**Winter**

19

Contracts Summary

Professor Demeyere

**Misrepresentations and Recision 3**

***Richard v Hurd (1881), 20 Ch d 1 (CA) 3***

***Smith v Land and House Property Corp (1884), 28 Ch d 7 (CA) 4***

***Bank of BC v Wren Developments LTD (1973), 38 DLR (3d) 759 (BCSC) 5***

***Kupchak v Dayson Holdings Inc (1965), 53 WWr 65, 53 DLR (2d) 482 (BCCA) 5***

**Unilateral Mistakes as to Terms 6**

***Smith v Hughes (1871), LR 6 QB 597 (Div Ct) 6***

**Agreements Made under mistaken assumptions 7**

**Common Law 7**

***Bell v Lever Brothers Ltd, [1932] AC 161 (HL) 7***

**Equity 8**

***Solle v Butcher, [1950] 1 KB 671 (CA) 8***

**Frustration 8**

***Paradine v Jane (1647), Aleyn 26, 82 Er 897, Sty 47; 82 ER 519 (KB) 9***

***Taylor v Caldwell (1863), 3 B & S 826, 122 ER 309 (QB) 9***

***Claude Neon General Advertising Ltd v Sing, [1942] 1 DLR 26 (NSSC) 10***

***David Contractors v Farnham, [1956] AC 696, [1956] 2 All ER 145 (HL) 10***

***Capital Quality Homes Ltd v Colwyn Construction (1975), 9 OR (2d) 617 (CA) 11***

***Victoria Wood Development Corp v Ondrey (1977), 14 OR (2d) 723, 1 RPR 141 (HC) 11***

***KBK No 138 Ventures Ltd v Canada Safeway Ltd (2000), 185 DLR (4th) 650 (BCCA) 12***

***Gerstel v Kelman, 2015 ONSC 978 (Ont SCJ) 12***

***Kreway v Kreway, 2016 SKQB 115 (Sask QB) 13***

**The Parole Evidence Rule 13**

***Hawrish v Bank of Montreal 13***

***Bauer v Bank of Montreal 14***

***Gallen v Allstate Grain Co (1984), 53 BCLR 38, 25 BLR 314, 9 DLR (4th) 496 (BCCA). 14***

**Exclusion Clauses 14**

**Signed Documents 15**

***Tilden Rent a Car v Clendenning (1978), 83 DLR (3d) 400, 18 OR (2d) 601, 4 BLR 50 (Ont CA) 15***

***Karroll v Silver Star Mountain Resorts LTD (1988), 33 BCLR (2d) 160 (BCSC) 16***

**The Doctrine of Fundamental Breach 16**

***Tercon Contractors v BC Ministry of Trasnportation, [2010] 1 SCR 69, 2010 SCC 4 17***

**The Duty to Perform in Good Faith 19**

***Bhasin v Hrynew, 2014 SCC 71 (SCC) 19***

**Remedies 20**

**The Expectation Principle 20**

**Calculating Expectation Damages: Example 1 21**

**Calculating Expectation Damages Example 2 21**

**Calculating Expectation Damages Example 3 21**

**Calculating Expectation Damages Example 4 21**

**The Reliance Measure of Damages 21**

***McRae v Commonwealth Disposals Comm, (1951), 84 CLR 377 (Aust HC) 22***

**Remoteness 22**

***Hadley v Baxendale (1854), 9 Exch 341, 156 ER 145 23***

***Victoria Landry (Windsor) Ltd v Newman Industry, [1949] 2 KB 528 (CA) 23***

**Mitigation 24**

***Asamera Oil Corporation v Sea Oil & General Corporation, [1979] 1 SCR 633, 24***

***Evans v Teamsters Local Union No 31, [2008] 1 SCR 661, 2008 SCC 2 25***

**Damages for Breach of Contract 26**

**Damages for Mental Distress (Aggravated Damages) and Punitive Damages 26**

**General Damages for Mental Distress 27**

***Jarvis v Swans Tours, [1973] 1 QB 233 (CA) 27***

***Vorvis v Insurance Corp of BC 27***

***Whiten v Pilot Insurance Co, [2002] 1 SCR 595 28***

***Fidler v Sunlife Assurance Co of Canada, [2006] 2 SCR 3, 2006 SCC 30 (SCC) 29***

***Honda Canada Inc v Keays, [2008] 2 SCR 362, [2008] SCJ No 40, 2008 SCC 39 (SCC) 30***

***Wallace v United Grain Growers (1996)- this case has since been overruled 30***

**Punitive Damages 31**

# Misrepresentations and Recision

* “rescission” can be used in at least 3 ways:
  + to set aside a contract because of defect affecting its’ formation, such as misrepresentation, duress or undue influence
  + discharge of an existing contract by subsequent agreement of the parties
  + incorrectly, but commonly, used to refer to situation in which an innocent party is discharged from having to carry out his or her obligations under the contract because of the other party’s serious breach of contract or failure to perform. Here, the contract is not breach of contract or failure to perform. The contract is not “wiped out” but, rather, the innocent party is entitled to be compensated by virtue of its previous existence to the extent necessary to put them in the position they would have been in had contract been performed
* difference between a claim for damages and a suit to rescind an agreement:
  + action for damages: action to enforce the agreement and thus, has as its object the substitution of money damages for the performance which should have been rendered under the binding agreement between the parties (innocent party may also wish to be freed from the obligation to perform)
  + effect of a suit for rescission: determine that contract is one that ought not to be enforced. Any monetary award made upon rescission should have as its object the restoration of parties to pre-contract positions
* mere representation
  + has no consequence in contract law
    - where there is a representation that turns out to be fraudulent, the remedy in contract law is recision
      * recision allows out from the contract or to undo the contract
        + essentially, if you want something back you would argue this instead of tort

## Richard v Hurd (1881), 20 Ch d 1 (CA)

**Facts:** Redgrave advertised to sell his business premises and a share in his business. He entered negotiations with Hurd, representing that it brought in between £300 and £400 a year when it truly grossed less than £200 a year. Redgrave said that the difference between these values could be accounted for by additional business. Hurd did not examine the papers Redgrave claimed showed this additional business. Redgrave purchased the property and a partnership in the law practice on the basis of this representation. However, when he discovered that the law practice was ‘utterly worthless’ he refused to complete his payments. Redgrave sued for specific performance. Hurd alleged that he was induced to enter the agreement by a misrepresentation, and counterclaimed for recession of the contract, return of his deposit and damages in deceit.

**Prior Proceedings:** TJ held for Redgrave and dismissed counterclaim. TJ held that because Hurd failed to examine the documents regarding the additional business, he either did not rely upon the misrepresentation, or he showed negligence as to deprive him of his right to relief through recision or damages. Hurd appealed.

**Issue:** (1) Can a party to a contract have the contract rescinded due to an innocent misrepresentation made by the other party? (2) If so, is this true even if the misled party had the chance to verify the false statement?

**Decision:** Appeal allowed, contract rescinded.

**Reasons:** Jessel stated that the claim for damages in deceit fails because Hurd did not claim Redgrave knew the statements were untrue. According to rules of equity, a man is not allowed to benefit from a statement that he now admits is false, even if he did not know it was false at the time. In addition, if a man is induced to enter into a contract by false representation, he cannot be denied of the ability to rescind the contract just because he did not use due diligence to determine if the statement was false. Jessel rejects TJ’s position that Hurd did not rely on the misrepresentation and that a party’s right to be relieved based on a misrepresentation should only be waived if the party shows they had knowledge of facts contrary to the representation. The defendant argues that the plaintiff cannot rescind the contract because he should have used due diligence and sought more information. However, the judge rejects this and says that the only limitation on suing for a misrepresentation is the limitation period, which starts when the fraud reasonably should have been discovered. If it is shown that a representation was made in an attempt to induce a party to enter into a contract, and the contract was formed, then there is a presumption that the representation was relied upon. This can only be refuted by proving that the party hearing the representation had definite knowledge to the contrary, or by explicit evidence that they did not rely it. Judge finds misrepresentation to have been innocent. Therefore, the contract can be rescinded but damages are not awarded.

**Ratio:** Innocent misrepresentations lead to a contract being able to be rescinded. There is a presumption that any statement made in an attempt to induce another party to enter into a contract is relied upon as a condition if the contract is eventually formed. For innocent misrepresentations you can only ask for damages if you cannot rescind the contract. No inducement if contract entered for independent reasons. A party does not have a duty to complete due diligence to determine if a statement offered in contract is false.

## Smith v Land and House Property Corp (1884), 28 Ch d 7 (CA)

**Facts:** Smith owned a hotel which was leased to a tenant. Tenant was late in paying a quarter’s rent and eventually payed it in increments upon being pressured by Smith. Land and House contracted with Smith to buy the title of the hotel. Smith advertised that it was let to Fleck, a most desirable tenant. Land and House agreed to buy the hotel but Fleck, who had been overdue with rent, went bankrupt just before the transfer of title. Land and House refused to complete the transaction on the grounds that Smith misrepresented the character of the tenant. Smith argued that his reference to the tenant was an opinion, not a statement of fact. Smith brought an action for specific performance.

**Issue:** Was the statement a mere opinion or a representation of fact?

**Held:** Smith’s description of the tenant amounted to a misrepresentation of fact. Appeal dismissed.

**Reasons:** When facts are equally known to both sides, then statements are generally opinions, however when facts are not equally known, then a statement of opinion by one who knows the facts best is a statement of fact. In this case, with Fleck being behind in his rent, the statement of him being a “desirable tenant” was not true and thus Land and House entitled to not complete the transaction due to misrepresentation. Smith knew the tenant had been unreliable in paying rent but Land and House did not.

**Ratio:** A statement of opinion, from a knowledgeable party to one who is not, is a representation. Where A knows fact X and B does not know fact X, an opinion expressed by A is also a representation of fact X if it is implicit that fact X justified A’s opinion. Innocent misrepresentation allows recision.

## Bank of BC v Wren Developments LTD (1973), 38 DLR (3d) 759 (BCSC)

**Facts:** Smith and Allan were directors of Wren. They wanted a loan, so they put up shares in another company owned by Wren as collateral with Bank. Smith had the bank cash in shares without Allan knowing, who thought that the shares were still in place. Allan went to the bank to ask about them and they said they would “get back to him later with the details”. At that time, Allan signed the new guarantee, not knowing that many of the original shares had been cashed by Smith. Bank claimed the balance owing in place of the collateral from Allan.

**Issue:** Did the Bank concealing their dealings with Smith from Allan constitute a misrepresentation of fact?

**Decision:** In favour of the defendant. Action dismissed with costs and counterclaim dismissed without costs.

**Reasons:** Munroe held that Allan had laboured under the mistaken belief that collateral security pledged by the company was still at the bank. Ruled that Allan could not be bound by the second guarantee nor be held liable for the amount owed under the new agreement. He had not been informed of any sale or exchange, his signature was required for banking transactions, and neither he nor the company had ever authorized Smith to act as agent. Allan therefore had no reason to believe that any change had occurred with the collateral deposited at the Bank. He had been materially misled by the words, acts and conduct of the Bank into believing that there had been no change in the collateral securities held by the plaintiff and otherwise he would not have signed it. Satisfied that Allan would not have signed the second lean guarantee if he had known all the facts, Munroe found he was induced by misrepresentation (failure to disclose facts) to sign the second agreement. In the circumstances, he is not liable for repayment of the second agreement.

**Ratio:** Failures or omissions can qualify as a misrepresentation. Negligent misrepresentation permits recision.

## *Kupchak v Dayson Holdings Inc* (1965), 53 WWr 65, 53 DLR (2d) 482 (BCCA)

**Facts:** The Kupchaks bought shares of a motel company from Dayson Holdings giving in exchange 2 properties on Haro Street and North Vancouver and a mortgage for $64,500 for the motel. In July 1960, the lawyer for the Kupchaks stopped making payments on the mortgage as they discovered that past earnings of the hotel were false. On September 16 their solicitor wrote to Dayson referring to “proposed action against your client”. Dayson subsequently sold half of their interest in the Haro street Property to Marks Estates Ltd and the existing building was torn down and an apartment complex erected. Dayson issued an unsuccessful writ for foreclosure against the Kupchaks in 1961. On November 21, 1961 the Kupchaks commenced their action against Dayson for recision; in the meantime the Kupchaks had continued to live in and operate the motel.

**Prior Proceedings:** TJ found for the Kupchak’s, but said they were not entitled to recision because Dayson could not fully restore the Haro property to the Kupchaks. Awarded $28k in damages. Kupchaks now appeal.

**Issue:** Can the plaintiffs claim a recision and if so, what can they get? Did the plaintiffs affirm the exchange by word, action or silence? Is the plaintiff’s right to recision barred by laches (delay/lapse of time)?

**Decision:** Appeal allowed, contract rescinded and compensation ordered. Dayson ordered to provide recision compensation for value of Haro property as of March 31, 1960. Continued occupation and operation of motel DID NOT amount to “affirming the exchange”, and year long delay was NOT a sufficient amount of time to prevent a claim for recision.

**Reasons:** Davey analyzed the case law to see if the plaintiff’s are entitled to recision in the circumstances. In *Spence v Crawford*, Lord Wright held that dealing in property obtained by fraud cannot be used to bar restitution- there must be flexible remedies to attempt to restore parties to their original positions. Davey holds that a remedy of recision is equitable and its application is discretionary while noting that when applied it must be moulded to the exigencies of the case. In cases of innocent misrepresentation the courts will exercise their jurisdiction to order recision to the fullest unless that order would be impractical or unjust. In this case, the return of the Haro property would be unjust due to the fundamentally altered nature. Even though equity is not supposed to give damages, it can order compensation to make good some deficiency in perfect restitution, and so orders recision and compensation of the value of the property as it was at the time the contract was signed, plus a 5% per annum interest. In considering the defence of affirmation (that plaintiffs affirmed the contract by retaining shares of motel and remaining as directors of company), Davey finds that they have no other option because to return the shares would of required the defendant’s signature and the defendant would have had to nominate new directors, neither of which there is any indication Dayson would have agreed to. On laches, the facts show that the defendant was aware of an action as early as September of 1960 and there was no prejudice against them as a result of the action not being commenced until November 1961.

**Ratio:** Recision may be used to order one party to provide monetary compensation to the other where returning the original property is impossible or inequitable. Situations where the misrepresents are not entitled to claim recision are: (i) when restitutio in integrum is not possible, (ii) when 3rd party rights intervene, (iii) when there is election or affirmation, (iv) when there is laches or delay, (v) when recision would cause injustice to misrepresenter and (vi) when there is innocent misrepresentation and contract has been executed.

# Unilateral Mistakes as to Terms

* no duty on a contracting party to tell the other of a mistake the latter has made about a fact material to its decision to enter contract
  + If A knows that B believes that the painting he is buying from A is an original, the contract will stand despite the fact that A knew that it was in fact a copy and said nothing: ***caveat emptor***
* there is another situation where A is aware that B has made a mistake, not about a fact external to the agreement, but about the terms to which A is agreeing, such as when A knows that B knows that A has promised that the painting he is selling to B is an original

## *Smith v Hughes* (1871), LR 6 QB 597 (Div Ct)

**Facts:** Smith was a farmer, who offered to sell oats to Hughes, a racehorse trainer. Smith provided Hughes’ manager with a sample of oats. Hughes retained the oats for two days, after this time Hughes, via his manager, agreed to purchase 40 or 50 quarters of oats from Smith. Smith sent a portion of the oats, and Hughes rejected them on the basis that they were not what he thought they were. Hughes wanted old oats as that is what the horses ate. The oats sent were new oats, the same as the initial sample. Hughes refused to pay. Hughes asserts that he expressly stated that he was ready to buy old oats, and the plaintiff replied that the oats were old. However, the plaintiff denies any reference to the oats being new or old.

**Prior Proceedings:** Jury held in favour of the plaintiff. Judge put 2 questions to the jury: (1) whether the word “old” had been used with reference to the oats in the conversation between the plaintiff and the defendant’s manager and (2) whether the plaintiff had believed that the defendant believed, or was under the impression, that he was contracting for old oats; in either case the jury were to find for the defendant.

**Issues:** (1) Did the judge properly instruct the jury on the second question? (2) Is Hughes’ mistake a mistaken assumption or a mistake as to the term of the agreement?

**Ratio:** A unilateral mistake as to the terms differs from a mistaken assumption. A unilateral mistake as to the terms, where the mistake goes to to quality of the goods for sale, can negate the validity of a contract.

**Reasons:** County judge erred in putting the second question to the jury, as there was insufficient evidence. If judge had found that the plaintiff believed that the defendant had agreed under a unilateral mistake as to the terms, the jury was improperly instructed to find for the plaintiff. The agreement lacked the meeting of the minds regarding the age of the oats, however there was a meeting of the minds regarding the sale and purchase of the oats. Cockburn found that as the agreed upon price was higher than what new oats usually sell for, the seller must have known. Therefore, the county judge erred in putting the second question to the jury. Blackburn held that unless there is fraud or a warranty regarding a particular quality, the purchaser must take the item as they agreed to it. There is no legal obligation on the vendor to inform the purchaser that he is mistaken, unless he has induced the mistake. Blackburn held that where the sample represents the bulk, and the purchaser inspected the sample, the purchaser will be bound to their acceptance. Blackburn referenced *Freeman v Cooke* to assert that regardless of one’s intention, if your conduct would make another believe you are assenting to their terms, you are equally as bound as if you had intended to agree to their terms. It is an essential component of contract formation that both parties should agree to the same thing in the same sense. If Smith knew Hughes was looking for old oats, then he cannot insist that Hughes be bound by the contract but the lack of consensus on the evidence prompts the need for a new trial. Jury was likely to misunderstand the distinction between merely finding Smith believed Hughes to believe he was buying old oats and finding that Smith believed Hughes to believe that Smith was contracting to sell old oats. To relieve defendant, it is necessary that plaintiff believed the defendant to believe that he, the plaintiff, was contracting to sell old oats.

**Held:** New trial ordered.

# Agreements Made under mistaken assumptions

* situations where the parties have reached an agreement and it has been correctly recorded but both parties make the same false assumption concerning a matter material to the decision to enter into the contract
* these are referred to as “common mistakes”
* cases of mistaken assumptions as to existing facts are distinguished from where circumstances unexpectedly change in the future, after the contract is formed, the latter are dealt with under frustration

### Common Law

## *Bell v Lever Brothers Ltd*, [1932] AC 161 (HL)

**Facts:** Lever Brothers appointed Bell and Snelling chairman and vice chairman of Board of Directors at a company in which they had a controlling interest. Bell and Snelling made a private profit off the company’s business, committing breaches of duty that would have amounted to justified termination of their appointments. After amalgamation with another company, Lever Brothers negotiated Bell and Snelling’s termination with compensation, while unaware of their transgressions. An agreement was reached and Bell and Snelling were paid 30,000 and 20,000 euros respectively as compensation. Lever Brothers brought a claim for recision of the compensation package on the grounds of mistake, claiming that they would have dismissed without compensation had they known of the defendants’ breaches of contract.

**Prior Proceedings:** TJ and CA held that compensation agreements were void, made under mistake

**Issue:** Is the compensation agreement void under mistake?

**Ratio:** Agreements make under mistake must go to fundamental aspect of contract for contract to be void.

**Reasons:** Atkin held that it would be wrong to decide that an agreement to terminate a definite specified contract is void if it turns out that the agreement had already been broken and could otherwise have been terminated. Absent fraud, both parties are getting what they bargained for. Lever Brothers were paying for the release of contract with consideration and thus, they got what they bargained for. It seems immaterial that Lever Brothers could have got the same result in another way or that if they had known the true facts they would not have entered bargain. Atkin drew a parallel between this case and a situation where A buys B’s horse; thinking horse is sound and pays the price of a sound horse. He would not have bought the horse had he known that it was unsound. However. if B made no representation as to the soundness of the horse and has not contracted that the horse is not sound, A is bound and cannot recover back the price. If parties honestly comply with the essentials of contract formation (i.e. agree to the same terms on the same subject matter), then they are bound. Akin cautioned against construction for the parties contracts which they have not in terms made by importing implications which would appear to make the contract more businesslike or more just.

**Held:** Appeal allowed.

### Equity

* In *Solle*, Denning suggested that cases of mistaken assumption should be subjected to two-stage analysis:
  + (1) It should be asked whether a mistake had occurred which rendered the contract void at common law
  + (2) If contract valid at CL, then necessary to ask whether it was voidable on grounds of equitable mistake

## *Solle v Butcher,* [1950] 1 KB 671 (CA)

**Facts:** Butcher owned a war-damaged house containing five flats. Butcher hired Solle as surveyor to help with the restarting and renting of the flats. Solle became interested in renting one of the flats. In discussion of renting, Solle advised Butcher that the rebuilt flats would not be subject to rent control legislation. On this assumption, the parties entered a 7-year lease agreement at an annual rent of £250. The rent control did apply and the rent should have been £140. Realizing the mistake, the plaintiff sued the defendant.

**Arguments of the Parties:** Plaintiff said that the rent set by the defendant breaches rent control legislation. According to legislation, the rent for the flat is statutorily required to be £140. As such, the plaintiff should be entitled to recover the rent he overpaid, and the court should issue a declaration that the rent for the lease is £140. The defendant has put forward that the lease was void as it was based on the mistake that the rent control legislation did not apply. As both parties shared this assumption, this is a case of common mistake. Accordingly, the lease agreement should be rescinded on the grounds of mistake.

**Issue:** Does the common mistake of the parties render the lease agreement void?

**Reasons:** The court began its decision by noting 2 types of mistakes. First, mistakes that render a contract void, nullifying it from the beginning; the courts of CL dealt with these. Second, mistakes that render a contract “voidable” and liable to be set aside on terms the court sees as fair; courts of equity deal with these. Given the fusion of law and equity, both forms of mistake should be recognized and applied. With reference to the common mistake voiding the contract, Court held that a contract had been formed and the common mistake (that the house fell outside rent control legislation) was not grounds for claiming the lease was a null. With reference to rendering the contract voidable, Court gave the following standard: a common misapprehension will render a contract voidable provided the misapprehension was fundamental and that the party claiming the contract is voidable is not at fault. Applying this to the case, the Court found that the misapprehension was fundamental and had been caused by the plaintiff, not the defendant. Accordingly, the Court found the lease agreement was voidable and it was set aside on terms.

**Ratio:** Establishes equitable mistakes that do not render contract void. Equitable mistakes instead render contract voidable, meaning that contract is liable to be set aside on terms court deems fit

**Held:** For defendant. Lease set aside on terms for reason of common misapprehension

# Frustration

* frustration is another way in which parties may be excused from contractual obligations
* frustration relates to inaccurate assumptions about future circumstances
* “sanctity of contract”: all parties locked in and have to perform their obligations or pay damages for breach
* courts have however been widening the doctrine of frustration, allowing parties to walk away from their future obligations because of a supervening contingency
* frustration of contract might be possible in situations of death, incapacity or unavailability of a contracting party; destruction or unavailability of the subject matter; illegality; method of performance becoming impossible, and thwarting of a common venture
* those who favour judicial restraint argue that “no court has an absolving power” (*Tamplin (FA) SS Co Ltd v Anglo-MExican Petroleum Co Ltd*
  + rationale for this position is certainty and predictability in market place
  + explain frustration cases by saying there is an implied term which allows parties to avoid contractual rights
* on the other side are those who think that it is better if we acknowledge that in there situations the courts are actually making aspects of the contract for the parties

## Paradine v Jane (1647), Aleyn 26, 82 Er 897, Sty 47; 82 ER 519 (KB)

**Facts:** P leased lands to D. During the English Civil War, the land was occupied and defendant failed to pay rent. After war was over, the plaintiff brought an action for the rent that was owed.

**Issue:** Is lessee who was expelled from land liable for rent for a period in which the lessee has been expelled?

**Ratio:** The parties to a contract are absolutely liable to their contractual obligations.

**Reasons:** The defendant is liable for the rents. The court ruled that the contract was a duty created by the defendant and he could have contracted out if he so chose. Leasee reaps the rewards of the land and should therefore assume the risk of any loss. The court also found it unfair that if the leasee were to be absolved of paying rent in circumstances like this then the principle established could mean a leasor would bear all the potential losses while the leasee reap all potential the gains.

**Note:** Case said that if you agree to it then you are held to it, you are responsible to what you agreed to. Parties could of put a clause to modify their obligations but they did not.

## *Taylor v Caldwell* (1863), 3 B & S 826, 122 ER 309 (QB)

**Facts:** P and D entered into a contract by which D’s agreed to let the P’s use Surrey Gardens and Music Hall on 4 specific days for four concerts. P’s agreed to take Gardens and Hall on those days and pay 100*l* for each day, in addition to providing a number of performers and various forms of entertainment. After the signing of the contract, but before the first concert, the Hall was destroyed by a fire. The destruction was not the fault of either party and was so extensive that the concerts would no longer be held. P’s sued D’s for breach of contract for failing to rent out the music hall to them. There was no clause within the contract that allocated the risk to the facilities, except the phrase “God’s will permitting”.

**Issue:** Did the defendants’ failure to perform constitute a breach of contract recoverable by the plaintiffs?

**Ratio:** When there is an implied condition that is essential to the fulfillment of a contract that involves the existence of particular goods, parties’ duties under a contact are discharged if those goods are destroyed without fault of either party, thereby rendering performance of the contract impossible.

**Holding:** No. D’s were discharged from performing the contract and failure to perform was not a breach.

**Reasoning:** Under doctrine of absolute obligation, when a contract is positive and absolute, contractor must perform or pay damages for nonperformance. However, Justice Blackburn noted the harshness of this obligation and released defendants from their obligations under doctrine of frustration. The contract in question was not absolute, but rather was subject to an implied condition that excused the parties from performance. In order to distinguish an absolute contract from one subject to this implied condition, it must be established from the nature of a contract itself, that the parties knew from the beginning that the contract could not be fulfilled unless some specific thing continued to exist. As such, when entering the contract, they must have contemplated the continuing existence of this thing as the foundation of contractual obligations. In the absence of any express or implied warranty that the thing would continue to exist, the contract is subject to an implied condition that the parties would be discharged from performance in the event that the thing ceased to exist.

**Note:** Doctrine of impossibility acts as an excuse for the nonperformance of duties under a contract based on a change in circumstances, the nonoccurence of which was an underlying assumption of the contract, which makes performance of the contract impossible. This relaxed the rule of absolute liability.

## *Claude Neon General Advertising Ltd v Sing*, [1942] 1 DLR 26 (NSSC)

**Facts:** Sing, defendant, contracted with Claude to build, erect and maintain a sign for the Oriental Café Parlour. The contract was for a period of 60 months. When lighting restrictions were introduced during WWII, Sing claimed that the contract was frustrated and he was relieved of his duties under the contract

**Issue:** Was the contract frustrated because of the wartime law restricting lighting?

**Ratio:** A change in circumstances making a thing contracted for less useful but not wholly useless or different from what was contracted for will not amount to frustration.

**Reasons:** Doull J noted that the contract was for the purpose of paying the cost of construction and rental as well as maintenance and noted that it had been operated on D’s premises for some time. After lighting restrictions were in place, D received less benefit from the sign, but, the sign was not entirely useless as a sign and, more importantly, no part of the contract became impossible. Doull distinguished this from *Krell v Henry*.

**Held:** Judgment for the plaintiff

## *David Contractors v Farnham,* [1956] AC 696, [1956] 2 All ER 145 (HL)

**Facts:** Davis Contractors Ltd (“Davis”) contracted with defendant municipality to build 78 houses in 8 month period. Due to labour shortages in post-war Britain, project completed in 22 months. Davis argued contract was frustrated and that they were entitled to be paid *quantum meruit* for the value of the work completed.

**Issue:** Did shortage of labour, which resulted in delayed performance of the contract, amount to frustration?

**Holding:** appeal dismissed.

**Ratio:** Change in circumstances that makes it more onerous for party to fulfill obligations (i.e. change in degree of circumstances but not radically different character of obligation) does not amount to frustration.

**Reasons:** Lord Radcliffe: “So, perhaps, it would be simpler to say at the outset that frustration occurs whenever the law recognizes that, without the default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract”.

**Note:** This is where we are today. Not asking what the parties agreed to but rather given superseding event and what would be required to complete contract, is agreement radically different from what they agreed to.

## *Capital Quality Homes Ltd v Colwyn Construction* (1975), 9 OR (2d) 617 (CA)

**Facts:** On January 15, 1969, the respondent purchaser agreed to purchase 26 separate building lots with the intention, known to the appellant vendor, to build homes and later sell them. On June 27, 1970, 33 days prior to the closing date, certain amendments to *The Planning Act* restricted an owner’s right to convey without obtaining the necessary consent from the relevant committee of adjustment. Vendor was accordingly precluded from conveying the building lots in separate deeds without proper consents. Following failure to close on the agreed date, purchaser contended that vendor was in default, repudiated the agreement and demanded for the return of the deposit.

**Prior Proceedings:** TJ held that the vendor was not justified in its default. The purchaser was entitled to repudiate the contract and recover deposit.

**Issue:** Does the doctrine of impossibility of performance of a contract, i.e. frustration, have any application when the contract is for the purchase and sale of land?

**Positions of the Parties:** The appellant, vendor, submitted that the legislation which restricted the transfer of the lots was a burden falling upon the purchaser. Upon execution of the agreement, the purchaser became the equitable owner of the lands and any amending legislation which affected the land was a burden to them. The respondent, purchaser, submitted that the new legislation made it impossible to fulfill the terms of the contract. It was argued that there was a lack of consideration and that the purchaser should not be forced to take something fundamentally different than what was agreed upon.

**Ratio:** If there is a clear “frustration of the common venture” then the contract, for the sale of land or otherwise, is at an end and the parties are discharged from further performance.

**Reasons:** Amendments to *The Planning Act* were not contemplated by the parties, not provided for in the agreement and not brought about through a voluntary act of either party. Legislation destroyed the very foundation of the agreement. Purchaser’s lack of ability to build houses for re-sale created a situation not within the contemplation of the parties when they entered into agreement. Since all the factors necessary to constitute impossibility of performance were established, doctrine of frustration can terminate the agreement.

**Held:** The judgement below was affirmed and appeal was dismissed with costs.

## *Victoria Wood Development Corp v Ondrey* (1977), 14 OR (2d) 723, 1 RPR 141 (HC)

**Facts:** Pentered a contract with D on April 6th, 1973 to purchase 90 acres of land in Oakville. Sale to be completed on October 31. D knew that P wanted to develop the property and subdivide land. On June 22, 1973, new amendments to Ontario planning legislation were passed, and came into effect on August 4th, 1973. Amendments brought the property into a restricted development area, making subdividing the land impossible. P brought an action alleging that contract had been frustrated and sought the return of their deposit.

**Issue:** Has the very foundation of the agreement been destroyed?

**Positions of the Parties:** P argued that contract was frustrated because of new legislation. D argued that the new legislation should not impact their contract, as the very foundation of the agreement was still in tact. The plaintiff did not insert any terms into the contract that would protect them in these circumstances.

**Ratio:** The agreement was not conditional on the ability of P to carry out its intention. The foundation of the agreement is that the vendor would sell, and the purchaser would buy the property described upon the terms.

**Reasons:** Legislation does not affect abilities of the parties to carry out respective obligations. Developer in purchasing land is always conscious of the risk that zoning may delay the carrying out of their intention or make it impossible. Developer can guard against this by inserting proper conditions in contract; but they did not. Therefore, the very foundation of agreement was not affected, and doctrine of frustration does not apply.

**Held:** P’s action was dismissed; the defendant’s concurrent action for specific performance was successful.

## *KBK No 138 Ventures Ltd v Canada Safeway Ltd* (2000), 185 DLR (4th) 650 (BCCA)

**Facts:** Canada Safeway Limited, entered into a contract for the sale of its property with KBK No. 138 Ventures Ltd. KBK intended to redevelop property as mixed residential and commercial property and paid deposit of $150,000. Before closing date, the land was rezoned by the City, which made the respondent’s planned redevelopment no longer commercially feasible. Both parties unsuccessfully objected the rezoning. KBK advised CSL that contract had been frustrated and demanded return of the deposit. CSL refused the return and then sold the property to another party. The respondent sued for the return of the deposit.

**Prior Proceedings:** TJ found that KBK’s planned redevelopment was at the root of the contract. The rezoning of the property, which was neither reasonably foreseeable or contemplated by either party, made the intended development impossible and altered the purpose of the contract.

**Issue:** Is the agreement frustrated due to the rezoning of the property?

**Positions of the Parties:** CSL argues that primary purpose of contract was for the sale and purchase of property, thus the rezoning should not impact contract. KBK argues contract is frustrated because it was reasonably held that the primary purpose was for the specific development of the land in question.

**Ratio:** Where a contract is radically altered from what was reasonably held to be the fundamental core purpose of the agreement, the contract is frustrated.

**Reasons:** Distinguished from *Victoria Wood Development Corp v Ondrey* as CSL had more than “mere knowledge” of KBK’s intention to redevelop property. Agreement clearly specified the respondent’s sole intention of developing the land for residential and commercial property. Court held that the rezoning was not foreseeable by either party. The result was found to be greater than an inconvenience. The contract had been radically altered into something fundamentally different than what was originally intended by both parties.

**Held:** appeal was dismissed; contract was frustrated.

## *Gerstel v Kelman,* 2015 ONSC 978 (Ont SCJ)

* five principles emerged from this case:
  + Frustration occurs when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes a thing radically different from that which was undertaken by contract;
  + court is asked to intervene to relieve parties of their bargain because supervening event has occurred without the fault of either party;
  + the key to doctrine of frustration is the idea of a radical change in the contractual obligation, arising from unforeseen circumstances in respect of which no prior agreement has been reached, those circumstances having come about without default by either party;
  + the basis of frustration is impossibility, namely, the physical impossibility and impossibility resulting from a legal development that has rendered the contract no longer lawful;
  + frustration can also apply to situations where the contract may be both physically and legally capable of being performed but would be totally different from what the parties intended

## *Kreway v Kreway,* 2016 SKQB 115 (Sask QB)

* eight principles emerged from this case:
  + (a) a contract becomes frustrated if it is incapable of being performed because performance is radically different from the obligations that were undertaken in the contract;
  + (b) frustrating event must have occurred after the formation of the contract and not have been foreseen;
  + (c) frustrating event cannot be self-induced;
  + (d) there is a distinction between complete fruitlessness and mere inconvenience;
  + (e) the disruption must be permanent or protracted, not temporary or transient;
  + (f) the change must totally affect the nature, meaning, purpose, effect and consequences of the contract;
  + (g) if there was mistaken assumption about current or future event, unexpected event must be so outside of the range of the risks allocated by the contract that it undermines its very substance; and
  + from policy perspective, values favouring non-enforcement must outweigh those favouring enforcement

# The Parole Evidence Rule

* parole evidence rule: has the effect of excluding from the court’s consideration evidence as to oral (and written) statements preceding or contemporaneous with completion of the written contract. Prior statements, whether promises or affirmations are thus confined to being mere representations.
* helps courts reconcile any outside representation, statement or promise outside of written agreement
  + - just because something is not a term, does not mean you cannot be held liable to that
* at what point do “terms” said outside the initial agreement becomes part of that agreement
* traditional rule
  + used to be a rule just about evidence
  + that only if agreement was incomplete could parties use evidence about what was said during negotiations during the time that it was written
* modern rule
  + - now more about presumption, but a court will hear evidence about negotiation or other correspondence, and they may find the outside evidence to be terms, if it reconciles with the original contract
    - more about contractual interpretation as opposed to evidence
    - if agreement incomplete, may need to look at discussion around contract formation to fill in gaps
* if written agreement is unique in the sense it was individually created for the agreement then courts are less likely to read in outside evidence, given why was it not already included in the initial document
* standard form contract, where it is received from another source, court will be more likely here than elsewhere to read into other evidence.

## Hawrish v Bank of Montreal

**Facts:** H signs guarantee upon being given oral assurance from AM that it would only cover certain period, and would be released when bank obtained joint guarantee from directors of company, which happened

**Reasons:** No error of the CA. Dismissed appeal. H’s oral assurance is not good enough to act as protection, given his contract is worded in the opposite way and no clear intent to create a separate agreement can be found. Oral representation cannot be relied on.

**Ratio:** There must be clear intent that the parties are creating a separate collateral agreement. Collateral agreement cannot be established where it is inconsistent with or contradicts written agreement. For it to be binding there would need there to be clear intent that the parties were creating a separate agreement

## Bauer v Bank of Montreal

**Facts:** B was guarantee of a loan made by the bank to a company he was a SH of. Failure to register interest by the bank causes a problem. There is a clause that says the bank doesn't have to.

**Reasons:** Complete written agreement prevents the court from accepting an oral agreement to the contrary.

**Ratio:** Similar to Hawkish. If collateral agreement contradicts written terms it likely cannot be enforceable.

## *Gallen v Allstate Grain Co* (1984), 53 BCLR 38, 25 BLR 314, 9 DLR (4th) 496 (BCCA).

**Facts:** Gallen (farmers) were given oral assurance by D (Allstate Grain Co) that buckwheat would kill off weeds. Upon oral assurance, farmers bought buckwheat. Contrary to what they were told by D, P’s crop of buckwheat was destroyed by weeds. Farmers are suing to have the oral statements made by the defendant regarding the buckwheat admissible at trial in addition to the written contract made between the parties.

**Issue:** Was the oral representation a term of the contract?

**Prior Proceedings:** P successful at trial on the basis of breach of warranty. An appeal was argued on the basis that TJ should not have admitted the evidence as to the oral assurances as they conflicted with a clause in the written agreement and that the evidence did not establish a warranty by the defendants.

**Held:** Appeal dismissed, in favour of farmers. Oral statement binding, Allstate is liable for breach of warranty.

**Reasons:** The judge held that there was no contradiction between oral agreement and written agreement but that the warranty was false, meaning there was a breach of warranty. The judge held that despite the clause, Allstate still has to standby their marketing claim. While Allstate should not be held responsible for growth of crop, that is limited to anything outside what Allstate has claimed the seed could do. Therefore, weed control does not fall under the clause. Since there was no contradiction between the oral statement of warranty and the written document, the parole evidence rule will allow for the oral warranty to be admissible.

**Ratio:** The parole evidence rule is a rebuttable presumption in favour of written terms. When there is no contradiction between a written contract and oral terms, oral terms will be binding.

**Note:** When there is a written contract that will be presumed to be the whole of the contract.

# Exclusion Clauses

* very common in commercial and consumer transactions
* the point is essentially to remove or exclude liability of a party for breach of contract
* there is nothing inherently offensive about a contract that limits or denies liability
* no problem exists where the limiting or exempting clauses are a reasonable device for defining the bargain reached by freely consenting parties in a situation of reasonably equivalent bargaining power
* problem arises when an exemption is inserted in standard form contract by a dominant party, or when exclusion clause relieves a contracting party of the very responsibility contract seemed intended to impose
* two issues:
  + - **(1) Incorporation Issue:** Is the clause part of the agreement?
      * + signature, notice, previous dealings

there has to be a way that the party can contemplate the terms and not be bound. So you need the exclusion clause to be communicated at the time of formation and not after, otherwise the exclusion clause would not be incorporated

* + - * + fine print: should it be used?

depends on the clause. If it is reasonably/ordinary, it will likely be fine

but if the clause is harsh or restrictive, court may be more likely to say fine print does not count

* + - * + there are certain terms that would be considered ordinary

with ordinary terms, no communication really needs to be shown, given they are reasonably expected to occur (movie rental place: it is ordinary term to assumed to have to replace it etc)

* there are three distinct questions that may be raised in the process of deciding how to deal with a particular limiting clause that is relied on by one contracting party and is challenged by another:
  + (1) has the clause been effectively included as a term of the contract?
    - this may involve inquiry into the notice of the clause given to the party who challenges it
  + (2) what does the clause mean?
    - this may involve a very strict reading of the clause to narrow its effect; a narrow application of a limiting clause may be justified on the ground that the tendency of such a clause is to subtract from the benefit of the contract would otherwise extend to the party who now challenges the clause
  + (3) Independently of the resolution of the first two questions, and particularly important if clause survives those test, is there some reason why we will simply refuse to apply the clause to a particular set of facts?
    - may decide that clause would produce a result that is too unfair, unjust, oppressive or unconscionable

### Signed Documents

* traditional view in *L’Estrange v F Graucob Ltd*  was that one party’s signature to a document containing terms established that party’s assent to those terms, in the absence of fraud or misrepresentation.
* where the clause in question is onerous or burdensome then it may not necessarily be part of a contract

## *Tilden Rent a Car v Clendenning* (1978), 83 DLR (3d) 400, 18 OR (2d) 601, 4 BLR 50 (Ont CA)

**Facts:** Clendenning rented a car from Tilden. Clendenning verbally accepted additional coverage by agreeing to pay an additional fee for the collision damage waiver, and signed the contract without reading terms. However, the waiver contained an exclusion clause that refused coverage if the driver consumed any alcohol. Waiver was included at the back of the contract and in small font. Clendenning, having consumed alcohol, drove the car into a pole to avoid collision with another vehicle.

**Prior Proceedings:** TJ held for Clendenning, finding that Tilden misrepresented the terms. Tilden appealed.

**Issue:** Is respondent liable for damage caused to the car by reason of the contract’s exclusionary provisions?

**Positions of the Parties:** Tilden argued that the rights of the parties were governed by the rule in *L’Estrange v F Graucob Ltd*, making the contract enforceable. Clendenning argued that he would not have entered into the contract had he known full terms. He argued that it wasn't incorporated correctly and was too harsh (ANY alcohol at ANY location). While he signed it, he said that he did not agree to it. He also argued that Tilden misrepresented the contract because a Tilden representative advised him that his payments would not hold him responsible for any damage to the car unless damage was caused by extreme intoxication that would render him incapable of proper control of the car.

**Ratio:** If a standard for contract’s terms are onerous, the party looking to enforce those terms must achieve consensus ad idem by taking reasonable steps to ensure the other party understood and was aware of terms.

**Reasons:** The more extreme the clause is, the more you need to do to ensure it is communicated clearly. Burden lies on the person relying on the exclusion clause to demonstrate that they incorporated the clause. Dubin found the exclusion clause to be inconsistent with the express terms that profess to provide complete coverage for damage to car. Dubin stated that the exclusion clause was unreasonable because it would apply to a driver who consumed one glass. Dubin found that despite his signature, Clendenning did not agree to the onerous and stringent terms of the exclusion clause. Many standard contracts are signed without being read or understood; parties who seek to rely on the terms of these agreements should know that the singing party is unaware of the onerous and stringent provisions. In such circumstances, the party seeking to rely on such terms must take reasonable measures to notify the other party of these terms. Tilden was required to explain the provisions of the waiver, rather than hand the contract over for Clendenning to sign.

**Held:** appeal dismissed with costs.

## *Karroll v Silver Star Mountain Resorts LTD* (1988), 33 BCLR (2d) 160 (BCSC)

**Facts:** Miss Karroll, an avid skier, participated in a skiing competition for 5th time at Silver Star. Prior to skiing, Karroll signed a release form absolving Silver Star from liability regarding personal injuries that she may sustain. After descending down a hill, Miss Karroll fell and broke her leg. Subsequently, she sued Silver Star for failing to ensure that the race course was clear of other skiers.

**Issue:** Is Karroll bound by the terms of the release which absolves Silver Star from liability for her injuries?

**Positions of the Parties:** Karroll argued that the release terms were not binding because she was not provided adequate notice of the terms and was not given the opportunity to fully comprehend them. Silver Star maintained that the release was binding because Miss Karroll knew that the release affected her legal rights.

**Ratio:** It is not a general principle of contract law that a party presenting a release for signature with an exclusion of liability must take reasonable steps to bring the exclusion to the other party’s attention. The principle is to be applied only where the reasonable person should know that the party signing is not consenting to the release’s terms. In making a determination, one must consider: (1) the nature of the contract; (2) the length and format of the contract; and (3) the time available for reading the contract.

**Reasons:** Karroll and Silver Star relied on seemingly contradictory lines of legal authority. Karroll’s authority suggested that a party presenting a release with an exclusion of liability must take reasonable steps to bring the exclusion to the other party’s attention. Silver Star’s authority posited that the party signing the release is bound by its terms despite not having read them, absent fraud or misrepresentation. To reconcile the two, McLachlin argued that Karroll’s principle must be applied only when a reasonable person would have known that the signing party was not consenting to the release of terms. Justice McLachlin determined that a reasonable person would have known of Miss Karroll’s consent. First, the release was deemed to be logically consistent with the contract’s overall purpose of permitting skiers to engage in hazardous activity. Second, it was put forth that Silver Star did not fail to take reasonable step to bring the release terms to Karroll’s attention. The release was short, easy to read, and headed in capital letters. The release was not buried in fine print. Finally, Karroll’s claim was weakened by the fact that the release was a commonplace skiing document which Karroll had experience signing on 4 previous occasions. On a side note, McLachlin dismissed the claim that Miss Karroll did not have sufficient time to read the release because of the lack of evidence.

**Held:** Case dismissed.

# The Doctrine of Fundamental Breach

* in the 1920’s and 1960’s the courts developed a doctrine of fundamental breach of contract to the effect that a party could not rely upon an exclusion clause, however widely expressed, where it had committed a fundamental breach of contract
* primary proponent of this doctrine was Lord Denning
* doctrine of fundamental breach may have a certain intuitive or equitable appeal
* **doctrine of fundamental breach:** cannot rely on an exclusion clause even if it has been incorporated where the party has fundamentally breached the contract
* doctrine criticized for undermining contract certainty, as judicial discretion was unpredictable and varied as to what qualified as fundamental
* ***Suisse Atlantique Société d’ armement Maritime SA v NV Rotterdamsche Kolen Central***
  + HL attempted to put an end to the doctrine of fundamental breach by determining whether it was simply a question of construction of the contract as to whether a particular breach fell within the protection of a particular clause, or whether a particular clause prevented a breach from having occurred at all
  + HL recognized that the process of construction was flexible
  + overarching principle: the more serious the breach the clearer the language required
* Lord Denning attempted to resurrect the doctrine of fundamental breach as a rule of law
* ***Harbutt’s “Plasticine” Ltd v Wayne Tank & Pump Co* (1969), [1970] 1 QB 447 (CA)**
  + court held that where a contract has come to an end because of a fundamental breach, either through the election of the innocent party or automatically because the serious consequences of the breach rendered any election redundant, then the exclusion clause also falls to the ground
* ***Photo Production Ltd v Securicor Transport Ltd***
  + HL endorsed a construction approach and signalled an end to the doctrine of fundamental breach
* In Canada, the position was less clear. *Following Photo Production*, the tendency of the Canadian courts was to apply a principle of construction but they were still inclined to pose the initial question of whether the defendants conduct constituted a fundamental breach of contract
* ***Syncrude Canada Ltd v Hunter Engineering Co*, [1989] 1 SCR 426 (SCC)**
  + court considered *Photo Production* whether to abandon doctrine of fundamental breach but was divided
    - Dickson favoured following the HL and doing away with fundamental breach, and reserving the ability to invalidate an exclusion clause under the doctrine of unconscionability
    - Justice Wilson however emphasized that there was no Canadian equivalent to the consumer protections provided for by the Unfair Contracts Terms Act which helped the HL justify the result in *Photo Production.* Wilson advocated maintaining a place for fundamental breach in Canadian law and that courts should refuse to enforce exclusion clauses when it would be unfair or unreasonable, or contrary to public policy.
* there were two significant developments after *Hunter*.
  + (1) most Canadian jurisdictions adopted legislation that deems exclusionary classes void in consumer context (Ontario Consumer Protection Act)
  + (2) wide variance in judicial discretion over exclusion clauses was not lessened by *Hunter* and was exacerbated as courts tried to reconcile unconscionability with fair and reasonable or conflated the approaches while maintaining doctrine of fundamental breach (*MacKay v Scott Packing & Warehousing)*

## *Tercon Contractors v BC Ministry of Trasnportation,* [2010] 1 SCR 69, 2010 SCC 4

**Facts:** In 2000, The Ministry of Transportation and Highways issued a request for proposal (RFP) for a highway project to select pre-approved teams. Only 6 teams were eligible to submit a proposal. The RFP contained an exclusionary clause that eschewed liability for all claims of damages arising “as a result of participating in this RFP”. Brentwood, one of the original bidders, teamed up with another company, Eil Anderson Construction Co. (EACC). EACC was not one of the original bidders and together, they submitted a bid in Brentwood’s name. Brentwood was selected as the successful bidder instead of Tercon, who was one of the original teams. Tercon brought an action seeking damages on the basis that the province had accepted an ineligible bid and that, but for that breach, Tercon would have been the successful bidder.

**Issue:** If the province breached the tendering contract (Contract A) by accepting a bid from an ineligible bidders does the exclusion clause contained in the RFP bar Tercon from making a claim for damages against the Province for having breached the terms of the tendering contract?

**Prior Proceedings:** The province’s consideration of the Brentwood proposal, a non-compliant bid, resulted in a dual breach of Contract A, first by accepting a bid incapable of acceptance and second, in treating Tercon unfairly in the evaluation process by choosing a non-compliant bid. TJ relied on a fundamental breach analysis and found the province’s conduct to be egregious, as it attacks the concept of fair competition in the tender process. Accordingly, the exclusion clause could not be enforced. Also, having found the clause to be ambiguous, she maintained that it was “inconceivable” the parties could have intended exclusion for the type of breach that occurred. TJ found the exclusion clause to be too ambiguous, and thus not applicable in the face of the breach. On appeal, BCCA disagreed with TJ on the interpretation of the exclusion clause. CA found the words of the clause to be so clear and unambiguous that it is inescapable that the parties intended it to cover all defaults, including fundamental breaches. CA concluded that the exclusion clause barred Tern’s claim.

**Ratio:** The doctrine of fundamental breach is no longer valid. It is not a general principle of contract law that the company should bring the exclusion clause to the other parties intention. It is to be applied only where the reasonable person should know that the party signing is not consenting to the terms. Rather the enforceability analysis for an exclusionary clause should be guided by the following three part test: (1) As a matter of contractual interpretation, does the exclusion clause apply to the circumstances as established by the evidence in the case? (2) If the exclusion clause applies, was the clause unconscionable at the time the contract was made, as might arise from situations of unequal bargaining power between the parties? (3) If the exclusion clause is held to be valid and applicable, should the Court nevertheless refuse to enforce the clause because of the existence of an overriding public policy concern?

**Reasons:** The SCC adopted the new test for exclusion clauses and discarded the doctrine of fundamental breach. The court was split as to the application o the test on this set of facts. According to the majority, Tern’s damage claim - which arise from the province’s selection of an ineligible party and from its breath of the implied duty of fairness to bidders- was not barred by the exclusion clause. The clause, on its construction, was found to apply only to “claims arising ‘as a result of participating in the RFP;, not to claims resulting from the participation of other, ineligible parties” and that “both the integrity and the business efficacy of the tendering process support an interpretation that would allow the exclusion clause to operate compatibly with the eligibility limitations that were at the very root of the RFP. Further, given the implied duty of fairness to treat all bidders fairly and equally that is inherent in the tendering process, an exclusion clause aimed at excluding liability for breach of that basic requirement needs to contain clear language, especially in cases of public procurement.

**Held:** Judgement for the plaintiff to the sum of 3 million dollars.

**Dissent (Binnie):** Found that the province did breach the terms of it own RFP when it awarded the bit to n ineligible bidder but that the exclusion clause, being clear and unambiguous, barred a claim arising for the province’s consideration of an ineligible bidder. The dissent determine that (i) the exclusion clause applied to the circumstances, (ii) the clause was not unconscionable given the sophisticated nature of the parties and (iii) that the public policy concern of having a fair and transient tendering process was not on a level grievous enough to limit the freedom of contract.

**Note:** this case represents the last chapter on this matter. Here we already have a term that has been incorporated but the court is trying to figure out whether it is too unfair or unconscionable to enforce.

# The Duty to Perform in Good Faith

* should be seen as an emerging area. Right now we mostly have the organizing principle from Bhasin
* good faith does not inform contract formation but more so contract interpretation of the contract by the court
* it is an organizing principle
  + at best, it can be said as a lens that court will use to view the contract
* unfair does not equal bad faith but lying and deceiving is certainly bad faith.
* once contents of agreement have been determined it is possible to identify performance obligations of parties
* “gaps” in the agreement may arise where unexpected circumstances occur in the course of performance that were not anticipated by the parties when drafting or reaching their agreement
* difficulties in determining the nature and scope of performance obligations are resolved within the domain of the law of contractual interpretation
* Canadian courts have given much consideration to the question as to whether every contract should be considered to include an implied term imposing on each party an obligation to perform in good faith
* some courts have expressed the view that all agreement should be considered to include this implied term but other courts have resisted the idea of implying such a term, on the basis that it would introduce an unattractive degree of uncertainty into the interpretation of contractual obligations
* good faith adds to commercial certainty: honest attempts to perform the contract will mean there is certainty what you agree to will happen
* *Bhasin v Hrynew*
  + SCC provided an answer to the question of whether such a term should be implied or deemed to be included in all agreements and if so, the convention of the notion of good faith contractual performance

## *Bhasin v Hrynew,* 2014 SCC 71 (SCC)

**Facts:** B and H are competing enrolment directors for Canadian American Financial Corporation (Can-Am), which markets education savings plans to investors through enrolment directors. H had previously approach B about merging their agencies, B refused. C appointed H to review its enrolment directors in compliance with securities laws. B objected to having H, a competitor, review his confidential business records. C repeatedly misled B by (i) telling him that H, as PTO, was under an obligation to treat the information he collected confidentially and (ii) that the Commission had rejected a proposal to have an outside PTO. C decided to give notice of non-renewal of their Agreement with B, and B lost the value of his business, while the majority of his sales agents were successfully solicited by H’s agency.

**Prior Proceedings:** Alberta Court of Queen’s Bench found that both defendants owed Bhasin a duty of good faith and that they breached this duty. Also found that had Can-Am acted honestly, Bhasin would have been able to take steps to prevent the loss of his business. CA reversed trial decision based on the express provisions of the contractual agreement between the parties. CA allowed appeal and dismissed B’s lawsuit.

**Issue:** (1) Does Canadian CL impose duty on parties to perform contractual obligations honestly? (2) If so, did C or H breach that duty?

**Holding:** (1) Yes there is a duty to perform contracts honestly; (2) C breached the duty, but H did not. Found in favour of B, there is a duty to perform contracts honestly. There is an organizing principle of good faith which is that parties generally must perform their contractual duties honestly that manifests itself in various more specific doctrines.

**Reasons:** (1) C’s conduct does not fit into any of the existing situations in which good faith can exist, but it is a natural extension from good faith to recognize a duty of honest performance, which “imposes as a contractual duty a minimum standard of honesty in contractual performance” (2) C breached it’s contract with B because it did not act honestly in exercising the non-renewal clause and for the purpose to merge B and H’s agencies. However, all claims against H must be dismissed because H did not breach any contract and there is no liability for inducing breach of contract or unlawful means conspiracy.

**Ratio:** SCC recognized that good faith contractual performance is a general organizing principle. Parties must not lie to otherwise knowingly mislead each other about matters directly linked to the performance of the contract. There is no obligation to disclose however but if you choose to say something you must be honest.

# Remedies

### The Expectation Principle

* expectation damages are forward looking, aim to put the party in the position they would have been in if the contract had been fulfilled fully.
  + - therefore, default damage is monetary (like the contract has been completed)
    - reasonable expectations are what damages are intended to cover
* Fuller and Purdue make the case in favour of the expectation measure of damages. They argue that the goal of contract remedies is to promote market activity. To further this goal, contract law should protect reliance interests of non-breaching parties. To protect reliance interests contract law should award the expectation measure of damages
* courts exercise a considerable degree of control on the extent of damages recoverable under expectation measure by the use of mitigation and remoteness
* ***Sally Wertheim v Chicoutimi Pulp Co* (1910), [1911] AC 301 (Quebec PC)**
  + the “ruling principle” to be applied in awarding damages for breach of contract was to place plaintiffs in the same position they would have occurred “if the contract had been performed”
* ***Highway Properties Ltd v Kelly, Douglas & Co***
  + SCC removed traditional limitations on availability of full expectation damages in leases of real estate
  + the lessor on termination of a lease for breach by the lessee became entitled not just to rent unpaid at the date of termination but also to claim for the rent for the balance of the term less the actual value for the property in question for the unexpired portion of the lease
* ***Generic Tractor Sales Ltd v Langille*, [19878] 2 SCR 440**
  + Wilson referred to earlier restrictions as an “historical anomaly” which could have been rectified only by the assessment of damages “on general contract principles”, those being “that the award should put the plaintiff in the position he would have been in had the defendant fully performed his contractual obligations”
* sometimes attempts have been made to reduce the defendant’s damages by examining the position in which the plaintiff would have found itself in the event that the contract had been perfumed
* ***Clydebank Engineerings and Shipbuilding Co v Yzquierdo-y-Cataneda, Don Jose Ramos***
  + defendants contracted to supply four “torpedo-boat destroyers” to Spanish government in 1987-98, by which time the Spanish-American war had commenced
  + defendants were late in delivering the destroyers and argued that the plaintiffs had lost little as a result
  + Earl of Halsbury said that this was an absurd contention
  + court proceeded to find liquidated damages clause binding
* make sure the contract is fulfilled when doing the formula so even if the plaintiff did not breach, for determining damages, you must act like the contract has been performed including their potential losses
* expectation formula:
  + expected benefits under the contract
    - eg. 1: 10 k collection of dolls
    - eg. 2: 1 k piano
  + minus expected costs under the contract
    - eg. 1: 5 k to buy this collection of dolls
    - eg. 2: 3 k to buy this piano
  + equals expectation damages
    - eg. 1: 5 k expectation damages
    - eg. 2: Nominal damages
      * in this case it is a negative amount. However, given the difference between cost and market value, there might be something specific about the piano that gave value outside monetary value (belonged to family member) and result in a desire for specific damages (they want THAT piano specifically) as opposed to just monetary damages
        + this is essentially rescission where damages is specifically getting the thing back. Rescission is an equitable remedy and it is backward looking.

### Calculating Expectation Damages: Example 1

* A and B are bound by a contract where A promises to pay B $5,000 for B’s collection of antique toys and B promises to sell her collection of antique toys to A for $5,000.
* Before A pays the $5,000, B discovers that the collection is worth $10,000 on the market. B changes her mind and refuses to sell her collection of antique toys.
* A sues B for breach of contract. What are A’s damages?
* If B had not breached the contract, A would be the owner of a collection of antique toys worth $10,000
* But if B had not breached the contract, A would have been obligated to pay $5,000 for the collection
* Therefore, A’s damages are $5,000
* Expectation Damages = Expected benefits under the contract $10,000 minus Expected costs under the contract $5,000.Therefore, A’s damages are $5,000

### Calculating Expectation Damages Example 2

* D agreed to sell a diamond ring to C for $5,000. D refused to deliver the ring to C because D had received an offer from E to purchase the ring for $7,500 which is now market price.
* If C is successful in her action for breach of contract, to what amount of damages is she entitled?
* Expectation damages = Expected benefits under the contract $7,500 minus Expected costs under the contract $5,000. Therefore, C’s damages are $2,500.

### Calculating Expectation Damages Example 3

* G agreed to sell F piano for $3,000. G refused to deliver despite the fact that piano was only worth $1,000.
* If F is successful in his action for breach of contract, to what amount of damages is he entitled?
* Expectation damages = Expected benefits under the contract $1,000 minus Expected costs under the contract $3,000. What are damages? Damages are -$2000 so probably would not sue for breach of contract
* they might sue for specific performance or for reliance damages

### Calculating Expectation Damages Example 4

* H agreed to construct a building on J’s land for $100,000. H’s expected cost to complete project was $90,000. J repudiated the contract after H had begun work and spent $60,000. J did not pay H anything and H cannot salvage any value from money spent. Value to J of the partially constructed building is $40,000.
* What are J’s damages?
* Expectation damages = Expected benefits under the contract $100,000 minus Expected costs under the contract $30,000. What are the damages? The damages would be $700,000
* you take the moment of breach and figure out what is left to be done. J owes 100,000 but H has not yet finished his obligations under the contract he would still have to build the house and that would cost him another 30, 000 to reach 90,000. You need to subtract his future costs from his future gain.

### The Reliance Measure of Damages

* these are backward looking (versus forward looking expectation damages)
* the point is to make you whole, as if the contract was not breached
  + - e.g. You spend $ to prepare for what contract provides, but other party does not perform. You are entitled to make you whole again.
* Reliance measure sometimes surface because P has not suffered any losses measurable by expectation level or has been unable to prove or establish expectation losses with requisite degree of certainty
* as a consequence, the damages claim or judgement is confined to restoring P to their pre-contract position and does not extend to putting P in the position that they would have been in had contract been performed
* there may be some occasions on which the plaintiff is seeking reliance recovery because it represents potentially a more lucrative basis of damages than the expectation measure
* reliance damages will often be used if expectation damages cannot be quantified (i.e. a missing ship case)
* strongest case for reliance damages is when there is a loss due to the breach

## *McRae v Commonwealth Disposals Comm,* (1951), 84 CLR 377 (Aust HC)

**Facts:** The Commonwealth Disposals Commission sold McRae a shipwreck of an oil tanker on the “Jourmand Reef”, near Samarai. When McRae went to the location, after laying out significant expenses for the salvage, it was discovered that the Jourmand Reef, and the oil tanker did not exist. Defence was: there might not have been anything of value on tanker anyway. Is it really an issue that there was no tank, seems they bought it on the chance there was oil on board. Obviously there was still a chance of there being no oil. Plaintiff unable to prove expectation losses, so claims reliance damages. Court held that Commission was in breach of contract.

**Issue:** What damages could McRae recover for breach of contract? Is he entitled to damages, even though there was no guarantee that they would have even received anything from the contract?

**Ratio:** When an implied promise in a contract for the sale of goods is that the goods exist, and the goods in fact do not exist, a party can recover damages for breach of contract, and damages are to be measured by costs incurred in reliance of the promise. Where parties have equal knowledge as to the existence of the subject matter, and it turned out to be false, then it would justify the implication of a condition precedent.

**Reasons:** Normally, for breach of contract by non-delivery, the measure of damages is the estimated value of the goods if delivery had occurred. However, there was no way of determining the value of the tanker at the place where it ought to have been delivered, because there was no tanker. McRae argued that the damages should be assessed based on the value of an average tanker and the oil it would contain. Commission argued that even if there had been a tanker, the tanker could have been unsalvageable or worthless, upon which the plaintiff’s expenditure would have ended anyway. Court rejected both arguments, as the contract was not for the salvaging of the tanker, it was a promise of the existence of the tanker. Commission promised there was a tanker, and the plaintiffs reasonably expended considerable money in reliance of this promise. The plaintiff's real grievance is recovering the amount of the wasted expenditure. Characterizing the breach of contract as a simple non-delivery of goods left the plaintiff with no starting point for the value lost, because the value of the tanker, if delivered, cannot be quantified. However, the promise made in this case was that the tanker existed, therefore, the plaintiff could recover expenses incurred on the promise of a tanker. Burden then shifted to the Commission to show that if there had been a tanker, the expenses would have been wasted anyways which the Commission could not establish. Plaintiffs could recover for loss of revenue of the steam vessel used for the possible salvage and other items of expenditure incurred, including travel costs and crew wages. Plaintiffs could not recover equipment purchased for the vessel or the reconditioning of the vessel, since both occurred prior to contract formation. Court says that it is not unreasonable that McRae would prepare to salvage a tanker, even without knowing if it would be worth it.

**Held:** Plaintiff can recover damages for breach of contract and the damages are to be measured by reference to expenditure incurred and wasted reliance on the Commissioner’s promise.

### Remoteness

* the remoteness limit imposed by contract law departs from the idea that a plaintiff should be compensated for all provable losses flowing from the breach of contract. D relieved from liability for losses that are too remote
* courts are concerned with the fundamental problem of whether the defendant caused the loss which occurred, but also whether D ought to be burdened with the payment of damages of the type claimed
* modified objective test: what would a reasonable person have contemplated in the situation
* defendant is liable for losses flowing from the breach of contract that :
  + (1) could fairly or reasonably be considered as arising naturally from breach (normal course of things); or
  + (2) Are reasonably in the completion of both parties and known to both parties at the time of the contract
    - * this step is subjective
      * at this step, there must be actual knowledge from both parties that there will be loss. If they know about the loss they can be responsible for it, if not more likely they will not be held to be responsible

## *Hadley v Baxendale* (1854), 9 Exch 341, 156 ER 145

**Facts:** The plaintiffs operated a flour mill which had to be shut down because a component of their steam engine broke. P contracted with D, a carrier company, to carry the component to the manufacturer to have a new part created. Delivery was delayed due to the defendant’s negligence causing plaintiff’s mill to remain shut down longer than expected. Plaintiffs sued to recoverdamages.

**Issue:** Are the defendants liable for the damages suffered by the plaintiffs due to lost profit?

**Ratio:** Where two parties have made a contract which one of them has broken, the damages which the other party is entitled to receive are limited to those arising naturally from the breach itself or those that are in the reasonable contemplation of the parties at the time of the contract unless it is explicitly communicated prior. You can only be liable for losses that are generally foreseeable or if those losses are mentioned prior.

**Reasons:** If the special circumstances under which the contract was made are communicated by P to D, then the damages reasonably contemplated to be resulting from a breach of such contract would be the amount of injury that would ordinarily follow from a breach of contract under those special circumstances. Special circumstances, unknown to one of the parties in a contract, cannot be then used against them. But if those special circumstances were not communicated then the defendants would not be able to reasonably contemplate injury resulting from those special circumstances. In the present case, it was not conveyed to the defendants that the mill would remain shut down until the new shaft was received. Therefore, the defendants could not have reasonably contemplated that P would suffer a loss of profits; the losses were too remote.

**Held:** Court found for defendant. New trial ordered where the jury must be better instructed.

## *Victoria Landry (Windsor) Ltd v Newman Industry,* [1949] 2 KB 528 (CA)

**Facts:** Victoria Landry Ltd, wishing to extend their business to include drying contracts required a larger boiler. On April 26, 1946, a contract was formed with the defendants, Newman Industries Ltd to purchase a boiler. It was also to be installed on the defendants’ premises, for £2,150, and delivery was arranged to be taken on June 5. While the boiler was being dismantled by a third party it sustained damage. Delivery to Victoria Landry was delayed until November 8, 1946. Newman was aware of the nature of their business, and by letter had been informed the boiler was intended to be used within the shortest possible space of time. Victoria Landry claimed to include in their damages their loss of business profits throughout this period.

**Issue:** Should loss of profit be recoverable under damages? If so, what is the test for measuring loss of profit and liability? Can you claim extraordinary profit alongside ordinary profit?

**Prior Proceedings:** TJ allowed plaintiffs a sum for damages of £110 under certain minor heads but disallowed the claim for loss of profits on the ground that it was based on special circumstances and too remote.

**Ratio:** In breaches of contract, the aggrieved party is entitled to recover such part of the loss that at the time of the contract was reasonably foreseeable to result from the breach which depends on the knowledge possessed by the parties or another party who latter commits breach. D has to know, at the time of agreement, of the prospect and terms of such extraordinary contracts to be liable for any loss through these contracts.

**Reasons:** Damages were originally provided to put the party whose rights had been violated in the same position, so far as money can do so, as if his rights had been observed. This is recognized as too harsh a rule. Knowledge “possessed”, which is required, is of two kinds - one imputed, the other actual. Everyone, as a reasonable person, is taken to know the “ordinary course of things” and consequently what loss is liable to result from a breach of that ordinary course. This is the “first rule” in *Hadley v Baxendale*. Knowledge possessed that is to be of special circumstances outside the “ordinary course of things” would be liable to cause more loss. Such a case attracts the operation of the “second rule” so as to make additional loss also recoverable. To make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. It suffices that, if he had considered the question, he would, as a reasonable man, have concluded that the loss in question was liable to result. To make a loss recoverable, the breach must not necessarily result in that loss, but it is enough if he could foresee it was likely to result. With knowledge of the nature of plaintiffs’ business, the defendants having promised delivery by a particular date of a large and expensive plant, could not reasonably contend that they did not foresee that loss of business profit would be liable to result from a long delay. Although D had no knowledge of the drying contracts the plaintiffs had in prospect, it did not follow that the plaintiffs were precluded from recovering for loss of business in respect of contracts reasonably to be expected. Here, they knew about the business so they knew they needed the boiler for that purpose.

**Held:** appeal allowed and the damages were referred to an official referee for assessment. Only ordinary loss of profit was awarded. Potential loss form government and any other form of extraordinary loss is not covered.

### Mitigation

* in addition to requirements of certainty, causation and remoteness, plaintiff can only recover for losses that are unavoidable
* a plaintiff will not be able to recover to the extent that she has failed to act reasonably to limit or reduce her loss caused by the defendant’s breach, it is a duty to take reasonable steps to mitigate
* onus is on the breaching party (defendant) to prove that the plaintiff failed to mitigate (Asamera)
* successful mitigation will act to reduce damages
* if you tried to mitigate, but were unsuccessful, court will understand that and not take anything off damages
* **duty to mitigate:** it is an obligation, but it is not so much a duty that you could bring an action against someone for not mitigating
* it is meant to help sift through losses that occurred due to the breach and those that are so remote that they become the responsibility of the complainant. Even though the complainant may have done nothing wrong, it is their responsibility to try to remedy the wrong to limit loss.
* It is possible to technically mitigate all damages
* it is possible to claim compensation for any losses accrued when attempting to mitigate losses
* in the employment context/constructive dismissal if the employment doesn't expressly say that you are fired but implements policy that makes it seem as though you are and prevents you from doing work and the employer offers you a new job is it reasonable to take the job from employer who dismissed you ?
  + - No, not unreasonable for someone to take another position with company following wrongful dismissal.

## *Asamera Oil Corporation v Sea Oil & General Corporation,* [1979] 1 SCR 633,

**Facts:** In 1957, 125, 000 shares of Asamera Oil Corp were lent to Brook, president of Asamera, on the condition that they he returned to Baud Corporation by December 1960. However, Brook sold the shares in 1958. In 1960, Brook was subjected to an injunction preventing him from selling 125,000 shares of Asamera, which Brook interpreted as meaning that he was to remain in possession of any 125, 000 shares of Asamera, not necessarily the identical ones he had received from Baud. Baud requested specific performance (the return of the 125, 000 shares from Book) and claimed an additional $6 million in damages

**Issue:** (1) Did Baud have a duty to mitigate its losses; (2) What amount of damages is Baud entitled to, if any?

**Ratio:** Pcannot recover for losses which are reasonably avoidable. Though, not necessary for a P to take ALL possible steps to mitigate losses, such as putting their own money at an unreasonable risk to mitigate that loss

**Reasons:** The traditional rule is that damages are recoverable “in an amount representing what the purchaser would have had to pay for the goods in the market, less the contract price at the time of the breach.” This strikes a balance between the right of the plaintiff to recover all of their losses and the responsibility imposed on them to mitigate their losses. A plaintiff must base their claim either by replacement acquisition or, in some circumstances, by prompt litigation. The traditional rule about mitigating of damages is inapplicable to non delivery of share cases because of the speculative nature of shares. Justice Estey rejects a line of English authorities, relied upon by TJ, for the proposition that in the case of a loan of shares the plaintiff need not mitigate losses by purchasing shares or by bringing a suit for recovery within a reasonable time; one reason being that they were decided long before modern principles of contractual remedies were developed. Instead, Estey follows *R v Arnold*, which imposes “on the injured party the obligation to purchase like shares in the market on the date of breach (or knowledge thereof in the plaintiff) or within a period thereafter which is reasonable in all the circumstances.” However, a plaintiff is not required to take all possible steps to reduce his loss. It would be unfair to put the huge burden on the defendant here, when the plaintiffs could have reasonable avoided hitting this point. Therefore, Baud was not required to put their own money at an unreasonable risk to mitigate the loss by repurchasing shares, which are highly speculative. On the contrary, some of the losses could have been avoided. For example, Baud could have initiated legal proceedings within a reasonable amount of time. Instead, as a result of delays, this particular issue took 18 years to litigate. Plaintiffs can recover for the natural delay in litigation but not for delays that were caused by their failure to litigate in a prompt manner. And so, in calculating damages, Estey concludes that it would be unreasonable to hold the appellants to any timetable which contemplated the holding of a trial of these issues before 1966 or 1967 and awarded damages accordingly. The duty to mitigate is clear: “a P is entitled to recover damages for the losses he suffered but the extent of those losses may depend on whether he has taken reasonable steps to avoid their unreasonable accumulation” and “it is for D to carry the (evidentiary) burden of that issue”.

**Obiter:** Estey also considers the theory that “only where a breach gives rise to an asset in the hands of the plaintiff, will the law require him to mitigate his losses by employing that asset in a reasonable manner.” He concludes that the presence or absence of an asset is not determinative as to whether the plaintiff has a duty to mitigate and that the rules applying to sale of goods should not be applied to sale of shares. In any event, no asset is created “by the breach of the contract to return shares.”

**Held:** In favour of Baud. Normal rule: damages will equal price to buy the good in market at time of breach which is to encourage reasonable steps to avoid unreasonable accumulating by “damaged” party. Damages awarded in the amount of $812, 500 ($6.50 per share)

## Evans v Teamsters Local Union No 31, [2008] 1 SCR 661, 2008 SCC 2

**Facts:**  Mr. Evans was employed by respondent as a business agent for over 23 years. After an adversarial campaign where Evans supported the incumbent, the union had a new president, Mr. Henessey. The union’s legal counsel, Mr. McGrady, submitted the opinion that Evans was an “indefinite term employee” and the union’s current severance pay plan was an adequate substitute for notice or pay in lieu of. Evans viewed a copy of McGrady’s opinion letter shortly before receiving a fax of a letter of termination from Henessey. Hennessy’s fax did not include a clause regarding working notice. Since receiving the fax, Evan’s legal counsel, Mr. Macdonald, had a continuing correspondence with the respondents’ lawyers, but were unable to reach resolution. The union continued to pay Evans and warned him that if he did not return to work for the balance of his notice period, the union would treat that as cause and terminate Evans without notice.

**Issue:** Does Mr Evans have a duty to mitigate damages by returning to work for the respondent?

**Prior Proceedings:** TJ concluded that the union failed to prove it was reasonable for Evans to return to work. TJ found that 22 months’ notice was appropriate. BCCA overturned TJ, largely due to the fact Evans had agreed to return to work under certain conditions. The court held that the same principles apply to both constructive and wrongful dismissal based on the key element of dismissal without notice. Accordingly, the employee’s mitigation efforts in both situations should be evaluated on a case-by-case basis.

**Ratio:** Employees should mitigate damages by returning to work at request of the same employer when: (a) salary offered is the same; (b) working conditions are not substantially different or demeaning; and (c) personal relationships involved are not acrimonious. Damages pertaining to bad faith not subject to mitigation concerns.

**Reasons (Bastarache J):** SCC held that there is little difference between immediate termination with an opportunity for temporary employment and informing an employee that their contract will be terminated in the same amount of time. Temporary working with the dismissing employer falls under the idea of damages compensating for lack of notice. Absent bad faith or other extenuating circumstances, employers are entitled to give working notice and do not have to additionally financially compensate for termination. Absent working notice, the employer bears the onus for establishing that the employee has failed to make reasonably efforts to mitigate. As long as there is no hostility, embarrassment, or humiliation, it is reasonable to return. Employer will be given more leniency where the employees position is changed as a response to a legitimate business need. Other relevant facts include; nature of employment, whether litigation has commenced and if the offer was made before or after the employee left.

**Held:** appeal dismissed. Though the law ought not require an employee to return to work simply because he agreed to, Mr. Evans unreasonably requested appeared to be the reason he declined to return.

# Damages for Breach of Contract

### Damages for Mental Distress (Aggravated Damages) and Punitive Damages

* mental distress and punitive damages are parasitic meaning that once a breach has been established and you have figured out your expectation damages, we then ask are there any further heads of recovery. You cannot sue just in aggravated or punitive damages, they need to be in addition to something else.
* mental distress: the emotional distress or upset that accompanies the breach of contract
  + - sometimes referred to as aggravated damages
* Current state of the law seems to be that damages for mental distress in breach of contract are recoverable when they are captured by *Hadley v Baxendale,* when they are within the reasonable contemplation of the parties the time of contract formation (*Fidler*).
* **for punitive damages** 2 things must be established: (1) independent actionable wrong over and above the breach of contract (ie. breach of insurance policy or wrongful dismissal), could be breach of another term of the contract or a breach of statute or it could be a tort and (2) Defendant’s conduct must warrant punishment, it must be the kind of conduct that the court is willing to impose these damages such as vindictive, reprehensible, high handed
  + must prove that there was actually a loss, something beyond mere upset (prove emotional distress).

### General Damages for Mental Distress

* does not only have to do with dismissal
* you can look at any way the employee is not where they would have been had there not been a breach (one way is no notice, another way is emotional distress. Possibly at another position employee would not have been exposed to emotional distress)

## *Jarvis v Swans Tours,* [1973] 1 QB 233 (CA)

**Facts:** Jarvis booked holiday based on representations in Swan’s brochure. However, contents of the brochure were false, and Jarvis was disappointed by trip. The holiday was not even close to matching the description of the brochure so he sued. It was referred to as a house party but when he showed up it was pretty empty the first week and then he was the only person there the second week. Promised cake but got chips, had to use short skis, owner did not speak English when it said that he did, was promised entertainment but was limited. Jarvis wanted damages and mental distress and aggravation that he experienced on the holiday and after.

**Prior Proceedings:** TJ ordered half the cost of his holiday. Jarvis appealed.

**Issue:** What is the proper measure of damages when a party suffers disappointment, frustration, or distress because the other party breached a contract to provide entertainment and enjoyment?

**Ratio:** Where a party breaches a contract for entertainment or enjoyment, damages should compensate the plaintiff for the disappointment suffered and the loss of entertainment that should have been received. When you are contracting for feeling or experiences, you are able to get damages for mental distress. The court should take into account the mental distress suffered by the plaintiff.

**Reasons:** Brochure said specific things that the vacation did not live up to. Historically, mental wellbeing is not compensated for but in this case, it is not that mental distress is being compensated. It is that the contract was an attempt at easing mental distress and failed to do that. Had the vacation been as promised, there would be mental gain. He should not be compensated for only half, but also for the mental distress of looking forward to it and being disappointed. He only has limited time to go on vacation . He paid for entertainment not just a trip.

**Held:** Full amount of damages plus some for mental distress. Holding tried to put him in the position that he would have been in if the vacation would have been fully realized.

**Significance:** Good law. It shows that sometimes, emotional distress or feelings of disappointment can be compensated in a contract case. A vacation is not about improving one’s financial status, so this makes sense that compensation could be for something else. This is simply acknowledgement that it is possible to compensate for emotional distress or feeling of disappointment in a contract context.

**Class Notes:** Traditional courts had never awarded compensation for emotional upset or distress for breach of contract and limited losses to tangible losses. This is a breach of contract case where the contract was for a vacation. Jarvis sues but it is hard to say where he expects to be and how do we compensate that. Traditionally the approach would of been that Jarvis was not out of pocket anything because he paid for the vacation and got the vacation and he did not have anything he could point to that was a financial loss, only he disappointment. Denning breaks down this rule and says that **where the very matter contracted for is for emotions, peace of mind or enjoyment, then when those promises have been breached, compensation is owed.** This case broke down the rule that damages for emotional distress are never recoverable.

## Vorvis v Insurance Corp of BC

* one of the first Canadian cases dealing with emotional distress

**Facts:** long term employeelawyer was dismissed without cause or without notice and in harsh and bad faith way. Employer claims that he just did not fit the plans for the department and worked too slow. Boss had progress meetings in an attempt to get him to change his work style and intimidate him. He was offered 8 months salary and benefits to release company from any legal claim, but he refused. He was able to get new work in September 1981, but not in the same capacity as before (solicitor). He sued for wrongful dismissal and damages for mental distress and punitive damages

**Prior Proceedings:** TJ awarded wrongful dismissal. Vorvis wants mental distress damages due to distress and anxiety caused by termination.

**Issue:** Did TJ err in denying his claim for punitive damages?

**Held:** Reasonable notice damage remains the same. Any claim for aggravated damages is dismissed in respect of the wrongful dismissal because any independent actionable wrong has to be separate from the wrongful dismissal. No punitive damages either.

**Ratio:** for both aggravated damages (mental distress) and punitive damages you have to show an independent actionable wrong! Two part test for punitive damages: (1) needs to be an independent actionable wrong AND (2) the conduct need to be so harsh or vindictive that the court would take the unusual step of punishing the company. It needs to be a completely different actionable wrong for there to be compensation, in terms of aggravated damages, over and above failure to give reasonable notice.

**Reasoning:** Aggravated damages dismissed because there is no way to show that Vorvis’ injury was caused directly from dismissal, which was already being compensated. Aggravated damages argument assessed under general rules relating to assessment of damages. They are compensatory in nature and may only be awarded for that purpose. Punitive damages are punitive in nature and may only be employed in circumstances where the conduct is of a nature that merits punishment. It imposes a fine for conduct found to be worthy of punishment as it was harsh or vindictive. Punitive damages requires careful consideration of the court, cannot just rule for punitive damages for things that the court does not like. Termination was legal on both sides, there was no wrong doing and the wrongful dismissal claim already satisfied the requirement of law for notice. Tort is an example of individual actionable wrong that could be compensated for via punitive damages. By saying that punitive damages requires an individual actionable wrong it is clear that punitive damages are punishment, not compensation so it is possible to sue in tort for damages to compensate you, and then in contract law and claim punitive damages as it was an individual actionable wrong.

**Significance:** In *Jarvis*, he can tie his distress directly to the contract. Difference here is that it is an employment contract, so to award damages, there needs to be an independent actionable wrong outside dismissal, since that is already compensated for.

## *Whiten v Pilot Insurance Co,* [2002] 1 SCR 595

**Facts:** Wife, husband and daughter, house on fire. Husband gives slippers to his daughter, but they are forced outside and he gets frostbite and ends up in wheelchair for a while. Insurance paid $500K and covered for a rental place for a few months. They cut it off trying to get the family to settle for less money as they thought the family burned the house intentionally. Proved not to be arson and insurance company conceded that.

**Ratio:** Good faith and fair dealing only exist for insurance contracts. You need an independent actionable wrong for punitive damages and breach of good faith and fair dealing can be an independent actionable wrong.

**Reasons:** Courts said they breached an implied duty of good faith and fair dealing and that is an actionable wrong that would allow them to award aggravated or punitive damages. Insurance companies are held to a duty of good faith. Individual actionable wrong satisfied. It was harsh and vindictive, so punitive damages apply. Insurance contracts are unique given it is a contract for peace of mind. Not having to worry in accidents about finding a place to stay, recovering from loss etc is part of the contract, in addition to financial coverage.

**Held:** Restore jury’s award of $1 million in punitive damages to family.

## *Fidler v Sunlife Assurance Co of Canada,* [2006] 2 SCR 3, 2006 SCC 30 (SCC)

**Facts:** SLA denied Fidler suffered from chronic fatigue syndrome. She was eligible to receive long term disability benefits. SLA did its own secret investigation of F and found she was not disabled, so cut off her payments. SLA denied her benefits for 5 years, even after her doctor reconfirmed her disability. SLA did its own medical examination, in which it misrepresented the findings as saying that F could return to work.

**Issue:** Was SLA acting in bad faith and are punitive damages appropriate?

**Prior Proceedings:** TJ awarded 20,000 in aggravated damages for mental distress but dismissed claim for punitive damages because decided no bad faith. BCCA upheld distress award and awarded $100,000 punitive damages, finding that there was bad faith.

**Held:** Aggravated damages (extra loses that flow from the bad faith conduct and how she was treated; reached a high level enough to compensate her separate from the breach), but not punitive damages because it did not pass 2nd part of *Vorvis* punitive test (not harsh or vindictive enough to punish company). Also gets regular aggravated damages (*Hadley v Baxendale*: reasonable person expected losses due to the breach)

**Reasoning:** No need to show an independent actionable wrong to recover damages for mental distress. LTD contracts are not just commercial contracts, but other contracts with benefits that are both tangible (monthly payments) and intangible (comfort and knowledge that it will provide income security in the event of disability). True aggravated damages came from an individual actionable wrong PLUS evidence that demonstrated true mental distress from that actionable wrong. You an have that individual wrong but without evidence that it led to harm, there would be no damages. The plaintiff must prove that there was a substantial degree of mental suffering and that this suffering was reasonably foreseeable at the time the contract was made. An insurance contract is often made as bringing peace of mind. Thus, F’s distress in the event of non-performance was reasonably foreseeable at the time the contract was made. Punitive damages are not appropriate though. S acted overzealously but in good faith and what they felt was their legal right. While it could be seen as an individual actionable wrong, it does not meet the standard of harsh or vindictive so thus no punitive damages.

**Ratio:** Replaces two part test for emotional distress but for punitive damages it is still the two part test! **For emotional distress, no independent actionable wrong is necessary.** Instead the rule is *Hadley v Baxendale* meaning whether or not the breach was within the reasonable contemplation of the parties at the time contract formed. (1) Aggravated damages can be awarded when the object of the contract was to secure a psychological benefit that brings mental distress upon breach that is within the reasonable contemplation of the parties (*Hadley v Baxendale*) and the degree of suffering was sufficient so as to warrant compensation; (2) Punitive damages should only be awarded exceptionally and in cases of clear bad faith. Insurance wise, aggravated damages are possible where LTD benefits are improperly denied by insurance companies. General rule that damages are awarded to restore the wronged party to the position they would have been in had the contract not been broken and damages for mental distress were not generally recoverable in breach of contract cases now includes damages for mental distress where such damages were in the reasonable contemplation of the parties at the time the contract was made.

**Significance:** There are two types of damages- (1) Aggravated damages or trust aggravated damages and (2) Damages for mental distress (which can be on same level as damages for lost profits, etc).

**Class Notes:** Court tries to clarify aggravated damages and draw distinction between true aggravated damages and where they flow from contract. True aggravated damages are where there is an independent actionable wrong and damages flow from there (where there is something over and above but they do not see that as a necessary hook). Where there is an actionable wrong you should just get your losses for that.

## *Honda Canada Inc v Keays,* [2008] 2 SCR 362, [2008] SCJ No 40, 2008 SCC 39 (SCC)

**Facts:** K was fired on an assembly line and moved to data entry. K ended up with chronic fatigue syndrome, ceased work and received disability insurance until 2008 when they thought he could go back but he continued to be absent. Honda wanted him to meet with a specialist. K worried about termination so he got a lawyer who advised him not to meet with specialist. Honda gave warning and said that if he did not meet with specialist they would terminate. He doesn't meet the specialist and gets terminated. K sues for wrongful dismissal.

**Prior Proceedings:** TJ ruled in favour of K ordering 500k in punitive damages and wrongful dismissal (reasonable notice). CA reduced punitive damages to 100K but upheld wrongful dismissal.

**Ratio:** There are no Wallace damages anymore, only contract damages. Respect *Vorvis* framework and need an independent actionable wrong (punitive). Door is open for some kind of mental distress.

**Reasons:** Punitive damages were not well justified. There was no individual actionable wrong. The disability program Honda offered cannot be equated with malicious intent to discriminate against persons with specific affliction, so it is not an individual wrong. Support CA’s decision which said that break of human rights code cannot be seen as an individual actionable wrong. Honda’s actions were not so bad as to warrant an award of any punitive damages; they do not meet the harsh and vindictive standard set out in Vorvis.

**Held:** No punitive damages. Appeal allowed to change the *Wallace* bump rule.

**Class Notes: Upshot:** For mental distress damages you need to satisfy *Hadley v Baxendale*, you don't need to prove independent actionable wrong, just have to prove that it was within the reasonable contemplation of the parties that conduct would result from the breach of contract. But for punitive damages you need an independent actionable wrong and conduct warranting punishment. SCC said that there were no more *Wallace* damages and they were going to do what as done in *Whiten* and *Fidler* and say that for emotional damages, *Hadley v Baxendale* is all you need and when it comes to punitive damages you need an independent actionable wrong and conduct that the court feels is deserving of punishment.

## *Wallace v United Grain Growers* (1996)- this case has since been overruled

**Facts:** Wallace was a good salesman and was lured away from secure employment. He had 35 years of service wth the previous employer when he was approached by defendant who induced him to come work for them. D made representations to Wallace to induce him. They said your job is secure and everything will be great. Wallace leaves and 14 years in, Wallace is dismissed 2 days after he received a positive performance evaluation which came as a huge shock. Independent of this he was going through a tough time personally and was filing for bankruptcy. When he sues for wrongful dismissal, employer said that there was just cause for terminating him but they did not say what the just cause was. W suffered mental distress caused by dismissal as he was worried that he did something so bad and no one wanted to talk about it. D was hoping Wallace would just go away. Employer eventually conceded right before the trial that there was no just cause.

**Prior Proceedings:** TJ awarded 24 months notice and $15, 000 mental distress damages. CA reversed finding and overturned mental distress damages and reduced notice period to 15 months.

**Issue:** How much reasonable notice was he entitled to?

**Held:** TJ notice period of 24 months reinstated. No mental distress damages.

**Ratio:** Bad faith on the part of employer in how it handled the termination of an employee is another factor properly compensated for by an addition to the notice period. **Wallace Bump:** court can extend reasonable notice in instances of alleged bad faith dismissal, where it does not reach the requirements of other damages.

**Reasons:** SCC wants to compensate Wallace but also reprimand employer. The nature of the problem before the court is that at the time (1996) we are still working with *Vorvis* which says you always need an independent actionable wrong which must be independent from breach of contract, something over and above that. Wallace says that the court should recognize a new tort by the name of bad faith discharge and that was the independent actionable wrong meaning we can argue about aggravated and punitive damages. Argument was not compelling. Also makes the argument that there was an implied duty of good faith and that that was breached. But the court said that it is not the courts duty to find a duty of good faith. TJ has discretion to extend period of reasonable notice to which an employee is entitled. So while damages under mental distress may not be possible, they could be through reasonable notice. Iacobucci said he would give *Wallace* damages: which is one extra damage award where an employer engaged in bad faith conduct in the manner of dismissal. *Wallace* damages take the form of figuring out reasonable notice damages (TJ found 12 months) then Iacobucci bumps the damages to 24 owing to employer’s bad faith conduct to the manner of dismissal. Not a lot of guidance as what counts as bad faith. Very problematic. Another problem is that all contracts subject to mitigation meaning if employee finds another job in the meantime whatever he makes is subtracted from damages.

**Significance**: Supports idea that independent actionable wrong is needed and stands for *Vorvis* framework.

**Problems:** How is the bump decided? Is it just doubling? Could have found an implied duty of food faith dismissal but court avoids it. The courts lists factors of bad faith and think they should be compensated for the harm that they caused but avoids calling it an implied term in the contract that ti needs to be good faith.

### Punitive Damages

* purpose of punitive damages is not to compensate the other party, more to deter a specific type of behaviour
* punitive dames are a high bar because you are punishing the other party for breaking the contract so you need an actionable wrong to open the door for punitive damages