort duty of care in commercial contract negotiations; relates to the Walford principle that the purpose of such negotiations is to gain commercial advantage; no compensation for pure economic loss. Of course, this does not extend to *fraud*.

44.Contract Modification Cases

- *Harris v. Watson* (KB 1791)

    - Court refuses to enforce modification of contract, where to do so would be to encourage sailors to employ duress as bargaining advantage in pursuing modification of contract.

    - For instance, sailors could suffer a ship to sink unless the captain agrees to pay enormous amount, effectively ransom; unconscionable to allow negotiation under

duress.

- *Stilk v. Myrick* (UK 1809)

    - The duress policy rationale given in *Harris* is not correct; rather, the agreement in that case was not enforceable because of the lack of consideration.

    - Cannot contract to do for increased consideration what one has already contracted to do for valid consideration; ITC, the sailors have nothing more to sell.

- *Gilbert Steel Ltd. v. University Construction Ltd.* (ONCA 1976)

    - Facts

        - Plf. makes initial written deal, later introduces oral modification to reflect increase in steel prices. D. proceeds as if modification never agreed to, pays original prices, effectively repudiating modification.

    - Issue

        - Did oral contract constitute modification of original agreement? If so, was there consideration given in exchange, such that the modification is enforceable? Or, on the other hand, did the oral contract constitute a rescission of the original contract, such that it was effectively a new contract for different consideration?

    - Rule

        - Oral contract was a modification of the original agreement, and, absent consideration, not enforceable.

    - Principles

        - There was no mutual consideration in the oral agreement; only the Plf. received consideration; absent quid pro quo, not enforceable.

        - Promising to give a "good price" on a subsequent bargain is not valid consideration (in spite of the fact that increase bargained for was indeed smaller in proportion than the increase in price of steel); too vague and uncertain.

        - There was no express rescission of the written contract; and while change in price is a fundamental term of contract, this is not sufficient to imply a rescission of the original agreement.

        - There were no changes other than price; evidence must be read as a whole, and ITC implies that oral agreement was a variation, not a new contract in toto.

- Estoppel is a shield, and not a sword; cannot be wielded by the Plf. to hold the defendant liable; so lack of repudiation not sufficient to found a claim. Further, would only be actionable were the contract to be relied upon detrimentally.

- *Williams v. Roffey Bros. Ltd.* (QB 1991)

  - Facts

    - Plf., carpenter, underbids on contract offered by D. Unable to finish work within budget, offered bonus by D. to finish project. After completed, D. reneges on promise.

  - Issue

    - Does a modification to an existing agreement between a contractor and sub-contractor to complete same work in exchange for additional consideration constitute an enforceable variation of a contract?

  - Rule

    - No economic duress, so promise is binding, even though there was no consideration for promissor beyond that already contracted for.

  - Principles

    - Main contractor who negotiates too low a price with a subcontractor is acting contrary to own interest; will never get job finished without furnishing further sums.

      - This seems to imply that the law will protect poor negotiation on the part of subcontractors; allow them to acquire work by offering low rates, and then provide them with compensation to make up the difference by holding main contractor to ransom for completion of work.

    - D. contends that while there were benefits to be derived by offering consideration, this amounted to no more than the benefits bargained for in the original agreement.

    - *Promissory estoppel* will allow a person to make an additional payment for services which are bound to be rendered under existing contract to show that promissor is estopped from claiming that there was no consideration for promise

      - ITC, not argued, therefore not applicable.

    - *Economic duress* - subcontractor guilty of securing promise by taking advantage of difficulties caused by non-completion of work, in underbidding on contract;

agreement voidable because entered into under duress.

- In modifying a contract, if there is a benefit to be obtained by one party (even if this is the same benefit bargained for initially), consideration is offered, and there is no economic duress or fraud, the promise is binding.

- *Greater Fredericton Airport Authority Inc. v. NAV Canada* (NBCA 2008)

  - Facts

    - Plf. wants to extend runway; req. D. to move navigation equipment. D. agrees to do so, but refuses to accept cost. Plf. acquiesces, but claims that this was under duress.

  - Issue

    - Is the inclusion of "under protest" in contract formation sufficient to establish that bargain was under duress, therefore modification of contract not enforceable?

  - Rule

    - Not sufficient;

  - Principles

    - Requirement of every bilateral contract is a consensual bargain, in which a promises pass mutually between parties; consideration must move from promissor to promisee.

    - Performance of a preexisting obligation does not qualify as fresh or valid consideration, and therefore such an agreement to vary an existing contract remains unenforceable.

    - Forbearance from breaching an existing contract does not qualify as fresh consideration.

    - Detrimental reliance not a basis for enforcing otherwise gratuitous promise; reliance on such a promise is of no consequence to a plaintiff, as estoppel is a sword, and not a shield.

    - Four means of creating an enforceable variation on a bargain:

      - *New consideration* - promising to do more than original obligations require.

- *Substantive change* - circumstances must have changed after the formation of the original contract, so that to do as obligated by agreement would in fact be to do more.

- *Detrimental reliance* - acceptable on the basis of justice and equity, in spite of formal rules to the contrary concerning *promissory estoppel*.

- *Rescission* - holds that mutual contract rescinded by mutual agreement of parties, replaced with new agreement in toto.

- Courts can construct consideration by implying terms of contract, for instance if Plf. promises to forbear from firing D. for reasonable period of time after agreement formed.

- "Fresh consideration" no longer required in English courts to vary contract, in accordance with *Roffey* - sufficient that there be a practical benefit, no duress.

- Rule in *Stilk* is *overinclusive*, in that agreements under duress present consideration are enforceable, and *underinclusive*, in that agreements not under duress absent consideration are unenforceable.

- Courts must modernize approach to commercial agreements; over reliance on formalism should not trump the good faith of parties. This should not be accomplished through creation of legal fictions (such as mutual rescission).

- Notion that detrimental reliance is only a shield and not a sword is unfair, and will create unjust results in circumstances where promisor not under duress

- Presence of consideration important such that it evidences the consent of the promisor to the variation, and implies that duress was not a factor in formation. Neither necessary nor sufficient, however.

- Globex Foreign Exchange Corporation v. Kelcher (ONCA 2011)

- Employment contract modified in order to include non-competition clause. Forbearance on right to terminate employment not good consideration; must also *promise* to forbear.

45.Promissory Estoppel Cases

- *Lampleigh v. Brathwait* (UK 1615)

- D. feloniously slays a person; asks the Plf. to arrange for a pardon from the King, on a promise to pay him one hundred pounds. The Plf. does so. The D. reneges.

- Voluntary courtesy does not have consideration from the receiver to the giver such that it can support assumpsit. However, invited courtesies do bind - the promise is not naked.

- *Hughes v. Metropolitan Railway Co.* (1877 UKCA)

  - Plf. demanded repairs from tenant, giving six months notice. The parties agree to negotiate the matter. The negotiations break down after the notice expired, and the Plf. attempted to assert right following notice lapse.

  - Central concept of equity; if a party enters into negotiation such that it leads another party to suppose that strict rights will not be enforced (eg. viz. deadlines), then the first party will be restricted from being able to enforce these rights.

- *Central London Property Trust Ltd. v. High Trees House Ltd.* (KB 1947)

  - Agreement to reduce rent during WW2, as people are leaving London for the safety of the countryside.

  - Previously, leases and other deeds under seal could not be modified by parol, whether in writing or otherwise, but only be deed. However, equity has said that the Courts may give effect to such modifications now.

  - Promises made which are intended to create legal relations, which, according to knowledge of promisor will be acted upon by promisee, and which have been acted on in fact by the promisee are enforceable.

  - Generally, promises made without consideration fall within the realm of promissory estoppel; that is, that they are not actionable themselves, but where they were intended to be legally binding, will prevent the promisor from acting inconsistently with the promise.

  - Promise intended to be binding, intended to be acted on and actually relied on, is binding so far as its terms properly apply.

  - However, the Courts do not recognize a cause of action for the breach of the promise; it's not a sword. However, the party making such a promise cannot act inconsistently with it.

- *Combe v. Combe* (UKCA 1951)

  - Husband agrees to pay spousal support annually. No payment is made, wife sues for arrears seven years later.

- Court holds that this promise is not enforceable; promissory estoppel cannot be used to create new causes of action where none existed before.

- Doctrine of promissory estoppel only usable to prevent party from insisting on strict legal rights when it would be unjust in view of dealings between the parties. It is a shield, not a sword; does not give rise to a cause of action.

- Creditor cannot enforce a debt which he has agreed to waive if the debtor has changed his business or practices in reliance on that promise.

- Promissory estoppel does not give rise to a cause of action itself; it is merely a shield which can be used to prevent parties from acting inconsistently with promises made and acted upon.

- If the wife had agreed to waive her right to sue in divorce court in exchange for consideration from the husband, this would not be consideration; the waiver would mean nothing, because the promise would not bind the wife (she would still be able to sue)

- However, the forbearance of suing in divorce court (eg. not waiving the right, but in fact *not exercising* the right) would be sufficient; a unilateral promise, which would be enforceable so long as done at the implied or explicit request of the promisor.

    - ITC, no implied or express request by the husband to not sue in divorce court.

- Consideration is too central to the law to be overthrown by promissory estoppel; cardinal necessity of the formation of contract, although not of modification / discharge (although consideration remains necessary for modification until practical benefit developed)

- *John Burrows Ltd. v. Subsurface Surveys* (SCC 1968)

    - Heads of two companies are friends; late payments allowed, in spite of the fact that contract holds that entire amount due if payments are late. Heads have falling out, and the Plf. calls in the outstanding debt.

    - The fact that one party granted indulgences to another company is not sufficient to establish an expectation that the strict rights of the contract would not be enforced.

    - There must be evidence that both parties expected alteration of the terms of the contract; estoppel must be the product of negotiations to change legal relationship.

    - The course of negotiation must have the effect of leading a party to suppose that the strict rights under contract would not be enforced; not sufficient to show that one party took advantage of indulgences, the other party must have intended *legal* relations.

- *Owen Sound Public Library v. Mial Developments* (ONCA 1979)

    - Library contracts with D. based on conditions that library pay within five days of certificate, with contract being terminable on D.'s discretion if no payment within seven days thereafter.

    - Certificate obtained, library acts for seal of subcontractor on contract; D. undertakes, despite it being unnecessary. Library does not pay on time due to lack of seal, D. decides to terminate contract. Library sues for breach of contract.

    - *Estoppel applies*; as a matter of business practice, negotiations would be seen as a move to extend the deadline after the seal was received. In this case, the undertaking was sufficient to imply that the nature of the legal relationship had changed.

    - Consistent with Borrows, mere conduct or indulgence is not enough. Intent to create legal relations *does not require explicit statements* to that effect, can be inferred from the evidence. Not a subjective test requiring specific intent.

- *D&C Builders v. Rees* (UKCA 1965)

    - Small company, employed by D. to complete work. D. refuses full payment. Plf. needs payment to avoid bankruptcy. Accepts partial payment, and seeks remainder in Court. Wife of D. had obtained receipt to the effect that the partial payment had covered the entire sum.

    - Builders wanted full payment for work, D.'s wife would only pay partial. Plf. had to accept in order to avoid bankruptcy; made it clear this was under duress.

    - No person can insist on a settlement by intimidation; there needs to be true accord and understanding between parties to allow for the substitution of a lesser sum for a greater sum.

    - ITC, there was accord and satisfaction; accord that the Plf. would accept partial payment, despite its reluctance, and satisfaction when money actually paid.

    - There is no difference between remitting payment of a lesser sum through cash as opposed to cheque. It is the same as cash.

    - Creditors are barred from legal rights when inequitable to insist on them; must be a true accord, intended to create legal relations, which is acted on by the debtor. However, a true accord cannot be made in a circumstance in which one party is held to ransom.

        - ITC, D. was threatening to break contract, pay nothing whatsoever; else, the Plf. would have to accept partial payment. This cannot be a true accord.

- *N.M. v. A.T.A.* (BCCA 2003)

  - Plf. gave up job, moved to Canada from England to marry D., provided that he pay balance of mortgage. D. did not, but paid $100k towards mortgage (via promissory note). They broke up, she can't find employment; sues.

  - No evidence that the parties intended to enter into a legal relationship; therefore, this contract is not legally enforceable. Smacks more of a familial / emotional relationship.

  - Must be demonstrated that there was an *intention* for parties to enter into a legal relationship, and not merely rely on informal, non-contractual ties re: agreement.

  - With a gift, there must be delivery of the property; if the D. had given a promise under seal, the outcome would have been different; but emotional agreements not enforceable.

  - Equitable estoppel is a flexible doctrine, requiring a broad approach to preclude unconscionable conduct / injustice; however, not unjust ITC.

  - In the US, the position is set out in Restatement of the Law - action for promissory estoppel allowed - if promisor should reasonably expect promise to induce action or forbearance, binding if injustice can be avoided only by enforcement of the promise; limited as justice requires, because not contractual / common law, but rather equity.

- *Waltons Stores (Interstate) Ltd. v. Maher* (AusCA 1988)

  - Waltons aware that Maher demolishing building as part of lease contract with landlord Maher; market conditions change, and Waltons pulls out of the deal. As Waltons had not yet agreed to the lease in writing (only orally, not binding for land).

  - Court allows promissory estoppel to be used as sword, basis for plaintiff's cause of action. Waltons was estopped from denying that there was a contract.

  - The shield is pointy in Canadian jurisprudence; the law will likely develop in coming years to allow for promissory estoppel to be used as a sword instead. Where a party acts egregiously, and there is significant detrimental reliance, it would be unfair to not provide a remedy.

46.Privity of Contract Cases

- *Tweddle v. Atkinson* (UKCA, 1861)

  - Fathers promise to pay an amount to daughter and son-in-law on marriage. Fathers die without paying. Son-in-law sues estate.

- Love and affection is not sufficient consideration; this agreement to pay the amount was effectively an agreement between the fathers; therefore, a third party beneficiary has no cause of action in such an agreement; consideration must move from party entitled to sue (and exposed to being sued) on the contract.

- ITC, action cannot be maintained, as there was no consideration flowing from the Plf. to the father in law.

- *Drive Yourself Hire Co. Ltd. v. Strutt* (QB 1954)

    - No stranger could take advantage of a contract, even a contract made for one's own benefit; however, this is not a rule which has been followed in the US or Scotland.

- *Beswick v. Beswick* (HL 1968)

    - Coal merchant has business; helped by nephew. Owner ailing, nephew wants to ensure that business passes to him. Makes arrangement, whereby business transfers to nephew in exchange for weekly payment to uncle for the rest of his life, and to his aunt following the death of his uncle. Nephew makes payments to uncle, but does not pay aunt; holds that as she was not privy to contract, has no cause of action for breach.

    - Denning (CA)

        - This would mean that the nephew would retain the business, and at the same time repudiate his promise to pay the widow - nothing could be more unjust.

        - The contract could be repudiated by fraud or misrepresentation, or other good reason; however, otherwise the D. is bound to pay. The executor of the estate can sue to enforce the contract; widow can join this suit. If the executor refuses to sue, the widow could sue in own names, and name the executor as a defendant.

        - Tweddle is distinguishable, as in that case neither party paid the sum required to the third party; this prevented the executors of either estate or the third party beneficiaries from suing. If the fathers hadn't died, neither would have a cause of action against the other because neither had performed.

        - Court should recognize assignee relationship, allowing for third party beneficiaries to sue in the name of the contracting party.

            - Could be argued that in such circumstances, the damages would be nominal, as contracting party has not suffered the damages. However, this is not the case; can recover full amount of breach, but must pass this money to third party.

        - Such contracts are sometimes made in trust; right to sue vested in trustee on behalf of beneficiary. This is a different type of contract, as it is only rescindable /

variable with permission of the beneficiary; third party allowed to sue in equity, although as a rule should join the trustee as a party.

- The rule that a third party cannot sue is a rule of procedure; goes to the form of the remedy, not the underlying right. Where a third party beneficiary has a legitimate interest in enforcing a contract, sensible to allow them to sue.

- Reid (HL)

- There was a time when existence of right relied on existence of means through which it could be enforced; today, this is no longer the case.

- Not so that a third party beneficiary can sue in own name; undermines Denning's reasoning. However, ITC, has right as executor of husband's estate to compel performance of D.

- *Dutton v. Poole* (UK 1678)

- Father wants to cut down trees to raise funds for daughter. Eldest son, inheritor, asks father not to do so, instead promising to pay daughter one thousand pounds. This is accepted. Father dies, son inherits and repudiates contract, holding that as daughter only a third party beneficiary, has no cause of action for breach of contract between son and father.

- The father's executor could have sued on behalf of the daughter; however, ITC was not possible, as the executor was a primary witness, and therefore would have been precluded from testifying. In such special circumstances (where a party cannot give evidence), the daughter is allowed to sue on contract, although not a party.

- Resch v. Canadian Tire (ONSC 2006)

- Plf. claims against D. for negligence and breach of contract re: Sale of Goods re: injury from bicycle purchased from D. Plf. did not purchase bicycle, father purchased on his behalf, so issue is whether privity under Sale of Goods Act can extend protection for breach of contract.

- Plf. not a buyer under the SGA; did not pay part of the purchase price at time of purchase, seller was not aware of any financial contribution by the Plf; further, person who is the user of the goods is not the buyer - an owner or operator is not a buyer, and privity of contract cannot be relaxed to allow otherwise.

- *New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite & Co. Ltd. (UKCA 1975) - Eurymedon*

- Plf. was acting as agent for stevedores who damaged drill; made contract which limited liability; ergo, no liability on part of stevedores.

- Four requirements for agency agreement:

    - *Intention* – parties must have intended for third party to benefit from the contract.

    - *Agency* – contracting party must be expressly acting as agent for third party.

    - *Authority* – contracting party must have had authority to act as agent

    - *Consideration* - must be consideration flowing from third party to contracting party. ITC, unilateral consideration accepted - if you agree to unload goods, I accept that you are protected by limitation clause.

– *Greenwood Shopping Plaza Ltd. v. Beattie (SCC 1980)*

- Facts

    - Contract says that mall owner must insure for property damages. Insurer to have no right of subrogation, cannot sue tenant (Cdn. Tire). Cdn. Tire welders cause fire; mall owner to insure for property.

- Issue

    - Can employees benefit from landlord's waiver of right of subrogation?

- Rule

    - Employees are third party beneficiaries; exceptions do not apply. Situation is not within the agency requirement as established in *New Zealand Shipping*.

- Principles

    - Test to determine whether there is an agent-principle relationship such that would allow a subrogation clause between agent and plaintiff capable of protecting a third party (principle):

        - *Intended benefit* – negotiating parties must have intended that the third party benefit from the contract. ITC, no evidence that clause intended to apply to employees.

        - *Contracting as agent* – Contracting party must also be contracting as agent of the third party. ITC, no evidence that Cdn. Tire was in fact contracting as agent for employees, but rather only on its own behalf.

- *Authority as agent* - in order to act as agent, must have authority or ratification that allows that party to do so. No such authority ITC.

- *Consideration* - must be consideration moving from the third party to the non-agent party. ITC, no such consideration from employees to landlord; there was no performance that could act as consideration.

- Employees are therefore liable in tort for their negligence; the subrogation clause of the land lord vis a vis Cdn. Tire does not apply to employees.

- *Himalaya clause* - risk allocation mechanism, if one is shipping an object on a carrier's ship, one will take out one's own insurance concerning the loss of the object; effectively a waiver of right to sue concerning these goods.

    - This is a commercial bargain which lowers transaction costs, as the person who can insure at the least cost is usually the owner.

    - Shipping companies act as agents for stevedores loading and unloading goods; therefore, subrogation clause also protects stevedores from liability

- Policy

    - Formalistic - this approach is formalistic, as it fails to consider the consequences of the judgment.

    - Unfair surprise - employees were not aware that they would be liable, and had no chance to prepare for this circumstance (eg. by arranging for their own insurance).

    - Distributive justice - consider who works in malls - this is not a domain where one would expect particularly wealthy individuals to be working. The cost of the fire is therefore passed to those least capable of absorbing the loss.

    - Risk allocation - approach disrupts risk allocation of the contract, in which the landlord was to arrange for insurance.

    - Unjust enrichment - presumably, Cdn. Tire has paid for the waiver of subrogation, and having not received that waiver ITC, the Plf. has been unjustly enriched as a result. The terms of the contract are being renegotiated ex post facto.

    - Efficiency - this circumstance requires that the employees also need insurance to protect their interests; this is inefficient, as both employee and employer must therefore be insured.

- *London Drugs v. Kuehne and Nagel International Inc. (SCC 1992)*

    - Facts

        - Storage of transformer by D. on behalf of Plf.; D.'s employees negligently damage transformer.

    - Issue

        - Does a limitation of liability clause in a contract between an employer and another company extend to employees?

    - Rule

        - SCC eases doctrine of privity in context where the employee is a third party beneficiary to limitation of liability clause between employer and customer.

    - Principle

        - IMPLICITLY IMPLIED, ya?

        - Limitation of liability between employer and third party applies where it expressly or impliedly extends this benefit to employees. This is perhaps a shift on the onus, as now, in context of employment, must negative employees expressly for the limitation of liability to not apply.

        - Three requirements for limitation of liability between contracting party and employer to extend to employees:

            - *Limitation* - there is a contractual limitation of liability between employer and contracting party.

            - *Benefit* - the contract expressly or impliedly extends this benefit to employees.

            - *Context* - the employee seeking the benefit of the limitation of liability clause must be acting in the context of employment, providing the very services provided in the contract when the loss occurs.

        - While the "warehouseman" in the contract might be the juridicial person of "Kuehne and Nagel Co" - this person has no actual corpus, and cannot move the transformer. There was no evidence that they were intended to be excluded.

            - The D. knew or should have known that the only people moving the transformer would be actual humans.

- Greenwood is distinct, as employees were not necessary to the performance of the agreement - that is, don't need employees for a lease of space contract.

    - That's some questionable reasoning, however. Consider that the store is being leased for commercial retail. Commercial retail requires employees. This contract clearly intended that agent / employee of tenant company would occupy space; otherwise, contract has no business efficacy.

- Privity of contract should not be discarded lightly; however, this is merely an incremental advancement of the law consistent with the purpose of common law courts.

    - For instance, in this case, does not create a new cause of action, but rather merely extends and gives meaning to limitation of liability clause; would have no business efficacy if it did not protect employees, as a corporate body cannot itself move a transformer; requires employees.

- There is a special relationship between employers and employees such that employees carry the responsibilities related to the obligations of the employers; this is within the knowledge of contracting parties.

    - If the parties to a contract agree to a certain allocation of risk, this should not be disturbed by the Courts; would undermine deliberation and negotiation.

- Dissent (LaForest) - would have held that whenever employees are acting in the course of their employment, that person could not be held individually liable for their negligent actions.

- Policy

    - Problems continue, if employer has no insurance or no limitation clause. Employee only protected if employer protected. Further, employer might fail to ensure that the clause applies to employees. Finally, employees may decide not to insure their employees. So, the problem is still a live one in certain situations.

- *Midland Silicones*

    - Agency applies if:

        - Contract makes it clear that employees are protected by limitation of liability clause;

        - Contract makes it clear that employer is acting as agent for employees;

        - Employer has the authority to act as agent for employees;

- Difficulties concerning consideration from employee to third party are overcome.

- *Fraser River Pile & Dredge v. Can-Dive Services (SCC 1999)*

- Facts

- D. charters boat from Plf.; boat sinks due to negligence of D. Insurance company that the *London Drugs* rule is limited to contract for services. D. seeks to rely on waiver of subrogation clause in insurance contract between insurance company and boat owner (eg. insurer had K. not to collect from owner; D. holds that this constitutes agent->principle arrangement which extends to those chartering from owner).

- Issue

- Is the *London Drugs* rule limited to contract for services?

- Rule

- *London Drugs* rule can apply anywhere, if it meets the conditions set out below.

- Principles

- *Intention* - did the contracting parties intend to extend the benefit to a third party? ITC, insurance contract referred to persons chartering the boat specifically.

- *Scope* - are the activities performed by the third party the very activities contemplated as coming within the scope of the contract? ITC, this is the case; chartering the boat and using it is the very activity contemplated.

- Plf. holds that the limitation of liability clause between these parties only extends to third party if the agent / employer enforces the clause; contends that the agent / employer can waive this protection if they see fit, allow for contracting party to sue third party beneficiary (employee / principal / charterer).

- Court says that this may be the case, however such rights could not be revoked unilaterally once they have developed into an actual benefit; this benefit had crystallized by the point of the accident, and so cannot be disturbed thereafter.

- Policy

- The *London Drugs* test is a watered-down agency test; as the agency test requires a higher threshold, if one does not meet the *London Drugs* criteria, one will probably also fail to meet the agency criteria. However, the agency criteria still exists as a means for eluding privity of contract.

- *Kitimat (District) v. Alcan Inc.* (BCCA 2006)

  - Plf. hopes to benefit from statutory / contractual relationship between the Plf. and the PG (PG was not enforcing its rights, to Plf.'s detriment). However, Plf. has no private interest standing concerning agreements between Alcan and the PG (could have public interest standing, but that was not what was at issue).

- *Resch v. Canadian Tire* (ONCJ 2006)

  - Damages for negligence; Plf. injured after accident due to defect in bicycle. Bought with father; claim governed by *Sale of Goods Act* - however, Plf. does not meet definition of buyer within the meaning of that act. Ergo, no cause of action in contract due to statute, and so can only sue through tort (negligence).

  - Plf.'s father put the entire portion of cost on credit card, and there was no credible evidence to show that in fact Plf. met the definition of a buyer.

    - s.2(1) - contract of sale *between* one part owner and another; contention that this shows that there can be co-buyers; Court holds that this is the case, there can be co-buyers.

      - However, this does not mean that merely contributing money after the fact renders one a party to the original contract; this smacks more of a second sale, in which son purchased part or full ownership from his father.

      - To be a buyer under the Act would have required that the Plf. contribute some portion of the purchase price, to the vendor directly, at the time of sale.

      - Giving the Plf. a gift certificate in order to compensate for lost time due to a recall / repair of the bicycle does not mean that the D. has recognized the Plf. as the *buyer*; owner or user, perhaps, or more likely, the person who was inconvenienced by the recall.

    - The reason for distinction between *buyer* and *user* in *Sale of Goods Act* is deliberate; users have no rights in contract under that act, must look to torts.

47.Parol Evidence Cases

- *Re CNR and CP* (BCCA 1978)

    - Subsequent conduct is restricted evidence in English view, but taken flexibly in Canadian view. May be admitted, has legal relevance if additional evidence will determine which of two reasonable interpretations is reasonable

- *Prenn v. Simmonds* (HL 1971)

    - D. was to have stock options if RTT Co. made $300k profit; under one calculation, this was achieved; under another calculation, this was not achieved. Question is which calculation should apply - one written in contract, or one implied by parol evidence?

    - Must inquire beyond language, see what circumstances were with reference to how the words were used, and the object which the person using them had in view. Evidence of mutually known facts may be admitted to identify the meaning of a descriptive term.

    - Negotiations leading up to the contract cannot be taken into the account; can only be used to establish a trade or technical meaning. This evidence should not be used to establish the subjective intentions of the parties, however.

    - Evidence from negotiations is unhelpful, as only the final document records a consensus; can show the business object of the transaction, however. And if one interpretation renders this object futile, this strongly recommends other options.

    - Evidence from prior negotiations is not admissible for the purposes of understanding a contract. Evidence concerning surrounding circumstances, object and aim of transaction, mutually known facts, and the trade / technical meaning is admissible. However, subjective intentions are not admissible; only final document evidences agreement of

parties.

- *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* (HL 1998)

    - Matrix of fact - the background of the contract, includes anything which would have affected the way in which the language in the document would be understood; ergo, evidence admissible if it meets this definition.

- *Eli Lilly & Co. v. Novopharm Ltd.* (SCC 1998)

    - Contractual intent of the parties is to be determined by reference to the words used in drafting the document, read in the light of the circumstances prevalent at the time.

- *Hawrish v. Bank of Montreal* (SCC 1969)

    - Plf. gives guarantee for company; signs form to that effect. Form states that his guarantee continues. Makes oral agreement with D. holding that guarantee would end once other conditions met. This latter satisfied, the D. refused to discontinue Plf.'s guarantee. Plf. sues.

    - At trial, parol evidence held admissible on the ground that it was a condition of signing the guarantee; effectively, either a portion of the contract, or a separate second contract.

        - Plf. contends that this oral agreement did not contradict or vary terms of primary agreement, but rather provided a completely independent agreement. Oral evidence proving the existence of such an agreement is admissible.

    - Parol evidence is only admissible where it evidences the existence of a distinct collateral agreement which did not contradict / was not inconsistent with written instrument.

    - Any agreement collateral or supplementary to written instrument can be established through parol evidence provided that this is an independent agreement, capable of being made without writing, which does not contradict and is consistent with written agreement.

    - Collateral agreement can be independent or supplementary; consideration for such agreement can be the entering into of another contract (eg. the terms of contract X are that A will give B one hundred pounds if B agrees to enter into contract Y).

        - In this formulation, each has independent force and character as a contract; however, must be viewed strictly and with suspicion by the courts.

    - ITC, the agreement clearly contradicts or is inconsistent with the terms of the guarantee, and therefore cannot be admissible.

- *Tilden Rent-A-Car Co. v. Clendenning* (ONCA 1978)

    - D. opts for additional coverage when renting a car; believed that this would cover him so long as he did not become so inebriated so as to be unable to control the vehicle. Became intoxicated (but not to that extent), crashed vehicle. Pled guilty to DWI. Insurance declined to pay, relying on clause that those who are "under the influence" of liquor, regardless of quantity consumed, are not covered. D. did not read agreement.

    - The terms of the contract are very strict; one driving in a parking lot would not be covered, neither would a person who consumed one beer, or exceeded the speeding limit by one kilometre per hour. D. clearly did not acquiesce to such Draconian terms.

    - *Consensus ad idem* - signature of the contract is only one way of manifesting assent. If one party believes the set of terms to be one thing, while the other party believes them to be another, there is no contract, unless circumstances preclude one of the parties from denying agreement to the terms of the other.

    - However, this is objective, not subjective; regardless of one's actual intentions, if one conducts oneself in a manner so that a reasonable person would believe that he had assented to the terms proposed, then there is *consensus ad idem*.

        - ITC, as D. did not read the terms of the contract, and this was immediately apparent, Plf. cannot rely upon reasonable belief that they were being assented to

        - ITC, the Plf. touts the speed of its transactions, a feature which would preclude the possibility of reading and understanding the terms of its insurance contract.

    - Document not meant to be read, nor understood by those signing it. Signatures in such circumstances no more significant than handshakes.

    - On the ground of estoppel, consent makes contracts binding except for where the party denying the obligation proves, on balance of probabilities:

        - That the other party knew that at the time that the contract was made, that the mind of the denying party did not accompany the expression of intent; or

        - It was not reasonable and natural for the other party to suppose that the denying party was giving real consent, and real consent was not in fact given.

    - When a contract of a common type contains special onerous or unusual provisions, it is the duty of the party in whose interests these provisions are made to see that they are brought to the attention of the other party; otherwise, they will not be held binding.

        - In other words, if one wishes to depart from the ordinary and well understood form, one must make this perfectly plain to the client.

- Where standard form printed documents are used, they are not designed to be read or understood; therefore, signature known not to represent true intention of signer. In such circumstances, party seeking to rely must take reasonable measures to bring stringent and onerous provisions to the attention of the other party.

    - Putting important provisions on the other side of the agreement and in small type would discourage even the most cautious customer from reading them.

- *Gallen v. Allstate Grain Co. Ltd.* (BCCA 1984)

    - Oral representation made by D. which turned out to be wrong, to the detriment of the Plf. farmer. Is evidence of an oral representation admissible, does it constitute a warranty? Can it vary the signed agreement?

    - Where parties to contract have apparently set down all terms of agreement in document, extrinsic evidence is not admissible to vary or contradict this document.

    - There are exceptions to this rule, however - this list is inexhaustive.

        - Evidence of invalidity due to fraud, misrepresentation, mistake, incapacity, lack of intention;

        - Dispelling ambiguities, establish meaning of trade terms, demonstrate the factual matrix;

        - Supporting a claim of rectification;

        - Establish a condition precedent to the agreement;

        - Establish a collateral agreement;

        - Support allegation that document was not intended to constitute whole agreement;

        - Support of claim for equitable remedy;

        - Support of claim in tort concerning breach of a duty of care.

    - Concerning the admission of parol evidence concerning a collateral agreement, does not matter whether one subscribes to the one-contract or two-contract theory.

    - Warranties form part of the contractual relationship; establish present facts (eg. the car is five years old) or allocate risk for future facts (eg. guaranteed rust-proof for two years).

    - To differentiate between warranties and bare representations:

- The recipient should make clear that the disputed matter is so important that the contract would not have been made without the assurance of the warranty;

- The maker of the warranty must be stating a matter which is within knowledge, and of which the recipient is known to be ignorant.

- Must look at the contract in light of all surrounding circumstances, including the extent to which the statement which would affect the agreement which took place between parties. Statements differentiated from warranties by the trier of fact.

    - Essence of warranty is that it becomes plain by words of vendor that responsibility of soundness will rest upon the vendor.

- Parol evidence presumptively inadmissible where it contradicts or varies main agreement; unreasonable to contemplate that between same parties, at same time, two contradictory contracts would be made. The written contract was clearly and demonstrably made, and so reason requires court to conclude that oral contract was not.

- Parol evidence inadmissibility based on a further presumption, that a document which looks like a contract is to be treated as the entire contract. However, this is stronger where the parties individually negotiated agreement than where standard form used.

- Principle concerning admissibility of parol evidence is not absolute; cannot be made a tool for the unscrupulous to dupe the unwary, for instance.

- Contract induced by misrepresentation or by oral representation inconsistent with the written contract would not stand, could not bind party to whom representation had been made. However, there must be some misrepresentation or inconsistent oral representation for this argument to stand.

- Collateral agreements can add to written agreements; nothing wrong with supplementary agreements. CAs which subtract from or vary WAs represent a halfway stage between adding to (wholly reasonable) and contradicting (wholly unreasonable).

- Presumption against parol evidence weaker where the a specific oral representation was held against a general written clause, than where a specific oral representation held against an equally specific written clause.

- If an oral representation is a warranty, then it and document must be read together, harmoniously if possible; if no contradiction, then everything is find; if there is a contradiction, the written document is favoured; however, if it is shown that the oral clause was intended to prevail, then it will prevail.

- L'Estrange (UKCA, 1934)

- Signed contracts are binding - common law traditionally accords a high level of deference to the written terms of the contract.

- *Zippy Print* (BCCA, 1995)

- Representation made that franchise generated $100k per year; contract had exclusion clause. Cannot dupe someone into contract by making oral representations, and then excluding liability for these representations in written agreement - unless otherwise acknowledged specifically (eg. highlighting exclusion clause, specifically drawing attention). If acknowledgement, then falls to risk allocation.

48.Fundamental Breach Cases

- *Photo Production Ltd. v. Securicor Transport Ltd.* (HL 1980)

- Plf. contracted with D. to provide security for factory; D.'s employee burned down factory. D. relies on exclusion of liability clause, which Plf. holds is inapplicable due to doctrine of fundamental breach.

- Where parties are not of unequal bargaining power and risks are borne by insurance, there is no case for judicial intervention; parties must be allowed to apportion risks as they see fit.

- Problem with doctrine of fundamental breach is that it requires the Courts to determine, ex post facto, whether the breach was factually and legally fundamental.

- Where one speaks of termination caused by breach, one means that the innocent party (or occasionally, both parties) are excused from further performance. Damages are claimed under contract as a result; why should the Court disregard what the contract says about the apportionment of such damages?

    - It is a severe next step to say that as the contract has been breached, for policy reasons certain clauses of the contract lose their force, regardless of intention.

- Exclusion clauses have to be approached with the aid of cardinal rules of construction; these include *contra preferentem*, and that in order to escape the consequences of one's own wrongdoing, clear words are necessary.

- *Hunter Engineering Co. Inc. et al. v. Syncrude et al.* (SCC 1989)

- Warranty clauses excludes Plf.'s liability after a certain period of time for defects in product. D. alleges fundamental breach of contract, in that the gearboxes were not fit for the purpose for which they were sold.

- Court should not disturb the bargain that the parties have struck; fundamental breach doctrine must be replaced with rule that holds parties to the terms of their agreements,

provided that these are not unconscionable.

- Dissent (Wilson)

    - Contractual provisions which seem unfair to third parties may have been the product of hard bargaining between the parties; ergo, must be enforced in accordance with their terms.

    - Begs the question, should parties be able to commit fundamental breach secure in the knowledge that no liability can contend it? Or should, in circumstances where one party repudiates all burdens of transaction, but seeks to enforce its benefits, the Court intervene?

    - Absence of legislation along the lines of the *Unfair Contract Terms Act* in the UK is such that the judiciary must continue to develop balance through common law.

    - Exclusion clauses do not lose validity by virtue of hard and fast rule of law; must give weight to these clauses only in light of subsequent events. This is not the place for unconscionability; does not require inequality in bargaining power.

    - Fundamental breach should apply where one party to the contract is deprived of substantially the whole benefit of the contract; in such circumstances, breaching party cannot seek to benefit from the exclusion clause, as to do so would be to abuse the freedom of contract.

    - Favours not just pre-breach unconscionability in considering whether to avoid an exclusion clause, but also post-breach analysis concerning the subsequent actions of the parties (eg. deprivation of substantially the whole benefit)

- *Tercon Contractors Ltd. v. British Columbia* (SCC 2010)

    - Tender process, D. accepts bid from party not eligible to participate in RFP; D. relies on exclusion clause in tender contract to avoid liability.

    - TJ held that exclusion clause was ambiguous, and having been written by the D., *contra proferentem* holds that ambiguity must be resolved in favour of the Plf.

    - Fundamental breach must be laid to rest, as Dickson attempted to do in *Hunter*. Only of historical interest going forward.

    - Limiting eligibility of bidders was the foundation of the RFP. The acceptance of a bid from an ineligible party attacks the underlying premise of the process. Cannot conclude that the exclusion clause was intended to gut the eligibility requirements in this way.

- Dissent (Binnie)

    - Doctrine of fundamental breach should be kept alive; reformulated, holding that Court cannot refuse to enforce exclusion clause unless the Plf. can point to some paramount consideration of public policy sufficient to override interest in freedom of contract.

    - Doctrine is a rule of law which operates independently of party intentions where the defendant has so egregiously breached the contract so as to substantively deprive the plaintiff the whole of its benefit.

    - There is nothing inherently unreasonable about exclusion clauses, and they must be given force unless there is a compelling reason not to do so.

    - There are cases in which the exercise of the *ultimate power* to refuse to enforce a contract may be justified, even in the commercial context - as freedom of contract may itself be abused.

    - Determine first whether exclusion clause applies to present circumstances; if so, determine whether it was unconscionable at the time the contract was made (eg. due to unequal bargaining power); if not, then determine whether there is a valid overriding public policy interest such that the clause should not be given weight.

- Policy - exclusion clauses act as litigation risk management, allowing corporations to apply the clauses where they feel that a claim is spurious / fraudulent, or to avoid the clause where it would be bad press to litigate / the claim is meritorious.

- *Guarantee Co. of North America v. Gordon Capital Co.* (SCC 1999)

    - As a matter of construction (not law) fundamental breach prevents breaching party from continuing to rely on an exclusion clause; question is whether the parties *intended* for the exclusion clause to apply in circumstances of breach or not (regardless of whether that breach was fundamental).

- *Karsales (Harrow) Ltd. v. Wallis* (UKCA 1956),

    - Used car delivered extremely damaged. D. refused delivery, vendor sues, relying upon exclusion clause.

        - No matter how widely exclusion clause is expressed, only avail when carrying out contract in essential respects; does not protect one guilty of a breach undermining the very root of the contract.

- *Photo Production v. Securicor* (HL 1980)

- Contract between Plf. and D. to protect Plf.'s premises. Security guard negligently sets fire which destroys premises. Contract contained exclusion clause which negatives D.'s liability.

    - Fundamental breach of contract brings contractual obligations of performance to an end; so, there is a repudiatory breach,

    - The exclusion clause survives, and the issue is whether the clause applies to the loss or type of loss in question.

49.Collateral Agreement Cases

- *Heilbut, Symons and Co. v. Buckleton* (HL 1913)

    - Plf. underwrote a large number of shares in D.'s rubber company. Plf. asked whether the D. was "bringing out a rubber company", and D. replied "we are". Plf. asked how many shares could be had, did not look at prospectus because of D.'s position in rubber trade. However, deficiency in rubber trade caused shares to fall in value. Plf. sues for fraudulent misrepresentation, holding that the D.'s company was not a "rubber company" as had been warranted.

    - Incumbent in such an action for the Plf. to prove that there was a warranty, a contract collateral to the main contract in which the D. made some promise to the Plf. in addition to the obligations of the contract.

    - Collateral contracts must be rare by their nature; as they add/vary the main contract, they are viewed with suspicion by the law.

    - To constitute a warranty, there must be evidence that the representation was intended to have legal effect; must not simply be a reply to a request for information. Must be sufficient to evidence the existence of intention to create a collateral agreement.

        - ITC, statement by the D. in response to Plf.'s question was a mere statement of fact, in reply to a request for information; nothing more.

    - *Legal fraud* is not a recognized doctrine; cannot hold that because one *could* have obtained correct knowledge, than one must do so; an honest mistake cannot be made equal to a fraudulent misrepresentation, as this would make one liable for forgetfulness.

    - Therefore, to be an actionable misrepresentation, must be fraudulent, or alternatively, must be made recklessly without care for whether it happens to be true.

    - That an affirmation is made in the course of dealing, before or at the time of sale, does not mean that it is necessarily a warranty or a collateral agreement. Can yet be mere information; relevant is whether there is *intention* on the part of either or both parties

that there should be contractual liability in view of that statement.

- *Bentley (Dick) Productions Ltd. v. Smith (Harold)(Motors) Ltd.* (UKCA 1965)

  - Breach of warranty regarding Bentley car; D. represented that vehicle has only 20k miles since replacement of motor, and that he had ability to look into history of car. Former representation turned out to be untrue (not the latter).

  - If a representation is made in the course of dealings for the purpose of inducing the other party to act on it, and if the other party acts on it, then the representation is intended as a warranty prima facie.

  - This is rebuttable if the representation was made innocently; however, this requires an honest belief, with no ability or capacity to obtain better knowledge. Not sufficient to show that they were not dishonest.

    - ITC, D. made representations for which there was no foundation; D. had means and obligation to obtain better knowledge, but did not do so. Ergo, not innocent misrepresentation.

- *Redgrave v. Hurd* (UKCA 1881)

  - Plf. made representations concerning success of law practice, and used this as a means for inducing D. to purchase his house. D. repudiated upon learning the falseness of the representation, Plf. seeks order for specific performance.

  - At equity, not necessary in false representation to prove that the faulty party knew that the representation was false. Ought to have found out that representation was false before making it.

  - At common law, generally necessary to prove that the faulty party knew that the representation was false, although this is not true in all cases.

  - Equitable position ultimately overrides the common law; if one is induced to enter a contract under a false representation, the faulty party cannot say that the innocent party should have used due diligence to uncover the falsehood.

  - Not required to prove that the false representation was relied upon; if it was calculated to induce the party to enter the contract, the Court must infer that the innocent party was so induced.

  - Contract was rescinded due to innocent misrepresentation; therefore, while Plf. received deposit back (in accordance with rescission) did not receive reliance damages for moving expenses, because one cannot sue on a contract which has been rescinded.

- *Leaf v. International Galleries* (KB 1950)

    - D. sells Plf. painting, claiming that was by Constable. After five years, Plf. attempts to sell, learns that it is not constable. Plf. claims that this was innocent misrepresentation, therefore in equity entitled to claim recession of executed contract on that account.

    - Mistake about quality of subject matter, and this was fundamental / essential. However, this does not avoid the contract, as there was no mistake about the subject matter itself. Therefore, Plf. not entitled to rescission, but rather only to damages.

    - Term of the contract could be a condition or a warranty; condition requires rejection at or before time of acceptance of goods, while warranty means that goods cannot be rejected, but allows for claim in damages if goods do not meet contractual requirements.

        - ITC, term was a condition, therefore could reject, but only until acceptance; as five years had passed, reasonable period for acceptance long gone, claim limited to *damages* only.

    - *Material* misrepresentation in sale of goods contract may be a ground for rescission even in a contract which has been executed; however, this is *not* the case concerning an *innocent* misrepresentation.

        - Innocent misrepresentation is much less potent than a breach of condition; however, if a claim to reject on breach of condition is barred, then a claim to rescission on innocent misrepresentation must also be barred.

50.Warranty Cases

- Murray v. Sperry Rand Corp (ONSC 1979)

    - Plf. purchases forage harvester. Explained intended use of machine, was told that machine would be ideal for use. Induced through oral representations, and actual performance fell short of what was represented.

    - Affirmation made with intention of inducing contractual relations is a warranty.

    - Brochure provided by the manufacturer goes beyond providing specifications, and is intended as a sales tool. This document also represents collateral warranties given by manufacturer.

    - *Consideration for collateral warranty of third party* - is entering into of the main contract in relation to which the warranty is given. Therefore, warranty is enforceable on this basis; warranty between A and B supported by consideration that B should do some other act for benefit of A - for instance, enter into a contract with C.

- In this case, while the manufacturer (A) was not privy to the contract itself, it provided collateral warranties to the Plf. (B) to buy from the dealer (C).

- Ranger v. Herbert A. Watts (Quebec) Ltd. (ONSC 1970)

  - To allow a company to evade the fair implication of advertising is to allow profit to be harvested without obligation to the purchaser; this is due to the fact that advertising is alluring and attractive means of representing quality and confidence, therefore must protect public.

- Hedley Byrne and Co. Ltd. v. Heller & Partners Ltd. (HL 1964)

  - Plf. advertising agency asks D. bank for credit report on client before advancing that client credit for purchase of advertising time. D. holds that this service was provided gratuitously and therefore cannot be a cause of action. Plf. holds that action should then lie in negligent misrepresentation in tort.

  - If a person undertakes to perform an act, while gratuitous and voluntary, an action will lie if that act is performed negligently. Such an action is best understood as arising out of a voluntary undertaking, and not out of contract itself. Does not require a special relationship, but assumption of responsibility in circumstances where, present consideration, there would have been a contract.

  - Payment for advice is evidence that this advice is being relied upon, and that the party providing the advice knows that it is being relied upon. Absent payment, must take care re: surrounding context to ensure that the party giving advice knows that it is being relied on.

  - Not necessary that the party providing advice know the identity of the party relying. Can provide statement not for the use of a specific person, but still be aware that it is reasonable that *someone* will rely on it (inasmuch as someone, though no one in particular, would end up drinking the ginger beer).

- Esso Petroleum Co. Ltd. v. Mardon (QBCA 1976)

  - D. franchisee of Esso station. Plf. made estimates concerning the viability of site, but these were thrown awry when planning authority insisted that pumps be built at back, rather than at front. No readjustment made, a fatal error due to Esso's lack of care. D. puts in best effort, but fails to make a go of it. D. claims that representation concerning viability of site constitutes collateral warranty.

  - Innocent misrepresentation gives no right to damages. However, collateral warranties and fraudulent misrepresentations do; so if such a misrepresentation can be reclassified as a collateral warranty, action likely to succeed.

- In sale of business agreements, representations concerning profits that had been made in the past were invariably held to be warranties (inducement to enter agreement according to intention).

- Esso possessed enhanced expertise and experience concerning viability of gas station sites, better position to make a forecast. Where a forecast is made intending that the other party should act upon it, and the other party does rely, it is interpreted as a warranty - sound and reliable in the sense that it was made with reasonable skill and care.

- Not a breach necessarily just because the forecast was incorrect; only a breach of collateral warranty where the forecast was one which no person of skill and experience should have made. The warranty is that the forecast was made with skill; where this is broken, then the contract has been breached.

- If the collateral warranty is not found in this case, then Mardon can still collect in negligent misrepresentation tort. There can be concurrent liability in contract and tort.

- D. not liable for loss of a bargain; there was no bargain that the throughput would amount to a certain number of gallons per year, but rather only a warranty that the forecast was made with reasonable skill which induced him to enter contract disastrously. The effect was his entry into the contract, so his remedy is to be measured only by the loss suffered. Calculate what position would have been had he not entered into contract, compensate accordingly.

51.Unconscionability Cases

- Lidder v. Munro (BCSC 2004)

- Plf. signed settlement for motor vehicle accident, now seeks to have this set aside. This is accomplished through unconscionability.

- Concerning lack of intention (no consensus ad idem) not subjective, but objective; what would be in the mind of a reasonable person in the circumstances.

- First stage of non est factum is to show that the understanding of the party is fundamentally different from the agreement signed.

- Undue influence requires that one party must have exercised oppression, coercion, or abuse of power such that the will of the other party was overborne.

- Unconscionability requires weakness in bargaining power on one side, and the taking of an unfair advantage on the other side. Present in this case.

- Policy concerns

1. Law and economics approach (Trebilcock) - Economic assumption is that if two parties enter into an agreement, they must be better off - transaction must enhance welfare, otherwise they would not have transacted. *Pareto efficiency* holds that the question is whether the transaction makes somebody better off, while making nobody worse off.

    a. However, this approach does not allow for understanding of the distributive value of transactions; whether the gains are substantively on one side or the other, it is considered welfare enhancing on a societal level so long as both parties are better off.

    b. Also, subject to market failures - monopoly, externalities, information failure, and voluntariness. Must investigate these if it is discovered that an agreement is not *Pareto* efficient. Reflects a focus on *procedural unconscionability* – unfairness in the bargain making *process*, and not the resultant bargain itself.

    c. Rejects substantive unconscionability, that the fairness of the bargain should be considered, that there is a "just price"

2. Critical approach holds that there is no such thing as freedom of contract; coercion lies at the heart of every bargain (the need to obtain some thing). The cost of ensuring that transactions are free from coercion (as consumers eat cost of independent legal advice).

    a. Therefore, the system is entirely beneficial to capitalist interests (eg. entrenched wealth). This is opposed to the cost-benefit approach, which holds that the cost of taking steps to avoid undue influence must be compared against the cost of restricting freedom of contract (eg. if people can't borrow on house, then cost of borrowing increases, economic activity decreases, etc.)

- Trebilcock on Unconscionability and Undue Influence

    - Inequality of bargaining power

        - Pareto principles require that each party in an exchange benefit; Gordley's principle holds that each party must gain *equally*.

        - Parties must be able to gain relief where they have contracted for substantially more or substantially less than the market price. In such a circumstance, whether or not the ignorance of the party disadvantaged was taken advantage of by the benefiting party, the deal must be adjusted.

        - Where the market price cannot be ascertained, under Gordley's theory the valuation negotiated by the parties would be respected, except for where the costs of the seller are widely discrepant with the amount paid by the buyer.

- Benefit of Gordley analysis is that the procedural irregularities are a moot and irrelevant consideration. Theory of substantive, not procedural fairness.

- Cognitive deficiencies

    - No misrepresentation of information, no non-disclosure of material facts, so both parties share access to same body of information. However, parties have different capacities to evaluate the implications of information concerning their respective welfare.

    - Generally, for contracts to be binding, should arise out of autonomous consent of parties, represent voluntariness and information.

    - Transactional incapacity - occurs where unscrupulous party knows of others inability to deal with a given transaction due to lack of aptitude, experience, or judgment. Exploits incapacity by inducing the lesser party to make a bargain that a person of full capacity probably would not have made.

    - Unfair persuasion - the use of bargaining methods that impair the free and competent exercise of judgment, produce a transitory state of acquiescence, such as taking advantage of a distraught widow.

- Standard form contracts

    - Monopoly - argument that these documents are reflective of monopoly, esp. due to their "take it or leave it," rigid nature. However, true nature may be to reduce transaction costs, particularly as they are often used in fractional/competitive (eg. non monopoly) markets.

    - Imperfect information - parties will often not read, or not spend time renegotiating terms of standard form contracts. However, market may be disciplined by informed, aggressive, sophisticated margin of consumers. There is a risk that inframarginal consumers will be exploited, however.

        - Test for unconscionability with inframarginal consumers - whether a deal has been received is significantly inferior must be judged against that realized by marginal consumers in the same market, with the same economic as opposed to personal characteristics of consumers held constant.

        - Markets which are so badly disrupted by imperfect information so that there is no sophisticated margin beckon legislative, not judicial intervention.

- Leff on Unconscionability / weakness in 2-302 of the UCC

- Some defences have to do with the process of contracting (fraud, duress), others with the resulting contract (unconscionability);

- The UCC clause concerning unconscionability is too abstract; would have been easier to simply draft statute which puts percentage limit or states "grossly too much"

- Did each party to the contract, considering education or lack thereof, have a reasonable opportunity to understand the terms of the contract?

- First step is to determine whether or not 2-302 of the UCC will apply; whether or not the terms of the contract will be subject to judicial meddling.

- Next step is to weigh the contract in terms of the circumstances in which it was made, applying a flexible and pragmatic approach.

- Add-on clauses (such as in Williams - each rent-to-own item is security for all items in circumstance of default) are not themselves disallowed; so, therefore, in that case, contract is unconscionable because retailer sold expensive luxury item to poor person.

- Consider the minority-majority dichotomy; we hold that those under 21 do not have sufficient probity to bind themselves; easy to administer because easy to measure. However, the easier classification is, the less likely it is to be accurate, particularly as classes are never wholly homogeneous.

- Benevolence / patriarchy inherent in clauses like those which would avoid sale of luxuries to the poor could lead to colonization.

- Marshall v. Canada Permanent Trust Co. (ABSC 1968)

- Specific performance for sale of land; Plf. arranged for sale of D.'s farm for $7k; however, before delivery of deed, Canada Permanent Trust Co. appointed committee for D.'s estate, under *Mentally Incapacitated Persons Act*. Pursuant to that act, hold that contract was grossly unfair; D. had brain damage due to stroke.

- *Two requirements for unconscionability* - (1) *capacity*, one party is incapable of adequately protecting own interests, (2) *improvidence*, other party has made some immoderate gain as a result. Investigation is first whether parties were on equal terms; if not, them the party of greater power must show that the price given was not unfair.

- Do not have to have a relationship of confidence (eg. fiduciary, parent); where relationship is such that one can take undue advantage of the other through distress, negligence or another factor, and this party has taken such advantage, then such dealings are unconscionable and will not stand.

- The party taking advantage does not have to be aware of the incapacity of the other party; sufficient that incapacity exists, and resulting transaction is not for appropriate

value.

- Cain v. Clarica Life Insurance Co. (ABCA 2005)

  - *Four requirements for unconscionability* - (1) grossly unfair transaction, (2) lack of independent legal or other advice, (3) overwhelming imbalance in bargaining power caused by ignorance of business, illiteracy, other disability, (4) other party knowingly taking advantage of this imbalance.

52.Undue Influence Cases

- St. Pierre (Litigation Guardian of) v. St Pierre (SKCA 2010)

  - Plf. action against grandson re: transfer of home to the D., who rented the home out rather than repairing it for the use of grandmother. Plf, was capable of transferring title, however, there was a power imbalance that D. took advantage of; undue influence.

- Mundinger v. Mundinger (ONCA)

  - Action for alimony; parties married, but separate due to adultery on part of the D. Plf. undergoes nervous breakdown, D. attempts to press her to sign settlement agreement which gives her only fraction of equity, and lump sum in lieu of alimony. On gaining independent legal advice, declines. D. tries again, more money offered, plies Plf. with alcohol and threats. Plf. wants this agreement set aside for undue influence.

  - Equitable rule of undue influence - where party is in a situation where there is no autonomy, unable to defend self, then that party will be protected not from own folly or carelessness, but against being taken advantage of by other parties due to incapacity.

  - Onus of proof in undue influence - in such a circumstance, onus on donee to prove that gift/settlement was a voluntary and deliberate act, understood consequences, not the result of undue influence.

  - Only applies if bargain is unfair - bargains will only be set aside if unfair. Fair bargains will not be altered; nor, if the parties were of equal capacity, will an improvident bargain be set aside. only where inequality and improvidence coincide will equity intervene.

- Williams v. Downey-Waterbury (MBCA 1995)

  - Undue influence must occur at time of contract - not sufficient that one party have been incapacitated or subordinate to another at other times; must be shown that this is the case at the time that the improvident contract was made. Not applicable if outside of the "orbit of influence" of the contracting party.

- Rick v. Brandsema (SCC 2009)

- In breakdown of marriage uniqueness of the negotiating environment meant that the principles governing commercial contracts negotiated between parties of equal strength were inapplicable.

- Agreement based on full and honest disclosure is an agreement that is prima facie based on the informed consent of both parties; in such circumstances, court will be less likely to set aside contract.

- *Lloyd's Bank Limited v. Bundy* (QB 1975)

  - D. farmer puts up farm as guarantee for son's business. The charge on his property was greater than the amount of debt that his son owed, and further, in exchange for increasing extent of charge, the bank offered no consideration and in fact reduced amount of overdraft available to son's business. Business fails, bank seeks foreclosure, D. claims that the agreement was unconscionable.

  - No bargain will be upset which is the ordinary interplay of forces; however, contracts are set aside where parties have not met on equal terms - where one is so strong in power and the other so weak, that a meaningful agreement cannot result from negotiation between the two.

  - Categories

    - Duress of goods - where one party is in a strong position due to possession of the goods of another by virtue of a legal right (eg. a pawn or pledge taken in distress). The owner of such goods is in urgent need of the goods, and so the stronger party demands more of the weaker than is justly due - this is a voidable transaction. Even where made in good faith, without fraud or misrepresentation, differentiation in strength in conjunction with urgency of need renders improvident bargains as a result voidable.

    - Colore officii - strong bargaining position by virtue of public position of profession; relies on this to gain from weaker parties more than is justly due;

    - Unconscionable transaction - person is in need of special care and protection, weakness is exploited by a stronger party in order to make an improvident bargain. Even where made without fraud or misrepresentation, differentiation in strength in combination with incapacity to defend self renders improvident bargains as a result voidable.

    - Undue influence - carried out either through fraud or wrongful acts to gain some gift or advantage, or where relationship exploited to provide some gift or advantage for stronger party. Certain categories presumptive (parent), others must be established as relationships of confidence.

- Undue pressure - where an agreement which is already hard and inequitable has been exacted under circumstances of pressure on the part of the person who exacts it, it will be set aside.

- Salvage agreements - potential rescuers are in strong bargaining positions, due to the urgency of the other party's need. Parties are not on equal terms.

- Common thread is inequality of bargaining power; requirements are as follows:

- No independent advice received;

- Terms are very unfair, consideration inadequate;

- Bargaining power grievously impaired by needs, desires, infirmities;

- Coupled with undue influences or pressures brought to bear for benefit of another.

- Royal Bank of Scotland p.l.c. v. Etridge (HL 2002)

- Multiple cases in which wife charged her interest in home in favour of a bank as security for husband's debts, where wife later asserts this signed under undue influence.

- Undue influence requires investigation into the manner in which the intention to enter into the transaction was secured; if this done through improper means, then the transaction will not stand.

- Two types of undue influence - (1) improper pressure / coercion, which effectively overlaps with *duress*, and (2) relationship of influence of ascendancy between parties leading to unfair advantage for the ascendant.

- In considering relationship, not the particular type which matters, but whether one party has reposed sufficient confidence and trust in the other so as to generate an unfair disadvantage.

- Disadvantage is not essential in undue influence; the transaction need not have been improvident financially or in other means to be set aside, but merely must have been procured or exacted through inappropriate means.

- Burden of proof in indue influence - proof that the complainant placed trust and confidence in the other party concerning financial affairs, coupled with a transaction which calls for explanation is normally sufficient absent evidence to the contrary. On this basis, court can infer that transaction was procured by undue influence.
    - Effectively, an evidential shift; once shown on BOP, other party must disprove or else transaction will be set aside.

- *Independent advice is but one, non-determinative factor* - person may entirely understand implications of proposed transaction, and yet still be acting under the influence of another person. Outside advice does not preclude exercise of undue influence.

- Not every gift in the context of a trust relationship calls for undue influence - only where gift is so large, or advantage so great that it cannot be reasonably accounted for within the context of the relationship between parties must donee disprove undue influence.

- Securing of husband's debt by wife may not be manifestly disadvantageous, in that this may secure some benefit for the family unit as a whole.

- *Constructive notice* - Generally, banks taking security from wife of customer will be altogether ignorant of the possibility of undue influence - this is why constructive notice is necessary. Therefore, in certain circumstances, will ascribe knowledge to bank, that it should have known that undue influence was possible, and therefore had responsibility to take reasonable steps.

- Follows equitable position in tripartite situations, where if other party to the transaction knows of the undue influence, the transaction will be set aside, but otherwise will be held in force. Therefore, constructive notice imputes to the bank knowledge of undue influence in certain circumstances.

- Interestingly, while constructive notice imputes knowledge, the reasonable steps required by the doctrine are not aimed at determining *whether* undue influence was at play, but rather at reducing or eliminating the risk of the wife entering into the transaction under a misapprehension as a result of undue influence.

- Threshold for constructive notice - where spouse offers to stand as surety for other spouse's debts, lender is put on notice where (1) transaction is not to the financial advantage of the wife, prima facie and (2) there is a substantial risk that in procuring the assent of the spouse to act as surety, the other spouse committed a legal or equitable wrong that would entitle a court to set aside the transaction. In effect, constructive notice applies wherever a spouse stands for the debt of a spouse.

- Requirements for bank discharging constructive notice - must insist that spouse seeking to act as surety: (1) attend private meeting with bank representative where she is (2) apprised of liability, (3) warned of risks, and (4) urged to take independent legal advice (5) from solicitor she nominates herself, (6) must provide solicitor with necessary financials for explaining transaction, (7) obtain written confirmation of inquiry from solicitor. Bank and solicitor do not have to determine whether undue influence present.

- Requirements for solicitor conducting inquiry into undue influence - must ensure (1) understanding of documents, (2) seriousness of risk, (3) that spouse knows that there is a choice, (4) whether spouse wishes to proceed, (5) in face to face meeting, (6) in absence of husband, (7) in non-technical language. Can be solicitor for husband as well

so long as there is no conflict of interest in discharging duty of inquiry.

- Van der Ros v. Van der Ros (BCCA 2003)

    - Transaction not automatically set aside by failure to satisfy O'Brien (Etridge) requirements. Surety must establish legal entitlement to set aside the transaction (eg. must actually have been the result of undue influence).

- Bank of Montreal v. Courtney (NSCA 2005)

    - Contract not set aside where the spouse had appreciation of financial and business matters. The lack of independent legal advice did not affect the outcome, as the D. already knew of the rights and obligations concerning surety transaction.

- Canadian Kawasaki Motors Ltd. v. McKenzie et al. (ONCA 1981)

    - Plf. owed a duty to explain the effect of the surety guarantee, disclose all relevant facts, to advise the D. to get independent advice. To do otherwise is a breach of trust relationship, otherwise contract is unenforceable.

- Bertolo v. Bank of Montreal (ONCA 1986)

    - Plf. interests conflicted with the interests of the other parties to the transaction (eg. home could be lost, her only asset), and therefore independent legal advice was essential. Bank knew or ought to have known that the Plf. did not have such advice.

- Pridmore v. Calvert (BCSC 1975)

    - Plf. was attended by insurance adjuster immediately following accident (48 hours), obtained release / "on the spot" settlement in view of insurance obligations.

    - Concerning insurance settlements, one question to ask is whether any practicing lawyer would have approved the settlement; if the answer is in the negative, then the agreement is improvident. If it was exacted through inequality in bargaining power, then must be set aside.

    - Plf. naive concerning such transactions, limited education, no advice received; further, her poor physical condition was apparent. The insurance adjuster was experienced, had expertise. The adjuster served interests other than the Plf.'s, and therefore independent advice was necessary.

53.Illegality Cases

- Holman v. Johnson (KB 1775)

- D. sold tea to Plf., latter going to smuggle into England, now seeks to avoid contract on basis of illegality.

- No court will lend aid to person who founds cause on immoral or illegal grounds; therefore, the Courts will not enforce contracts which are based on illegality.

- While D. had knowledge of Plf.'s purpose, this does not mean that the contract itself is immoral; was merely a sale of goods agreement for tea. Vendors are not guilty of offence, have not transgressed.

- Shaffron v. KRG Insurance Brokers (Western) Inc. (SCC 2009)

- Plf. sells business to D., sale agreement includes non-compete clause for "Metropolitan City of Vancouver" - Plf. challenges this clause, holding that it this restrictive covenant is contrary to public policy (undue restraint on trade).

- Central tension is balancing between public policy concerning restraint of trade on one hand, and the economic concept of freedom to contract on the other.

- Restraint on trade clauses are enforceable where justified, and this justification is allowable where the restriction is reasonable; must be considered in view of interests of the parties, interest of the public, affording protection etc.

- There is more freedom of contract between buyer and seller than between master and servant, or between employer and employee.

- Person seeking to sell business might find commodity unsaleable commodity if denied the right to assure the purchaser that he, the vendor would not later enter into competition (could steal existing clientele, or wield expertise re: weaknesses of previous business to unfair advantage).

- In restrictive covenant consideration, normal considerations are the extent of the activity being prohibited, extent of the temporal and spatial scope of the prohibition, nature of the relationship between the parties, as well as ambiguity of covenant.

- Where covenant is ambiguous, in that does not clearly define what is prohibited, then it is not possible to demonstrate reasonableness Only where ambiguity can be resolved is it possible to determine whether covenant is reasonable.

- Do not want to encourage employers to include unreasonable, vague restrictive covenants and then leave it to the courts in order to interpret them in a reasonable manner.

- New Solutions Financial Corp. v. Transport North American Express Inc. (SCC 2004)

- D. borrowed $500k from Plf. at rate of interest equal to 60%; defaulted. D. holds that rate of interest was criminal.

- Void ab initio - contracts which offend statutory or common law are void, unenforceable due to their inconsistency with the law. No longer applied in view of s.347.

- Blue pencil approach - only distinct promises can be struck out of the contract. Using the blue pencil approach, this means that distinct promises which are not legal are struck out in order to make agreement legally compliant (eg. where s.347 re: criminal interest is involved).

- Notional severance approach - discretionary approach, allows for contract to be rewritten / illegality severed without having to identify a particular provision of the contract to be struck out. ITC ruled as apt solution for s.347 contract cases.

- Spectrum of illegal contracts; those which have a criminal *object* are void ab initio, while at the other end are contracts which are otherwise not objectionable but offend a statute. Severance applies in such cases.

- Where severance is effected, the resulting set of legal terms should retain the core of the agreement; if agreement disturbed at core, then severance cannot apply; contract is void. However, the only agreement that parties can be said to have entered into is the one they *did* enter into; therefore, severance will often fundamentally alter bargain.

- Still v. Minister of National Revenue (FC 1998)

- Plf. married citizen, moved to Canada. Worked illegally for a time (unbeknownst to her that her employment was illegal), laid off, seeks unemployment, government denies due to illegal contract.

- Illegality doctrine honoured more often in the breach than in observance through exceptions to the rule; these are truly a move away from the doctrine itself.

- Contrary to policy to allow a person to maintain action on contracts prohibited by statute; therefore, must identify policy considerations which outweigh the interests in having contract enforced (in this case, unemployment benefits).

- Moral disapprobation is a reasonable policy consideration, however, this sentiment should not be considered determinative, nor be used to unjustly deny benefits to persons acting in good faith, necessarily.

- There is no concern from the solvency of the fund, as even during illegal employment both employer and employee made necessary contribution to the fund.

- Object of the exclusion is to keep illegal immigrants from taking Canadian jobs / benefits, to discourage employers from hiring illegal workers; however, this does not

apply to the Plf.'s circumstance (acting in good faith).

54.Mistaken Identity Cases

- *Phillips v. Brooks* (KB 1920)

  - Man enters Plf.'s shop; agrees to purchase certain items. Pays by cheque. As signing the cheque, claims to be Sir George Bullough; Plf. offers to allow man to leave with ring due to apparent creditworthiness of client. Cheque not honoured. Man sells ring to D., pawnbroker, who bought goods in good faith. Plf. sues D. for damages.

  - D. not liable; Plf. intended to sell the ring to the *very* person present in the store; this is evidenced by the fact that the Plf. had completed the sale before determining that the man was "Sir George Bullough" - was not only willing to sell ring to *actual* SGB.

  - It could not be said that, but for the belief that the man was Sir George Bullough, that the sale would not have been completed. Therefore, the contract between Plf. and the man was *voidable*, not *void*;

  - Though the goods were obtained by fraud, if they are acquired from fraudster by a bona fide purchaser for value, then that purchaser obtains a good title. Plf. can collect only from fraudster, and not from the D.

- *Ingram v. Little* (QB 1961)

  - Plf. selling car; not willing to take a cheque, will only accept cash. Man makes representation that he is a prominent business owner (which the Plf. took some minor, if ineffectual steps towards verifying). Plf. accepts cheque, man leaves with car, sells to third party.

  - Does not matter that the contract was not concluded when the man made the fraudulent statements; property would not have passed to the man unless cash was paid, but for the representations that he was a prominent business owner.

  - Man knew exactly what was in the minds of the Plf. during the sale (eg. that he was someone other than whom he purported to be) because he put it there; he knew that the acceptance of offer to purchase car was addressed to prominent business owner, not self.

  - Where parties are negotiating, and there is no question of one purporting to act as agent for another party, the conclusion would be to have no doubt as to identity of parties.

  - Physical presence of an individual is not conclusive of the fact that the contract negotiated by that individual is for that *very* person, and not a party that they purport to be.

- In some circumstances, won't matter; one can pretend to be a party unknown to the other contracting party (eg. Brown instead of Smith, when the other party has no knowledge of either Brown or Smith) - ergo, cannot say that the contract was made and intended to be with someone other than the physical person present.

- Personal knowledge cannot be an essential feature; merely a strong factor. There are claims which can be made purporting to be a person unknown which would nonetheless raise the level of confidence sufficiently so that the contract was intended for that unknown person, and not the person physically present.

- If less had been said by the rogue, or nothing done to confirm statements concerning identity - the concern for creditworthiness of buyer might not have been revealed; ergo, the contract in that case could have been interpreted as being w/ the person present.

- No authority to say that merely because an offer is presented to a physical person that the offer is intended for that person; this is a question of the facts.

- Ultimately, if the vendor is under the belief that they are contracting with a certain party; the purchaser is aware of this belief; but for the identity of the purchaser the vendor would not have entered the contract; in this circumstance, there can be no K.

- The interpretation of the promise is essential; reasonable man, reasonable position would place on contract; but where promisor knows that promisee has put a particular interpretation on words, this is the binding interpretation.

- Dissent (Devlin)

    - Question is whether the argument is settled by inquiring as to with whom the D. intended to contract; with the person that she was speaking with, or rather with the person that this person purported to be.

    - Exception to this is where one of the parties is posing as an agent; in that circumstance, the deceived party has no thought of contracting with that agent, but clearly with the party that the agent purports to represent. There can be no contract.

    - Mistake voids contract if, at the time it was made, there was some state of fact which formed the basis of the contract, and as it is in truth, voids the contract.

    - Seems odd that the question of whether a third party should be liable for damages in conversion depends on inferences drawn from a conversation to which that party was not privy (eg. one between the vendor and fraudulent purchaser)

- Would make sense to apportion loss between the innocent parties on the basis of their diligence / negligence in allowing the fraud to occur.

- *Lewis v. Averay* (KB 1972)

- As with other mistake cases, Court must decide which of two innocent parties must pay for the fraud of a third. Man purchases car w/ cheque, pretending to be actor Richard Greene. Turns out to be fraudster, who sells car to third party. Plf. is original vendor, D. is ultimate purchaser.

- Question is whether there was a void or rather voidable contract of sale between Plf. and man - whether he contracted to sell to the physical person, or rather to the representation made by that person.

- Denning's view is that the usual distinction between *Brooks* and *Ingram*, namely that in the former case the sale had been concluded when the fraudulent misrepresentations were made, while in the latter the sale had not been concluded, is immaterial - in either case, the property did not pass until the seller let the rogue actually *have* the goods.

- Differentiation between mistake in *identity* vs. mistake in *attributes* - however, it is not clear that this distinction is meaningful - consider the name given, which is both attribute and identity. Fine distinction does no good for the law.

- The mistake of identity does not mean that there is no contract, but rather that the contract is merely voidable - it is liable to be set aside by the mistaken party so long as this is done before third parties acquire rights under it in good faith.

55.Non est factum Cases

- *Saunders v. Anglia Building Society (Gallie v. Lee*) (HL 1971)

- Concerns *non est factum* - person signed deed, thereafter claims deception by assignee relating to the nature and character of the deed; assignment was relied upon by innocent third party.

    - ITC, third party defendant lent money to the rogue on the basis of the security of the property which was assigned by the plaintiff to the rogue.

- Plf. thought she was transferring the ownership of the house to her nephew, or alternatively was arranging affairs so that he could borrow money on security of house. However, document was actually transferring house to rogue.

    - ITC, arrangement was entered into between nephew and rogue, as the former feared that his ex wife would be able to seize the asset for unpaid maintenance.

- Plf. held that she had broken her spectacles, could not read contract. She asked nephew what it was, and was told that it was a transfer from her ownership to nephew's ownership.

- The mistake was concerning the content (eg. to whom) and not the nature (eg. what & how) of the contract; this cannot be regarded as a wholly different character from what the Plf. believed it to be. Clearly concerned legal rights, and not substantially different.

    - ITC, the signor would have entered into the agreement even had its true nature and character had been explained to her, and she had understood.

- Where a person of full age/understanding who can read and write signs a legal document which has *prima facie* legal consequences, does not take the trouble to read it, takes the word of another as to its contents or effect, then it is that person's document.

- Must be capable of understanding the deed; must be able to detect fundamental difference between the actual document and the document as signer believed it.

- There can be no relief if the signature was brought about by the negligence of the signer in taking objectively reasonable precautions, or document was not fundamentally different from the representations made.

- The following scenario has yet to be dealt with at law: where the document is intended to have legal consequences, the signer is capable, the document is fundamentally different, and the signer is induced to sign without reading. But, likely wouldn't succeed.

    - Person who forbears to read the document should nearly always be regarded as negligent, debarred from succeeding via *non est factum*.

- *Ascertainment of intention* - determination of the signer's intention involves subjective, rather than objective test; relevant is the intention which is in the man's own mind, rather than the intention exhibited to others.

    - The fact that one neglects to read as a matter of habit or convenience does not make documents void, but rather voidable. One who does so takes the risk of a fraudulent substitution. The presence of one's signature is intended for reliance.

- *Negligence* - if signing of the document was due to one's own negligence, one is debarred from pleading *non est factum*. Not negligence in technical sense, means more carelessness, rashness. If one with ordinary amount of intelligence and caution would have been deceived, then one is entitled to be relieved under this plea.

    - Not estoppel; estoppel arises from representations, not negligence; this also brings in technicalities, and requirement than representation was intended to be acted upon; nor should the caution of the innocent third party be relevant.

- Finally, estoppel must be pleaded and proved by the party relying upon it, which in *non est factum*, would put the burden of proof on the wrong party. If a person negligently signs a document, one cannot rely on that negligent act to escape the consequences of the signature; not so much an estoppel, but illustration of the principle that no man may take advantage of his own wrong.

- *Degree of difference* - difference between character / class, and difference in contents recognized, only the former giving rise to a plea of *non est factum*. However, more useful to think of it as fundamentally, radically, or totally different.

- *Non est factum* applies when the person did not in fact sign the document; but only applies where one did in fact sign the document, in narrow circumstances (eg. illiteracy, blindness, other incapacity relating to understanding the document). Not available to those of full capacity who make a mistake as to the *legal effect* of the document.

    - If one makes a mistake as to the legal effect of the document, then one cannot plead *non est factum* regardless of whether the mistake was his own, or someone else's.

    - What amounts to a radical or fundamental difference depends on the circumstances; if one intends to transfer property to A, but the document transfers it instead to B, this may in some cases give rise to *non est factum*, but not in others.

- Alternate analysis

    - *Gallie* induced to sign transfer of deed to third party; not void via *non est factum*.

    - Person of full capacity, age, and understanding, who can read and write, is bound by their signature on a legal document.

    - Plea of *non est factum* is available to persons who, for permanent or temporary reasons, are not capable of reading / sufficiently understanding the document. Absent such a deficit in capacity, documents signed are binding.

    - *Non est factum* does not avail where the signature of the document was brought about by the negligence of the signer in failing to take precautions which ought to have been taken (eg. reading the document).

        - Negligence in this case is not technical, but rather relates to common usage - merely carelessness.

    - *Non est factum* does not avail where the document was not fundamentally different from the document that she believed it to be (no fundamental mistake about nature of document. ITC, was a transfer of property; identity of transferee

not character, but content.

- TJ found that Gallie had no idea that she had assigned the deed to Lee; CA found that Gallie understood that the document she had signed was intended to be a transfer of property, a security against her property to raise money.

    - For CA, *non est factum* does not apply, as she knew the essential nature of the document that she was signing. She didn't know to *whom* the document was being transferred, but that is not entirely relevant.

- Higher standard for non est factum where one is signing a document which, on its face, affects one's legal rights; however, doctrine applicable where one is signing a document which does not, prima facie, affect one's legal rights (eg. so, if document fundamentally different from what one thought vis a vis legal rights, doctrine protects capable party - if you think you're signing a petition, and in fact it's a transfer deed, the doctrine applies).

- *Marvco Colour Research Ltd. v. Harris et al.* (SCC 1982)

    - Parents tricked into giving mortgage on property by son in law (mortgage was security to Marvco).

    - Between innocent party and mistaken party, law must take into account that one party was completely innocent of negligence; the other by its carelessness made it possible for rogue to inflict a lost.

    - There is a need for certainty and security in commerce; this is best protected by ensuring that parties take all caution before entering into agreements. Parties that fail to do so should be held responsible for losses which ensue. Of two innocent parties, the careless party should bear the loss.

    - To interpret contracts; must look at the whole of the contract in view of the true intent of the parties. Literal meaning should not be applied where result unrealistic, or inappropriate to commercial atmosphere.

    - The more reasonable of two constructions, that which produces fair result, must be taken. However, absent ambiguity, fair result or sensible commercial result is not determinative. Parties intend the legal consequences of their words, and so Courts must not renegotiate contracts on behalf of parties.

    - No need for extrinsic evidence in contract interpretation where there is no ambiguity in the agreement.

    - Alternate analysis

- D. was told that document was unimportant amendment to mortgage; however, in reality document was second substantial mortgage.

- To plead non est factum, the mistake concerning the nature of the transaction must arise from deceit which could not be penetrated by ordinary diligence; this applies unless the document is a bill of exchange (which is not undermined by non est factum)

- Negligence is used in the tortious sense; only when a duty of care exists in the signor and his act is the proximate cause of the loss by the third party can it bar a successful plea of non est factum. In all other cases, negligence is irrelevant.

- As between an innocent third party and the victims of the rogue, the law must take into account that the third party was completely innocent of any negligence or carelessness, while the victims made it possible for wrongdoers to create a loss through carelessness.

- Simple justice requires that the party which was capable of avoiding the loss to all parties (the victims of the rogue) should bear any loss that results when the only alternative would be to place the loss on an innocent third party.

56.Mutual Mistake Cases

- *Williams et al. v. Gled et al.* (BCSC 2006)

- D. entered into agreement to buy apt building, used Plf. for financing, which fell apart when it came to light that the D. had more debt than originally stated (LOC, $223k). As a result, claim commission and fees against D., who claims mistake; were not aware of the fact that the LOC was secured against title.

- Common law re: mistake - fundamental or substantial error going to the root of a contract will render that contract void. There is consensus ad idem (parties agreed), so the issue is whether the mistake destroyed the basis of the contract and its terms. Can be void ab initio, or subject to equitable remedies.

- Unilateral mistake - equitable doctrine which relieves the rigours of the common law. Mistake does not need to go to essential substance, so long as it relates to a material term of the contract and is inadvertent / honest, will afford relief. Applies where one party knows or ought to know of other party's mistake, but remains silent and snaps at offer.

- Raffles v. Wichelhaus (UK 1864)

- D. arranges to purchase cotton delivered on ship "Peerless"; claims mistake about which ship "Peerless" contract referred to, as there are two such ships.

- As there are two ships, there is an ambiguity; and parol evidence may be given concerning ambiguity for the purpose of elucidating this ambiguity. In this case, evidence shows that there is no consensus ad idem, ergo no contract.

- Staiman Steel Ltd. v. Commercial and Home Buildings Ltd.

    - Plf. bids on lot of steel presented as "all of the steel in the yard" - after winning auction, holds that lot includes new building steel which was in the yard, albeit separately tagged, new and not used, etc.

    - Steel that Plf. claims was already sold to another party, and so there was no intention on part of the D. to sell or represent to sell that material; only included the steel that would otherwise have been sold in separate lots.

    - Plf. should have made separate inquiries concerning what was included; should also have been clear from the circumstances that the new steel was not included (reasonable person would have concluded thus).

    - D. also claims no consensus ad idem, as if the Plf. believed that he was bidding on lot including building steel, and the D. believed otherwise, then there is no contract between the parties.

        - This cannot be so; Plf. was willing to accept lot at price given without new building steel (and pursue action in damages), which accords with D.'s representations concerning their understanding of what was being sold. Ergo, contract enforceable.

    - Not a party's intention that matters, but rather the intention manifested by words and actions of the parties, as they would be perceived by a reasonable person.

    - Therefore, Plf. does not gain damages for new building steel, but can claim for breach of contract for purchase of the rest of the lot.

- Bell v. Lever Brothers Ltd. (HL 1932)

    - Plf. employee of D. company; buyout of contract due to restructuring; D. finds out later that contract would have been terminable without buyout due to breach by D. D. seeks to have that agreement set aside, relying on doctrine of mistake.

    - Mistake nullifies consent to contract - parties must be mistaken in the identity of the contracting parties, or in the existence of the subject matter being contracted about; can be made by one party, or by both.

    - Consider a circumstance where A contracts to sell to B some chattel or realty, in a circumstance where, unbeknownst to B, that party already has title to that property. In such a circumstance, the contract is set aside as it proceeded due to a *common mistake* (ie.

a mutual mistake).

- But, where the vendor has no title, but the parties believe otherwise, then the vendor has either committed breach of stipulation re: title, or is unable to perform the contract. Therefore, the contract is unenforceable (by that person), but *not void*.

- True analysis is that there is a contract, but that one party is unable to supply the thing contracted for, and therefore is unenforceable by one party (if executory), and the other party can recover consideration paid (if executed).

- There is no difference between an agreement to terminate a broken contract and an agreement to terminate an unbroken contract. The released party got what it contracted for in either case. Where parties agree on terms on same subject matter they are bound, and must rely on the stipulations of the contract.

- Where circumstances indicate that a consensus has been reached upon basis of a contractual assumption, and that assumption is not true, the contract is avoided ab initio. Ceases to bind if of future fact, and never bound if of present fact.

- Condition implied by various words, including "contemplation of both parties fundamental to the continued validity of the contract", "foundation essential to its existence" - must be such a condition in order to be relevant to the business efficacy of an agreement in considering the doctrine of mistake.

- Cannot construct contracts for the parties which they have not made themselves. Implications must only be made when necessary for giving business efficacy to the transaction. Conditions will not be implied unless the new state of facts makes the contract about something different in kind than the original state of facts (eg. will imply a condition that music hall rental contract only valid if music hall in existence at time of rental).

- Mere fact that Bell did not disclose full state of affairs does not render the contract voidable. While this was a material fact, the principle of caveat emptor applies (even though this is not a contract of sale). While certain contracts must be of the utmost good faith, this is not one such contract. Consider the butler's raise.

- While employee unfaithful to some work may retain compensation which may not be deserved, it is of greater importance that principles of contract be maintained than that this hardship be addressed.

- Solle v. Butcher (KB 1950)

- Plf. rented apt from the D. for 250 pounds per annum; both parties believed that it was not rent controlled. Turns out, it is rent controlled; Plf. seeks reduction to 140 pounds. However, 250 was a fair market value, and had D. fulfilled formalities, could have

increased value to 250.

- Two kinds of mistake; one which renders void ab initio, common law remedy, and one which renders the contract voidable at the will of equity.

- Contract signed with outward certainty on same subject matter is enforceable unless there is the failure of some condition on which the existence of the contract depends, or fraud, or equitable grounds. Applies regardless of whether one party or neither party were aware of mistake.

- Contract will be set aside if induced through material misrepresentation, though not fraudulent or fundamental; or if one party knowing that the other is mistaken about the terms of the offer, or the identity to the person to whom it is made, lets him remain under delusion, signing under mistaken terms rather than pointing out mistake.

- Contract liable in equity to be set aside if parties under common misapprehension as to facts or as to relative and respective rights, provided that this misapprehension was *fundamental* and that the party seeking relief was not itself at fault.

- Great Peace Shipping Company Ltd. v. Tsavliris Salvage Ltd. (UKCA 2002)

  - Plf. salvage services engaged by D. to engage in salvage / rescue operation; both parties operated under assumption that Plf. ship was closer to D.'s ailing vessel than it was, in actuality, leading to a considerable delay in the delivery of escort services hired for. D. seeks contract to be set aside on basis of mutual mistake.

  - Common mistake must require that performance of the contract within the new circumstances would mean something different from the performance that the parties originally contemplated; must be fundamental or material to the agreement in question. In this case, argues that this mistake robs the contract of its consideration.

  - Theory of implied term is unrealistic when considering common mistake, as when considering frustration. Where a fundamental assumption proves to be mistaken, not to ask whether the parties agreed that in those circumstances the contract would be binding (because the contract should represent the entirety of the agreement; this is the courts rewriting contracts for the parties).

  - Must also look at whether performance is now impossible; must identify this in accordance with the *contractual adventure*. As frustration only applies where not provided for in contract, so the same applies to mistake (eg. if subject matter of mistake already accounted for in risk allocation, no need for court involvement).

  - If it can be truthfully asserted that the contract can be performed, or that the subject matter of the contract exists, then the contract cannot be held void on the basis of common mistake.

- Four elements must be present for contract to be avoided on *common mistake*: (1) mutual assumption as to a state of affairs, (2) no warranty concerning the existence of the state of affairs in the contract, (3) nonexistence of state of affairs can not be attributed to either party's fault, (4) performance of the contract is impossible, (5) the nonexistent state of affairs must be vital attribute of consideration to be provided *or* circumstances which must subsist for performance to be possible.

- Contracts cannot be rescinded at equity on the basis of common mistake, particularly where the contract is deemed valid at common law.

- Two categories of mistake: one which renders contract void at law, another which renders the contract voidable at equity.

- The ships were not so far apart so as to render the bargain substantively different than what had been negotiated for; therefore, subject to cancellation fee.

- Policy

- Test for mistake in this case appears unduly restrictive, therefore could lead to manipulations which had been prevalent in earlier forms of the test.

- At common law, test is "essentially different" while at equity, test is "fundamental" - effectively, testis identical to frustration. Only difference between mistake and frustration is timing, in that with common mistake the the event occurs before the contract (immediate discharge of all obligations) while with frustration the event occurs once the contract is extant, discharging future obligations.

- Both equitable and common mistake doctrines are live in Canadian contract law.

- Miller Paving Ltd. v. B. Gottardo Construction Ltd. (ONCA 2007)

- Plf. contracted to sell materials to D. for building highways. Plf. signed agreement stating that all materials had been paid, for, subsequently discovered additional materials and issued invoice, which D. held was contrary to previous agreement. Plf. seeks to have that agreement set aside under common mistake.

- Great Peace is not good law in Canada, as this would restrict ability of Courts to correct unjust results. Eliminating the doctrine would be a step backward.

- In this case, contract itself governed, as there were provisions which allocated the risk for payment / invoicing to Plf.

57.Frustration Cases

- Triantis on risk allocation

- Risk trees are rarely complete; may miss branches because they were not contemplated, or may identify branches but fail sensitivity tests due to slight marginal impact on broader assessments. However, even omitted risks are contemplated and manageable at a broader level.

- Unknown risks are typically remote, exogenous, and therefore managed best on broader level where they can be packaged with other contributing risks. Therefore, the fact that they are unforeseen does not necessarily affect the efficiency of risk management.

- Failure to foresee specific contingencies could increase the uncertainty of broadly framed risks. The failure to foresee is the failure to identify one of the variables associated with broad risk - internal uncertainty. However, acquisition of information so as to offset this uncertainty may not be cost justified.

- Anchor and adjustment - adds amount for unforeseen contingencies, to be applied as needed. The amount is determined through probability on the basis of contemplated state variables. Adjustment could be positive or negative, and is a function of the level of the anchor, the amount of uncertainty, and the weighing of contemplated probabilities.

- Information is costly, and so therefore there is a point at which it becomes more efficient for decision maker to accept the existence of unknown risk than to invest in additional information.

- This dispels the myth that unknown risks cannot be rationally managed or allocated. Gap filling rationales for the doctrine of commercial impracticability (eg. impossibility of performance in frustration or mistake) are based on the myth that unforeseen risks are not allocated for in contracts, there must be alternative justifications foudn for the doctrine.

- The ability of the courts to improve the efficiency of risk allocation or to redress inequities in compensation for risk bearing is severely limited. Thus, courts who apply doctrine of impracticability are generally well founded.

- Paradine v. Jane (UK 1647)

- D. failed to pay rent to landlord, action brought against him as a result. Held that this was because Prince Rupert had invaded the land, preventing the D. from reaping profits.

- *Absolute promises* - where contract creates a duty or charge on oneself (assumpsit), one is bound to make it good, regardless of whether there are accidents or other issues which prevent him from doing so. If one is to have the advantage of casual profits, one must run the risk of casual losses.

- Taylor v. Caldwell (UK 1863)

- Contract for use of music hall, which was subsequently consumed by fire before the contract was executed; contract did not allocate for this risk (eg. the risk of the building no longer existing).

- Where there is a positive contract to do something, one must perform it or else be in breach, regardless of whether it has become burdensome or impossible.

- Absolute promises rule is only applicable where the contract is positive and absolute, not subject to conditions whether express or implied.

- Where, from the nature of the contract, the parties must have from the beginning known that it could not be fulfilled unless some particular specified thing continued to exist, then rule of absolute promises is relaxed.

- Class of promises concerning positive personal performance which is not qualified in practice by express exception concerning the death of the party (eg. promises to marry) - however, in such cases the contract is broken if the promisor dies before fulfillment. There is an implied condition concerning the continued existence of life.

- In contracts of loan, chattels, bailments, if the performance of the promise becomes impossible because the object of the contract has been destroyed, and this did not come about at the fault of the promisor, then that party is relieved from performance.

- Policy

    - Tacit assumption - do not contemplate alternatives - we assume that when we step out into the hallway, that the floor will be there to receive us, though we may not consciously contemplate this. Violation of such tacit assumptions concerning future states of affairs, without allocation in contract, excuses performance of parties.

- Capital Quality Homes Ltd. v. Colwyn Construction Ltd. (ONCA 1975)

    - Deposit paid for sale of land; before the sale was completed, land rezoned in a manner so that the Plf. developer could no longer use it for intended purpose. Holds that deposit should be returned, contract avoided for frustration.

    - Frustration does apply in contracts for purchase and sale of land. No distinguishable difference between these transactions and others.

    - Contract is not absolute, if the contracting parties must have known (tacit assumption) that fulfillment of contract depended on continued existence of some peculiar thing, and that this was the foundation of the bargain. Parties shall be excused, before breach, where performance becomes impossible as a result.

- Legal effect of frustration does not rely on intention of parties or their knowledge, but rather whether the intervening event is inconsistent with further prosecution of the adventure.

- Meaning of the contract is not what the parties intended, but that which the parties would have agreed upon if, they had made express provision. Supervening event must be beyond the control of the parties, change nature of original obligations - "it was not this I promised to do."

- Change in zoning destroyed the foundation of the agreement. Impossibility of performance has been established, agreement terminated by frustration. Deposit must be returned in accordance with Frustrated Contracts Act.

- Krell v. Henry (KBCA 1903)

  - Rent of room for viewing of coronation ceremony. Coronation cancelled, Plf. able to get deposit back re: frustration, because coronation was foundation of contract.

- Edwinton Commercial Corp. v. Tsavliris (The Sea Angel) (UKCA 2007)

  - D. hires the Plf. ship to assist with pollution cleanup operation.

  - Frustration occurs where the law recognizes that without default of either party, contract is incapable of being performed because the circumstances are now such that performance is radically different than what was contemplated by the contract.

  - Delay in frustration - often will be a question of degree as to whether the delay suffered will be such as to bring about frustration of the *adventure* in question.

  - Foreseen events will usually exclude operation of frustration (eg. because it will have been accounted for in risk allocation of contract).

  - Foreseeability reduces likelihood of frustration - not determinative; issue which must be considered is whether one of the parties has assumed the risk for that event. Foreseeability only supports risk assumption where this would be reasonably foreseen as a real possibility by the parties.

  - Radically different - test is not invoked likely. Mere expense, delay, or onerousness is not sufficient, has to be effectively a break in identity between the old and new agreements.

  - Test in delay is to compare the *probable length of delay* with the unexpired duration of the contractual adventure (in this circumstance a charter). However, considering only a single factor is too blunt an instrument, given intervention of other issues (eg. negotiation with port authorities).

- Dictates of justice to be used as reality check - would it be just to relieve party of its burdens in all of the circumstances?

- KBK No. 138 Ventures Ltd. v. Canada Safeway Ltd. (BCCA 2000)

  - Sale of land frustrated so that deposit must be returned? D. owned property, sold to Plf. Property rezoned during sale agreement, claim frustration.

  - Definition - frustration occurs where supervening event so significantly changes the contractual adventure (not merely expense or onerousness) that it would be unjust to hold them to the literal stipulations of new circumstances. Supervening event cannot have been self induced. Difference must be that between complete fruitlessness and mere inconvenience.

  - Three considerations - what was the foundation of the contract? Was the performance of the contract prevented? Was the event of such a character that it can't be said to have been in contemplation of the parties at the time of formation?

  - Mere disappointed expectations are not sufficient.- mere knowledge of one party that the other party intends a certain use is not sufficient to bring into operation the doctrine of frustration; this only applies where there is a common venture - deal must be structured with a view to such intentions for there to be frustration.

- Rickards (Estate of) v. Diebold Election Systems Inc. (BCCA 2007)

  - Plf. dismissed after 21 years of employment. No cause, paid three months severance; Plf. died while negotiating for larger severance package. Clause in contract concerning attenuation of severance should Plf. find work; D. claims that this clause was frustrated through Plf.'s death.

  - Plf.'s promise was to seek a position of employment with a new employer; this cannot be undertaken now that he is dead. Therefore, contract is frustrated.

58.Penalty and Liquidated Damages Cases

- H.F. Clarke Ltd. v. Thermidaire Corp. Ltd. (SCC 1974)

  - Plf. agreed to distribute D.'s product exclusively; clause re: damages in case of breach of this provision, which holds that this would be amount equal to gross trading profit realized through the sale of competing products ($92k in actual loss v. $239k according to clause).

  - Penalty, not liquidated damages - this is a grossly excessive and punitive in proportion to the problem it addressed; while the Plf. was foolish to agree to such terms, should not be left to rue its unwisdom.

- Stockloser v. Johnson (QBCA 1954)

    - Plf. agrees to buy items from D. Clause concerning default by Plf. held that D. could repossess all machinery, and retain all payments. Plf. defaults, challenges clause as invalid penalty.

    - Penalties involve the extraction of extravagant sum through legal appropriation; claimant relies on the letter of the contract to support demand, but the Courts do not assist in act of oppression.

    - Clause in this circumstance is not a penalty - keeps money which already belongs to him in part payment of the purchase price. Not obtained through extortion or oppression or the like; there is also no express clause, making this more of a claim for restitution by buyer than of penalty exaction by seller.

    - Absent forfeiture clause - money handed over as part of purchase price with default in the balance, so long as the *seller* keeps the contract open for performance, the buyer cannot recover the money. However, on repudiation of contract by seller, the buyer can cross claim for damages.

    - Present forfeiture or deposit clause - the buyer in this case cannot recover the money at law; can recover at equity where the forfeiture clause is *penal* in that it is disproportionate to the damage, and where it is unconscionable for the seller to retain the money.

- Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd. (UKCA 1915)

    - While prima facie contract clause stipulating as "penalty" or as "liquidated damages" means what is says, this does not end the analysis for the Courts, who must determine on the basis of proportionality, etc. the true nature of the clause.

    - Penalty is money paid *in terrorem* of the offending party, while liquidated damages are genuine, covenanted estimates of damages.

    - Disproportionate - held to be penalty if sum extravagant and unconscionable in comparison with the greatest loss that could have occurred through breach.

    - If breach is sum of money - if the breach is merely omission of payment of sum of money, then penalty is found where breach is greater than sum of money which would have been paid.

    - Lump sum - where lump sum payment is made payable as compensation for occurrence of one or more events, some of which are serious, but others trifling in damage.

- Estimate - allowable where the clause is a genuine pre-estimate of damage, particularly where it is difficult to estimate what actual damage would be ahead of time.

- Elsley Estate v. J.G. Collins Insurance Agencies Ltd. (SCC 1978)

  - Absent oppression, should enforce penalty clauses; if actual loss *exceeds* the penalty, then only the agreed sum can be recovered. Therefore, functions as limitation on damages recoverable, but cannot increase damages above the actual loss sustained when loss is less than the stipulated amount. However, will be given effect where it is a liquidated damages clause, regardless of relation to the actual damage sustained.