RECENT DEVELOPMENTS IN CANADIAN LAW: CONTRACTS

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I. INTRODUCTION

The law of contracts covers a vast area. For this reason, this survey concerns itself with the general law of contract and does not deal with special types of contracts, such as contracts for the sale of goods, contracts dealing with interest in land, contracts of employment, insurance, banking and so forth, except where generally applicable principles are involved.

The cases discussed are those that contain some new exposition of law or that deal with novel situations. The survey covers Canadian common law jurisprudence, although, because of considerable impactl some important decisions of English courts are included. In the final analysis, the selection of the cases discussed is a matter of judgment.

Except for the area where contracts and torts meet, there have been relatively few developments in the period under review. The preceding

survey[1] dealt with concepts in contractual terms, re-interpretation of exemption clauses and *non est factum* and new developments in damages. In the current period, we are witnessing further elaboration and application of the already established principles. If there is any trend discernible, it is a certain degree of relaxation from the strict formal application of precedents and doctrines and a tendency to give effect to the intentions and expectations of the contracting parties. While this approach may provide a better solution of the disputes involved, it adds uncertainty.

In 1987 the Ontario Law Reform Commission released its *Report on Amendment of the Law of Contract*.[2] This comprehensive report examines and makes recommendations for remedial legislation touching on the following areas of contract: consideration, third party beneficiaries, the *Statute of Frauds*,[3] the seal, comparative aspects of consideration, unconscionability, mistake and frustration, penalty clauses, illegality, misrepresentation, minors' contracts, good faith and waiver of conditions. The *Report* states that it makes no attempt to codify the whole law of contract. The principles of contract law are largely judge-made and this should continue to be the case. What is proposed is remedial legislation where it is deemed desirable.

The last section of the paper deals with cases involving liability in contract and liability in tort for negligence. The ongoing concurrence of contracts and torts and the relevance of the cases surveyed make this necessary.

The survey covers the period from December 1983 to the end of June 1987.

II. Formation of Contracts

A. *Intention*

Intention to create a legally binding obligation is essential for the formation of a contract. In determining whether the parties in fact concluded an agreement, the courts are usually guided by the actions of the parties. Agreement is not a mental state but an act and, as an act, is a matter of inference from conduct.[4] The following three cases illustrate the emphasis on factual situation.

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[1] E.J. Hayek, *Recent Developments in the Law of Contracts* (1983) 15 Ottawa L. Rev. 599 [hereinafter the last survey].

[2] Ontario Law Reform Commission, *Report on Amendment of The Law of Contract* (Toronto: Ministry of the Attorney General, 1987) [hereinafter *Report*].

[3] R.S.O. 1980, c. 481.

[4] G.C. Cheshire, C.H. Fifoot & M.P. Furmston, The Law of Contract, 8th ed. (London: Butterworths, 1972) at 20, *as cited in Errol B. Hebb & Assocs. Ltd.* v. *Carter* (1983), 58 N.S.R. (2d) 55 at 57, 123 A.P.R. 55 at 57 (A.D.). *See generally* S.M. Waddams, The Law of Contracts, 2d ed. (Toronto: Canada Law Book, 1984) at 109.

In *Bank of Nova Scotia* v. *Omni Constr. Ltd.*,[5] the Saskatchewan Court of Appeal found the existence of a solicitor-client relationship from the conduct of the parties, the various matters discussed, time spent together and the reliance of a client toward the solicitors. The conduct of the parties was a decisive factor in *Errol B. Hebb & Assoc. Ltd.* v. *Carter*,[6] where Macdonald J.A. inferred a binding agreement from the fact that a busy surveyor immediately surveyed land and prepared the plans. The issue of whether a distributorship agreement existed was decided in the negative in *Royal Bank of Canada* v. *M.F. Schurman Co.*[7] The Court, having examined the dealings between the parties, came to the conclusion that there was no distributorship or agency, but a series of separate individual contracts. Each new contract was represented by an invoice.

The question of validity of a guarantee where only one of the intended guarantors executes the document was considered in *Bank of Montreal* v. *Marogna*.[8] The Court held, applying *Evans* v. *Bremridge*,[9] that, as there was clear intention that the guarantee would be given jointly, the execution by a second guarantor became a condition precedent for the instrument becoming binding upon the first guarantor.

Intention, certainty and the authority of a cabinet minister to bind the Crown were the main issues in *R.* v. *CAE Indus. Ltd.*[10] CAE took over an Air Canada maintenance base in Winnipeg, relying on a letter signed by three ministers of the Crown to the effect that the government could guarantee only a minimum amount of work, but would use its best efforts to secure additional work. The workload declined and CAE brought an action for damages. Dealing with the first issue, the Court found that there was an intention to create a legal relationship, especially as the negotiations were initiated by the government. It was not a mere political agreement. The Court found further that the contract was sufficiently certain, despite some vagueness in language. "Best efforts" was interpreted as a general obligation to secure work. The Court quoted Lord Wright's *dicta* in *Hillas & Co.* v. *Arcos, Ltd.* that the Court should make every effort to preserve a contract rather than to destroy it.[11] Following *Verreault*,[12] it was held that a cabinet minister has the authority to bind the Crown unless his authority is restricted by statue. The letter was approved by the Cabinet and there was no statute applicable. Pratte J. dissented. It would appear that this majority decision is a borderline case.

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[5] (1983), 22 Sask. R. 161, [1983] 4 W.W.R. 577 (C.A.).
[6] *Supra*, note 4.
[7] (1984), 64 N.S.R. (2d) 379, 26 B.L.R. 193 (C.A.).
[8] (1986), 10 B.C.L.R. (2d) 325, 33 D.L.R. (4th) 405 (S.C.).
[9] (1856), 8 De G.M. & G. 99, 44 E.R. 327, 114 R.R. 48 (Ch.).
[10] (1985), [1986] 1 F.C. 129, 30 B.L.R. 236 (A.D.).
[11] (1931), 147 L.T. 503 at 514, [1932] All E.R. 494 at 503.
[12] *J.E. Verreault & Fils* v. *A.G. Quebec* (1975), [1977] 1 S.C.R. 41, 57 D.L.R. (3d) 403 [hereinafter *Verreault*].

B. Uncertainty

To have a valid contract, the parties must reach an agreement concerning certain terms, involving certain subject matter. When there is ambiguity or uncertainty, the courts will strive, wherever possible, to uphold the contract.[13] An example of this is *Wiebe* v. *Bobsien*,[14] a case involving an agreement for the purchase of property subject to the purchaser selling his own home by a certain date. The majority of the Court of Appeal considered the "subject to" clause to be sufficiently certain by implying the term that the purchaser would act in good faith and use all reasonable efforts to sell his home. Lambert J.A., dissenting, thought that the clause fell into the category of incurable uncertainty. What terms should be implied? What does the term "to make all reasonable efforts to sell the house" mean? Does it mean that he must sell at a price he can get, on the market, in the time allotted, or is he bound to sell only at a price he considers reasonable? The reasoning of the majority was followed in *Fraser* v. *Van Nus*.[15]

Contractual terms were held valid notwithstanding alleged uncertainty in *Sunshine Vacation*, a British Columbia Court of Appeal decision.[16] Sunshine Vacation entered into an agreement with the Bay to operate travel agencies in the Bay's stores. It was primarily interested in four large lower mainland stores, but began operations in six smaller regional stores. When Sunshine Vacation realized that the Bay would not make the large stores available, it closed the agencies in the Bay's stores altogether and sued for damages. The first issue was whether the agreement was invalid for uncertainty. The agreement provided that the licence to operate the agencies would commence "in the spring". Three other conditions were also alleged to be ambiguous. The Court of Appeal found the term "in the spring" to be sufficiently certain, as both parties had a fixed date in mind. As far as the other three conditions were concerned, while they may have been ambiguous in the abstract, Sunshine Vacation satisfied them in the operations at the six locations. The second issue concerned damages and is discussed under that heading.[17]

In *Morguard Bank of Canada* v. *Eagle Mgmt. Servs. Ltd.*,[18] an agreement to purchase property at a base price of 8.5 million dollars, to be adjusted up or down depending on "net income" at the end of the first year of operation, was held to unenforceable for uncertainty. It was unclear what the term "net income" meant. The Court will imply terms

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[13] *See generally* the last survey, note 1, *supra*.

[14] (1985), 64 B.C.L.R. 295, 20 D.L.R. (4th) 475 (C.A.), *leave to appeal denied* (1985), 64 N.R. 394 (S.C.C.).

[15] (1985), 67 B.C.L.R. 285, 22 D.L.R. (4th) 459 (C.A.).

[16] *Sunshine Vacation Villas Ltd.* v. *Governor and Co. of Adventurers of England Trading into Hudson's Bay* (1984), 58 B.C.L.R. 33, 13 D.L.R. (4th) 93 (C.A.) [hereinafter *Sunshine Vacation*].

[17] *Infra*, Part XII.

[18] (1985), 31 B.L.R. 183 (B.C.S.C.).

to give effect to the real intentions of the parties, but where these intentions are not clear, the Court will refuse to imply a term.

The principle that agreement to agree does not constitute an enforceable contract[19] was re-affirmed in two decisions at the appellate level. In *Angus Leitch & Assocs. Ltd.* v. *Legrand Indus. Ltd.*,[20] the parties signed a "letter of intention" to combine their resources in a company to be incorporated. The company was incorporated and commenced operations. When disagreements arose between the parties, one party left the company. The Court held that the letter of intent was not a binding agreement. The fundamental terms as to financing were ambiguous and the parties contemplated further agreements which never materialized although proposals were exchanged.

Boult Enterprises Ltd. v. *Bissett*[21] concerned a contract for the sale of land for subdivision by the defendant to the plaintiff, with a provision that the plaintiff would build a house for the defendant on one of the subdivided lots "at a price to be agreed". The defendant refused to complete the agreement, maintaining that it was unenforceable. The Court, applying *Canada Square Corp.* v. *VS Servs. Ltd.*,[22] held that there was a valid contract, although the provision dealing with the building of the house was an unenforceable agreement to agree. The contract was primarily for the sale of land for subdivision and the parties acted as though they had a valid agreement.

The identity of the other contractual parties was one of the issues before the Supreme Court of Canada in *Scotsburn Co-op. Servs. Ltd.* v. *W.T. Goodwin Ltd.*[23] The issue was decided on evidence and there are no principles of law involved. In the course of the judgment, the Supreme Court of Canada dealt with the question of whether the second appellate tribunal should review a first appellate tribunal's reversal of the finding of facts by a trial judge. Reference was made to the recent statement of the principle by Mr. Justice Lamer in *Beaudoin-Daigneault* v. *Richard*[24] to the effect that the second appellate tribunal will interfere with the judgment upon facts of the first appeal only where it is clearly satisfied that it is erroneous.[25]

C. Incomplete Agreements

Parties sometimes reach an agreement in general terms, but stipulate the execution of some further formal document or say that the agreement

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[19] *See May and Butcher Ltd.* v. *R.* (1929), [1934] 2 K.B. 17 (H.L.).

[20] (1983), 65 A.R. 232, 31 Alta. L.R. (2d) 158 (C.A.).

[21] (1985), 67 B.C.L.R. 273, 21 D.L.R. (4th) 730 (C.A.).

[22] (1981), 34 O.R. (2d) 250, 130 D.L.R. (3d) 205 (C.A.) [hereinafter *Canada Square*]. *See also supra*, note 1 at 601-02.

[23] (1985), [1985] 1 S.C.R. 54, 16 D.L.R. (4th) 161.

[24] (1984), [1984] 1 S.C.R. 2, 37 R.F.L. (2d) 225.

[25] For a commentary of this decision, *see* D. Vaver, *Developments in Contract Law: The 1984-85 Term* (1986) 8 SUP. CT. L. REV. 109 at 112.

they have reached is "subject to contract". The problem then is whether the agreement is too general to be valid in itself. Questions then arise as to whether the subsequent making of a formal contract is a condition precedent to a binding contract, or whether the parties have in fact completed their agreement and the execution of a formal contract is not required. These principles were laid down in *Von Hatzfeldt-Wildenburg* v. *Alexander*[26] and approved by the Supreme Court of Canada in *Calvan Consol. Oil & Gas Co.* v. *Manning*.[27]

In *Alta-West Group Invs. Ltd.* v. *Femco Fin. Corp.*,[28] both parties signed, after lengthy negotiations, a joint venture agreement for the sale and development of land. The agreement contained a final, unnumbered paragraph to the effect that it intended to set out in broad terms the manner of operations and that the parties would be required to enter into a formal agreement with the usual clauses, but that it was essential that in the meantime the basic ground rules be agreed upon. McFayden J., quoting from *Von Hatzfeldt- Wildenburg* and *Canada Square*, found that the parties intended and did enter into a binding agreement.[29] Read as a whole, the document itself contained no "subject to" provision, no condition precedent, merely an expression of desire to have the agreement reduced to a more formal document.

A modern version of the problem, consisting of exchange of a skeletal offer and acceptance by telex with a subsequent refusal to sign a detailed standard form contract, occurred in *Sandy Frank Film Syndication Inc.* v. *CFQC Broadcasting Ltd.*[30] After oral negotiations and an exchange of a brief written offer and its acceptance by telex, CFQC refused to sign a standard licensing agreement, which included an acceptance of a liability for import duties. Tallis J.A., speaking for the Court of Appeal, found that the oral consensus reached between the parties was formally confirmed by the exchange of a letter and telex and a binding contract then came into existence. Even if the payment of the import duties was a material term of the contract, it could be implied under the *Moorcock* doctrine[31] to give the agreement the necessary business efficacy. These two cases seem to indicate that, unless the agreement contains an unequivocal "subject to" clause, the courts will enforce it, especially where the agreement has been acted upon.

A stricter and more formal approach to "agreements to agree" in other common law jurisdictions is exemplified in *A.G. of Hong Kong* v.

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[26] (1911), [1912] 1 Ch. 284 at 288-89, [1911-13] All E.R. Rep. 148 at 151 [hereinafter *Von Hatzfeldt-Wildenburg*].

[27] (1959), [1959] S.C.R. 253, 17 D.L.R. (2d) 1.

[28] (1984), 57 A.R. 33, 34 Alta. L.R. (2d) 5 (Q.B.).

[29] *Ibid.* at 38, 42-43, 34 Alta. L.R. (2d) at 12, 18.

[30] (1983), [1983] 23 Sask. R. 241, 4 W.W.R. 360 (C.A.), *leave to appeal denied* (1984), 28 Sask. R. 240, 51 N.R. 319 (S.C.C.).

[31] *The Moorcock* (1889), 14 P.D. 64, [1886-90] All E.R. Rep. 530 (C.A.).

Humphreys Estate (Queen's Gardens) Ltd.[32] An agreement in principle, incorporating the clauses "without prejudice" and "subject to contract", was reached and substantially acted upon. Before the execution of the requisite documents, Humphreys Estate withdrew. The Judicial Committee held that it is possible, though unlikely, that a party to a document expressed to be "subject to contract" would be able to satisfy the court that the parties have converted the document into a contract or that some form of estoppel has arisen.

An interesting case, involving the issues of an incomplete agreement and promissory estoppel, is *Mentuck* v. *R.*.[33] Following on representations and arrangements made by a representative of the Ministry of Indian and Northern Affairs, a treaty Indian moved off the reserve and relocated his farming operation. The Crown refused to pay the promised relocation costs. The Court held that there was a completed contract, which was breached by the Crown, and also that the Crown gave promises or assurances on which the plaintiff relied and it would be unjust to allow the Crown to go back on its word.

The Court appears to have settled both issues by utilizing the principle of reasonable reliance:

> The expectation implicit in the offer or inducement and the reasonable reliance based thereon and consequent alteration of position served to bolster the concept of an enforceable agreement and dispel any illusion of a mere "agreement to agree".
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> . . .
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> In my view, the doctrine of promissory estoppel must be perceived as playing an important supplementary part in reinforcing the leading roles of expectation and reliance.[34]

The Court, further commenting on the sword/shield maxim,[35] indicated that it is far from settled whether promissory estoppel by itself is capable of constituting a cause of action. However, the judgment implies that the Court allowed it as a cause of action.[36]

The Court also held that the Crown is bound by contractual obligations, ordinary rules of agency and reasonable reliance in the same manner as an individual.

D. Agreement

It is commonplace that offer and acceptance must be sufficiently precise to indicate the assumption of contractual obligations and not be

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[32] (1986), [1987] 2 W.L.R. 343 (P.C.), *aff'g* the judgment of the Court of Appeal of Hong Kong.

[33] (1986), [1986] 3 F.C. 249, 3 F.T.R. 80 (T.D.).

[34] *Ibid.* at 268-69, 3 F.T.R. at 96-97.

[35] *See supra*, note 1 at 611-13.

[36] *Supra*, note 33 at 269, 3 F.T.R. at 97.

a mere statement of intentions or willingness to do business. *National Harbours Bd.* v. *Northern Sales Co.*[37] illustrates this. Northern Sales applied in July for a grain storage permit for October, but the National Harbour Board refused to issue the permit so far in advance and advised that the application be made within twenty-one days of the actual loading of the vessel. Following the ensuing discussion, the Board sent a telex stating that the Board would issue a permit and asking when the shipping was expected to commence. There were no subsequent communications and, in October, the Board refused to issue a permit due to unusual congestion in the port. The Court of Appeal held that the telex was not a blanket undertaking to accept cargo whenever and in whatever quantity it arrived. At best, it was an undertaking to accept the cargo when the required particulars were supplied.

Revocability of an "irrevocable option" was dealt with in *Wareham* v. *Steele*.[38] Both parties were directors of a company and wanted to purchase additional shares in the company that became available. As the plaintiff was short of funds, they agreed that the defendant would purchase the available shares in his own name and give the plaintiff an option to buy half. The defendant also lent the plaintiff money to purchase other shares and received an option to buy one half of these shares. The option agreement was expressly irrevocable, but was not under seal and no consideration was indicated. The Court held that the option agreement was a mere offer by the defendant to the plaintiff to sell certain shares. There was no obligation placed upon the plaintiff to buy the shares and there was no benefit accruing to the defendant. The two cross options did not constitute consideration for each other. As there was no consideration or seal, the "option" was a mere offer and thus revocable at any time by the offeror, notwithstanding that it was expressly irrevocable.

The issues of a prescribed mode of acceptance and of applicability of instantaneous communication were addressed by the Saskatchewan Court of Appeal in *Humble Invs. Ltd.* v. *N.M. Skalbania Ltd.*[39] If the offeror wishes that a particular mode of acceptance be followed, this must be made clear to the offeree. The mere fact that the offer is in writing does not mean that the acceptance must be in writing. Regarding instantaneous communications, Tallis J.A., quoting extensively from *Brinkibon Ltd.* v. *Stahag Stahl G.m.b.H.*,[40] stated: "In this age of extensive national and international transactions, there is much to be said for prompt communications which may, for example, alleviate the potential hazards of the 'postal rule' with respect to acceptance."[41]

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[37] (1984), 29 Man. R. (2d) 248 (C.A.), *leave to appeal denied* (1985), 32 Man. R. (2d) 160 (S.C.C.).

[38] (1985), 162 A.P.R. 59, 30 B.L.R. 299 (Nfld. C.A.).

[39] (1983), 22 Sask. R. 81 (C.A.), *leave to appeal denied* (1983) 24 Sask. R. 240, 50 N.R. 79 (S.C.C.).

[40] (1982), [1982] 2 W.L.R. 264, [1982] 1 All E.R. 293 (H.L.).

[41] *Supra*, note 39 at 90.

The issues of mode of communication and whether there was an effective communication of acceptance divided the Ontario Court of Appeal in *Lanca Contracting Ltd.* v. *Brant County Bd. of Educ.*[42] Lanca submitted a tender to the Board to build a school. The president of Lanca was present at the Board meeting when a resolution accepting the bid was passed. His presence was known to the Chairman and several members of the Board and, after the meeting, the Chairman approached him and said "Build us a good school". Some officers of the Board and the architect also spoke to him after the conclusion of the meeting. Two days later, because of financial problems, the Board rescinded the resolution accepting the bid.

Cory J.A., speaking for the majority, first dealt with the mode of acceptance. Although the tender was required to be in writing, the conditions did not state that the written notice of the acceptance *must*[43] be given to the successful tenderer. It has been held that even if written communication is prescribed, but not in terms insisting that this is the only valid method of acceptance, communication by any other mode not less advantageous to the offeror is sufficient.[44] Cory J.A. considered that to be an eminently reasonable approach to the notice requirement, fair to both the offeror and the offeree. Mr. Justice Cory then addressed the question of communication. In his view, the Chairman of the Board was clearly a person authorized to give notice of the Board's acceptance. Zuber J.A. stated in his dissenting opinion that the Board at no time communicated its acceptance. By passing the resolution, the Board was simply making up its corporate mind and the words of the Chairman fell short of being a communication. Communication is a necessary part of acceptance. It involves more than the offeror learning that the other party decided to take up the offer. The offeree must communicate to the offeror. Zuber J.A. thus draws a clear distinction between the act of acceptance and the communication of that fact.

The "mailbox doctrine" provides that a contract is made when and where the letter of acceptance is posted, providing that the Post Office is the accepted means of communication.[45] This doctrine has been extended to apply to courier services in *Nova Scotia* v. *Weymouth Sea Prods. Ltd.*[46] The Court of Appeal stated that the extension of the mailbox doctrine to a courier service is sound in principle and quoted the trial Judge's view that in Canada today an increasing amount of correspon-

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[42] (1986), 54 O.R. (2d) 414, 26 D.L.R. (4th) 708 (C.A.).

[43] *Ibid.* at 420, 26 D.L.R. (4th) at 714.

[44] *Per* Buckley J. in *Manchester Diocesan Council for Educ.* v. *Commercial & Gen. Invs. Ltd.* (1969), [1970] 1 W.L.R. 241 at 246, [1969] 3 All E.R. 1593 at 1597-98 (Ch.D.).

[45] *Compare Entores, Ltd.* v. *Miles Far East Corp.* (1955), [1955] 3 W.L.R. 48, [1955] 2 All E.R. 493 (C.A.); *Brinkibon Ltd.* v. *Stahag Stall G.m.b.H.*, *supra*, note 40.

[46] (1983), 61 N.S.R. (2d) 410, (*sub nom. R.* v. *Commercial Credit Corp.*) 4 D.L.R. (4th) 314 (C.A.), *aff'g* (1983) 59 N.S.R. (2d) 181, 149 D.L.R. (3d) 637 (S.C.).

dence is conducted by courier due to the unreliability of the Post Office. The mailbox doctrine should equally apply where correspondence is conducted by courier.

III. PROMISSORY ESTOPPEL

To successfully raise the defence of promissory estoppel, there must be an unequivocal promise or assurance that the promisor will not insist on the strict performance of his legal rights, the promisee must act on that promise and it must be inequitable for the promisor to go back on his promise. The requirement that there must be a clear and unequivocal assurance by one party to the other by words or conduct, intended to affect the legal relations between them, was highlighted by the Supreme Court of Canada in *Engineered Homes Ltd.* v. *Mason*.[47] McIntyre J., delivering the judgment of the Court, quoted *Halsbury's Laws of England*[48] and the judgment of Lord Denning in *Combe* v. *Combe*[49] to that effect. Having reviewed the evidence, McIntyre J. agreed with the trial Judge who did not find any promise and overturned the judgment of the majority of the Court of Appeal, which had found a promise. The case illustrates how sometimes diametrically opposed conclusions may be drawn from the actions of the parties.

Clear and unequivocal promise is one of the issues considered by the English Court of Appeal in *Scandinavian Trading Tanker Co. AB* v. *Flota Petrolera Ecuatoriana*.[50] Under a charterparty, failure by the charterers to make monthly payments on a fixed date entitled the owners to terminate the agreement. On previous occasions payments had been accepted when overdue up to three days. The dispute arose when, with the charterers four days late, the owners sent notice of the withdrawal of the ship. The Court, referring to *Hughes* v. *Metropolitan Ry. Co.*,[51] stated that it would have to be unequivocally demonstrated that the owners would not insist on their strict legal rights and also that it would be inequitable to allow them to go back on their promise. These conditions were not met in this case, especially as the conduct of the owners did not induce the charterers to make late payments. The judgment was affirmed by the House of Lords[52] on different grounds. Their Lordships further stated that where two parties with equal bargaining positions choose to make time of the essence, then failure to comply constitutes a breach of condition entitling the other party to treat the contract as at

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[47] (1983), [1983] 1 S.C.R. 641, 51 B.C.L.R. 273.

[48] 4th ed., vol. 16 (London: Butterworths, 1976) at ¶1514, *cited ibid.* at 646, 51 B.C.L.R. at 277.

[49] (1951), [1951] 2 K.B. 215, [1951] 1 All E.R. 767 (C.A), *cited supra*, note 47 at 647, 51 B.C.L.R. at 277.

[50] (1982), [1983] 2 W.L.R. 248, [1983] 1 All E.R. 301 (C.A.).

[51] (1877), [1876-77] A.C. 439, [1874-80] All E.R. 187 (H.L.).

[52] (1983), [1983] 3 W.L.R. 203, [1983] 3 All E.R. 763 (H.L.).

an end. It may be observed that a stipulation as to time was treated as a condition by implication in *Bunge Corp.* v. *Tradex S.A.*[53]

Several aspects of the defence of promissory estoppel were briefly dealt with in *Edwards* v. *Harris-Intertype (Canada) Ltd.*[54] Tarnopolsky J.A., speaking for the Court, first stated that it was unnecessary to decide whether promissory estoppel can provide the basis for an action where none existed before,[55] because of the trial Judge's finding that an appellant did not alter its position to its detriment. Furthermore, the extension of time requested was granted as a result of the concealment of a refusal of a previous request for an extension. One who seeks the aid of equity must come with clean hands.

IV. Form

A. *Contracts Under Seal*

The effect of the unauthorized addition of a seal to a document was considered in *Petro Canada Exploration Inc.* v. *Tormac Transp. Ltd.*[56]

Three individuals had signed guarantees in respect of their company's indebtedness to the plaintiff, which contained the words "If Individual Do Not Seal". Subsequently, the representative of the plaintiff affixed red wafer seals to the documents. Taylor J., having reviewed the precedents, held that the addition of the seals altered the legal effect of the documents and that this constituted material alteration. A person who effects unauthorized material alteration is deemed in law to have obliterated the whole document and rendered it void as against any party who could have been prejudiced by the alteration. Taylor J. distinguished cases where the late addition of a formal seal has been held not to materially alter the document. In those cases, the documents were clearly executed with the intention that they were to be under seal.

B. *Statute of Frauds*

The antiquated *Statute of Frauds*, passed in its original form during the reign of Charles II,[57] continues to be a source of unnecessary litigation.

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[53] (1979), [1981] 1 W.L.R. 711, [1981] 2 All E.R. 513 (C.A.). *See also supra*, note 1 at 617-19.

[54] (1984), 46 O.R. (2d) 286, 9 D.L.R. (4th) 319 (C.A.), *aff'g* (1983), 40 O.R. (2d) 558 (H.C.J.).

[55] For a discussion of the sword/shield distinction, *see supra*, note 1 at 611-12; *supra*, note 33 at 262, 3 F.T.R. at 93.

[56] (1983), 44 B.C.L.R. 220, 23 B.L.R. 1 (S.C.).

[57] *The Statute of Frauds (U.K)*, 29 Car. 2, c. 3, for criticism and reform, *see* G.H.L. Fridman, THE LAW OF CONTRACT IN CANADA, 2d ed. (Toronto: Carswell, 1986) at 190-91, 219-21.

The enforceability of an oral guarantee has been an issue in numerous cases. In *Travel Mach. Ltd.* v. *Madore*,[58] Mrs. Madore, an employee of a travel agency, made a sale on credit contrary to usual policies. She gave a personal oral guarantee of the payments of the debt. The debtor defaulted and the Small Claims Court Judge gave judgment for the plaintiff travel agency against the guarantor, Mrs. Madore. On appeal, the High Court held that, although a Small Claims Court judge is empowered by the *Small Claims Court Act*[59] to make such an order "as appears to him just and agreeable to equity and good conscience", he is nonetheless bound to give effect to any applicable statutes and rules of law. On the issue of the validity of the oral guarantee, the Court held, applying *Sutton & Co.* v. *Grey*[60] and *Harburg India Rubber Comb Co.* v. *Martin*,[61] that where the guarantee is merely incidental to a larger contract and not the sole object of the parties to the transaction, it is outside the *Statute of Frauds* and need not be evidenced in writing. Here the main object of the transaction was the sale of travel services. The oral guarantees were merely incidental to this sale and were made in relation to Mrs. Madore's employment.

In *Talisman Projects Inc.* v. *Sunnymede Agrico Ltd.*[62] this exception from the Statute was held to be inapplicable on two grounds. First, the fact that a president and sole shareholder of a company may have a motive to guarantee its debt is not sufficient to take the case out of the Statute. The president had no other interest in the dealings except as a guarantor. Second, the exception was formulated on the wording of section 4 of the original Statute, which refers to "special promise". The now repealed section 4 of British Columbia's *Statute of Frauds* reads: "A guarantee or indemnity is not enforceable. . . ."[63] This change in wording, referring to a broad concept of a guarantee and not to a special promise, rendered the old cases inapplicable.

Abernethy Credit Union Ltd. v. *Flavel*[64] is another guarantee case. The first issue was whether a contract of a guarantee which did not contain the name of the principal debtor constituted a sufficient memorandum. There was, however, another letter from the guarantor to the creditor. The Court, quoting CHESHIRE AND FIFOOT'S LAW OF CONTRACT[65] and case law, held that the two documents read together constituted a sufficient memorandum. There was also an ambiguity as to the amount of the debt. The Court held that while the complete omission of the

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[58] (1983), 143 D.L.R. (3d) 94 (Ont. H.C.).

[59] R.S.O. 1980, c. 476, s. 57.

[60] (1894), [1894] 1 Q.B. 285, [1894] L.J.Q.B. 633 (C.A.).

[61] (1902), [1902] 1 K.B. 778, [1902] L.J.K.B. 529 (C.A.).

[62] (1984), 55 B.C.L.R. 393 (S.C.).

[63] R.S.B.C. 1979, c. 393, *as rep. Law Reform Amendment Act, 1985*, S.B.C. 1985, c. 10, s. 8.

[64] (1983), 25 Sask. R. 310 (Q.B.).

[65] M.P. Furmston, CHESHIRE & FIFOOT'S LAW OF CONTRACT, 10th ed. (London: Butterworths, 1981) at 189-90.

amount would not be curable, a mere ambiguity may be resolved by admission of extrinsic evidence.

The doctrine of part performance was extensively reviewed in *Lensen* v. *Lensen*.[66] Under this equitable doctrine the Court will, in certain circumstances, allow a contract dealing with an interest in land, even though of a kind required to be evidenced in writing by the Statute, to be proved by oral evidence, where the party seeking to enforce the contract had done acts in performance of it. The original strict requirement, formulated in *Maddison* v. *Alderson*,[67] that the acts of performance relied upon must be such as to be not only referable to a contract such as alleged, but be referable to no other title, was relaxed in *Kingswood Estate Co.* v. *Anderson*,[68] which required only that the acts of performance must suggest the existence of the contract alleged.

This change in requirements over a period of eighty years was undoubtedly caused by an increased inclination by the courts to give effect to the intentions of the parties rather than to frustrate these intentions by strict adherence to formal requirements. Further liberalization occurred in the landmark decision of the House of Lords in *Steadman* v. *Steadman*.[69] The reasoning of that decision could be summarized as follows:

— The requirement that the acts of part performance must "unequivocally" indicate the existence of a contract do not mean that they must so indicate beyond a reasonable doubt. The test is the normal civil standard of the balance of probabilities.
— The acts must prove the existence of *some* contract, as well as be consistent with the contract alleged.
— Lord Reid and Viscount Dilhorne were of the view that the contract need not be one relating in whole or in part to land.
— The mere payment of money may constitute part performance.

The Canadian cases have vacillated between the narrow interpretation applied in *Maddison* v. *Alderson* and the broad one in *Kingswood Estate Co.* v. *Anderson*. The Supreme Court of Canada has not reexamined the rule following the recent decision in *Steadman*. The thorough and scholarly examination of the Saskatchewan Court of Appeal in *Lensen* is therefore welcome.

The facts in *Lensen* involved an oral contract for the sale of a family farm by a father to his son. The son had been in exclusive possession of the farm for many years and had made substantial improvements. Tallis J.A., delivering the judgment of the Court, found the oral agreement of sale to have been proven on the balance of probabilities. In relation to the acts of part performance, the Court, having extensively canvassed

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[66] (1984), 35 Sask. R. 48, 14 D.L.R. (4th) 611 (C.A.) [hereinafter *Lensen*].
[67] (1883), 8 App. Cas. 467, [1881-85] All E.R. Rep. 742 (H.L.).
[68] (1962), [1963] 2 Q.B. 169, [1962] 3 All E.R. 594 (C.A.).
[69] (1974), [1974] 3 W.L.R. 56, [1974] 2 All E.R. 977 (H.L.) [hereinafter *Steadman*].

English and Canadian cases, came to the conclusion that "[i]f the acts relied upon are 'unequivocally referable in their own nature to *some* dealing with the land', the requisite test is met".[70]

The Court further rejected the so-called "contractually bound" or "obligatory" test in respect of acts of part performance. The test is based on the statement by Fry that for acts to amount to part performance they must be obligatory and done under the terms of the agreement.[71] This test was rejected by the Supreme Court of Canada in *Brownscombe* v. *Public Trustee of Alberta*[72] and by implication in *Thompson* v. *Guaranty Trust Co. of Canada*.[73] Applying these principles, Tallis J.A. formed the opinion that the acts of the son, in effecting substantial improvements and foregoing the opportunity to purchase other parcels of land, could only be referable to a contract of purchase and not to some other arrangement, such as tenancy.

The *Steadman* decision was applied and referred to as the leading authority on the subject in the British Columbia Court of Appeal decision in *Currie* v. *Thomas*.[74] Vendor and purchaser went to a lawyer's office to enter into an agreement for a sale of land. The secretary took notes of the terms of the agreement and the purchaser gave the vendor a cheque for the deposit, which was cashed. Before the lawyer finalized the agreement, the vendor died and the executor invoked the Statute. The Court held that the notes of the secretary together with the cashed deposit cheque constituted a sufficient memorandum for the Statute. In any case, the payment of the deposit and the retaining of the solicitor were acts similar in their nature to acts found in *Steadman* to constitute part performance. It would appear that, as a result of the two preceding appellate court judgments, the principles of *Steadman* are now well established in Canadian jurisprudence.

Surprisingly, *Steadman* was not even mentioned in the 1986 Manitoba Queen's Bench judgment of *Pople* v. *Cowan Estate*,[75] and neither was *Lensen* or *Currie* v. *Thomas*, both appellate decisions. In *Pople*, the plaintiff worked on the testator's farm under an alleged oral agreement that he would receive the farm under a will. The testator in fact executed three subsequent wills in which the plaintiff was designated as a beneficiary, but he revoked the last will and left the farm to his relatives. The Court held that, although a revoked will may be a sufficient memorandum for the purposes of the *Statute of Frauds*, it was not so in this case. Further, the Court held that the alleged parol agreement had not been proven and that the acts of the plaintiff were not done in part performance

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[70] *Supra*, note 66 at 60, 14 D.L.R. (4th) at 626.

[71] E. Fry, SPECIFIC PERFORMANCE OF CONTRACTS, 6th ed. by G.R. Northcote (Toronto: Carswell, 1921) at 284.

[72] (1969), [1969] S.C.R. 658, 68 W.W.R. 483.

[73] (1973), [1974] S.C.R. 1024, [1973] 6 W.W.R. 746.

[74] (1985), 19 D.L.R. (4th) 594 (B.C.C.A.).

[75] (1986), 39 Man. R. (2d) 136 (Q.B.) [hereinafter *Pople*].

of, nor were they clearly and equivocally referable to, the alleged agreement.

V. MISTAKE

A. *Mistake of Law*

Mistake of law in a matrimonial property agreement was the subject of *Hall* v. *Hall*.[76] A husband and wife entered into a separation agreement in the mistaken belief that certain shares held by the husband were not subject to division pursuant to matrimonial property legislation. The Court found that both parties were mistaken at law as to their rights and that this constituted a common mistake of law which does not vitiate a contract. Where in fact a law exists but the parties are not aware of its extent or application, it is a mistake of law. The Court distinguished *George (Porky) Jacobs Enterprises Ltd.* v. *City of Regina*[77] where it was held that a mistake as to the existence of a law is a mistake of fact. Cameron J.A. queried whether general principles of mistake should apply to matrimonial property contracts:

> it may be that the balance between fairness on the one hand and certainty on the other, struck by the common law doctrines of mistake of contract, may not . . . apply to matrimonial property contracts. Contracts of this nature may not necessarily stand on the same footing as commercial contracts and thus attract the same principles of law relative to mistake. I express no opinion about that, but it is a matter I would prefer to leave open.[78]

B. *Mistake in Tenders*

The state of Canadian law as to the effect of a mistake in a tender has been a matter of some confusion since the Supreme Court of Canada decision in *R.* v. *Ron Eng'r & Constr. (Eastern) Ltd.*[79] This confusion is reflected in two subsequent decisions.

The traditional rule, based on *Smith* v. *Hughes*,[80] is that a tender is an offer and that a mistake in the terms of the offer, as opposed to mistake in motivation or assumptions underlying the offer, which is known to the offeree, prevents the acceptance of the bid and the formation of a valid contract. This traditional distinction between mistake in terms and mistake in assumption has been departed from in the Ontario Court of

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[76] (1986), 30 D.L.R. (4th) 134, [1986] 5 W.W.R. 425 (Sask. C.A.).

[77] (1964), [1964] S.C.R. 326, 47 W.W.R. 305.

[78] *Supra*, note 76 at 138, [1986] 5 W.W.R. at 429.

[79] (1981), [1981] 1 S.C.R. 111, 119 D.L.R. (3d) 267 [hereinafter *Ron Eng'r*]. *See also supra*, note 1.

[80] (1871), [1871] 6 Q.B. 597, [1871] L.J.Q.B. 221, and *see* A.G. Guest, ed., ANSON'S LAW OF CONTRACT, 25th ed. (Oxford: Clarendon Press, 1979) at 302.

Appeal decision in *Belle River Community Arena Inc.* v. *W.J.C. Kaufman Co.*[81] There the Court stated that the offeree cannot accept an offer that he knows contains a mistake as to a fundamental term of the contract. The Court considered a mistake in assumptions as a mistake in fundamental terms.

The position was complicated by a two contract theory expounded by Estey J. in *Ron Eng'r.* According to this theory, a call for tender is an offer and the submission of a tender is the acceptance of that offer whereupon a unilateral contract (Contract A) comes into existence. If the tender is accepted, a second contract, dealing with the performance of the work tendered for, is established (Contract B). Contract A concerns the formalities of the tendering process, such as provisions dealing with irrevocability and forfeiture of deposit. Contract B governs the substantive agreement as to work to be performed. If there is a mistake in the tender, such as a mistake in price quotation, this mistake does not affect Contract A. Consequently, when there are provisions in the call for tender as to irrevocability of the tender and forfeiture of deposit, a mistaken tender cannot be withdrawn and if the mistaken bidder refuses to enter into Contract B on acceptance of his tender, a deposit will be forfeited. The Supreme Court of Canada did not have to deal in its judgment with the effect of mistake on Contract B.

Estey J.'s analysis was applied by the Alberta Court of Appeal in *City of Calgary* v. *Northen Constr. Co.*[82] On facts very similar to those in *Ron Eng'r*, Northern Construction submitted a tender which, as a result of a clerical error not apparent on the face of it, was understated by a substantial sum. The call for tenders contained a provisions that the tenders were irrevocable after opening. The error was discovered after the opening but before the formal acceptance and Northern immediately notified Calgary, which refused any adjustment. Nothern's tender was the lowest and when Northern refused to execute the substantive contract, Calgary awarded the contract to the second lowest bidder and sued Northern for the difference.

The trial Judge distinguished *Ron Eng'r* on two grounds. First, unlike the situation in *Ron Eng'r*, the second contract, the construction contract, came into existence and its validity had to be considered. Second, the provision for a forfeiture of the deposit was applicable only if the contractor attempted to withdraw its tender and no withdrawal occurred. The Judge applied the *Belle River* reasoning, as in his view there was a fundamental mistake in the tender and Calgary knew of it. He was of the opinion that *Belle River* was not overruled by the Supreme Court of Canada. The Court of Appeal allowed the appeal, holding that the second contract, Contract B, never came into existence and the first contract, Contract A, was not affected by any mistake. Under Contract

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[81] (1978), 20 O.R. (2d) 447, 87 D.L.R. (3d) 761 (C.A.) [hereinafter *Belle River*].

[82] (1985), [1986] 2 W.W.R. 426, 42 Alta. L.R. (2d) 1 (C.A.), *rev'g* (1982) 23 Alta. L.R. (2d) 338 (Q.B.).

A, the selected party was obliged to enter into the construction contract (Contract B) and failure to do so constituted a breach of Contract A, entitling Calgary to select another bidder and sue for the difference.

The second issue was that of damages. As the plaintiff sued for liquidated damages, a question arose as to whether the clause was a penalty. Without deciding that question, the Court of Appeal followed the *dicta* of Dickson J. (as he then was) in *Elsely* v. *J.G. Collins Ins. Agencies Ltd.*[83] that the power to strike down a penalty clause is a blatant interference with freedom of contract, and the only justification of such interference is to provide relief against oppression. Where there is no oppression, the remedy is inappropriate. In the case at bar, the amount claimed was in fact a fair estimate of the damage suffered.

Ron Eng'r and *Calgary* v. *Northern Constr. Co.* were applied by the Alberta Court of Appeal in *Northern Constr. Co.* v. *Gloge Heating & Plumbing Ltd.*[84] Northern intended to bid for a government job and called for tenders from subcontractors. Gloge submitted a telephone bid which Northern used in preparing its own tender. Gloge knew that its bid had been relied upon by Northern. After Northern's tender had been accepted, Gloge refused to sign a contract with Northern, claiming mistake. Irving J.A., in a brief oral judgment, quoted Estey J. in *Ron Eng'r*, emphasizing industry practice and the necessity of maintaining the integrity of the holding system. He held that Gloge could not withdraw its tender to Northern after tenders by main closed and its tender was irrevocable for the same period as Northern's tender.[85]

C. Rectification

The grounds on which rectification of a written document will be granted were canvassed in *United Grain Growers Ltd.* v. *Agri-Builders (Regina) Ltd.*[86] The plaintiffs had given a contract to the defendants to construct grain bins. The contract contained, *inter alia*, provisions requiring the defendants to insure the work in progress. The defendants signed the standard construction contract without reading it, although they knew that it contained clauses affecting their legal obligations. The bins were damaged in a windstorm.

In an action for damages by the plaintiffs, the defendants asked for rectification on the grounds that the contract did not represent the intentions of the parties. Scheibel J. of the Court of Queen's Bench refused rectification. Quoting from the judgments in *Frederick E. Rose (London)*

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[83] (1978), [1978] 2 S.C.R. 916 at 937, 3 B.L.R. 183 at 202.

[84] (1986), [1986] 2 W.W.R. 649, 42 Alta. L.R. (2d) 326 (C.A.).

[85] *Compare* N. Rafferty, *Mistaken Tenders: An Examination of the Recent Case Law* (1985) 23 ALTA. L. REV. 491, written prior to the appellate decisions discussed.

[86] (1982), 18 Sask. R. 316 (Q.B.), *aff'd* (1984), 33 Sask. R. 241 (C.A.).

Ltd. v. *Wm. H. Pim, Jr. & Co.*[87] and *Bercovici* v. *Palmer*,[88] he reiterated that, as "[r]ectification is concerned with contracts and documents, not with intentions", there must be clear, unambiguous evidence that there was a mistake in putting down the party's intentions. The mistake must be mutual. Unilateral mistake will warrant rectification only in very exceptional circumstances amounting to fraud or fraudulent misrepresentation.[89] On the evidence, there was no mutual mistake or improper conduct.

The Judge also dealt briefly with the effect of signing a contract without reading it. He referred to *Gallie* v. *Lee*[90] and *L'Estrange* v. *F. Graucob, Ltd.*[91] and held that, in the absence of fraud or misrepresentation, a person who chooses not to read a contract before signing it is nonetheless bound by it. *Conkin* v. *Konschuh*[92] is a case where such common mistake existed. Another case in which rectification based on mutual mistake was granted is *United Mine Workers of America, Local 7297* v. *Canmore Mines Ltd.*[93] In that case, the Court would also have granted rectification based on unilateral mistake, because of the improper conduct of the defendants, even though the Court was not prepared to hold the conduct fraudulent.

A claim for rectification in somewhat unusual circumstances was allowed in *Storozuk Family Holdings Ltd.* v. *Boulevard Mach. Ltd.*[94] The error to be rectified consisted of the omission of an important clause in a lease agreement between the plaintiff and the defendant, although the same term was incorporated in an agreement of sale between the plaintiff and a second company, which was closely associated with the defendant. The president, directors and major shareholder of the two companies, who exercised effective control, signed both agreements. The Court viewed both agreements as part of a single transaction and allowed rectification against the defendant. The president who signed the lease for the defendant company could not hide behind the corporate veil, as all parties intended to be bound by the principal agreement of sale.

Rectification and its relationship with the parol evidence rule were examined in *Chant* v. *Infinitum Growth Fund Inc.*[95] Mr. and Mrs. Chant executed a mortgage and a guarantee to secure a loan to their company by Infinitum. There was an oral understanding that the guarantee was a

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[87] (1953), [1953] 2 Q.B. 450, [1953] 3 W.L.R. 497, [1953] 2 All E.R. 739 (C.A.).

[88] (1966), 59 D.L.R. (2d) 513, 58 W.W.R. 111 (Sask. C.A.).

[89] *Supra*, note 86 at 322-24 (Q.B.).

[90] (1969), [1969] 2 Ch. 17, [1969] 1 All E.R. 1062 (C.A.), *aff'd* (*sub nom. Saunders* v. *Anglia Bldg. Soc'y*) (1970), [1971] A.C. 1004, [1970] 3 All E.R. 961 (H.L.) [hereinafter *Saunders*].

[91] (1934), [1934] 2 K.B. 394, [1934] All E.R. Rep. 16 (Div. Ct.).

[92] (1984), 54 A.R. 326 (Q.B.).

[93] (1985), 36 Alta. L.R. (2d) 423, 28 B.L.R. 250 (Q.B.).

[94] (1985), 39 Man. R. (2d) 293 (C.A.).

[95] (1986), 55 O.R. (2d) 366, 28 D.L.R. (4th) 577 (C.A.).

"formality" and would "never be called". The trial Judge admitted the parol evidence and allowed rectification as the guarantee did not correctly set out the terms of the agreement between the parties. Robins J.A., delivering the judgment of the Court, did not disturb the trial Judge's finding of facts, as they were based on credibility, but overruled his judgment on legal grounds. He held that, while parol evidence is inadmissible to vary or contradict a written agreement, it may be admitted to rectify it. He then referred to the equitable principle underlying the doctrine of rectification,[96] as expressed by Brooke J.A. in *H.F. Clarke Ltd.* v. *Thermidaire Corp.*:

> When may the Court exercise its jurisdiction to grant rectification? In order for a party to succeed on a plea of rectification, he must satisfy the Court that the parties, all of them, were in complete agreement as to the terms of their contract but wrote them down incorrectly. It is not a question of the Court being asked to speculate about the parties' intention, but rather to make an inquiry to determine whether the written agreement properly records the intention of the parties as clearly revealed in their prior agreement.[97]

Robins J.A. found on the facts of the case that the guarantees were properly drawn. Since there was no suggestion of any omission or mistake, rectification was not an appropriate remedy. The parol evidence clearly varied, contradicted or added to the written guarantee and was therefore inadmissible.

D. Non est Factum

The Supreme Court of Canada judgment in *Marvco Color Research Ltd.* v. *Harris*,[98] which adopted the principles governing the defence of *non est factum* laid down in *Suanders*,[99] was followed in a number of cases. The interesting feature of these cases is that they examine the interrelationship of *non est factum* with mistake, misrepresentation, unconscionability and rescission.

Araki v. *Wlodyka*[100] deals with *non est factum* and common mistake. Plaintiff and defendant were involved in a car accident. The defendant, a lawyer, agreed to pay for all the damage to the plaintiff's car and subsequently the plaintiff signed a release from all claims arising from the accident. At the time of signing of the release, there was no sign of personal injury, although it did become apparent subsequently. Following the *Marvco* case, the Court found that the document signed was fundamentally different from what the plaintiff thought she was signing.

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[96] *Ibid.* at 369, 28 D.L.R. (4th) at 580.

[97] (1973), [1973] 2 O.R. 57 at 64-65, 33 D.L.R. (3d) 13 at 20-21, *rev'd on other grounds* (1974), [1976] 1 S.C.R. 319, 54 D.L.R. (3d) 385.

[98] (1982), [1982] 2 S.C.R. 774, 141 D.L.R. (3d) 577 [hereinafter *Marvco*].

[99] *Supra*, note 90. *See also supra*, note 1 at 614-17.

[100] (1983), [1983] 5 W.W.R. 360 (B.C.S.C.).

However, the Court found that she had been careless in signing the document in that she had not taken reasonable precautions. She had not read the document or asked any questions, and a signor is not generally entitled to rely on someone to ensure that the document represents the signor's intentions. Consequently, the plea of *non est factum* did not succeed.

Ruttan J. then considered the plea of common mistake. He stated that the doctrine of common mistake is similar to *non est factum* in that there has been some fundamental error relating to the subject matter of the contract. But, whereas in *non est factum* the mistake may be the signor's alone, in common mistake the same error is shared by both parties. While in most circumstances it is acceptable to include terms covering situations that neither party envisages will arise, here both parties thought there were no injuries resulting from the accident and the release was signed under a common mistake as to the non-existence of personal injuries.

Caisse Populaire de Ste-Anne du Madawaska Ltee v. *Cormier*[101] deals with the application of *non est factum* to negotiable instruments. The judgment was given shortly after *Marvco* and it contains extensive quotations from Estey J.'s judgment in that case. It reaffirms the qualification of the general rule with respect to negotiable instruments that if the document signed is a bill of exchange and the signor intended to sign a bill of exchange, the plea of *non est factum* is not available even though there has been no negligence. Thus, in relation to negotiable instruments, the plea of *non est factum* will succeed only where a signor signs a bill of exchange believing it to be a fundamentally different document. In the case at bar the plea did not succeed as the signor knew she was signing a bill of exchange. Futhermore, the Court found negligence on the part of the signor.

The Court drew a further distinction between *non est factum* and fraud or mistake, the former making a document void *ab initio*, whereas fraud or mistake renders a document voidable at the instance of the defrauded or mistaken party. In the present case, the defendant was induced into unilateral mistake by the plaintiff's representations as to the nature of the endorsement and, for this reason, the defendant was not liable on the endorsement. Although unilateral mistake was not specifically pleaded, the Court held that that defence was basically contained in the defence of *non est factum*.

Beaulieu v. *National Bank of Canada*[102] involves *non est factum*, misrepresentation and the equitable remedy of rescission. Mr. and Mrs. Beaulieu signed collateral mortgages and guarantees as security for bank loans to their father's company on the understanding that they would terminate when a government loan was advanced. This understanding

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[101] (1983), 53 N.B.R. (2d) 1, 138 A.P.R. 1 (Q.B.).
[102] (1984), 55 N.B.R. (2d) 154, 144 A.P.R. 154 (C.A.).

proved incorrect. The Court disallowed the plea of *non est factum* as the documents signed were not fundamentally different from those which the parties intended to sign and the parties had been careless in not reading them. The treatment of misrepresentation is unclear. Although the Court stated that different considerations apply to misrepresentations, it appears that this plea was also rejected on the ground that the documents signed were not fundamentally or radically different. The Court also considered the equitable remedy of rescission on the grounds of unconscionability, even though this remedy was not pleaded. There were no sufficient reasons to conclude that the transactions were unfair, inequitable or improper so as to warrant rescission.

The effects of ignorance of language and illiteracy on the plea of *non est factum* were considered in *Royal Bank of Canada* v. *Gill*.[103] A father, who could not read, write or speak English signed a guarantee to secure a bank loan for his son. The son accompanied the father to the bank where, at the son's request, the father signed the document. The son did not read or explain the document to his father. On the petition against the deceased father's estate, the Court held that *non est factum* was not available. Illiterates, like all other persons, come within the general principle of *non est factum*. In this case, the father was careless in not obtaining explanations from his son as to what he was signing, as he knew that he was signing a document of some commercial significance.

Carelessness in signing a document without understanding its content was not considered in *Garcia* v. *Garcia*.[104] The parents, who spoke little English, transferred the title to the matrimonial home to their son at his request. He told them that it had to be done and they accepted his word. The lawyer did not explain the nature of the transaction. The Court, in a short judgment on the issue, held that the doctrine of *non est factum* certainly applies where a person is ignorant of the English language and does not understand the nature of the transaction. It is difficult to understand why the issue of carelessness was never raised, as the parents, who had come to Canada in 1972, had bought and sold several properties in both Portugal and Canada previously. The Court held further that in any event the transfer failed for lack of consideration, as the consideration of one dollar was never paid.

The plea of *non est factum* was not allowed due to the carelessness of the signing party in both *Co-operative Trust Co. of Canada* v. *Receveur*[105] and *C.I.B.C.* v. *Chang*.[106]

The plea of unilateral mistake was successful where *non est factum* was not because of the carelessness of the signor in the unusual case of

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[103] (1986), 6 B.C.L.R. (2d) 359, 31 D.L.R. (4th) 61 (S.C.).
[104] (1986), 72 A.R. 180 (Q.B.).
[105] (1985), 40 Sask. R. 315 (C.A.).
[106] (1985), [1986] 1 W.W.R. 326, 40 Alta. L.R. (2d) 315 (Q.B.).

The Prince Albert Credit Union v. *Diehl*.[107] Mrs. Diehl signed, on the advice of lawyers acting for both herself and the credit union, a parcel of documents including a promissory note for $12,000. She was told that the documents related to her late husband's company and she thought that she was signing in her capacity as the sole surviving shareholder of her husband's company. She did not read the documents. The plea of *non est factum* did not succeed because of her carelessness in not reading the documents but, as she signed the note in the mistaken belief that it was not her personal note and since the Credit Union was aware of that mistake, Mrs. Diehl was held not personally liable on the note.

The preceding cases would indicate, first, that as a result of the *Marvco* and *Saunders* decisions, there will be very few cases in which a person in full possession of his faculties will succeed in a plea of *non est factum*, as signing a document without knowing what it is would normally indicate carelessness. The doctrine is thus returned to the position that it occupied after *Foster* v. *Mackinnon*,[108] that is, it will primarily benefit persons who are in some way incapacitated or disadvantaged. Second, even though the plea of *non est factum* may not succeed, this does not rule out the possibility of establishing mistake or misrepresentation.

VI. Misrepresentation

A surprisingly large number of cases alleging misrepresentation came before the courts during the period under review. Some of them also involved collateral contracts, exemption clauses and negligent misrepresentation. These topics are dealt with under this heading.

A. *Innocent Misrepresentation*

The issues in *Hayward* v. *Mellick*[109] concerned innocent representation, negligent misrepresentation, collateral contract and exemption clauses. Hayward, a purchaser of a farm, was informed by Mellick, the owner, that the farm contained sixty-five workable acres. Hayward relied on this information and purchased the farm. Mellick believed that the farm comprised sixty-five workable acres. He had been told so by his father and grandfather. Some months after completion of the sale, Hayward discovered that the farm comprised only fifty-one workable acres and brought an action for damages.

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[107] (March 1987), (Sask. Q.B.) [unreported].

[108] (1869), L.R. 14 C.P. 704, 38 L.J. 310 (C.P.).

[109] (1984), 45 O.R. (2d) 110, 5 D.L.R. (4th) 740 (C.A.), *rev'g* (1982), 23 R.P.R. 265 (Ont. H.C.), *leave to appeal granted* (1984), 55 N.R. 395n., 40 O.A.C. 239 (S.C.C.).

Heatherston J.A., with whom Goodman J.A. concurred, found that the statement was an innocent misrepresentation because it was stated as a matter of fact. Before completion, it would have been a ground for rescission. It was not a collateral warranty, because the circumstances and the informal manner in which it was given negated contractual intent. It was, however, a negligent misrepresentation, as it was made without personal knowledge of the fact or even information that the fields had been carefully surveyed. Following the *Hedley Byrne* principle,[110] negligent misrepresentation will give rise to an action for damages. The contract contained an exemption clause that there was no representation, warranty, collateral agreement or condition other than as expressed in writing the contract. The majority, applying *Photo Prod. Ltd.* v. *Securicor Transp. Ltd.*,[111] held that it would be too strained a construction of the disclaimer clause to say that it does not apply to negligent misrepresentation. Houlden J.A. dissented on the ground that the disclaimer clause as drawn did not cover antecedent negligent misrepresentation.

A somewhat similar factual situation was involved in *Andronyk* v. *Williams*.[112] The Manitoba Court of Appeal, in a lengthy judgment, quoted extensively from *Hayward* v. *Mellick*. Again, there was a contract for the sale of land, a representation that there were 425 acres of "improved" land when there were in fact only 300 acres, and a disclaimer clause. In a judgment that is difficult to follow, the Court first held that the contract could not be rescinded as *restitutio in integrum* was not possible. The Court then canvassed the possibility of an action for damages for misrepresentation. It found that there was no intention to create a collateral warranty. In respect of negligent misrepresentation, the Court stated the law in Manitoba as follows: "representations made in the course of negotiations, but not incorporated into a contract as a term thereof, are not actionable in damages for economic loss, unless they are made in breach of an actionable duty to take care".[113] The Court then held that the only relationship between the parties was that of pre-contract negotiators, which is not sufficient to create an actionable duty of care.

C.I.B.C. v. *Larsen*[114] is an interesting case dealing with the banker-client relationship. Larsen agreed to guarantee the indebtedness of his

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[110] As formulated by the House of Lords in *Hedley Byrne & Co.* v. *Heller & Partners Ltd.* (1963), [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.). This principle was affirmed in the following cases: *Esso Petroleum Co.* v. *Mardon* (1976), [1976] 1 Q.B. 801, [1976] 2 All E.R. 5 (C.A.) [hereinafter *Esso Petroleum*]; *Sodd Corp.* v. *Tessis* (1977), 17 O.R. (2d) 38, 79 D.L.R. (3d) 632 (C.A.); *Ronald Elwyn Lister Ltd.* v. *Dunlop Canada Ltd.* (1978), 19 O.R. (2d) 380, 85 D.L.R. (3d) 321 (H.C.), *amendment of reasons* 25 O.R. (2d) 155, 104 D.L.R. (3d) 702, *rev'd* (1979), 27 O.R. (2d) 168, 105 D.L.R. (3d) 684 (C.A.), *rev'd* (1982), [1982] 1 S.C.R. 726, 135 D.L.R. (3d) 1.

[111] (1980), [1980] A.C. 827, [1980] 1 All E.R. 556 (H.L.).

[112] (1985), 21 D.L.R. (4th) 557, [1986] 1 W.W.R. 225 (Man. C.A.), *leave to appeal denied* (1986), 69 N.R. 77, [1986] 4 W.W.R. lxviii (S.C.C.).

[113] *Ibid.* at 574, [1986] 1 W.W.R. at 246 (Man. C.A.).

[114] (1983), 45 B.C.L.R. 212, [1983] 5 W.W.R. 179 (C.A.).

son's company to the bank. The bank manager informed him of an outstanding $1,000 loan but omitted to mention a $7,000 overdraft. The case bears some resemblance to *Lloyds Bank Ltd.* v. *Bundy*.[115] The trial Judge, applying that case, held that there was no duty of "fiduciary care" and that Larsen was not misled. Anderson J.A. considered that approach misconceived. The *Bundy* case did not involve misrepresentation, as Bundy was fully aware of all relevant facts. The *ratio decidendi* of that case was undue influence. In the case at bar, there was no question of undue influence. Anderson J.A. found that there was a material misrepresentation and any material misrepresentation entitles the guarantor to rescission. In his view, the trial Judge should have approached the issue on "settled principles" relating to misrepresentation and rescission.

Another case of innocent misrepresentation with an underlying issue of quasi-fiduciary duty is *449576 Ontario Ltd.* v. *Bogojevski*.[116] The defendants, who did not understand English well, wanted to have a single unattached dwelling built. They were shown a vacant lot by the agents and told that the house to be built would be a "link house". They did not understand the meaning of the term. The offer to purchase was not read to them in its entirety and the fact that the house would be a semi-detached one was not communicated to them. The Court found that the plaintiff's agents' whole conduct amounted to an innocent misrepresentation. An underlying factor in the decision was the special reliance Bogojevski placed in the agents, who acted also as translators. Had it been necessary, Van Camp J. was prepared to find that the agents owed the defendants a quasi-fiduciary duty.

Mercury Int'l Travlsurance Agencies Ltd. v. *Canada*[117] is a decision of the Federal Court, Appeal Division. The facts resemble those in *Esso Petroleum*[118] in some respects. Mercury entered into a lease for concessions at the Mirabel Airport. Its tender was based entirely on the forecasts of passenger traffic supplied by the Department of Transport. The information package stated that the figures were forecasts and could not be relied upon as accurate due to continuing changes in aircraft movements. The actual traffic turned out to be about fifty percent of the forecast. Le Dain J. held that *Esso Petroleum* was not applicable, since in this case there was clearly no intention on the part of the Department to form a collateral warranty and neither were the representations negligent.

Innocent misrepresentation, negligent misrepresentation, collateral warranty and a breach of contract were all present in *Terri-Grant Enterprises* v. *82506 Canada Ltd.*[119] The plaintiff purchased from the defendant a "Sam the Record Man" franchise. During the negotiations, the defendant stated that the sales would grow to $350,000 *per annum*,

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[115] (1974), [1975] 1 Q.B. 326, [1974] 3 All E.R. 757 (C.A.) [hereinafter *Bundy*].
[116] (1984), 46 O.R. (2d) 161, 9 D.L.R. (4th) 109 (H.C.).
[117] (1984), 52 N.R. 148 (F.C.A.D.).
[118] *Supra*, note 110.
[119] (1986), 47 Sask. R. 63 (Q.B.).

although, in fact, the sales were falling at that time, the actual sales amounting to slightly over $300,000. Gerein J. held that this comment amounted to more than an expression of opinion and was a negligent misrepresentation relied upon by the plaintiff. Gerein J. was presumably referring here to a negligent misrepresentation in tort under the *Hedley Byrne* principle.[120] He then held that "misrepresentation which is not fraudulent (which is the situation herein) traditionally gives rise only to an entitlement to rescission.[121] He undoubtedly made a finding of innocent misrepresentation. Rescission was, however, not available in this case because of laches and also because restitution was not possible. In addition, there was a clause in the agreement that certified that the defendant did not have any material information, which, if known to the purchaser, would deter him from completing the transaction. This clause was breached and the plaintiff was awarded damages. Finally, the Judge stated that he would award the same damages whether on the basis of a breach of collateral warranty or negligent misrepresentation in tort.[122]

Suppressio veri suggetio falsi was held to constitute innocent misrepresentation in *MacLeod* v. *Ruck*.[123] In lieu of a cash settlement of the defendant's debt, the plaintiff agreed to accept shares in a company held by the defendant. During the negotiations, the shares were stated to be of a certain value, but it was not disclosed that the bankruptcy of a subsidiary company was pending. The shares subsequently dropped in value. The failure to give complete information amounted to an implied representation that the shares were worth more than they actually were and the plaintiff was entitled to rescission. Reference was made to a leading case on the topic, *Curtis* v. *Chemical Cleaning and Dyeing Co.*[124]

B. Fraudulent Misrepresentation

Francis v. *Dingman*[125] could be described as a classic case of fraudulent misrepresentation. The Court of Appeal held that Dingman obtained a release from Francis by fraudulent misrepresentation and rescinded the release. In the course of its judgment, the Court quoted from KERR ON THE LAW OF FRAUD AND MISTAKE,[126] the requirements of fraudulent misrepresentation: (1) the representation is untrue in fact; (2) the defendant knows it is untrue or is indifferent as to its truth; (3) it was intended or

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[120] *Supra*, note 110.

[121] *Supra*, note 119 at 69.

[122] *Ibid.* at 70.

[123] (1985), 3 B.C.L.R. (2d) 35 (C.A.).

[124] (1951), [1951] 1 K.B. 805, [1951] 1 All E.R. 631 (C.A.).

[125] (1983), 43 O.R. (2d) 641, 23 B.L.R. 234 (C.A.), *rev'g* (1981) 15 B.L.R. 190 (H.C.), *leave to appeal denied* (1984), 52 N.R. 400, 23 B.L.R. 234n. (S.C.C.).

[126] D.L. McDonnell & J.G. Monroe, eds., 7th ed. (London: Sweet & Maxwell, 1952) at 25.

calculated to induce the plaintiff to act upon it; and (4) the plaintiff acts upon it and suffers damage.[127]

In *Burrows* v. *Burke*,[128] rescission was not granted because the plaintiffs affirmed the contract after learning of the fraudulent misrepresentation. The plaintiffs leased a roller-skating rink as a result of the defendant's fraudulent misrepresentation of its revenue. When they learned the true figures, they did not rescind the lease, as advised by legal counsel, but renegotiated it, signed it in a final form and carried on the business for several months before bringing an action for damages for deceit and rescission. Howland C.J.O., delivering the judgment of the Court of Appeal, held that once the disclosure of the true revenues was made to the plaintiffs, the original fraudulent representation ceased to be an inducement to enter into the final contract and the actions of the plaintiffs after the discovery were an affirmation of the contract.

C. Negligent Misrepresentation

Not infrequently the courts find that a misrepresentation, although innocent, was made negligently. This creates liability under the *Hedley Byrne* principle.[129] In *Municipal Enterprises Ltd.* v. *Defence Constr. (1951) Ltd.*,[130] the Court held that a failure to advise a bidder of a change in labour rates amounted to a negligent misrepresentation. Municipal Enterprises tendered for construction of a jetty. The tender was based on labour rates attached to the tender call by Defence Construction. After the tenders were opened but before any tender was accepted, Labour Canada advised Defence Construction of new labour rates and requested that the contractor be advised, as the new rates were applicable to the proposed contract. Defence Construction failed to do so and accepted the tender based on the old rates. Municipal Enterprises brought an action for the extra expenses incurred as a consequence and Defence Construction claimed that it was under no contractual obligation to advise the bidder of labour rates. The action was successful. The Court held that, as the new labour rates came into effect before the acceptance of the tender, this changed the offer and thus negatived the contract. It is to be noted that under the terms of the call for tender, the contractor was bound to pay the prevailing labour rates. Alternatively, the Court held that the failure to notify the contractor of the change was negligent misrepresentation. It cited *Walter Cabott Constr. Ltd.* v. *R.*[131] as support for the proposition that the relationship between the person who invites tenders on a building contract and those who accept that invitation is such as to impose a duty of care to convey material information.

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[127] *Supra*, note 125 at 658, 23 B.L.R. at 253-54 (C.A.).

[128] (1984), 49 O.R. (2d) 76 (C.A.), *rev'g* (1982) 36 O.R. (2d) 737 (H.C.).

[129] *Supra*, note 110. *See also supra*, note 1 at 635-36, and Part XIII, *infra*.

[130] (1985), 68 N.S.R. (2d) 60, 28 B.L.R. 263 (S.C.T.D.).

[131] (1974), 44 D.L.R. (3d) 82 at 98 (F.C.T.D.), *var'd* (1975), 69 D.L.R. (3d) 542, 12 N.R. 285 (F.C.A.D.).

Breach of contract, negligent misrepresentation and basis for awarding damages were the main issues in *V.K. Mason Ltd.* v. *Bank of Nova Scotia*,[132] a Supreme Court of Canada judgment. Courtot was the owner and developer of a shopping complex in Toronto, Mason was the general contractor and the Bank provided bridge financing. Mason submitted a tender and was prepared to sign a fixed price contract, provided that it was satisfied of Courtot's ability to make the payments. In fact, Mason actually began construction before the contract was signed, but the trial Judge expressly found that Mason would not have signed the contract but for the assurances from the Bank. These assurances were contained in a letter from the Bank to Mason, stating that the Bank had accorded Courtot interim financing sufficient to cover the construction of the complex and that they would provide funds for progress billings. Having received this letter, Mason signed the contract. After substantial work had been done, it became clear that Courtot had insufficient funds and the Bank refused to provide an additional loan.

The trial Judge found that the Bank breached a contract with Mason and that, in the alternative, it was liable for negligent misrepresentation. The Ontario Court of Appeal, in an oral judgment, upheld the breach of contract and did not deal with the negligent misrepresentation issue. Madame Justice Wilson, delivering the judgment for the Supreme Court of Canada, found, surprisingly, that the Bank was not liable in contract. According to Her Ladyship's analysis, if there were a contract, it would have to be a unilateral contract. The letter would be an offer by the Bank to supply Courtot with sufficient financing to complete the project and that offer would be accepted by Mason signing the construction contract. The problem with this analysis, according to Her Ladyship, is that it requires that a great deal be implied from the conduct of the party and leaves the exact nature of the Bank's obligations uncertain. The disadvantage of implying a contract in this context is that much of the value of commercial contracts lies in their ability to produce certainty, which is one of the principal virtues of contract. This approach, emphasizing certainty, which undoubtedly is an essential element of contract, should be contrasted with the broader approach, based more on the intentions and actions of the contracting parties, adopted in cases such as *Hillas & Co.* v. *Arcos, Ltd.*[133] and *Canada Square Corp.* v. *VS Servs. Ltd.*[134] Wilson J. thought, however, that negligent misrepresentation was the appropriate basis of liability. She held that all the requirements for negligent misrepresentation: (a) an untrue statement, (b) made negligently, (c) a special relationship giving rise to a duty of care and (c) foreseeable reliance, were present in this case.[135]

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[132] (1985), [1985] 1 S.C.R. 271, 35 R.P.R. 118, *aff'g* (1982), 39 O.R. (2d) 630, 19 B.L.R. 136 (C.A.).

[133] *Supra*, note 11.

[134] *Supra*, note 22. *See also supra*, note 1 at 600-02.

[135] *Supra*, note 132 at 283, 35 R.P.R. at 134 (S.C.C.).

The treatment of damages is novel. It is stated that the proper function of damages is to restore the plaintiff to the position in which he would have been had the negligent misrepresentation not been made. This is a generally accepted principle for damages in tort. Her Ladyship then reasoned that had Mason not been induced by the Bank's representation to enter into the contract with Courtot, it would have found some other profitable work. It is therefore reasonable to equate Mason's lost profit with the profit he would have made on Courtot's contract: the lost profit on this contract represents the lost opportunity for profit on any contract.[136]

VII. DURESS, UNDUE INFLUENCE, UNCONSCIONABILITY

Apart from the traditional common law notion of duress, consisting of actual or threatened violence, it is difficult to categorize cases where consent has been obtained by improper pressure, as being instances of duress, undue influence or unconscionability, since they overlap to such a great degree.

The two most important recent cases formulating the concepts of unconscionability, *Lloyds Bank Ltd.* v. *Bundy*[137] and *National Westminster Bank* v. *Morgan*,[138] were cases of undue influence. The term duress describes the equitable doctrine of coercion, most commonly manifested today as economic duress. Undue influence arises where the parties stand in a relationship of confidence to one another, which puts one of them in a position to exercise over the other an influence which may be perfectly natural and proper in itself, but is capable of being unfairly used.[139] Unconscionability is the extension of undue influence without the personal element.

A. Duress

De Wolfe v. *Mansour*[140] is a case involving both undue influence and economic duress. A dispute arose between two business partners. The first partner refused to sign a business document until the other renegotiated a deal to buy out the first partner's share. A new deal was signed, but the other partner refused to pay, claiming unconscionability or economic duress. On the issue of unconscionability, the Court applied *Lloyds Bank* and *National Westminster*. The doctrine did not apply as

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[136] For a commentary on this decision, *see* J. Swan, *Annotation* (1985), 35 R.P.R. 120 and Vaver, *supra*, note 25.

[137] *Supra*, note 115.

[138] (1985), [1985] 2 W.L.R. 588, [1985] 1 All E.R. 821 (H.L.) [hereinafter *National Westminster*], *rev'g* (1983), [1983] 3 All E.R. 85 (C.A.).

[139] W.H.D. Winder, *Undue Influence and Coercion* (1939) 3 MOD. L. REV. 97.

[140] (1986), 73 N.S.R. (2d) 110, 176 A.P.R. 110 (T.D.).

the defendant was an experienced businessman, had legal advice and was not above reproach in his dealings. The Court's reasoning was as follows:

> In cases, such as this, where partners have fallen out there may very well be pressures on one side or the other which result in difficult or onerous settlement terms but most of these situations are "the result of the ordinary interplay of forces" and do not call into play the doctrine of unconscionable bargain.[141]

Regarding economic duress, the Court applied the factors enumerated in *Ronald Elwyn Lister Ltd.* v. *Dunlop Canada Ltd.*[142] and held that the facts did not sustain economic duress.

Anderson v. *Carter*[143] was a family dispute where duress was alleged. McBain J. stated:

> A contract is to be based upon the free consent, and relief may be given by the courts where a contract is obtained by improper pressure. Such a contract is voidable. It is difficult to draw a line between the pressure, or undue influence that will result in a contract being so avoided and various other factors that can operate as persuasion with the result that a person enters into an agreement that she later wishes that she had not.[144]

The Court was satisfied that the evidence did not establish duress or undue influence.

B. Undue Influence

Family relationships are often a factor in cases of undue influence. In *Matheson* v. *Johnston's Estate*,[145] a conveyance by a ninety year old hospitalized man to his nephew, on whom he was reliant for care and comfort and who he trusted explicitly, was set aside. The Court held that the circumstances of the parties, their positions, health and ages, gave rise to a presumption of undue influence which prevailed notwithstanding the fact that the nephew acted in good faith.

The presumption of undue influence was rebutted in *Randall* v. *Nicklin*[146] where there was a conveyance of a half interest in property by an alcoholic man to his half-niece and her husband, on whom he was totally dependent. Both the trial Judge and La Forest J.A. (as he then was) agreed that the presumption of undue influence arose but was rebutted because the man was fully aware of the nature of the transaction, which was thoroughly explained to him by his legal adviser. La Forest

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[141] *Ibid.* at 116, 176 A.P.R. at 116.
[142] *Supra*, note 110 (C.A.).
[143] (1986), 68 A.R. 100 (Q.B.).
[144] *Ibid.* at 113-14.
[145] (1984), 66 N.S.R. (2d) 19, 152 A.P.R. 19 (T.D.).
[146] (1984), 58 N.B.R. (2d) 414, 151 A.P.R. 414 (C.A.), *rev'g* (1984), 54 N.B.R. (2d) 95, 140 A.P.R. 95 (T.D.).

J.A. found, however, that the niece held the property in question under an implied trust for the benefit of the man.

The importance of independent legal advice was also highlighted in *Johnson* v. *Johnson*[147] where property transfers made by a mother to her son, prior to her entering a nursing home, were at issue. The Court refused to set aside the transfers on the ground that she had had legal advice, although she chose not to accept it.

The presumption of undue influence in the solicitor-client relationship was an issue in *Rochdale Credit Union Ltd.* v. *Barney*.[148] Farlow, a solicitor experiencing financial difficulties, applied to Rochdale for a loan. He persuaded Barney, a client and a friend, to guarantee the loan. Farlow acted for both himself and Rochdale, in the transaction. Farlow subsequently committed suicide and Rochdale sued on the guarantee. Lacourciere J.A., reversing the trial judgment for the plaintiff, stated, applying *Lloyds Bank Ltd.* v. *Bundy*:[149] "Where the relationship of solicitor and client exists and the solicitor stands to gain an advantage for himself at the expense of his client, a presumtpion of undue influence arises."[150] He further held that Rochdale was responsible at law for the undue influence presumably exercised by Farlow, because he was also acting as the solicitor for Rochdale. It was the credit union's duty to warn the defendant of the considerable risk involved, to recommend independent legal advice and to disclose the precarious state of Farlow's finances. The guarantee thus could not be enforced.

The concept of undue influence was re-examined and restated by the House of Lords for the first time in this century in *National Westminster Bank* v. *Morgan*.[151] Lord Scarman, with whose reasons the other Law Lords concurred, first examined the nature of a relationship which will give rise to undue influence. In His Lordship's view, too much emphasis is placed on such words and phrases as "confidence", "confidentiality", and "fiduciary duty". There are many confidential relationships which do not give rise to the presumption of undue influence and there are many non-confidential relationships where reliance is placed by one person in another. An ingredient of undue influence is the dominating influence of one party over another. However, the presumption of undue influence is not enough to set aside the transaction. It must also be shown that the transaction is wrong, unconscionable and that an unfair advantage has been taken of one party. The doctrine is not limited to the transactions of gifts. It arises in commercial transactions as well. The principles justifying setting aside a transaction of undue influence are not vague "public policy", but involve victimization of one party by another. Lord

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[147] (1986), 69 N.B.R. (2d) 408, 177 A.P.R. 408 (T.D.).

[148] (1984), 48 O.R. (2d) 676, 14 D.L.R. (4th) 116 (C.A.), *leave to appeal denied* (1985), 58 N.R. 1319, 8 O.A.C. 320 (S.C.C.).

[149] *Supra*, note 115.

[150] *Supra*, note 148 at 677, 14 D.L.R. (4th) at 117 (C.A.).

[151] *Supra*, note 138.

Scarman expressly rejected Lord Denning's test based on "inequality of bargaining power", formulated in *Bundy*. He also gave a warning that there is no precisely defined law setting the limits of undue influence: "this is the world of doctrine, not of neat and tidy rules".[152]

The judgment may be summarized as follows: It restates the doctrine formulated in *Allcard* v. *Skinner*[153] a century ago. A fiduciary relationship between the parties is not enough to invoke the doctrine. There must also be victimization of one party by another. Lord Denning's test of "unequality of bargaining power" as an underlying concept of undue influence has been expressly disapproved. It would appear that the judgment will put brakes on an overzealous use of "undue influence", particularly in commercial and banking transactions, as a mere relationship of confidence or inequality is no longer sufficient.[154]

Lord Scarman's judgment was closely examined in *Goldsworthy* v. *Brickell*,[155] an English Court of Appeal decision where much of the discussion centred on the use of the words "domination" and "dominating influence". All three Lords Justice agreed that it was not intended in *National Westminster* to change the law by making "domination" or "dominating influence" an essential ingredient of undue influence. Reference was made to Lord Scarman's closing words: "Definition is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends upon the particular facts of the case."[156] In this case, the plaintiff sought a rescission of a tenancy agreement on the grounds of undue influence. The trial Judge found undue influence, but the defendant was successful with a defence of promissory estoppel. The Court of Appeal upheld the finding of undue influence, but held on the evidence that the defence of promissory estoppel could not succeed, as there was neither a clear and unequivocal representation on behalf of the plaintiff or any act by the defendant in reliance on such a representation.

In *Cornish* v. *Midland Bank*,[157] another English Court of Appeal decision, the Court, following *National Westminster*, stated that the presumption of undue influence does not arise in the ordinary banker-client relationship. There must be some suggestion that the bank had unfairly taken advantage of the client.

Undue influence and *non est factum* were raised as a defence in *Columbia Trust Co.* v. *Solihull Enterprises Ltd.*[158] The defendant, at the

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[152] *Ibid.* at 602, [1985] 1 All E.R. at 831.

[153] (1887), 36 Ch. D. 145, 56 L.T. 187 (C.A.).

[154] For commentaries, *see* Notes (1984) 100 L.Q. REV. 1; (1985) 101 L.Q. REV. 305; N. Andrews, *Undue Influence and Contracts of Loan* [1985] CAMB. L.J. 192; D. Tiplady, *The Limits of Undue Influence* (1985) 48 MOD. L. REV. 579; M. Ogilvie, *Undue Influence in the House of Lords* (1986) CAN. BUS. J. 503.

[155] (1986), [1987] 2 W.L.R. 133, [1987] 1 All E.R. 853 (C.A.).

[156] *Supra*, note 138 at 602, [1985] 1 All E.R. at 831 (H.L.).

[157] (1985), [1985] T.L.R. 459, [1985] 3 All E.R. 513 (C.A.)

[158] (1986), 3 B.C.L.R. (2d) 123 (S.C.T.D.).

request of his brother, executed a guarantee of three mortgages. He alleged undue influence as his lawyer was also one of the mortgagees and had threatened to bring an action against his brother if the guarantee was not executed. The Court held that an element of undue influence is victimization and a lender is not victimizing his borrower by demanding money. Southin J. stated that he preferred the much more thorough analysis of Lord Scarman in *National Westminster* to that in *Hayward* v. *Bank of Nova Scotia*.[159] Regarding the defence of *non est factum*, the Court, applying *Saunders*,[160] stated that it is the inappropriate plea when the defendant asserts that his mind did not go with the signing, sealing and delivery of the instrument.[161] Here the defendant did not claim fraud, misrepresentation, trickery or that he was unaware of what he was signing.

C. Unconscionability

The leading case on the doctrine of unconscionable bargains in Canada is *Morrison* v. *Coast Fin. Ltd.*, where Davey J.A. stated the law as follows:

> The plea of undue influence attacks the sufficiency of consent; a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger.[162]

This statement was approved in *Bomek* v. *Bomek*,[163] an unconscionable bargain case involving a family factor and a financial institution. The Bomeks, an elderly couple with little education, executed a mortgage in favour of the credit union, believing their son would receive the funds. The funds, however, were used to reduce the overdraft in one of the son's companies. Neither the son nor the credit union explained anything to them and they were unaware of their son's financial difficulties. The Court held that the two requirements for finding an unconscionable bargain, inequality of bargaining power (through intelligence or financial situation) and unfairness in the bargain, were present. Although the credit union distanced itself from the transaction by handing the documents to

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[159] (1985), 51 O.R. (2d) 193, 19 D.L.R. (4th) 758 (C.A.), *aff'g* (1984), 45 O.R. (2d) 542, 7 D.L.R. (4th) 135 (H.C.). *See also* Part VII.C., *infra* dealing with unconscionability.

[160] *Supra*, note 90.

[161] *Supra*, note 158 at 131.

[162] (1965), 55 D.L.R. (2d) 710 at 713, 54 W.W.R. 257 at 260 (B.C.) [hereinafter *Morrison*].

[163] (1983), 20 Man. R. (2d) 150 (C.A.) [hereinafter *Bomek*], *aff'g* (1982), 24 R.P.R. 176 (Man. Q.B.), *leave to appeal denied* (1984), 27 Man. R. (2d) 239, 52 N.R. 234 (S.C.C.).

Bomek's son to obtain the signatures, in light of its self-interest and the son's self-interest, it had a duty to see that the Bomeks obtained independent legal advice. The absence of independent legal advice in the circumstances of this case rendered the mortgage unconscionable.

Toronto-Dominion Bank v. *Wong*[164] is another instance of a parent, the mother in this case, entering into transactions with a bank to assist her son. The Court of Appeal, reversing the trial Judge, held that there was no proof of substantial unfairness in the bargain. The transaction was not out of the ordinary or unfair. Even if the mother had received independent advice, which she did not, she would have signed anyway because of her enthusiasm for the transaction and the desire to help her son. The Court distinguished *Morrison*, *Bundy* and *Bomek* on the basis that in these cases there was oppressive conduct on the part of the lending institution.

The nature of the banker-client relationship in connection with loan transactions was canvassed in *Hayward* v. *Bank of Nova Scotia*,[165] the "exotic cow" case. Mrs. Hayward, a client of the bank for over forty years, was induced to invest in an exotic cow. She discussed the investment with the bank manager, who, although knowledgeable of exotic cattle business and the risks involved, encouraged Mrs. Hayward to make the investment and approved the loans. The Court quoted the comments of Sir Eric Sachs on the banker-customer relationship and as to when a fiduciary relationship comes into existence, from *Lloyds Bank Ltd.* v. *Bundy*[166] (approved in *National Westminster*[167]) and stated: "rarely will the ordinary loan transaction be set aside. It must be a transaction to the manifest disadvantage to the customer and the banker must have and exercise a dominating influence either directly or indirectly over the customer."[168] In the case under appeal, the bank manager, to use the words of Sir Eric Sachs, "crossed the line into the area of confidentiality". Thus there was a fiduciary relationship which the bank breached by not disclosing the information in its possession.

Bertolo v. *Bank of Montreal*[169] is again a case of a mother executing a promissory note and a mortgage in favour of a bank to enable her son to get a loan. The Court of Appeal found that although no fiduciary relationship or exercise of dominating influence was established between the bank and the plaintiff, the circumstances of the case nevertheless required the intervention of equity. The bank was aware, or should have been aware, that Mrs. Bertolo did not receive independent legal advice in respect of a transaction which, from a business point of view, was

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[164] (1985), 65 B.C.L.R. 243 (C.A.), *leave to appeal denied* (*sub nom. Lim* v. *T.D. Bank*) (1985), 67 B.C.L.R. xl, 64 N.R. 155 (S.C.C.).

[165] *Supra*, note 159.

[166] *Supra*, note 115 at 347, [1974] 3 All E.R. at 772.

[167] *Supra*, note 138.

[168] *Supra*, note 159 at 195, 19 D.L.R. (4th) at 760 (C.A.).

[169] (1986), 33 D.L.R. (4th) 610, 18 O.A.C. 262 (C.A.).

manifestly disadvantageous to her. The interesting feature of this case is that a solicitor, who acted for the bank and her son, asked his law partner to give independent advice to the mother. It appears from the transcript that the law partner was unfamiliar with the case and his recollection of his interview with Mrs. Bertolo was vague.

A somewhat similar situation concerning independent legal advice arose in *Bank of Montreal* v. *Featherstone*.[170] In this case, the wives of three business partners signed personal guarantees without any legal advice. The solicitor, who acted for their husbands and the bank, gave them, after they signed the guarantees, unsigned independent legal advice certificates and told them to go to another lawyer. They never did. Incredibly, a certificate of legal advice was in the bank's file. It was signed by a partner of the first-mentioned bank's solicitor. The partner's whereabouts are now unknown. McRae J. commented that even if the partner had given such advice, it would not have been independent.

The importance of independent legal advice to rebut the presumption of undue influence is well entrenched in law and referred to in every case or text dealing with the subject. The laxity with which the requirement is treated is therefore quite surprising.

VIII. Capacity

A. *Mental Incapacity*

The principle that a contract of a person lacking in mental capacity is void if it can be shown that at the time of contracting he did not know what he was doing and that the other party knew of his condition, was affirmed by the Privy Council in *Hart* v. *O'Connor*,[171] on appeal from New Zealand. The issue was whether a contract of a mentally incapacitated person, whose condition was not known to the other contracting party, can be set aside for unfairness resulting from the contractual imbalance between the parties. The Privy Council was of the opinion that it cannot and in so holding overruled the declaration of the New Zealand Court of Appeal in *Archer* v. *Cutler*.[172] Lord Brightman, speaking for the Judicial Committee, stated:

> To sum the matter up, in the opinion of their Lordships, the validity of a contract entered into by a lunatic who is ostensibly sane is to be judged by the same standards as a contract by a person of sound mind, and is not voidable by the lunatic or his representatives by reason of "unfairness" unless such unfairness amounts to equitable fraud which would have enabled the complaining party to avoid the contract even if he had been sane.[173]

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[170] (1987), 58 O.R. (2d) 353 (H.C.).
[171] (1985), [1985] A.C. 1000, [1985] 2 All E.R. 880 (P.C.).
[172] (1980), [1980] 1 N.Z.L.R. 386.
[173] *Supra*, note 171 at 1027, [1985] 2 All E.R. at 894.

His Lordship added further that to accept the proposition enunciated in *Archer* v. *Cutler*, that a contract by an ostensibly sane person can be set aside because it is "unfair" to the insane person in the sense of contractual imbalance, is unsupported by authority and would distinguish the law of New Zealand from the law of Australia and from the law of England.

B. Crown Agencies

The capacity to sue and be sued in the name of the Crown Agency and the concommitant question of the jurisdiction of the Federal Court was the subject of the lengthy judgment of the Supreme Court of Canada in *Northern Pipeline Agency* v. *Perehinec*.[174] Referring to numerous precedents, the Court restated that the provincial superior courts have always occupied a position of prime importance in the constitutional pattern of this country. They are the descendants of the Royal Courts of Justice as courts of general jurisdiction. They have jurisdiction in all matters federal and provincial. The transfer of jurisdiction to the Federal Court of Canada of claims against the Crown is an exception to the general principle. Where, on fair interpretation of the statute establishing the agency, it may enter into contracts in its own name, it may be sued in its own right. An action for a breach of contract may therefore be brought against the agency alone without including the Crown, in a competent court of provincial jurisdiction. This judgment affirms the right to sue an agency alone, but it is still necessary to determine in each individual case whether an agency may be subject to an action at law. This depends on the power given to the agency by the enabling statute and the degree and extent of governmental control.

IX. ILLEGALITY

A. Concept

There have not been any new developments in the law dealing with the illegality of the subject matter of a contract. The cases reviewed apply, and perhaps expound somewhat, the well established principles in sometimes novel situations.

A cohabitation agreement to live in a man's house and share costs was held not to be made for an immoral purpose and was therefore not illegal in *Chrispen* v. *Topham*.[175] The Court referred to a statement in Waddams that agreements which formerly were considered sexually immoral may not be so considered in present society.[176] The Court also

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[174] (1983), [1983] 2 S.C.R. 513, 4 D.L.R. (4th) 1.
[175] (1986), 48 Sask, R. 106, 28 D.L.R. (4th) 754 (Q.B.).
[176] *Supra*, note 4 at 345.

referred to *Pettkus* v. *Becker*[177] and a line of cases in which compensation was awarded in common law relationships. In *Cerilli* v. *Klodt*[178] it was affirmed that an agreement by a husband to sell property, which contained undisclosed part payments in cash intended to defraud the man's estranged wife, was unenforceable on the grounds of common law illegality and fraud.

The legal maxim *ex dolo malo non oritur actio* (from evil cause no action arises) was applied in *Mazerolle* v. *Day & Ross*.[179] The plaintiff, with the intent to avoid the payment of Nova Scotia and New Brunswick tobacco taxes, purchased cigarettes through an individual who, being a member of an Indian band, could purchase cigarettes tax free in Nova Scotia. The plaintiff then had the cigarettes delivered by a reputable common carrier to New Brunswick, where he disposed of them, this time avoiding New Brunswick taxes. One one occasion, the carrier released the goods to an unauthorized person and the plaintiff sued the carrier for negligence. The Court held that, as the action was based on a illegal act, it was not maintainable. The principle of public policy *ex dolo malo non oritur actio* referred to above applies to so-called revenue legislation as well.

On the other hand, distinct contracts that were able to be proven without reliance on the illegal unenforceable contracts were upheld in two cases. In *Central Trust Co.* v. *Rafuse*[180] the defendant solicitors acted for the trust company in connection with a mortgage loan. Unknown to the solicitors or the trust company, the loan infringed the provisions of the Nova Scotia *Companies Act*[181] and the mortgage was declared void. The trust company sued the solicitors for negligence. On the issue of illegality, Jordan J.A. held that the illegality of the loan transaction did not by itself make the contract for the solicitors' services illegal. It was a distinct contract not tainted by illegality in any way. Had both parties known of the illegality of the loan transaction, they would not have proceeded with it. It cannot therefore be said that the solicitors were engaged for carrying out an illegal transaction.[182]

In *Mack* v. *Edenwold Fertilizer Servs. Ltd.*,[183] the plaintiff contracted to purchase fertilizer from the defendant. It was agreed that both the order for fertilizer and a cheque in payment of the order would be backdated, so that the plaintiff could claim the fertilizer as an expense in the preceding taxation year. The defendant was unable to deliver the fertilizer and eventually the plaintiff obtained a written agreement from the defendant to pay interest on money held by him to the credit of the

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[177] (1980), [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257.

[178] (1986), 55 O.R. (2d) 399 (C.A.), *aff'g* (1984), 48 O.R. (2d) 260 (H.C.).

[179] (1986) 70 N.B.R. (2d) 119, 179 A.P.R. 119 (Q.B.).

[180] (1983), 57 N.S.R. (2d) 125, 147 D.L.R. (3d) 260 (C.A.), *rev'd on other grounds* (1986), [1986] 2 S.C.R. 147, 75 N.S.R. (2d) 109.

[181] R.S.N.S. 1967, c. 42.

[182] For a discussion of other aspects of this case, *see* Part XIII, *infra*.

[183] (1986), 46 Sask. R. 137, [1986] 3 W.W.R. 731 (Q.B.).

plaintiff. The Court held that the agreement to pay interest was a separate transaction from the illegal contract to evade tax. It was an agreement to pay interest at a certain rate and no assistance from the illegal contract was required to support the agreement.

An agreement was held valid even though it infringed federal legislation in *Dodge* v. *Eisenman*.[184] The parties agreed to settle a dispute and the agreement provided that if the plaintiffs could not pay by the stipulated date, they would release their interests in mining claims to the defendant. The defendant did not hold a licence under the *Canadian Mining Regulations*[185] and was therefore not entitled to acquire any claim or interest by transfer. It was alleged that the whole agreement was illegal and void. The majority of the Court of Appeal held that the purpose of the agreement was to settle litigation and the transfer of claims was not an integral part of the transaction, but only incidental to it. It could not be said that the whole object of the contract was to defeat the Regulations. In any case, the acquisition of a licence by the defendant was a routine and trivial matter, involving as it were the payment of five dollars. The settlement was for $2.25 million.

Ouston v. *Zurowski*[186] is an illustration of the second exception to the rule that money paid under an illegal contract cannot be recovered. The first exception applies where the parties are not in *pari delicto*. The second one applies where the contract is still executory and one party repents before performance.

Whether an agreement to sell real estate was executed on a Sunday and consequently void under the *Lord's Day Act*[187] was considered in *Ball* v. *Crawford*.[188] An agreement to purchase land, subject to an inspection clause, was entered into on a Wednesday. The inspection took place on the following Saturday and the purchasers informed the vendor's agents on Sunday that they were prepared to remove the clause. Later that Sunday they signed the agreement and gave the agents a deposit cheque post-dated to Monday. The vendors signed the agreemnent on Monday. Carrothers J.A., with whom the other justices concurred, held that the main portion of the agreement was entered into during the week and the removal of the inspection clause was effected on Saturday and Monday, as well as on Sunday. Consequently, the agreement was not executed on a Sunday.

B. Contracting Out

The question of whether parties can contract out of, or waive, the requirements of a particular statute has been considered in several cases.

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[184] (1985), 68 B.C.L.R. 327, 23 D.L.R. (4th) 711 (C.A.).
[185] C.R.C. 1978, c. 1516.
[186] (1985), 63 B.C.L.R. 89, 18 D.L.R. (4th) 563 (C.A.).
[187] R.S.C. 1970, c. L-13, s. 4. The validity of this legislation has been upheld, *see R.* v. *Big M Drug Mart Ltd.* (1985), [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481.
[188] (1983), 53 B.C.L.R. 153, 31 R.P.R. 58 (C.A.).

The general rule is that any person can enter into a binding contract to waive the benefits conferred on him by an Act of Parliament, unless it can be shown that it would be contrary to public policy to allow such an agreement. Similarly, persons for whose benefit statutory duties have been imposed may waive their right to the performance of those duties, unless those duties are imposed in the public interest.[189] In *Kuun* v. *University of New Brunswick*,[190] the New Brunswick Court of Appeal quoted Mr. Justice McIntyre of the Supreme Court of Canada in the *Etobicoke*[191] case in support of the proposition that where a statute expresses public policy, parties cannot contract out of the enactment, even though there are no explicit restrictions on such contracting out. It held that the New Brunswick *Human Rights Code*,[192] like the *Ontario Human Rights Code*,[193] is enacted for the benefit of the community at large as well as the individual members, and therefore may not be waived or varied by private contract. However, in the case at bar, Kuun voluntarily settled his complaint of an alleged violation of the Code in accordance with the provisions of section 18 of the Code, which provides for the settlement of complaints. Such a settlement, made in compliance with the statutory directions, cannot be regarded as unlawful contracting out of the Code.

Confusion exists regarding contracting out of section 10 of the *Interest Act*,[194] which provides for a right of repayment of non-commercial mortgages after five years. In *Potash* v. *Royal Trust Co.*,[195] the Manitoba Court of Appeal, overruling a judgment of Kroft J.,[196] held that section 10 is intended to confer rights of repayment to a borrower. As such, it can be classified as "consumer protection" legislation and it would be contrary to the policy of the statute to permit contracting out or waiver. The Alberta Court of Queen's Bench arrived at an opposite conclusion in *MacDonald* v. *Royal Trust Co. of Canada*.[197] Brennan J. held that the right or privilege to prepay or redeem a mortgage is conferred upon a borrower in his private capacity and is not conferred for the benefit of the public as a whole and consequently a waiver of the provisions of section 10 was valid. The learned Judge stated that he found further support for his view in the judgment of Kroft J. The reported judgment

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[189] *Compare* 9 HALSBURY'S LAWS (4th), ¶421 at 289; 44 HALSBURY'S LAWS (4th), ¶950, 951 at 596-97; *Great E. Ry. Co.* v. *Goldsmid* (1884), 9 App. Cas. 927 (H.L.); *Toronto Corp.* v. *Russell* (1908), [1908] A.C. 493 (P.C.).

[190] (1984), 56 N.B.R. (2d) 430, 146 A.P.R. 430 (C.A.).

[191] *Ontario Human Rights Comm'n* v. *Borough of Etobicoke* (1972), [1972] S.C.R. 202, 132 D.L.R. (3d) 14 [hereinafter *Etobicoke*].

[192] R.S.N.B. 1973, c. H-11.

[193] R.S.O. 1980, c. 340, *as rep. Human Rights Code, 1981*, S.O. 1981, c. 53.

[194] R.S.C. 1970, c. I-18, s. 10.

[195] (1984), 8 D.L.R. (4th) 459, 4 W.W.R. 210 (Man. C.A.).

[196] *Potash* v. *Royal Trust Co.* (1983), 28 Man. R. (2d) 1, 4 D.L.R. (4th) 41 (Q.B.).

[197] (1984), 54 Alta. R. 116 (Q.B.).

refers to the reversal of Kroft J.'s judgment on appeal, this reference presumably having been inserted by the editor.

C.M.H.C. v. *Sherritt-Gordon Mines Ltd.*[198] is an appellate decision holding that parties cannot contract out of section 16 of Manitoba's *The Mortgage Act*.[199] However, this was an *obiter dictum* as the Court found that the parties had not actually contracted out.

C. Severance

The doctrine of severance and the relevant case law were reviewed by the Privy Council in *Carney* v. *Herbert*[200] on appeal from the Supreme Court of New South Wales. Lord Brightman, delivering the judgment, stated that questions of severability are often difficult as there are no set rules which will decide all cases. He then summed up the doctrine as follows:

> Subject to a caveat that it is undesirable, if not impossible, to lay down any principles which will cover all problems in this field, their Lordships venture to suggest that, as a general rule, where parties enter into a lawful contract of, for example, sale and purchase, and there is an ancillary provision which is illegal but exists for the exclusive benefit of the plaintiff, the court may and probably will, if the justice of the case so requires, and there is no public policy objection, permit the plaintiff if he so wishes to enforce the contract without the illegal provision.[201]

The case involved a transfer of shares from one company to another with the accompanying guarantees and mortgages to secure instalment payments. In an action on the guarantee for unpaid instalments, it was contended that the guarantee was unenforceable since the guaranteed sales agreement contained mortgages contrary to the provisions of the New South Wales *Companies Act, 1961*. Their Lordships found that the contract was basically for the sale of shares and that the guarantees and mortgages were ancillary to that contract. The mortgages did not go to the heart of the transaction and its severance would leave unchanged the subject matter of the contract and the primary obligations of the parties. Further, the nature of the illegality of the mortgages was not such as to preclude the vendors from enforcing their rights under the contract of sale.

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[198] (1985), 36 Man. R. (2d) 310, [1986] 1 W.W.R. 651 (C.A.), *rev'g* (1984), 28 Man. R. (2d) 188 (Q.B.), *additional reasons at* (1985), 33 Man. R. (2d) 38 (Q.B.), *leave to appeal denied* (1986), 67 N.R. 400 (S.C.C.).

[199] R.S.M. 1970, c. M200, s. 16, C.C.S.M. M200.

[200] (1984), [1985] A.C. 301, [1984] 3 W.L.R. 1303, [1985] 1 All E.R. 438 (P.C.).

[201] *Ibid.* at 317, [1984] 3 W.L.R. at 1315, [1985] 1 All E.R. at 448.

Severance was also one of the issues in *Alec Lobb Ltd.* v. *Total Oil G.B. Ltd.*[202] Dunn L.J. expressed the principles of severance in these words:

> The preponderance of those authorities seems to me to indicate that, if the valid promises are supported by sufficient consideration, then the invalid promise can be severed from the valid even though the consideration also supports the invalid promise. On the other hand if the invalid promise is substantially the whole or main consideration for the agreement then there will be no severance.[203]

These are *obiter dicta* as the case was decided on other grounds.

D. Restraint of Trade

The well-established law that covenants in restraint of trade are unenforceable unless they can be shown to be reasonable and in the interest of the parties and in the public interest, was formulated by Lord Macnaghten in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*[204] It continues to be applied in cases dealing with restrictive covenants. In *Arvak Mgmt. Inc.* v. *McKee*,[205] it was held that one of the components of unreasonableness between the parties is the presence of a proprietary interest requiring protection. Such an interest would not comprehend methods of work, production or management which cannot be considered private to, or developed by, the party imposing covenants.

Western Inventory Serv. Ltd. v. *Sager*[206] restated the principle that covenants must be both reasonable as between the parties and in the public interest, and upheld a covenant covering the whole of Ontario for one year as being not unreasonable considering the extent of Sager's knowledge of Western's clients. On the other hand, a covenant prohibiting an employee from using information gained during his employment "at any time thereafter"[207] and a covenant prohibiting an accountant from doing any accounting for clients of his former employer for five years[208] were held to be unreasonable restraints.

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[202] (1985), [1985] 1 W.L.R. 173, [1985] 1 All E.R. 303 (C.A.).

[203] *Ibid.* at 188, [1985] 1 All E.R. at 317.

[204] (1894), [1894] A.C. 535 at 565, [1891-94] All E.R. Rep. 1 at 18 (H.L.).

[205] (1923), 40 Nfld. & P.E.I.R. 116, 115 A.P.R. 116 (Nfld. T.D.).

[206] (1983), 42 O.R. (2d) 166, 148 D.L.R. (3d) 434 (H.C.).

[207] *Nelson Burrs & Co.* v. *Gratham Indus. Ltd.* (1983), 42 O.R. (2d) 705, 150 D.L.R. (3d) 692 (H.C.), *additional reasons at* (1923), 74 C.P.R. (2d) 173 (Ont. H.C.), *aff'd* (1986), 30 D.L.R. (4th) 158, 9 C.P.R. (3d) 532 (Ont. C.A.), *leave to appeal denied* (1986), 56 O.R. (2d) 604 (S.C.C.).

[208] *Bassman* v. *Deloitte, Haskins & Sells of Canada* (1984), 44 O.R. (2d) 329, 4 D.L.R. (4th) 558 (H.C.).

Wells, Monaghan & Co. v. *Parsons*[209] involved restrictive covenants, fundamental breach and waiver. Parsons was hired by a Cornerbrook law firm of Wells, Monaghan & Co. to operate a law office for them at Port-aux-Basques for five years. Parsons covenanted not to practice on his own within a radius of forty miles of Port-aux-Basques during the term of the agreement. Wells, the managing partner, retired from the partnership and, as a consequence of the adjustments following the retirement, the partnership agreement became frustrated and some essential parts of the agreement with Parsons could not be fulfilled. Parsons withdrew from the partnership, purchased the firm's assets at Port-aux-Basques and commenced his own practice.

The Court found the restrictive covenant unreasonable. The Cornerbrook law firm had no intention of practising at Port-aux-Basques after Parsons' withdrawal and therefore had no interests to protect. In addition, the covenant was not in the public interest, as it deprived the town of legal services. Further, the sale of the firm's assets in Port-aux-Basques to Parsons probably amounted to a waiver of the covenant. The adjustments after Well's retirement went to the root of the contract and amounted to a fundamental breach. Parsons was therefore entitled to repudiate the contract and it could not thereafter be enforced against him.

Deacons v. *Bridge*[210] is a Privy Council decision on appeal from the Hong Kong Court of Appeal dealing with restrictive covenants in a solicitors' partnership agreement. Lord Fraser, speaking for the Privy Council, quoted Lord Macnaghten's classic *dicta* on reasonableness[211] and applied the approach adopted in *Esso Petroleum Co.* v. *Harper's Garage (Stourport) Ltd.*, where Lord Reid said: "I think it better to ascertain what were the legitimate interests of the appellants which they were entitled to protect and then to see whether these restraints were more than adequate for that purpose."[212] He held that a covenant, whereby a partner who ceased to be a partner was restricted for a period of five years thereafter from acting as a solicitor for any client of the firm or person who was a client during the three years preceding the partner's retirement, was not unreasonable. An interesting aspect of the case was the nature of the business of the firm of solicitors. The firm was divided into a number of departments, largely separate from each other and, as a consequence, each partner's knowledge of the firm's business was limited to his own department. In this case, the retired partner had no connection or dealings with the great majority (over ninety percent) of the firm's clients. Notwithstanding this, His

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[209] (1985), 162, A.P.R. 26, 55 Nfld. & P.E.I.R. 26 (Nfld. C.A.), *aff'g* (1942), 37 Nfld. & P.E.I.R. 339 (Nfld. T.D.).

[210] (1984), [1984] A.C. 705, [1984] 2 All E.R. 19 (P.C.).

[211] *Supra*, note 204.

[212] (1968), [1968] A.C. 269 at 301, [1967] 1 All E.R. 699 at 709 (H.L.) [hereinafter *Harper's Garage*].

Lordship found the covenant reasonable. He relied on the concept of mutuality. The contract (which included the restrictive covenant) applied to all partners, who were the owners of the firm's whole assets, which included goodwill. They shared in the profits and losses of the partnership and each benefited to some extent from other partners attracting clients to the firm. Lord Fraser disapproved of Lord Denning's *obiter dicta* in *Oswald Hickson Collier & Co.* v. *Carter-Ruck* [213] that a clause that purported to preclude a solicitor from acting for a client who wanted that solicitor to act for him would be contrary to public policy due to the existence of the solicitor-client fiduciary relationship

Alec Lobb Ltd. v. *Total Oil G.B. Ltd.*[214] is a case of restraint of trade agreement in the form of a "petroleum tied house". The judgment follows *Esso Petroleum*[215] where there was also a "tied house" restraint. In particular, it reaffirms that the quantum of consideration may enter into the question of the reasonableness of the contract.

X. Contractual Terms

A. Implied Terms

The courts continue to imply terms in contracts to give them the necessary business efficacy or to implement what are reasonably considered to be the intentions of the parties. This course is sometimes beset by difficulties, as is well illustrated by the case of *Hillis Oil & Sales Ltd.* v. *Wynn's Canada Ltd.*[216] Here a distributorship agreement contained two clauses regarding termination. Clause 20 provided for termination for specified causes to take effect upon giving notice in writing. Clause 23 provided for termination at any time with or without a cause. The manufacturer terminated the agreement by notice under clause 23 after eight years. The trial Judge construed clause 23 as impliedly requiring a reasonable period of notice. The Court considered one year to be a proper period. Hart J.A. of the Nova Scotia Court of Appeal reversed that decision on the grounds that the terms of the contract were perfectly clear and the trial Judge erred by implying an additional unnecessary term to interpret the written contract. Le Dain J., on appeal to the Supreme Court of Canada, restored the trial judgment. His decision was based on the differences in wording of the two clauses. This created ambiguity which was to be resolved

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[213] (1984), [1984] A.C. 720 at 723, [1984] 2 All E.R. 15 at 18 (C.A.).

[214] *Supra*, note 202.

[215] *Supra*, note 212.

[216] (1982), 53 N.S.R. (2d) 421, 109 A.P.R. 421 (T.D.), *rev'd* (1983), 55 N.S.R. (2d) 351, 114 A.P.R. 351 (A.D.), *rev'd* (1986), [1986] 1 S.C.R. 55, 25 D.L.R. (4th) 649.

against the manufacturer by application of the *contra proferentem* principle.

In accordance with the prevailing Canadian practice, the judgments at the appellate level were delivered by one Justice speaking for the Court. One has to assume that all other Justices hearing the appeal concurred. The disturbing aspect of this case, where the issue is solely the construction of the contract, is that three Justices of the Court of Appeal agreed that the terms of the contract were perfectly clear and that there was no ambiguity relating to the terminating provisions, while five Justices of the Supreme Court of Canada thought, also unanimously, that the wording of the two terminating clauses created an ambiguity.

The question of whether a statutory limitation period must be implied into an offer of settlement as limiting the time for acceptance was considered in *Mitchell* v. *Bennett, Cole Adjusters Ltd.*[217] The plaintiff's house was damaged by fire in November 1982. In February 1983, the insurance company made an offer of settlement, with no time-limit for acceptance stated. The plaintiff's solicitor, after negotiations, attempted to accept the settlement. The insurer denied liability on the basis of subsection 24(1) of the *Insurance Act*[218] requiring an action to be commenced within one year of the proof of loss. MacDonald J. held that the one year limitation period must be imported into the offer of settlement as an implied term limiting the time for acceptance. In this particular case, the offer expired on the first anniversary of the fire. The Court also rejected the argument that the offer of settlement constituted an estoppel preventing any reliance on the statutory limitation.

The terms of compliance with the *Building Code*[219] and of fitness for a particular purpose were implied in *G. Ford Homes Ltd.* v. *Draft Masonry (York) Co.*[220] In a contract for the installation of staircases in two houses, the Court of Appeal held that there was an implied term that the staircases would be installed so as to comply with the Ontario *Building Code*. The reasoning for this implication was based on the *Moorcock* doctrine.[221] Alternatively and additionally, it could be implied that both work and materials would be reasonably fit for the purpose for which they were required. Here the Court applied *Young & Marten, Ltd.* v. *McManus Childs, Ltd.*,[222] a House of Lords decision, followed in several Canadian cases,[223] which imported the implied conditions of

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[217] (1986), 9 B.C.L.R. (2d) 83, 33 D.L.R. (4th) 398 (S.C.).

[218] R.S.B.C. 1979, c. 200.

[219] R.R.O. 1980, Reg. 87.

[220] (1983), 43 O.R. (2d) 401, O.A.C. 231 (C.A.).

[221] *Supra*, note 31.

[222] (1968), [1968] 2 W.L.R. 630, [1968] 2 All E.R. 1169 (H.L.).

[223] *See Hart* v. *Bell Tel. Co. of Canada* (1979), 26 O.R. (2d) 218, 102 D.L.R. (3d) 465 (C.A.); *Laliberte* v. *Blanchard* (1980), 31 N.B.R. (2d) 275, 75 A.P.R. 275 (C.A.).

quality under the *Sale of Goods Act*[224] to contracts for work and materials and held that there is an implied condition that materials supplied will be of merchantable quality and fit for the purpose required. This is particularly relevant in respect of latent defects.

Solvency during the period of a guarantee was implied in *Doanne Raymond Ltd.* v. *Maritime Formwork Ltd.*[225] A subcontractor was required to provide a five year written guarantee of the materials supplied. Although the guarantee was delivered, it was worthless as the subcontractor was placed in receivership. The Court implied a term that the subcontractor would be capable of the financial backup of the guarantee for the whole period of its duration.

Greenberg v. *Meffert*[226] concerned an employment contract with a provision that any commission on sales effected after the termination of the listing agent's employment would be payable "at the sole discretion of the company". The Court held that the company's discretion was not unbridled, first, because of the nature of the contract and the subject matter of the discretion, the determination was governed by objective standards and, second, the discretion had to be exercised honestly and in good faith. As the exercise of the discretion was not based on reasoned consideration and the objective criteria of honesty and good faith, the agent was entitled to his commission. This is an interesting case where the Appellate Court, by implying the requirements of reasonableness, good faith and honesty, controls otherwise clear and unambiguous wording of the contract.

B. Construction

When courts are called upon to construe or interpret contractual terms, in a case of ambiguity they frequently apply the *contra proferentem* principle, resolving any doubt against the party who inserted the contentious provision into the contract. In *Alex Duff Realty Ltd.* v. *Eaglecrest Holdings Ltd.*,[227] the rule was applied against the realtor, which had inserted a clause entitling it to a commission on a "sale" resulting from a listing agreement. The Court felt that there was a great uncertainty in legal circles over the meaning of the word "sale". It could mean, for example, a completed sale or merely an agreement to sell and in this case the term was taken to mean "completed sale".

In *Wall Bros. Constr. Co.* v. *Canson Enterprises Ltd.*,[228] the issue was whether a contract should be interpreted as containing specifications which ought to have been inserted but were not. It was a standard

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[224] *Sale of Goods Act, 1893* (U.K.), 56 & 57 Vict., c. 71.

[225] (1985), 69 N.S.R. (2d) 30, 163 A.P.R. 30 (T.D.), *aff'd* (1985), 72 N.S.R. (2d) 30, 173 A.P.R. 1270 (A.D.).

[226] (1985), 50 O.R. (2d) 755, 18 D.L.R. (4th) 548 (C.A.).

[227] (1983), 44 A.R. 67, 146 D.L.R. (3d) 731 (C.A.).

[228] (1986), 70 B.C.L.R. 243, 17 C.L.R. 157 (C.A.).

form contract and the Court, applying *Consolidated Bathurst Export Ltd.* v. *Mutual Boiler & Mach. Ins. Co.*,[229] held that a party that proferred the standard form contract committed a breach in performing work that did not meet the requirements of the specifications.

In *Westmore* v. *Old MacDonald's Farms Ltd.*,[230] a document, drafted by a lawyer who was also a shareholder and a director of a company, was construed against the lawyer's (and the company's) interest, both because the lawyer drafted the documents and also because he was a lawyer and the other parties were not trained in the law.

The rule was not applied in the interpretation of an "economic clause" in *West Fraser Mills Ltd.* v. *Crown Zellerbach Canada Ltd.*[231] At issue was an ordinary commercial contract, negotiated between two very large corporations, with highly sophisticated management personnel, by their respective firms of solicitors. Here the doctrine of *contra proferentem* was held to be irrelevant. The "economic clause" provided for reduction of purchases because of, *inter alia*, market conditions. The Court interpreted "market conditions" as a *force majeure* clause and followed Dickson J.'s (as he then was) interpretation of "non-availability of markets" in *Atlantic Paper Stock Ltd.* v. *St. Anne-Nackawic Pulp & Paper Co.*[232] Such a clause discharges a contracting party when a supervening event, beyond the control of either party, makes performance impossible.

Adriatic Dev. Ltd. v. *Canada Trustco Mortgage Co.*[233] dealt with the construction of a discretion clause. The mortgage agreement gave the mortgagee an absolute discretion to refuse to make any advances. The Court followed *Schwartzman* v. *Great-West Life Assurance Co.*,[234] where there was an identical clause. The clause was absolute in its terms. It did not depend on the performance or non-performance of either party and when the mortgagee refused to advance money, that was the end of it, since that was the contract the parties had entered into. This approach is to be contrasted with that of the Ontario Court of Appeal in *Greenberg* v. *Meffert*,[235] where it was held that a sole discretion clause must be exercised reasonably, honestly and in good faith.

The meaning of "not less than thirty days notice of termination" was subject to different constructions in *Aldo Ippolito & Co.* v. *Canada*

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[229] (1979), [1980] 1 S.C.R. 888, 56 D.L.R. (3d) 409.
[230] (1986), 70 B.C.L.R. 332 (S.C.).
[231] (1983), 23 B.L.R. 126 (B.C.S.C.).
[232] (1975), [1976] 1 S.C.R. 580, 56 D.L.R. (3d) 409.
[233] (1983), 37 C.L.R. 307, 2 D.L.R. (4th) 183 (C.A.), *rev'g* (1982), 135 D.L.R. (3d) 549 (B.C.S.C.).
[234] (1955), 17 W.W.R. 37 (B.C.S.C.), *aff'd* (1956), 18 W.W.R. 45 (B.C.C.A.).
[235] *Supra*, note 226.

Packers Inc.[236] The learned trial Judge construed the clause as requiring reasonable notice, but not less than thirty days. On appeal, Goodman J.A. agreed, but Dubin J.A., with whom Thorson J.A. concurred, was of the view that the parties, having given consideration to the mode of termination of their agreement, were bound by the plain meaning of the words to which they assented. As such, thirty days notice was sufficient.

C. Condition/Warranty

The determination of a contractual term, which promised that the property subject to sale was a five-plex, was the issue in *Jorian Properties Ltd.* v. *Zellenrath.*[237] The case illustrates the difficulties implict in the characterization of a contractual term in a particular case.[238] Both the majority and the dissenting Justices in the Court of Appeal referred to the same precedents[239] and used the same analysis, yet they arrived at different conclusions.

Blair J.A., in his dissenting judgement, held the term to be a warranty. He stated that the use of a legal term such as "condition" or "warranty" creates a rebuttable presumption, but this presumption will be rebutted if it is shown that another interpretation was intended. It is not the label, but the effect of the term, which determines the issue. In this case the term "five-plex" was an essential condition of the contract, not a mere warranty. If the building were not a five-plex, the purchaser would not have gotten what he bargained for.

The majority, on the other hand, held that the purchaser was primarily interested in buying a rental property and the coveyance of a property which could be used as a triplex rather than a five-plex would not deprive the purchaser of substantially the whole benefit of the contract. The majority followed the decision in *Cehave N.V.* v. *Bremer*,[240] as the facts were parallel. In both cases, the original purchasing party eventually bought the property and used it for the originally intended purpose.

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[236] (1986), 32 D.L.R. (4th) 440, 17 O.A.C. 180 (C.A.), *rev'g* (1984), 29 B.L.R. (H.C.).

[237] (1984), 4 O.A.C. 107, 26 B.L.R. 276 (C.A.).

[238] For discussion of the construction and effect of contractual terms, *see supra*, note 1 at 617-19.

[239] *Hong Kong Fir Shipping Co.* v. *Kawasaki Kison Kaisha* (1961), [1962] 2 Q.B. 26, [1962] 1 All E.R. 474 (C.A.); *Cehave N.V.* v. *Bremer* (1975), [1976] 1 Q.B. 44, [1975] 2 All E.R. 739 (C.A.).

[240] *Ibid.*

D. Collateral Contracts and Parol Evidence

The courts continue to wrestle with the problem of collateral contracts and parol evidence.[241] In a great majority of cases, the proof of the existence of a collateral contract involves the admissibility of evidence under the parol evidence rule. However, in some cases this aspect is not emphasized. Thus, in *United Mine Workers of America, Dist. 18* v. *Cardinal River Coals Ltd.*,[242] the trial Judge admitted extrinsic evidence to establish an oral collateral contract. The Court of Appeal referred to *Carman Construction*[243] and *Hawrish*,[244] two recent decisions of the Supreme Court of Canada dealing with the parol evidence rule. But, without deciding on the admissibility of extrinsic evidence, the Court held that the extrinsic evidence admitted at the trial did not establish a collateral agreement.

An oral collateral contract, adding to a written agreement for the sale of land, was admitted in *Exploit Sales and Serv. Ltd.* v. *Fox Farm Village Ltd.*[245] The Court quoted the classic passage of Lord Moulton from *Heilbut, Symons & Co.* v. *Buckleton*[246] concerning the formation of collateral contracts. However, the issue of the admissibility of parol evidence was simply not mentioned. A factor which probably influenced the Court was the fact that the transaction was between a solicitor and his client. In the opinion of the Court this was clearly a case where the solicitor should have insisted on his client obtaining independent legal advice.

Hallmark Pool Corp. v. *Storey*[247] is a case where a collateral contract consisting of a guarantee of a swimming pool, contained in a newspaper advertisement and a sales brochure, was established. La Forest J. (as he then was) applied *Carlill* v. *Carbolic Smoke Ball Co.*

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[241] *See supra*, note 1 at 631-35; E.J. Hayek, *Collateral Contracts and the Supreme Court of Canada: Carman Construction Ltd. v. Canadian Pacific Railway Co.* (1982-83) 7 CAN. BUS. L.J. 328; S.M. Waddams, *Do We Need the Parol Evidence Rule?* (1984) Proceedings of the 14th Annual Workshop on Commercial and Consumer Law, Toronto; S.M. Waddams, *Two Contrasting Approaches to the Parol Evidence Rule* (1986) 12 CAN. BUS. L.J. 285; A. Hershorn, *The Admissibility of Parol Evidence to Prove Misrepresentation and Collateral Agreement* (1986-87) 7 ADVOCATES' QUARTERLY 156.

[242] (1985), 58 A.R. 371 (C.A.).

[243] *Carman Constr. Ltd.* v. *C.P.R.* (1982), [1982] 1 S.C.R. 958, 136 D.L.R. (3d) 193 [hereinafter *Carman Construction*], *aff'g* 33 O.R. (2d) 472, 124 D.L.R. (3d) 680 (C.A.), *aff'g* 28 O.R. (2d) 232, 109 D.L.R. (3d) 288 (H.C.).

[244] *Hawrish* v. *Bank of Montreal* (1969), [1969] S.C.R. 515, [1969] 2 D.L.R. (3d) 600 [hereinafter *Hawrish*].

[245] (1984), 142 A.P.R. 266, 48 Nfld. & P.E.I.R. 266 (Nfld. C.A.).

[246] (1912), [1913] A.C. 30 at 47, [1911-13] All E.R. 83 at 90 (H.L.). *See also supra*, note 1 at 632.

[247] (1983), 45 N.B.R. (2d) 181, 144 D.L.R. (3d) 56 (C.A.), *aff'g* (*sub nom. Storey* v. *Price*) 36 N.B.R. (2d) 317, 94 A.P.R. 317 (T.D.).

[248] and *De La Bere* v. *Pearson Ltd.*[249] as precedents. These cases really do not deal with collateral contracts, but with the establishment of principal contracts.

The English Court of Appeal denied the existence of collateral contracts in two cases dealing with claims for failed sterilization operations. In *Eyre* v. *Measday*,[250] the Court specifically denied the alleged collateral contract based on the physician's assertion that the operation was irreversible, as there was no intention to provide an absolute guarantee. In *Thake* v. *Maurice*,[251] the Court held there was no collateral warranty regarding the success of the operation, especially given that medicine by its very nature is an inexact science.

The different attitudes of English and Canadian courts to parol evidence were noted in the last survey.[252] Following the re-affirmation of a strict formalistic approach by the Supreme Court of Canada in *Carman Construction*,[253] the courts appear to consider themselves bound by that decision. But where they feel that parol evidence should be admitted in the interest of fairness and justice, they attempt to establish exceptions.

Gallen v. *Allstate Grain Co.*[254] is a good example of this inclination. The plaintiffs purchased buckwheat seed from the defendant seed merchants. They were assured by the defendant's manager that the buckwheat would grow quickly and smother weeds. They signed a contract which contained a provision that Allstate "will not in any way be responsible for the crop". When the plaintiffs planted the buckwheat it was smothered by the weeds. Seaton J.A., in his dissenting judgment, considered himself bound to follow the decision in *Carman Construction* and did not admit the oral undertaking. The majority, Lambert and Anderson JJ.A., was of the view that there was no contradiction between the oral warranty and the written standard form contract. The oral warranty was therefore admissible and Allstate was liable for its breach. The facts of this case are not dissimilar to those in the *Finney Lock Seeds* case[255] and one cannot but recall the warnings of Lords Bridge and Diplock in that case against the dangers of strained and artificial construction.

Bank of Nova Scotia v. *Zackheim*[256] was a case of a written guarantee of "all debts and liabilities present or future" with an oral

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[248] (1892), [1893] 1 Q.B. 256, [1891-94] All E.R. Rep. 127 (C.A.).

[249] (1907), [1908] 1 K.B. 280, [1904-07] All E.R. Rep. 755 (C.A.).

[250] (1985), [1986] 1 All E.R. 488 (C.A.).

[251] (1985), [1986] 2 W.L.R. 336, [1986] 1 All E.R. 497 (C.A.).

[252] *Supra*, note 1 at 633-35.

[253] *Supra*, note 243.

[254] (1984), 53 B.C.L.R. 38, 9 D.L.R. (4th) 496 (C.A.).

[255] *George Mitchell (Chesterhall) Ltd.* v. *Finney Lock Seeds Ltd.* (1983), [1983] 3 W.L.R. 163, [1983] 2 All E.R. 737 (H.L.).

[256] (1983), 44 O.R. (2d) 244, 3 D.L.R. (4th) 760 (C.A.), *rev'g* (1983), 42 O.R. (2d) 592 (H.C.).

assurance that the guarantee would apply to future indebtedness only. Griffith J., relying on *Bauer* v. *Bank of Montreal*,[257] was of the view that the parol evidence rule excluded evidence of an oral innocent misrepresentation that contradicted the terms of a written agreement. He was overruled by the unanimous decision of the Ontario Court of Appeal, which held that an accurate interpretation of *Bauer* was that the defence of innocent misrepresentation has not been precluded or dismissed. This alternative approach makes it possible to get around the parol evidence rule by treating the oral statement as a misrepresentation, where circumstances permit, and not as a collateral contract. A similar route was pursued by the British Columbia Court of Appeal in *C.I.B.C.* v. *Larsen*.[258]

In a short judgment in *Toronto-Dominion Bank* v. *Lenec*,[259] the British Columbia Court of Appeal held, applying *Hawrish*,[260] that an oral agreement to pay a higher interest rate than that stated in the written mortgage agreement and promissory note was inadmissible. The Court also held that oral evidence cannot vary a mortgage document dealing with an interest in land and which is required to be in writing under the *Statute of Frauds*.

C.I.B.C. v. *Trapp*[261] is another case dealing with the admissibility of parol evidence. The Court held, applying *Gallen* v. *Allstate Grain Co.*,[262] that parol evidence was admissible as it did not specifically contradict the written agreement. Treating the oral statement as an innocent misrepresentation, the Court, relying mainly on *Bauer*, stated the proposition that if a misrepresentation goes to the whole contract, the whole contract will be avoided, but if it goes to a portion only, the contract will be sustained but in an amended form. However, in *Chant* v. *Infinitum Growth Fund Inc.*[263] the Ontario Court of Appeal recently affirmed the inadmissibility of parol evidence to vary, contradict or add to a written agreement.[264]

E. Exemption Clause

There have been no new developments in the law relating to exemption clauses. The courts are applying the principles laid down

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[257] (1980), [1980] 2 S.C.R. 102, 110 D.L.R. (3d) 424 [hereinafter *Bauer*].
[258] *Supra*, note 114.
[259] (1984), 60 B.C.L.R. 36 (C.A.).
[260] *Supra*, note 244.
[261] (1985), 60 B.C.L.R. 241 (S.C.).
[262] *Supra*, note 254.
[263] *Supra*, note 95 and accompanying text.
[264] For a commentary on this case, *see* Waddams, *Two Contrasting Approaches to the Parol Evidence Rule*, *supra*, note 241.

in the early eighties by the House of Lords in the *Photo Productions* [265] case and the *Finney Lock Seeds*[266] case.

Dyck v. *Manitoba Snowmobile Ass'n Inc.*[267] is a short *per curiam* which touches on many issues without an in depth examination of any of them.[268] At issue was the validity of a signed waiver of liability clause in an action for damages for injuries suffered by the plaintiff in a snowmobile race as a result of the defendant's negligence. The Supreme Court of Canada held that the waiver clause in the race entry form was clearly worded to exonerate the Snowmobile Association and its agents. It indemnified against claims in respect of injury "howsoever caused" and it specifically mentioned negligence. The plaintiff, on his admission, was fully aware of the contents of the form. The fact that the form was drafted as an indemnifying release did not affect its validity as a waiver. The Court found it unnecessary to consider the argument that the defendant's negligence amounted to a fundamental breach which precluded the application of the waiver, on the grounds that the waiver clause did not appear unreasonable. The Supreme Court of Canada thus passed over the opportunity to provide guidance on the application of the recent House of Lords decisions[269] in Canadian jurisprudence. The Court also dismissed arguments that the clause was unconscionable, that the relationship between the plaintiff and the Association rendered the contract unconscionable because of the differences in bargaining power and the waiver was contrary to public policy. The judgment in *Delaney* v. *Cascade River Holidays Ltd.*,[270] another case of a sporting accident where an exemption clause was upheld,[271] has been affirmed on appeal.

In *Rose* v. *Borisko Brothers Ltd.*,[272] the Ontario Court of Appeal affirmed the trial judgment, stating tersely that, on proper construction of the whole contract, there was a fundamental breach and the appellant could not rely on the limiting clause. The trial Judge, dealing with the limitation clause, referred to the judgment of Wilson J.A. (as she then was) in *Chomedy Aluminum Co.* v. *Belcourt Constr. (Ottawa) Ltd.*,[273] where she stated that we should ask whether it is fair and reasonable

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[265] *Photo Prod. Ltd.* v. *Securicor* (1980), [1980] A.C. 827, [1980] 1 All E.R. 556 (H.L.) [hereinafter *Photo Productions*]; *Ailsa Craig Fishing Co.* v. *Malvern Fishing Co.* (1981), [1983] 1 W.L.R. 964, [1983] 1 All E.R. 101 (H.L.).

[266] For a discussion of these principles, *see supra*, note 1 at 620-31.

[267] (1985), [1985] 1 S.C.R. 589, 18 D.L.R. (4th) 634, *aff'g* (1982), 136 D.L.R. (3d) 11, [1982] 4 W.W.R. 318 (Man. C.A.), *aff'g* (1981), 11 Man. R. (2d) 308, [1981] 5 W.W.R. 97 (Q.B.).

[268] For commentary on this decision, *see supra*, note 25 at 124-62.

[269] *Supra*, notes 255 and 265.

[270] (1983), 44 B.C.L.R. 24, 24 C.C.L.T. 6 (C.A.).

[271] *See supra*, note 1 at 631.

[272] (1983), 41 O.R. (2d) 606, 147 D.L.R. (3d) 191 (C.A.), *aff'g* 33 O.R. (2d) 685, 125 D.L.R. (3d) 671 (H.C.).

[273] (1979), 24 O.R. (2d) 1 at 8, 97 D.L.R. (3d) 170 at 178 (C.A.), *aff'd* (1980), [1980] 2 S.C.R. 718, 116 D.L.R. (3d) 193.

that the limitation clause should survive the disintegration of the contractual setting. The trial Judge then held that it was not fair and reasonable for the clause to survive. These *dicta* resemble the test of reasonableness put forward by Lord Denning in the *Photo Productions* and *Finney Lock Seeds* cases, but not followed by other judges in those cases.[274] It is thus unclear whether the Ontario Court of Appeal favours the test of reasonableness.

In the Nova Scotia County Court judgment of *Bruce M. Atkinson Boatbuilders Ltd.* v. *Eddy*,[275] Anderson J. , having reviewed the case law, stated that it seemed to be the law in Nova Scotia that a fundamental breach negates the impact of an exemption clause. In *Daigle* v. *Cape Breton Crane Rentals Ltd.*,[276] the Court referred to the decision of the House of Lords in *Photo Productions*, which endorsed the construction doctrine, and the adoption of that doctrine by the Supreme Court of Canada in *Chomedy Aluminum Co.* v. *Belcourt Constr. (Ottawa) Ltd.*,[277] but held that it was neither fair nor reasonable for the defendant to rely on the exemption clause.

Armstrong J. of the Saskatchewan Court of Queen's Bench stated in *Garner* v. *Pete Straza Constr.*[278] that the exclusionary clause was operable except in the case of negligence or fundamental breach. No authorities or reasons were given for this conclusion.

In *Syncrude Canada Ltd.* v. *Hunter Eng'r Co.*,[279] the British Columbia Court of Appeal cited *Gafco Enterprises Ltd.* v. *Scholfield* [280] to the effect that there is no rule of law in Canada that automatically excludes an exemption clause in the event of a fundamental breach. It also noted the rule of construction reaffirmed in *Photo Production*. It applied the rule of construction and found that the exemption clause did not cover claims for fundamental breach.

The survey of preceding cases indicates that the law as to exemption clauses in Canada is not altogether clear. This is undoubtedly due to the unsatisfactory adoption of the *Photo Productions* case in *Chomedy Aluminum Co.* v. *Belcourt Constr. (Ottawa) Ltd.*[281] The trend in both England and Canada is to follow the rule of construction, but there are other views. We have seen references in recent cases in Nova Scotia and Alberta to the "rule of law" that fundamental breach

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[274] *See supra*, note 1 at 626-27.

[275] (1984), 62 N.S.R. (2d) 22, 136 A.P.R. 22 (Co. Ct.).

[276] (1985), 64 N.B.R. (2d) 129, 165 A.P.R. 129 (T.D.).

[277] *Supra*, note 273.

[278] (1985), 42 Sask. R. 227 (Q.B.).

[279] (1985), 68 B.C.L.R. 367 (C.A.), *rev'g* (1984), 27 B.L.R. 59 (B.C.S.C.).

[280] (1983), 43 A.R. 262, [1983] 4 W.W.R. 135 (C.A.).

[281] *Supra*, note 273. For comments on this judgment, *see, e.g.*, J. Ziegel, *The House of Lords Overrules Harbutt's Plasticine* (1980) 30 U.T.L.J. 421; M. Ogilvie, *Photo Production v. Securicor Transport Ltd.: An Inconclusive Unscientific (Canadian) Postscript* (1981) 5 CAN. BUS. L.J. 368; S. Waddams, *Note* (1981) 15 U.B.C.L. REV. 189.

destroys the effectiveness of an exemption clause, as well as references to the test of fairness and reasonableness in other cases. It is submitted that the test of reasonableness and the rule of construction are not the same thing. The test of what is fair and reasonable rests on some as yet unidentified objective standards, while the rule of construction attempts to give effect to the intentions of the parties. Although it would not be a usual occurrence, the parties may intend an exemption clause which is neither fair (to one party) nor reasonable.Exemption clauses may be drafted in such a way as to exclude liability for negligence. The exemption clause in *Majestic Theatres Ltd.* v. *N.A. Properties Ltd.*[282] read that the lessee would "not be responsible in any way" for any injury, loss or damage. The clause did not refer specifically to negligence and the trial Judge held that the clause did not exempt from liability caused by negligence. The Court of Appeal, applying *Agnew-Surpass Shoe Stores Ltd.* v. *Cummer-Yonge Inv. Ltd.*,[283] held that the wording of the clause was broad enough to cover negligence and therefore it did not need to do so explicitly. Furthermore, a provision requiring the lessee to insure demonstrated the intention of the parties that the lessee was not to incur liability.

Exchanger Indus. Ltd. v. *Dominion Bridge Co.*[284] concerned an exemption clause that read "we do not accept any responsibility whatsoever for damage etc." The Court referred to the rule of construction in *Photo Productions*, and to the rule of construction respecting applicability to negligence in *Alderslade* v. *Hendon Laundry, Ltd.*[285] and *Canada S.S. Lines Ltd.* v. *R.*,[286] and held that, as the head of damage was confined to some ground other than negligence, in this case departure from contractual terms, it did not exempt from liability for negligence.[287]

In *Scottish Special Hous. Ass'n* v. *Wimpey Constr.*,[288] Lord Keith carefully construed two exemption clauses. Clause 18 provided that the contractor would be liable for any loss except for such loss as was exempted under clause 20. Clause 20 provided that the buildings were to be at the sole risk of the employer as regards loss or damage by fire. The buildings were damaged by fire caused by the contractor's negligence. Lord Keith held that clause 18 made it clear that the contractor was liable for damages caused by his negligence, but that this was subject to an exception. The ambit of the exception was stated in clause 20, which did not differentiate between fire due to negligence

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[282] (1985), 57 A.R. 210, 35 Alta. L.R. 367 (C.A.), *rev'g* (1983), 51 A.R. 161, 24 B.L.R. 105 (Q.B.).

[283] (1975), [1976] 2 S.C.R. 221, 55 D.L.R. (3d) 676.

[284] (1986), 69 A.R. 22 (Q.B.).

[285] (1945), [1945] K.B. 189, [1945] 1 All E.R. 244 (C.A.).

[286] (1952), [1952] A.C. 192, [1952] 1 All E.R. 305 (P.C.).

[287] For a discussion of the determination of applicability of exemption clauses to negligence in *Canada S.S. Lines* v. *R*, *see supra*, note 1 at 624-51.

[288] (1986), [1986] 1 W.L.R. 955, [1986] 2 All E.R. 957 (H.L.).

of the contractor and fire due to other causes. Consequently, fire caused by the contractor's negligence fell within the exemption.

F. Privity

The doctrine of privity of contract means that only parties to the contract may acquire rights or incur liabilities arising under it. There are, of course, exceptions to the doctrine. The problems arising as a result of the doctrine may be broadly classified under two headings.

1. *Third Party Liability*

The main issue here is to what extent may strangers to the contract benefit from an exemption clause contained in it. Less frequently the converse issue arises: when will a stranger to a contract incur liability under it. The Supreme Court of Canada dealt with two cases involving this second issue.

In *Dyck* v. *Manitoba Snowmobile Ass'n Inc.*,[289] the Court of Appeal had no difficulty in finding that an exemption clause in a contract between Dyck and the Association enured to the benefit of the starter because the Association acted as his agent in obtaining the release clause, which specifically referred to the agents, servants and representatives of the Association. This finding was confirmed by the Supreme Court of Canada.

I.T.O.-Int'l Terminal Operators Ltd. v. *Miida Elecs. Inc.*[290] is an important decision of the Supreme Court of Canada. The Court considered, for the first time, the effectiveness of the so-called "Himalaya clause" in Canadian law and approved of it. The Himalaya clause is a typical clause inserted in bills of lading, which extends the limitation of liability of the carrier to his agents, such as stevedores, subcontractors and warehousemen.[291] The Court cited Lord Reid's speech in *Scruttons Ltd.* v. *Midland Silicones Ltd.*,[292] where he enumerated the four conditions which must be satisfied for the Himalaya clause to be effective:

> I can see a possibility of success of the agency argument if (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore that these provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later

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[289] *Supra*, note 267.
[290] (1986), [1986] 1 S.C.R. 752, 28 D.L.R. (4th) 641.
[291] *Ibid.* at 783, 28 D.L.R. (4th) at 663 for literature on the Himalaya clause.
[292] (1961), [1962] A.C. 446, [1962] 1 All E.R. 1 (H.L.).

> ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome.[293]

This passage was approved by the Privy Council in *The Eurymedon*,[294] where it was held that, as agent, the carrier had contracted for the same exemption for the stevedore as for itself. The Supreme Court of Canada approved of and followed *The Eurymedon*.

The next issue considered by Supreme Court of Canada was whether the clause extended to negligence, although negligence was not specifically stated in the clause. The Court, having canvassed the relevant case law, came to the conclusion that the clause was sufficiently broad to include negligence. In particular, McIntyre J., speaking for the Court, approved the judgment of May L.J. in *The Raphael*[295] where he advocated the construction approach, stating that the Court must consider all the relevant circumstances in determining what the parties intended the alleged exemption clause to mean.

A third issue was that of jurisdiction. The majority held that, as the subject was maritime law, it fell within the jurisdiction of the Federal Court. The minority, Beetz, Chouinard and Lamer JJ., all civilians from Quebec, dissented on the ground that part of the appeal was purely delictual and fell within the jurisdiction of the Civil Courts of Quebec.

L. & B. Constr. Ltd. v. *Northern Canada Power Comm'n*[296] deals with an unusual situation. L. & B. Construction contracted to off-load transformers for the Power Commission, which promised to provide insurance coverage so that the contractor and his employees would not need to be insured. The Commission failed to do so. One of the transformers was damaged due to the negligence of the contractor's emloyees and the issue was whether the employees were protected from liability. Marshall J. held that the promise to insure was a unilateral contract which became bilateral when the work was actually performed and consequently the workers were protected. Alternatively, the action may be looked upon as one in tort and the promise to insure may be interpreted as a voluntary assumption of the risk.

Punch v. *Savoy's Jewellers Ltd.*[297] deals with the nature of bailment, duties and liabilities of a bailee and sub-bailees, and the effect of a limitation clause. Lenore Punch took a valuable ring to Savoy's Jewellers for repairs. They sent the ring to Toronto to Walker Jewellery Manufacturers. Owing to a postal strike, Walker returned the ring by C.N. courier service, which lost the ring. There was a

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[293] *Ibid.* at 474, [1962] 1 All E.R. at 10.

[294] *New Zealand Shipping Co.* v. *A.M. Satterthwaite & Co. (The Eurymedon)* (1974), [1975] A.C. 154, [1974] 1 All E.R. 1015 (P.C.) [hereinafter *The Eurymedon*].

[295] *Lamport & Holt Lines Ltd.* v. *Coubro & Scrutton (M. & I.) Ltd. (The Raphael)* (1982), [1982] 2 Lloyd's Rep. 42 (C.A.) [hereinafter *The Raphael*].

[296] (1984), [1984] N.W.T.R. 324, [1984] 6 W.W.R. 598 (S.C.).

[297] (1986), 54 O.R. (2d) 383, 35 C.C.L.T. 217 (C.A.).

clause in the C.N. contract with Walker limiting the liability of C.N. to fifty dollars. Cory J.A., delivering a well reasoned judgment of the Court, dealt thoroughly with the legal nature of bailments, the respective duties of the bailee and sub-bailees and the effectiveness and interpretation of the exemption clause. He summarized the result of the appeal as follows:

> Both Savoy and Walker are liable to Lenore Punch for breach of their duty as bailees. They breached this duty by failing to obtain instructions from the owner as to the means of carriage in light of the postal strike; by failure to give a proper evaluation of the ring to the carrier, and by failure to stipulate as a term of the carriage insurance coverage for the true value of the ring itself. C.N. also is liable to the owner for the unexplained loss of the ring. Savoy and Walker are to be indemnified by C.N. for any loss which they must make good to the owner.
>
> Walker, however, should not be entitled to recover any costs against C.N. It was Walker which fixed the value of the article to be shipped at $100 and it must accept some responsibility for that action.[298]

Discussing the effectiveness of the limitation clauses, Cory J.A. expressed the view that where the owner did not consent expressly or impliedly to the terms of carriage, then he would not be bound by any limiting clause. In this case, Savoy did not consent expressly or impliedly to the terms of carriage by C.N. and Punch was not even aware of the existence of C.N. courier service. Consequently, neither of them was bound by the limitation clause. In any event, the limitation clause did not cover the unexplained loss of the subject matter of the bailmenet. Cory J.A. referred to *Heffron* v. *Imperial Parking Co.*[299] where it was held that such a loss amounts to a fundamental breach which vitiates the exemption clause. Whether you arrive at the result by applying the rule of law or the rule of construction, *Heffron* was decided before the *Photo Productions* case and Cory J.A. expressed the view that, on true construction, the clause was not intended to cover unexplained loss.

Muirhead v. *Indus. Tank Specialties*[300] is a decision of the English Court of Appeal, interpreting and at the same time placing limitations on *Junior Books Ltd.* v. *Veitchi Co.*[301] It contains an interesting *per curiam* statement to the effect that an exemption clause in a contract between the purchaser and the vendor enures to the benefit of a manufacturer whose products were incorporated in the goods sold. The statement was *obiter dictum* and referred to liability for economic loss in a tort action for negligence.

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[298] *Ibid.* at 396, 35 C.C.L.T. at 234.

[299] (1974), 3 O.R. (2d) 722, 46 D.L.R. (3d) 642 (C.A.) [hereinafter *Heffron*].

[300] (1985), [1986] 1 Q.B. 507, [1985] 3 All E.R. 705 (C.A.).

[301] (1982), [1983] 1 A.C. 520, [1982] 3 All E.R. 201 (H.L.) [hereinafter *Junior Books*].

2. *Contractual Parties*

A problem associated with the doctrine of privity is the identification of the parties to the contract. In *Fraser* v. *U-Need-A-Cab Ltd.*,[302] the plaintiff ordered a cab, by telephone, from U-Need-A-Cab. The cab arrived, bearing the insignia of U-Need-A-Cab and, after the ride, when the plaintiff was getting out of the cab, she was injured as a result of a defective door. The defendants claimed that the cab in question was independently owned and operated and that the contract was between the plaintiff and the owner of the cab. Zuber J.A. held that the contract was made between the plaintiff and U-Need-A-Cab when the plaintiff telephoned for the cab and the order was accepted. Although U-Need-A-Cab did not receive the fare, the consideration was the plaintiff's promise to pay. The fact that U-Need-A-Cab used an independent operator did not change the actual contract between the plaintiff and the defendant. It is interesting to note that, in determining the liability of the defendant, the trial Judge followed *Hart* v. *Bell Tel. Co. of Canada*[303] and implied a warranty that the cab was reasonably safe for use by the plaintiff.

Simpson-Sears Ltd. v. *Gerling*[304] deals with liability arising from the use of a credit card. A husband opened an account with Simpson-Sears. His wife was issued a credit card and made purchases on the account, using the card. The Master stated that it is a common commercial practice for a contract to be entered into between A and B, whereby both agree that C can purchase goods from A on B's account. Here the evidence indicated that the contract was between Simpson-Sears Ltd. and the husband and only parties to a contract are subject to its burdens.

MacDonald v. *Matheson*[305] involves the not uncommon situation in which a third party, for example, a welfare agency or insurance company, agrees to defray the cost of work done for its client. Under such circumstances the contract is between the client ordering the work and the supplier of the work. In this case, MacDonald made arrangements with Matheson, a dentist, to have a pair of dentures made. An order form was completed by the dentist and forwarded to the Department of Veteran Affairs for approval. The Department approved the work and forwarded a cheque to MacDonald. The Court held that the contract was between MacDonald and the dentist. There was no evidence that the Department ever entered into a contract with the dentist; it merely provided financial assistance.

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[302] (1985), 50 O.R. (2d) 281, 17 D.L.R. (4th) 574 (C.A.), *aff'g* (1983), 43 O.R. (2d) 389, 1 D.L.R. (4th) 268 (H.C.).

[303] *Supra*, note 223.

[304] (1985), 66 A.R. 318, 41 Alta. L.R. (2d) 426 (Q.B.).

[305] (1986), 57 Nfld. & P.E.I.R. 268, 170 A.P.R. 268 (P.E.I.C.A.).

XI. DISCHARGE

A. *Performance*

The instances in which a party that has not fully completed an obligation will be entitled to payment under an entire or lump sum contract were stated in *Mitchell* v. *To-Co Constr. Ltd.*:

> 1. The defendant's non-performance is attributable to the fault of the plaintiff.
>
> . . .
>
> 2. If the defendant had substantially performed its contract it can still recover for the value of the work performed by it. Whether or not there was substantial performance requires the consideration of at least the following elements:
>
> (a) the percentage completion, including the nature and kind of work to be done;
>
> (b) the amount of the contract price earned;
>
> (c) the quality of the work to be formed, including the skill and knowledge necessary for performance;
>
> (d) the availability of qualified workmen and equipment;
>
> (e) the ease or facility by which the aggrieved party could complete.
>
> . . .
>
> 3. The defendant could still recover on a *quantum meruit* basis provided there was evidence to support an inference that the plaintiff and the defendant had made a new agreement.[306]

The Court referred to *Fairbanks Soap Co.* v. *Sheppard*[307] and *Veregen* v. *Red Maple Farms Ltd.*[308] and authorities therein cited.

B. *Accord and Satisfaction*

What constitutes satisfaction was one of the issues in *Collavino (Nfld.) Ltd.* v. *Dobbin*.[309] The Court held that an executory promise to pay an agreed sum of money in settlement of a dispute is sufficient consideration, even if the money is not paid and the original agreement is discharged from the date the promise is accepted. The Court quoted CHESHIRE AND FIFOOT'S LAW OF CONTRACT[310] as authority. The same

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306 (1983), 2 C.L.R. 301 at 307-08 (Alta. Q.B.).

307 (1953), [1953] 1 S.C.R. 314, [1953] 2 D.L.R. 193.

308 (1974), 59 D.L.R. (3d) 221 (Alta. C.A.).

309 (1985), 55 Nfld. & P.E.I.R. 137, 162 A.P.R. 137 (Nfld. C.A.).

310 M.P. Furmston, ed., CHESHIRE AND FIFOOT'S LAW OF CONTRACT, 10th ed. (London: Butterworths, 1981) at 510.

principle is enunciated in *British Russian Gazette and Trade Outlook, Ltd.* v. *Associated Newspapers*,[311] a leading case on accord and satisfaction. A contrary view was expressed by Funduk, Master, in *Toronto-Dominion Bank* v. *Watson*,[312] where he stated, quoting *Hoolahan* v. *Hivon*[313] as authority, that it was not the settlement agreement that extinguished the original obligation, but the performance by the debtor of the settlement agreement. It is an implied term of the settlement agreement that if the debtor fails to perform it, the creditor may bring it to an end and resort to his original claim.

Whether a cheque for a smaller amount than the debt, endorsed "payment in full" and cashed by the creditor, constitutes an accord and satisfaction was the subject of two cases. In *Amesco (1967) Ltd.* v. *Beanland*,[314] a cheque, accompanied by a letter explaining the amount and received by a credit manager familiar with the account, was held to be an offer which was accepted by the cashing of the cheque. In *Fehr* v. *Robinson Diesel Injection Ltd.*,[315] accord and satisfaction was not established. The plaintiff was charged for repairs. He disputed the amount, but paid by means of a cheque which he stopped. Later, he forwarded another cheque for about half the amount with a notation "payment in full for repairs". The defendant cashed the cheque on legal advice and within two days demanded the balance. The Court held that there was no intention on the part of the defendant to accept the cheque in full satisfaction and there was no accord. The preceding two cases illustrate that whether or not there is an accord in these circumstances depends on the facts of a particular case.

C. Waiver

Federal Business Dev. Bank v. *Steinbock Dev. Corp.*[316] stressed two essential characteristics of a waiver. First, waiver is essentially unilateral. It results as a legal consequence of some act or conduct by a person against whom it operates. No act of the person in whose favour it operates is needed to make the waiver complete. The essentials of a waiver are the full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it.

D. Novation

A novation is essentially the substitution of a new contract for an old one, with different parties and/or terms, so that the old contract is

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[311] (1933), [1933] 2 K.B. 616 at 643-44, [1933] All E.R. Rep. 320 at 327 (C.A.).
[312] (1985), 67 A.R. 179 (Q.B.).
[313] (1944), [1944] 4 D.L.R. 405, [1944] 3 W.W.R. 120 (Alta. S.C.).
[314] (1985), 39 Man. R. (2d) 196 (Q.B.).
[315] (1985), 47 Sask. R. 12 (Q.B.).
[316] (1983), 42 A.R. 231 (C.A.).

discharged and the liabilities of the parties under the old contract are extinguished. When the new contract does not explicitly discharge the old one, then a question arises as to whether the transaction is really a novation or merely the variation of the existing contract or whether it was intended that both contracts, the old and the new one, should co-exist. In either case, the liabilities of the parties to the original contract would not be extinguished.

This creates problems, especially in connection with the transfer of mortgages. It is a common practice for a purchaser of real property to assume the existing mortgage. The effects of these assumption agreements on the liabilities of the original mortgages and possible guarantors have exercised the courts in several provinces. The law is unclear and the cases not easy to reconcile. In *Canada Permanent Mortgage Corp.* v. *Halet Enterprises*,[317] Macdonell J. states the essentials of a novation at common law: (i) the new debtor must assume complete liability, (ii) the creditor must accept the new debtor as the principal debtor and (iii) the creditor must accept the new contract in full satisfaction of and substitution for the old contract so that the original debtor is discharged. Applying these principles, he found, on the facts of the case, that, although the original mortgagor had not been specifically released, nevertheless a new contract, which had in fact been substituted for the original contract, had been entered into by the mortgagee and the purchaser. A novation had thus occurred and the original mortgagor and the guarantors were released from there respective liabilities.

The issue in *Eaton Bay Trust Co.* v. *Pollon*,[318] another British Columbia Supreme Court decision, was whether a mortgagor, who sold his property and the equity of redemption, remained liable to the mortgagee on his personal covenant contained in the mortgage. Catliffe, L.J.S.C. noted that the issue was made more perplexing by recent conflicting decisions in his Court. There had recently been four decisions, within a period of six weeks, each of which had come to a different conclusion. Catliff L.J.S.C. did not follow *Halet Enterprises* or *Canada Permanent Trust Co.* v. *Carlyle*[319] and held that in the case at bar the extending of time for payment and the changing of the interest rate did not amount to a novation so as to release the original mortgagor. The important factor was a personal covenant in the original mortgage to the effect that any subsequent dealings between the mortgagee and the owner of the equity of redemption at the time would not effect or prejudice the rights of the mortgagee against the original mortgagor.

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[317] (1983), 48 B.C.L.R. 207, 23 B.L.R. 173 (S.C.) [hereinafter *Halet Enterprises*].

[318] (1983), 48 B.C.L.R. 341, 30 R.P.R. 254 (S.C.).

[319] (1983), 49 B.C.L.R. 342, 30 R.P.R. 244 (S.C.).

Canada Permanent Trust Co. v. *Carlyle*[320] followed the *Halet Enterprises* case and held that mortgage renewal agreements, changing the rate of interest and signed by one of the joint mortgagors, were not binding on the non-consenting party. The renewal agreement was intended to deal only with the signor of that agreement and consequently the third requirement stated in *Halet* (that the creditor must accept the new contract in substitution for the old one[321]) was not satisfied. Further, the change of the interest rate was a material alteration releasing the non-consenting party.

Bank of Montreal v. *Miedema*,[322] again a British Columbia judgment, applied *Canada Permanent Trust Co.* v. *Carlyle* and held that a mortgage extension agreement, with a clause "entered into without novation", signed by the purchaser of the property, was not a novation. *Central Trust Co.* v. *Bartlett*[323] is a Nova Scotia Court of Appeal decision involving a series of transfers of the equity of redemption of a property, each transferee having executed an assumption agreement. The last transferee renewed the mortgage at a much higher interest rate and defaulted. The issue was the liability of Bartlett, one of the intermediate transferees. Hart J.A., delivering the judgment of the Court, stated that in his opinion a novation only occurs when two contracting parties agree that the contractual obligations of one shall be assumed by a third party, so that the original party to the contract will be released from further responsibility. This did not occur here as the assumption agreements specifically stated that none of the terms of the original mortgage would be released. However, Bartlett was liable for interest only at the rate originally agreed to.

Whether there is also a fourth requirement for novation — that the new contract be made with the consent of the old debtors — has been raised in several British Columbia judgments. The addition of this fourth principle was suggested in *Bank of British Columbia* v. *Firm Holdings Ltd.*[324] It was inconclusively discussed in *Re Prospect Mortgage Inv. Corp. and VAN-5 Devs. Ltd.*[325] The point was again raised in *Bank of Nova Scotia* v. *Vancouver Island Renovating Inc.*[326] where Lambert J.A. stated that the delineation of the kinds of cases which do or do not require consent of the original debtor must wait for an appeal where the relevant facts are raised. This occurred in *Canada Permanent Trust* v. *Neumann*,[327] where Lambert J.A. stated:

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320 *Ibid.*
321 *Supra*, note 317 at 209, 23 B.L.R. at 176.
322 (1983), 30 R.P.R. 264 (B.C.S.C.).
323 (1983), 30 R.P.R. 267 (N.S.C.A.).
324 (1984), 57 B.C.L.R. 1 (C.A.).
325 (1985), 68 B.C.L.R. 12, 23 D.L.R. (4th) 349 (C.A.).
326 (1986), 6 B.C.L.R. (2d) 250 (C.A.).
327 (1986), 8 B.C.L.R. (2d) 318 (C.A.).

> in a case where the old debtors are co-covenantors on a straightforward mortgage of land so that they are simply debtors, the situation is comparable to the situation of the assignability of another simple debt, that is, the consent of the old debtor is not required. So in straightforward mortgage cases the fourth principle of novation referred to in the passage quoted above from the *Bank of N.S. v. Vancouver Island Renovating Inc.* case does not apply. In such a case the consent of the party being released is not a requisite of the complete novation. The situation may well be otherwise where both the burden and the benefits are being altered for one of the parties to the original contract.[328]

A novation may, of course, occur outside the mortgage setting. In *Bank of British Columbia* v. *Firm Holdings Ltd.*[329] a loan owing by a firm to the Bank of British Columbia was guaranteed. The firm was sold and the contract of sale provided for the release of the guarantors. During the discussions with the Bank a third party, Linemayr, agreed to assume the responsibility for the loan. The Court refused to disturb the findings of the trial Judge that, on the evidence, a novation had been established.

In *King* v. *Solna Offset of Canada Ltd.*,[330] a novation was inferred from the conduct of the parties. A new compensation plan was announced by the employer. The employees did not protest, but rather continued their employment and accepted their salaries and commissions under the terms of the new plan. The Court held that the plan was not a unilateral alteration by the employer, which would not be binding, but a new contract accepted by the employees. It was a novation between the same parties with new terms substituted.

C. *Frustration*

Frustration may be defined as the premature determination of an agreement between parties, lawfully entered into and in the course of operation at the time of its premature determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law both as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement.[331]

Several interesting cases came before the courts where the issue was whether a particular event was so fundamental as to justify the termination of the contract on account of frustration. A divergence of opinion between the trial Judge and the Appeal Division occurred in *Kesmat Inc.* v. *Industrial Mach. Co.*[332] In consideration of granting of

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[328] *Ibid.* at 322-23.

[329] *Supra*, note 324.

[330] (1984), 3 O.A.C. 178 (C.A.).

[331] *Cricklewood Property and Inv. Trust Ltd.* v. *Leightons Inv. Trust Ltd.* (1945), [1945] A.C. 221 at 228, [1945] All E.R. 252 at 255 (H.L.), Simon L.J.

[332] (1985), 66 N.S.R. (2d) 51, 8 C.C.L.I. 173 (S.C.), *rev'd* (1986), 70 N.S.R. (2d) 341, 39 R.P.R. 191 (A.D.).

an easement, Industrial agreed to obtain a rezoning of Kesmat's lands. Subsequently, the planning authority adopted a policy whereby, in order to obtain rezoning, an environmental study had to be undertaken. Such a study was prohibitively expensive and Industrial did not obtain it and consequently did not secure the rezoning. Gluber C.J.T.D. was of the view that the difficulty of obtaining a study and the excessive and unreasonable cost, which was not a factor the parties had considered, rendered the doctrine of frustration applicable. Macdonald J.A., who delivered the judgment of the Appeal division, disagreed. The requirement of an environmental study was not an unheard of request. It made the performance of the contract by Industrial more onerous and expensive, but the cost of the study was not so unreasonable as to render the performance of the contract impractical. The cost was not so onerous "that no man of common sense would incur the outlay".[333]

The question of whether a change in taxation law is sufficient cause to frustrate a contract was answered in the negative in *III Niakwa Road Ltd.* v. *Duraps Corp.*[334] The parties entered into an agreement to develop a housing project as a tax shelter under a MURB scheme. The defendant withdrew because of a freeze by CMHC on financing and the unavailability of the MURB shelter. These intervening circumstances were not considered by the Court to be so fundamental as to destroy the basis of the contract. The same could apply to changing or deteriorating market conditions, as these are ever present.

The violence of a third party was held to be a frustrating event in *Bell Island Fisheries Ltd.* v. *Ishiwata Trading Co.*[335] Bell Island sold fish to Ishiwata who resold it to customers in Japan. The contract provided for fish inspection on Bell Island premises by an inspector appointed by Japanese customers. This inspector, who rejected numerous catches, was assaulted by fishermen outside the Bell Island plant. The inspector was removed and Ishiwata refused to purchase any fish for one and a half days, until an alternative method of inspection could be arranged. Hickman C.J. held that Ishiwata's refusal was not a breach of contract but a suspension of performance. In consequence of the withdrawal of the inspector following the assault, which was quite reasonable, it was impractical for Ishiwata to continue the performance of the contract, as its Japanese customers would not purchase the uninspected fish. The contract was thus held to be frustrated for a period.

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[333] *Moss* v. *Smith* (1850), 9 C.B. 94 at 103, 137 E.R. 827 at 831, quoted with approval by Lord Atkinson in *Horlock* v. *Beal* (1916), [1916] 1 A.C. 486 at 499, 85 L.J. 602 at 610 (H.L.).

[334] (1985), 37 Man. R. (2d) 250 (Q.B.).

[335] (1986), 59 Nfld. & P.E.I.R. 345 (Nfld. S.C.T.D.).

F. Breach

1. Various Instances

The issue of whether violence by a third party is a justifiable excuse not to perform a contractual duty was considered in *Placer Dev. Ltd.* v. *British Columbia Hydro and Power Authority*.[336] British Columbia Hydro entered into a contract with Placer for a supply of electricity. A strike broke out at Placer and power was interrupted. British Columbia Hydro did not effect the necessary repairs for eighteen days, although under a contractual duty to do so, because of the fear of violence by the strikers and of being considered an "ally" of Placer under the provisions of the *Labour Code*[337] and thus subject to secondary picketing. Placer sued for damages for breach of contract and succeeded at trial.[338] A Court of Appeal reversed the decision. Seaton J.A., with whom the other Appeal Judges concurred, held that the contract did not include an unconditional obligation to provide power. The proper interpretation was that British Columbia Hydro was to do only what was reasonable. Neither is there any common law duty to repair that is unconditional or unqualified. In the circumstances of the case, the delay in repairs because of the violence was reasonable and did not constitute a breach of contract. Anderson J.A. added a warning that the concept of "reasonableness" was applied in dealings with a public utility and would not necessarily apply to other types of contract.

The duty of a contractor to warn the employer against the possible risks involved in contractual work and the duty to refuse the work if it would not be carried out safely were emphasized in *Spencer* v. *Forseth Bldg. Movers Ltd.*[339] A failure to warn or refuse may constitute a breach of contract. This principle is based on *Duncan* v. *Blundell*[340] and *Pearce* v. *Tucker*,[341] the latter case having been cited with approval by the Supreme Court of Canada.[342]

Bank of British Columbia v. *Turbo Resources Ltd.*[343] reaffirmed the proposition that time is of the essence in commercial contracts. The issue was whether the defendant, a guarantor of a debt owed to the plaintiff bank, was released by the bank's breach of the agreement. The bank failed to give the guarantor notice, within the prescribed time, of the debtor's default and it also failed to make the guarantor party to any negotiations concerning the debt. The Court stated the

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[336] (1984), 16 D.L.R. (4th) 197 (B.C.C.A.).
[337] R.S.B.C. 1979, c. 212.
[338] (1983), 46 B.C.L.R. 329, 148 D.L.R. (3d) 697 (S.C.).
[339] (1983), 27 Sask. R. 247 (Q.B.).
[340] (1820), 3 Stark. 6, 171 E.R. 749.
[341] (1862), 3 F. & F. 136, 176 E.R. 61.
[342] *Steel Co. of Canada* v. *Willand Mgmt.* (1966), [1966] S.C.R. 746, 58 D.L.R. (2d) 595.
[343] (1983), 148 D.L.R. (3d) 598, 27 Alta. L.R. (2d) 17 (C.A.).

proposition that at common law the guarantor is not entitled to notice of the debtor's default, apart from special stipulation.[344] There was such stipulation in the guarantee in question.

A contractual stipulation as to notice has been held to be a condition precedent to the surety's liability,[345] and in *Bunge Corp.* v. *Tradax S.A.*[346] the House of Lords held that time is of the essence in commercial contracts and a breach of stipulations as to time entitles the innocent party to repudiate the contract. The proposition that time is of the essence and that delay in performance is treated as going to the root of the contract, without regard to the magnitude of the breach, was put forward by Mustell L.J. in *Lombard N. Cent. PLC* v. *Butterworth*[347] where he cited *Bunge Corp.* v. *Tradax S.A.* as one of the authorities.

The effects of bankruptcy on a contract were the subject of *Creditel of Canada* v. *Terrace Corp.*[348] The seller became bankrupt before the completion of the contract and the buyer refused the contract. The Court of Appeal reversed the trial judgment which had awarded damages against the buyer for breach of contract. Upon bankruptcy, the rights and benefits under contracts pass to the trustee as part of the bankrupt estate. The trustee then must elect to affirm or disclaim them. There was no evidence that the trustee made an election to perform or that such an election was ever communicated to the buyer, who consequently could not be in breach of the contract. It follows from this judgment that it is a trustee's duty to inform the other contractual party within reasonable time of the approbation of the contract, otherwise the other contracting party is entitled to treat the contract as broken.

2. *Anticipatory Breach*

The anticipatory breach and its consequences were recently the subject of examination by the House of Lords and the English Court of Queen's Bench.

Anticipatory breach has been described as occurring when a party, by express language or conduct, or as a matter of implication from what he has said or done, repudiates his contractual obligations before they fall due.[349] Lord Diplock, with whom each member of the House of Lords agreed, expressed the view in *Afovos Shipping Co. S.A.* v.

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[344] Referring to D.G. Marks & G.S. Moss, ROWLATT ON THE LAW OF PRINCIPAL AND SURETY, 4th ed. (London: Sweet & Maxwell, 1982) at 114.

[345] *Midland Counties Motor Fin. Co.* v. *Slade* (1950), [1951] 1 K.B. 346, [1950] 2 All E.R. 821 (C.A.).

[346] *Supra*, note 53.

[347] (1986), [1987] Q.B. 527, [1987] 2 W.L.R. 7 (C.A.).

[348] (1983), 50 A.R. 311, 4 D.L.R. (4th) 59 (C.A.).

[349] Fridman, *supra*, note 57 at 558.

Pagnan[350] that the doctrine of anticipatory breach applies only to a fundamental breach. Referring to the terminology used by him in *Photo Productions*,[351] Lord Diplock said:

> The doctrine of anticipatory breach is but a species of the genus repudiation and applies only to fundamental breach. If one party to a contract states expressly or by implication to the other party in advance that he will not be able to perform a particular primary obligation on his part under the contract when the time for performance arrives, the question whether the other party may elect to treat the statement as repudiation depends on whether the theatened non-performance would have the effect of depriving that other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the primary obligations of the parties under the contract then remaining unperformed. If it would not have that effect there is no repudiation, and the other party cannot elect to put an end to such primary obligations remaining to be performed. The non-performance threatened must itself satisfy the criteria of a fundamental breach.[352]

The consequences of *Afovos*, if it were to be followed, would be far-reaching in that it would seriously restrict the application of the doctrine of anticipatory breach, as well as creating difficulties in determining whether anticipatory breach had occurred. Until *Afovos* it was generally accepted that it was sufficient to show that one party had seriously breached the contract.[353] This may no longer be the case. It may be necessary to show that as a result of the breach, the other party was deprived of substantially all of the benefit of the contract. The determination of whether such a loss occurred could be very difficult, especially in commercial contracts or in respect of prospective breaches.

The complex problem of whether an innocent party has an unfettered right to elect either to accept a repudiation of a contract or not to accept and to consider the contract as valid and subsisting and enforce his full contractual rights, continues to be the subject of litigation. The recent judgment of Lloyd J. in *Clea Shipping Corp.* v. *Bulk Oil Int'l Ltd.*[354] suggests that such a right is not absolute and that, in exceptional circumstances, the Court, in the exercise of its general equitable jurisdiction, will not allow the innocent party to enforce his contract. He referred to the *dicta* of Lord Reid in *White and Charter (Councils) Ltd.* v. *McGregor*,[355] of Lord Denning in *The Puerto Buitrago*[356] and of Kerr J. in *The Odenfeld*[357] and states that

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[350] (1983), [1983] 1 W.L.R. 195, [1983] 1 All E.R. 449 (H.L.) [hereinafter *Afovos*].

[351] *Supra*, note 111.

[352] *Supra*, note 350 at 203, [1983] 1 All E.R. at 455.

[353] *Compare* Fridman, *supra*, note 57 at 558ff.

[354] (1984), [1984] 1 All E.R. 129 (Q.B.).

[355] (1961), [1962] A.C. 413, [1961] 3 All E.R. 1178 (H.L.).

[356] (1976), [1976] 1 Lloyd's Rep. 250 (C.A.).

[357] (1978), [1978] 2 Lloyd's Rep. 357 (Q.B.).

there comes a point at which the Court will cease, on general equitable principles, to allow the innocent party to enforce his contract according to its strict legal terms. Such a point may be difficult to define, but that there is such a point has been accepted by the Court of Appeal in *The Puerto Buitrago* and Kerr J. in *The Odenfeld*. For instance, it would be wholly unreasonable for the innocent party to enforce the performance of the contract, if "[he] has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages".[358]

Wile v. *Cook*[359] is mentioned simply because it is a decision by the Supreme Court of Canada dealing with a repudiatory breach. In a short judgment, not quoting any precedents or analyzing the legal issues involved, the Supreme Court of Canada affirmed the decision of the Nova Scotia Court of Appeal[360] to the effect that by inserting additional terms into an election under an agreement of sale, the buyer was not making an election provided for in the agreement, but was in effect dictating new terms. This amounted to a refusal to complete the agreement as written. It was a repudiation of the agreement and the vendor was entitled to accept this repudiation.

Reasonable expectation of incapacity of one party to perform a contract may be justification to consider the contract as repudiated by conduct of that party. In *Sanko S.S. Co.* v. *Eacom Timber Sales Ltd.*,[361] the parties entered into a contract of affreightment for a series of voyages to transport Eacom's timber. Sanko subsequently announced its intention to make application under Japanese insolvency legislation, which created general apprehension that Sanko would not be able to fulfil its obligation. Stevedores refused to load timber onto Sanko's ships unless paid in advance. Eacom then terminated the contract with Sanko on the basis of fundamental breach and chartered other ships. The Court applied the judgment of Devlin J. in *Universal Cargo Carriers Corp.* v. *Citati*[362] that renunciation may occur by words or conduct and that the test is whether the party renouncing has acted in such a way as to lead a reasonable person to conclude that the party does not intend to fulfil or is incapable of fulfilling the contract. It held that the apparent loss of Sanko's reliability was "a breach of fundamental term"[363] which Eacom was entitled to treat as a repudiation by conduct.

In a purely financial lease, a defect in the equipment leased does not go to the root of the leasing agreement and consequently does not

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[358] *Per* Lord Reid, *supra*, note 355 at 431, [1961] 3 All E.R. 1178 at 1183.

[359] (1986), [1986] 2 S.C.R. 137, 31 D.L.R. (4th) 205.

[360] (1984), 63 N.S.R. (2d) 14, 141 A.P.R. 14 (A.D.).

[361] (1986), 8 B.C.L.R. (2d) 69, 32 D.L.R. (4th) 269 (C.A.).

[362] (1957), [1957] 2 Q.B. 401, [1957] 2 All E.R. 70 (Q.B.).

[363] Presumably meaning fundamental breach. *Supra*, note 361 at 79, 32 D.L.R. (4th) at 279.

constitute a fundamental breach entitling the lessee to repudiate the lease.[364]

XII. DAMAGES

A. *Rules for Assessment*

The *Hadley* v. *Baxendale* test[365] for remoteness of damages was considered by the Supreme Court of Canada in *B.D.C. Ltd.* v. *Hostrand Farms Ltd.*[366] The case was concerned with liability in tort, but the interpretation of *Hadley* v. *Baxendale* applies in contract as well. First, Estey J. held that the same principles of remoteness apply in both contract and tort. He applied the rule in *Hadley* v. *Baxendale* as the proper test of remoteness. He referred to the comments of Asquith L.J. in *Victoria Laundry (Windsor) Ltd.* v. *Newman Indus. Ltd.*[367] and the use of the term "foreseeable" with reference to losses claimed would seem to indicate that Estey J. favours the rule in *Hadley* v. *Baxendale* in the form expressed by Asquith L.J. in the *Victoria Laundry* case, where His Lordship referred to the test of foreseeability.

It would follow that Estey J. presumably disagrees with the *dicta* of Lord Reid in *Koufos* v. *Czarnikow Ltd.*[368] that the modern rule of remoteness in tort is quite different from that in contract and that it imposes much wider liability and that to bring in foreseeability is confusing measure of damages in contract with measure of damages in tort. He would also likely disagree with Lord Denning's proposition in *H. Parsons (Livestock) Ltd.* v. *Uttley Ingham & Co.*[369] that in cases of personal injury or damage to property the test should be the tort test of foreseeability and in cases of loss of profits the test should be the contract test of reasonable contemplation. In the same case, Scarman L.J. suggested that the distinction between foreseeability and contemplation is semantic only.

The issue in *Prozak* v. *Bell Tel. Co. of Canada*[370] was whether, in a wrongful dismissal action, the damages are to be assessed with

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[364] *Citibank Leasing Canada Ltd.* v. *Action Fasteners Ltd.* (1986), 74 N.B.R. (2d) 241, 187 A.P.R. 241 (T.D.).

[365] (1854), L.R. 9 Ex. 341 at 354-55, [1843-60] All E.R. Rep. 461 at 465.

[366] (1986), [1986] 1 S.C.R. 228, 26 D.L.R. (4th) 1, *rev'g* (1982), 33 B.C.L.R. 251, 131 D.L.R. (3d) 464 (C.A.), *var'g* (1980), 22 B.C.L.R. 348, 114 D.L.R. (3d) 347 (S.C.) [hereinafter *Hofstrand Farms*]. For a commentary, *see* J. Blom, *Slow Courier in the Supreme Court: A Comment on B.D.C. Ltd. v. Hofstrand Farms Ltd.* (1986-87) 12 CAN. BUS. L.J. 43.

[367] (1949), [1949] 2 K.B. 528 at 537, [1949] 1 All E.R. 997 at 1001 (C.A.) [hereinafter *Victoria Laundry*].

[368] (1967), [1969] 1 A.C. 350, [1967] 3 All E.R. 686 (H.L.).

[369] (1978), [1978] Q.B. 791, [1978] 1 All E.R. 525 (C.A.).

[370] (1984), 46 O.R. (2d) 385, 10 D.L.R. (4th) 382 (C.A.).

reference to principles applicable to contracts of employment, or according to principles applicable to ordinary commercial contracts. The Court of Appeal held in this case that the rule in *Hadley* v. *Baxendale* was applicable and the plaintiff was entitled to damages for lost opportunities according to the principle enunciated in *Chaplin* v. *Hicks*.[371]

The time for assessment of damages was considered in *Ansdell* v. *Crowther*.[372] The British Columbia Court of Appeal went through a lengthy review of the approprite time to measure damages and concluded that it would be only in the most exceptional circumstances that the award would be made as at the date of trial. The Court then followed the usual course and assessed damages based on the value of property as at the time of the breach. In *Kemp* v. *Lee*[373] the same Court referred to *Ansdell* v. *Crowther* and reaffirmed that there is no inflexible rule requiring that damages be assessed as at the time of the breach. Here, the Court assessed equitable damages as at the time of the trial.

The perennial and complex problem of whether the plaintiff may recover damages for both loss of capital and loss of profits emerged again in *Sunshine Vacation*.[374] The trial Judge was of the opinion that *Esso Petroleum Co.* v. *Mardon*[375] overruled *Cullinane* v. *British "Rema" Mfg. Co.*[376] and that damages may be awarded for both loss of capital and loss of profit. The Court of Appeal held that the two criteria must be alternatives. It awarded damages for loss of capital, because damages for loss of profits would have been too speculative in the case. *Tase Bros.* v. *Tome*[377] emphasized the duty of the plaintiff to mitigate the damages. In that case no breach of duty was established, although the building in question remained unused for three years while the vendor attempted unsuccessfully to find a tenant.

B. Liquidated Damages

Whether a sum stipulated in a contract as payable upon breach is in the nature of liquidated damages or penalties, which will not be enforced, depends primarily on whether the sum is a genuine pre-estimate or was inserted *in terrorem* to penalize the defaulting party. In two recent cases[378] the importance of the genuine pre-estimate was

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[371] (1911), [1911] 2 K.B. 786, [1911-13] All E.R. Rep. 224 (C.A.).

[372] (1984), 55 B.C.L.R. 216, 11 D.L.R. (4th) 614 (C.A.).

[373] (1984), 58 B.C.L.R. 219 (C.A.), *rev'g in part* (1983), 44 B.C.L.R. 172, 28 R.P.R. 141 (S.C.).

[374] *Supra*, note 16.

[375] (1976), [1976] Q.B. 801, [1976] 2 All E.R. 5 (C.A.).

[376] (1953), [1954] 1 Q.B. 292, [1953] 2 All E.R. 1257 (C.A.).

[377] (1983), 21 Man. R. (2d) 121 (C.A.), *var'g* (1982), 21 Man. R. (2d) 129 (Q.B.).

[378] *Dezcam Indus. Ltd.* v. *Kwak* (1983), 44 B.C.L.R. 105, [1983] 5 W.W.R. 32 (C.A.); *Meunier* v. *Cloutier* (1984), 46 O.R. (2d) 188, 9 D.L.R. (4th) 486 (H.C.).

highlighted. In the Ontario case, a lawyer common to both parties inserted a sum in an off-hand manner and it was held to be the penalty. Both cases followed *Dunlop Pneumatic Tyre Co.* v. *New Garage & Motor Co.*[379]

C. *Damages for Mental Distress*

In the period under review there was evident a high incidence of awards of damages for mental distress. In an overwhelming majority of the cases the claim for damages for mental distress was based on wrongful dismissal[380] and one claim was for ruined holidays.[381] Nearly all of these cases follow *Brown* v. *Waterloo Regional Bd. of Comm'rs. of Police*.[382]

D. *Aggravated and Punitive Cases*

Although aggravated and punitive damages are being awarded in an increasing number of cases, these cases themselves reflect the state of uncertainty of the Canadian law. The exposition of this area of law by Linden J. in *Brown*, referred to in many cases, is therefore worth reiterating. Mr. Justice Linden first drew a distinction between aggravated damages and punitive or exemplary damages, although they are sometimes treated as synonymous. The aim of aggravated damages is to "soothe the plaintiff whose feelings have been wounded by the quality of the defendant's behaviour". They are a "balm for mental distress" that has resulted from the wrongful "character of defendant's wrongdoing". Though based on the quality of the defendant's conduct, they are compensatory in nature. Canadian law has recognized the need for something like aggravated damages in appropriate cases.

The goal of punitive or exemplary damages is to punish and deter. Their chief aim is not compensatory but prophylactic and retributory. There is no need to show any actual loss by the plaintiff. They are somewhat akin to a "civil fine". There is a state of uncertainty in

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[379] (1915), [1915] A.C. 79, [1914-15] All E.R. Rep. 739 (H.L.).

[380] *Fitzgibbons* v. *Westpres Publications Ltd.* (1983), 50 B.C.L.R. 219, 3 D.L.R. (4th) 366 (S.C.); *Speck* v. *Greater Niagara Gen. Hosp.* (1983), 43 O.R. (2d) 611, 2 D.L.R. (4th) 84 (H.C.); *Luchuk* v. *Sport B.C.* (1984), 52 B.C.L.R. 145 (S.C.); *Pilato* v. *Hamilton Place Convention Centre Inc.* (1984), 45 O.R. (2d) 652, 7 D.L.R. (4th) 342 (H.C.) [hereinafter *Pilato*]; *Bohemier* v. *Storwal Int'l Inc.* (1983), 44 O.R. (2d) 361, 4 D.L.R. (4th) 383 (C.A.), *var'g* (1982), 40 O.R. (2d) 264, 142 D.L.R. (3d) 8 (H.C.J.); *Vorvis* v. *Insurance Corp. of British Columbia* (1984), 53 B.C.L.R. 63, 9 D.L.R. (4th) 40 (C.A.); *Pearl* v. *Pacific Enercon Inc.* (1985), 18 D.L.R. (4th) 464 (B.C.C.A.).

[381] *Pitzel* v. *Saskatchewan Motor Club Travel Agency* (1983), 26 Sask. R. 96, 149 D.L.R. (3d) 122 (Q.B.).

[382] (1982), 37 O.R. (2d) 277, 136 D.L.R. (3d) 49 (H.C.), *var'd on other grounds* (1983), 43 O.R. (2d) 113, 150 D.L.R. (3d) 729 (C.A.) [hereinafter *Brown*]. *See also supra*, note 1 at 638-39.

the Canadian law regarding punitive damages for breach of contract. Linden J. concluded that it was not beyond the power of the court to award punitive damages in those rare situations where a contract has been breached in a high-handed, shocking and arrogant fashion so as to demand condemnation by the court as a deterrent.[383]

This state of uncertainty is well reflected in *Vorvis* v. *Insurance Corp. of British Columbia*,[384] a case of wrongful dismissal. Anderson J.A. in his dissenting judgment would have awarded punitive damages, quoting Linden J. in *Brown* in support. However, the majority held that punitive damages are not recoverable in an action for breach of contract. Similarly, in *A.G. for Ontario* v. *Tiberius Prods. Inc.*, Osler J. held that punitive damages are not available "in an ordinary action for a breach of a commercial contract".[385] The door was thus presumably left open for punitive damages for wrongful dismissal. That is exactly what happened in *Pilato*,[386] where the plaintiff, a manager of the Centre, was dismissed without notice and without hearing, for showing pornographic movies in his office. Fitzgerald J. stated that punitive damages can be awarded in a breach of contract case and, in particular, a wrongful dismissal action. He awarded the plaintiff $32,000 for wages for a contractual six months notice period, $25,000 by way of aggravated damages and $25,000 as punitive damages.

The judgments in both *Pilato* and *Tiberius* were handed down on April 17. On April 10, Pennell J. held in *Thompson* v. *Zurich Ins. Co.* that punitive damages were available in an appropriate case of wanton and reckless disregard for contractual rights of others.[387] In *Eli* v. *Royal Bank of Canada*[388] punitive damages were awarded against the Bank for refusing to honour cheques in a high-handed manner. Punitive damages were also claimed and awarded in several cases involving breach of distributorship agreements.[389]

E. Contributory Negligence

The controversial issue of contributory negligence in contracts was addressed positively in two New Brunswick cases. The issue

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[383] *Brown*, *ibid.* at 288ff, 136 D.L.R. (3d) 49 at 61ff.

[384] *Supra*, note 380.

[385] (1984), 46 O.R. (2d) 152 at 153, 8 D.L.R. (4th) 479 at 480 (H.C.).

[386] *Supra*, note 380.

[387] (1984), 45 O.R. (2d) 744 at 752-53, 7 D.L.R. (4th) 664 at 673-74 (H.C.).

[388] (1985), 68 B.C.L.R. 353, 24 D.L.R. (4th) 127 (S.C.).

[389] *Safeway Prods. Inc.* v. *Andico Mfg. Ltd.* (1984), 25 B.L.R. 149 (Ont. H.C.); *Demarco Agencies Ltd.* v. *Merlo* (1984), 48 Nfld. & P.E.I.R. 227, 142 A.P.R. 227 (Nfld. Dist. Ct.); *Edwards* v. *Lawson Paper Converters Ltd.* (1984), 5 C.C.E.L. 99 (Ont. H.C.); *57134 Manitoba Ltd.* v. *Palmer* (1985), 65 B.C.L.R. 355, 30 B.L.R. 121 (S.C.); *Fouillard Implement Exch. Ltd.* v. *Kello-Bilt Indus. Ltd.* (1986), 37 Man. R. 111, [1986] 2 W.W.R. 93 (C.A.), *aff'g* (1985), 36 Man. R. 133, [1985] 6 W.W.R. 548 (Q.B.).

involved is whether liability should be apportioned in an action for a breach of contract where the plaintiff himself contributed to the loss by his own negligence, which in this context has the meaning of fault. Classic common law does not recognize the notion of contributory negligence. It was introduced in tort mainly as a result of contributory negligence statutes enacted to relieve the harshness of common law. Some of these statutes are worded in such a way that they extend to contracts. The issue of whether contributory negligence should be recognized as a principle on its own weight in contract has arisen on several occasions.

In *Tompkins Hardware Ltd.* v. *North Western Flying Servs. Ltd.*,[390] Saunders J. concluded that there was no reason why the apportionment principle should not apply in contract as well as in tort. Grange J. in *Ribic* v. *Weinstein*[391] adopted the same principle. In *Cosyns* v. *Smith*,[392] Lacourciere J.A., speaking for the Ontario Court of Appeal, found these propositions attractive but did not have to pronounce either way as he found no negligence on the part of the plaintiff. In New Brunswick, on the other hand, the principle of contributory negligence can be considered firmly established following two decisions of the Court of Appeal. In *Doiron* v. *La Caisse Populaire d'Inkerman Ltee*,[393] La Forest J.A. (as he then was) stated that liability in contract should be apportioned on the basis of what might reasonably have been in the contemplation of the parties. In *Coopers & Lybrand* v. *H.E. Kane Agencies Ltd.*,[394] Stratton J.A. also applied apportionment.

XIII. Contract and Tort

The broadened concept of liability for negligence in tort, as formulated in *Anns*[395] and interpreted and applied in *Junior Books*,[396] together with the introduction of liability for negligent mistatements under the *Hedley Byrne*[397] doctrine and the availability of actions for economic loss in tort as a result of *Hedley Byrne* and *Junior Books*, have blurred the distinction between contract and tort. The courts are finding concurrent liability in contract and tort with increasing frequency. This convergence of contract and tort poses several problems, the foremost being the question of whether there should be concurrent liability in tort where the relationship of the parties is governed by

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390 (1982), 139 D.L.R. (3d) 329 (Ont. H.C.).
391 (1983), 140 D.L.R. (3d) 258 (Ont. H.C.).
392 (1983), 41 O.R. (2d) 488, 146 D.L.R. (3d) (C.A.).
393 (1985), 61 N.B.R. (2d) 123, 17 D.L.R. (4th) 660 (C.A.).
394 (1985), 62 N.B.R. (2d) 1, 17 D.L.R. (4th) 695 (C.A.).
395 *Anns* v. *Merton London Borough Council* (1977), [1978] A.C. 728, [1977] 2 All E.R. 492 (H.L.) [hereinafter *Anns*].
396 *Supra*, note 301.
397 *Supra*, note 110.

contract. There are other problems, such as the measure of damages and limitation periods. Two recent decisions of the Supreme Court of Canada have clarified some of these issues.

Hofstrand Farms[398] affirmed the actionability of pure economic loss in tort and put forward a proposition that the same test of remoteness (that being the test put forth in *Hadley* v. *Baxendale*[399]) applies in contract and tort. Although, at least in theory, different tests for the measurement of damages traditionally apply in contract and in tort, there is not one known case where the courts have decided on varying amounts of damages. It is yet unclear whether the *Hadley* v. *Baxendale* rule will have general application in tort or whether it will remain confined to economic loss.

Hofstrand Farms was followed in *University of Regina* v. *Pettick*[400] on a question of economic loss and in *Blair* v. *Canada Trust Co.*[401] on the application of the rule in *Hadley* v. *Baxendale* in tort. The explanation of the proximity or neighbourhood requirement was followed in *Snow* v. *Cumby*[402] and *Foster Advertising Ltd.* v. *Keenberg*.[403] The warning that reasonable limitations have to be placed on the expansion of liability in tort was also expressed in *Foster Advertising*.

Central Trust & Co. v. *Rafuse*[404] authoritatively confirmed concurrent liability in contract and tort and gave *quietus* to the doctrine of "independent tort" as put forward in *J. Nunes Diamonds Ltd.* v. *Dominion Elect. Protection Co.*[405] It follows that all previously decided cases on concurrent liability must now be read in the light of this decision. In a scholarly judgment, Mr. Justice Le Dain, speaking for the Supreme Court of Canada, stated propositions of concurrent liability which may be abstracted as follows:

1. The common law duty of care created by a relationship of proximity, according to general principles, stated in the *Anns* case, is not confined to relationships that arise apart from contract. There is nothing in the statements of general principles in *Donoghue* v. *Stevenson*,[406] *Hedley Byrne* and *Anns* to suggest that the principles be confined to relationships outside contract.
2. The contract will indicate the nature of the relationship that gives rise to the common duty of care, but the nature and scope

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[398] *B.D.C. Ltd.* v. *Hofstrand Farms Ltd.*, *supra*, note 366.

[399] *Supra*, note 365.

[400] (1986), 51 Sask. R. 270, 38 C.C.L.T. 230 (Q.B.).

[401] (1986), 38 C.C.L.T. 300 (B.C.S.C.).

[402] (1986), 60 Nfld. & P.E.I.R. 299, 42 R.P.R. 320 (Nfld. C.A.).

[403] (1986), 41 Man. R. (2d) 153, 27 D.L.R. (4th) 141 (Q.B.) [hereinafter *Foster Advertising*].

[404] (1986), [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481 [hereinafter *Rafuse*].

[405] (1972), [1972] S.C.R. 769, 26 D.L.R. (3d) 699. *See also supra*, note 1 at 636.

[406] (1932), [1932] A.C. 562, [1932] All E.R. Rep. 1 (H.L.).

of that duty of care, the breach of which gives rise to the tortious liability, must not depend on specific obligations created by the contract. In that sense the common law duty of care must be independent of contract.

3. The concurrent liability in tort will not be admitted if its effect would be to circumvent the contractual exclusion of liability for tort.

Propositions 4 and 5 deal with the liability of a solicitor to a client for negligence. There is no sound reason in principle why solicitors should be treated differently from other professionals in respect of concurrent liability. The solicitor's liability in tort for negligence is based on the general principles of tortious liability and is not confined to professional advice, but extends to the performance of any act for which the solicitor has been retained.[407]

With regard to the action in tort, Le Dain J. held, following *City of Kamloops* v. *Nielsen*,[408] that the discoverability rule applies to determine the commencement of the limitation period. A recent decision of the Supreme Court of Canada in *Canadian Pacific Hotels Ltd.* v. *Bank of Montreal*[409] dealing with banker-customer relationship in respect of forged cheques, followed *Rafuse* in a ffirming the concept of concurrent liability, notwithstanding *dicta* against concurrent liability in the Privy Council decision in *Tai Hing*.[410] Le Dain J., who also delivered the judgment in *CP Hotels*, expanded his third proposition in *Rafuse* not permitting concurrent liability in tort where such liability is subject to an exemption clause in the contract.[411] Such liability in tort will also not be permitted where it has been rejected as an implied term of the contract.

Rafuse has been considered in a number of cases. The concept of concurrent liability was followed in *University of Regina* v. *Pettick* [412] and *Blair* v. *Canada Trust Co.*[413] The discoverability rule in tortious actions was applied in both *July* v. *Neal*[414] and *University of Regina* v. *Pettick*.

The establishment of concurrent liability in contract and tort and the broadened scope of liability in tort for negligence have created certain apprehensions in the courts. These are succinctly expressed by

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[407] *Supra*, note 404 at 204ff, 31 D.L.R. (4th) 481 at 521-22.

[408] (1984), [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641.

[409] (1987), [1987] 1 S.C.R. 711, 77 N.R. 161, *rev'g* (1982), 139 D.L.R. (3d) 575n. (Ont. C.A.), *aff'g* (1981), 32 O.R. (2d) 560, 122 D.L.R. (3d) 519 (H.C.). [hereinafter *CP Hotels*].

[410] *Tai Hing Cotton Mills Ltd.* v. *Liu Chong Hing Bank Ltd.* (1985), [1986] A.C. 80, [1985] 2 All E.R. 947 (P.C.), *rev'g* (1984), [1984] 1 Lloyd's Rep. 555 (H.K.C.A.) [hereinafter *Tai Hing*].

[411] *Supra*, note 409 at 777-78, 77 N.R. 161 at 236ff.

[412] *Supra*, note 400.

[413] *Supra*, note 401.

[414] (1986), 57 O.R. (2d) 129, 44 M.V.R. 1 (C.A.).

two questions: Is there room for liability in tort between two parties whose relationship is governed by contract? And, is the present extent of liability in tort so broad as to raise actions where liability is not contemplated by the parties, or where the nexus between the negligence and loss is too remote?

The courts have reacted. In *Hofstrand Farms*, Estey J. enunciated the need for defined limits to be placed on the general concept of liability in negligence contained in *Anns*.[415] In *Rafuse*, Le Dain J. placed limitations of the concurrent liability in tort and further elaborated on it in *CP Hotels*.[416] These three decisions of the Supreme Court of Canada follow the trend discernible in judgments of English courts. In *Peabody Donation Fund* v. *Sir Lindsay Parkinson & Co. Ltd.*,[417] Lord Keith of Kinkle, with whom the other Law Lords concurred, stressed in his speech that the general principles of law of negligence, as enunciated in *Donoghue* v. *Stevenson*,[418] *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*,[419] *Home Office* v. *Dorset Yacht Co. Ltd.*[420] and *Anns* v. *Merton London Borough*[421] should not be treated as being of a definitive character. The true question in each case is whether the particular defendant owed to the particular plaintiff a duty of care and whether he was in breach of that duty. In determining whether or not a duty of care of particular scope is incumbent on the defendant, it is material to take into consideration whether it is *just and reasonable*[422] that it should be so.

Leigh and Sillivan Ltd. v. *Aliakmon Shipping Co.*,[423] another House of Lords decision, also explains and places limitations on the broad concept of liabiliy in negligence formulated in *Anns*. In his speech Lord Brandon made two observations on Lord Wilberforce's formulation of liability in negligence in *Anns*. First he observed that Lord Wilberforce could not have intended his passage to be a universally applicable test of the existence and scope of the duty of care and quoted with approval Lord Keith's *dicta* to that effect in *Peabody*.[424] Second, he stated that Lord Wilberforce dealt with a novel type of

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[415] *Supra*, note 366 at 243, 26 D.L.R. (4th) at 12-13.

[416] *See supra*, text at note 409.

[417] (1984), [1985] A.C. 210, [1984] 3 All E.R. 529 (H.L.) [hereafter *Peabody*].

[418] *Supra*, note 406.

[419] *Supra*, note 110.

[420] (1970), [1970] A.C. 1004, [1970] 2 All E.R. 294 (H.L.).

[421] *Supra*, note 395.

[422] *Emphasis added.*

[423] (1986), [1986] 2 W.L.R. 902, [1986] 2 All E.R. 145 (H.L.), *aff'g* (1984), [1985] 2 W.L.R. 289, [1985] 2 All E.R. 44 (C.A.). For commentaries, *see* R. Kichner, *Economic Loss: Anns, Junior Books and Bills of Lading* (1985) 48 MOD. L. REV. 352 (C.A. judgment); M. Clarke, *Buyer Fails to Recover Economic Loss from Negligent Carrier* (1986) 45 CAMBRIDGE L.J. 382; and B. Markesinis, *The Imaginative versus the Faint Hearted: Economic Loss still in a State of Chaos* (1986) 45 CAMBRIDGE L.J. 384 (H.L. judgment).

[424] *See supra*, text at note 417.

factual situation and that the same type of approach should not be adopted in a situation where it has been repeatedly held that a duty of care does not exist.[425]

In *Tai Hing*,[426] a Privy Council decision on appeal from the Hong Kong Court of Appeal, Lord Scarman, giving the opinion of the Board, went against the concept of concurrent liability in contract and tort. He stated that there is nothing to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. In any case, Their Lordships did not accept that the parties' mutual obligations in tort can be any greater than those found expressly or by implication in their contract.

These judgments of the highest tribunals in Canada and the United Kingdom are indicative of a new, cautious approach to the issue of concurrent liability in contract and tort.

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[425] *Supra*, note 423 at 913, [1986] 2 All E.R. at 153.

[426] *Supra*, note 410. For comments on these judgments, *see* E.P. Ellinger, *Bank's Liability for Paying Fraudulently Issued Cheques* (1985) 5 OXFORD J. LEGAL STUD. 293; M.H. Ogilvie, *Bank Accounts and Obligations* (1986) 11 CAN. BUS. L.J. 220.

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