Significant Cases

Tort

1932 Case, England House of Lords – Donoghue vs. Stevenson

- Products liability for tort law
- Plaintiff became ill when drinking ginger beer
- Friend of the plaintiff gave him this ginger beer
- The ginger beer had a decomposed snail in the bottle
- House of Lords determined that the ginger beer manufacturer was under legal duty to the consumer, to take reasonable care to ensure that the ginger beer was free of any defect to cause an injury to health
- Importance: No contract existed between the plaintiff and the manufacturer

1963 Case, England in House of Lords – Hedley Byrne vs Heller & Partners Ltd.

- Plaintiffs were advertising agents and asked their bankers to look into the credit rating of a company in which they had business dealings with
- These bankers made inquiries of this company to other bankers for the company that was being inquired on. These bankers that were being inquired on were the defendants
- The defendant bankers negligently reported that the company's financial status was fine, and there was nothing to worry about
- However, the defendant bankers said that this advice on the company's credit is as is, and will assume no responsibility
- The plaintiff then proceeded to do business with the defendant, using the advice the defendant bankers gave
- The plaintiff lost 17,000 GBP when dealing with the company
- The House of Lords said that since there was a disclaimer, the defendant is not liable to provide compensation to the plaintiff for the financial loss that was incurred
- House of Lords said that when one person relied on the special skill and judgment of another, and when this second person knew of this reliance, the second person is to take reasonable care in exercising this special skill.

1994 Ontario case – Wolverine Tube Inc. vs. Noranda Metal Industries Ltd. et al.

- Noranda asserted a claim against an environment consultant
- Noranda claimed that negligence took place when carrying out environmental compliance audits and liability assessments on certain properties Noranda was thinking of selling
- The consultant who did these audits had a disclaimer, which stated that he made his best judgmment with the information available at the time of the audit preparations. If a third party uses the report, the consultant does not take responsibility for damages
- Noranda decided that it was all good, and sold the properties to Wolverine Tube
- Wolverine had no dealings with the consultant, and the consultant wasn't aware of the sale until 5 years later, when the lawsuit commenced
- Noranda advised Wolverine that it could rely on the audits, and they don't need its own environmental consultant to review the property
- Damages resulted, and the consultant was not liable for damages as well, due to his disclaimer.

- Before the *Hedley Byrne* case, tort law provided relief where damanges to person or property had been incurred

- The *Hedley Byrne* case was used to expand the score of tort damages to include financial loss when advice was negligently given, where the person who gave this advice knew or should have known, that their skill and judgment was being relied on
- *Hedley Byrne* case has been used in many tort cases that involved engineers

Fundamental Breach of Contract

Harbutt's Plasticine Ltd. vs. Wayne Tank and Pump Co. Ltd.

- Contract was entered for designing and installation storage tanks for stearine, which is a type of greasy wax
- This was one of the main ingredients for plasticine
- As part of the contract, the contractors designed a plastic pipeline wrapped with electrical heating tape
- This pipeline was going to be used to liquefy the stearine to transfer it from one point to another
- The plastic pipe become distorted under the heat, and sagged and cracked.
- The stearine then escaped from the pipe and ignited
- The plaintiff's factory was thus completely engulfed in fire
- The trial judge concluded that the contractor was in fundamental breach of contract
- The trial judge said that the system that the contractor designed was completely inadequate for the use of transferring liquid stearine
- The contract contained a provision that the contractor's liability for damage and accidents was limited to 2,300 pounds
- The court said that because of this fundamental breach, the contractors were not entitled to rely on this clause, and they were to pay for the cost of reinstating the entire factory, which amounted to 170,000 pounds
- This precedent was applied in Canadian courts between 1970 and 1980, but this precedent was overruled in England

1980 English Case – Photo Production Ltd. vs. Securicor Transport Ltd.

- They stated that the whole foundation of the *Harbutt's Plasticine* case was unsound
- A security contract was entered between a manufacturer, plaintiff, and a security company, the defendant
- During a night patrol at the factory, one of the employees of the security company started a fire
- Fire spread out of control and destroyed the factory and its contents, valued all together at 615,000 pounds.
- The contract contained an exemption clause that limited the security company's liability.
- However, there wasn't any negligence found in this case
- The trial judge said that the defendants were allowed to rely on this exception clause
- Court of Appeal reversed the decision made by the trial judge and used the *Harbutt's Plasticine* precedent

- House of Lords overruled this decision and said the defendants were allowed to rely on the exception clause
- Fundamental breach concept has been applied in Canada

1989 Canada Case – Hunter Engineering Company Inc. vs. Syncrude Canada Ltd.

- This is the leading case where an exemption clause can be upheld
- Syncrude, the defendant, had contracted with Hunter, the plaintiff, and later with Allis Chalmers, for the supply of gear boxes to drive the bucket wheel conveyer belts that transported sand to Syncrude's oil extract tar sands plant at Fort McMurray
- Contracts said that Ontario law was to apply
- After the gear boxes were put in service, bull gears inside the gear boxes failed
- Syncrude had the gear boxes rebuilt, and sued Hunter and Allis Chalmers for the corst
- The express warranties in the contracts had expired, and they weren't any good to Syncrude
- However, the implied warranty of fitness, as contained in the Ontario Sale of Goods Act applied, and had been breached by Hunter and Allis
    - The gears broke down **right after** they were put to work
- Hunter was held liable on this basis
- As for Allis Chalmers, the warranty clause in their contract denied the application of all other warranties, including statutory warranties
- As such, the only way Allis could be liable is if the exemption clause didn't apply, by the fundamental breach concept
- Courts concluded that Allis wasn't liable and enforced the exemption clause
- Clear and direct exemption clauses found in contracts negotiated between parties of relatively equally bargaining power have been upheld
- Canadian court emphasis now is to look carefully at the wording of each contract, even when fundamental breach has happened, and resolve matters according to the true intention of the parties at the time the contract was created
- If the clause is clear and direct, it will be enforced, unless it is unconscionable.

Tender: "Contract A"

1960 BC Case – Imperial Glass Ltd. Vs. Consolidated Supplies Ltd.

- Contractor (offeror) used the wrong figure when calculating the price at which the contractor would supply some items
- The offeree was aware of this mistake, and the offeror was not told of this mistake
- The offeror was not lead to make this mistake in any way by the offeree
- Court was satisfied that the offeree's conduct was not fraudulent.
- This kind of conduct might be open to question on moral, or ethical grounds, but the court wouldn't relieve the contractor on his mistake
- Subsequent decisions in Ontario courts held that a contractor may be compensated due their unilateral mistake in some cases

1977 Ontario case – Belle River Community Arena Inc. vs. W.J.C. Kaufmann Co. et al.

- When the defendant contractor submitted a bid, they forgot to copy a figure from the summary sheet
- The defendant contractor's bid was then $70K lower than intended, making the total bid price to be $641,603.
- The bid was submitted under seal, and was allowed to be withdrawn (irrevocable) for 60 days.
- When the contractor discovered his mistake, he tried to withdraw the bid
- There wasn't any disagreement that an error was made
- However, the plaintiff refused to allow the contractor to withdraw his bid.
- After a month of the defendant being informed of his mistake, the plaintiff tried to accept the contractor's bid
- Plaintiff refused to allow the contractor to withdraw his tender (bid)
- Court said that the plaintiff did not create a formal contract between themselves and the contractor that contains the terms and conditions of what was to be constructed
- Therefore, the plaintiff didn't technically obtain a refusal from the contractor to enter into the contract
- Plaintiff entered into a contract with another tenderer and sued the defendant for the difference of amounts between the two tenderers.
- Before deciding, the court looked at the *Imperial Glass* case and said that the mistake for the *Imperial Glass* case was that it used the wrong price in the calculation
- In this particular case, the mistake consisted of forgetting to copy a figure into the overall bid
- The court was in favour of the contractor.
- The plaintiff later appealed, and they still were in favour of the contractor
- **Principle established:** Offeree cannot accept an offer that they know a mistake has been made, and that it affects a fundamental term in a contract

- The offeror did not intend to make this mistake, and this was not an offer that was intended to be made, and the offeree knew that, and made the offeror aware that a mistake was made
- **This situation would have been different if the offeree had not known that the bid contained a mistake**

1979 Ontario Case – Ron Engineering et al. vs. The Queen in right of Ontario et al.

- Bid deposit cheque of $150K was paid with a tender submitted to the defendant, The Water Resources Commission
- Tender concerned work to be done for the Commission in North Bay
- Tender contained a mistake that was similar to the one in the *Belle River* case: An amount was omitted from the final price
- This omitted amount was $750,058, leaving the bid at $2,748,000
- Contractor was unable to contact the Commission before the tenders were open
- After about an hour after the opening of these tenders, contractor spoke to the Commission
- Telegram arrived the following morning
- There wasn't any doubt in terms of how genuine the error was
- Next highest bidder had tendered a price of $3,380,464
- Trial judge found in favour of the defendant
- Contractor then appealed the decision, and the appeal court found in favour of the contractor
- In 1981, Supreme Court of Canada set aside the appeal court's decision
- This court pointed out that there was a contract relating to tender arrangements, and was separate from the contract itself
- This mistake wasn't communicated to the Commission at the time of tender submission, and didn't affect the contract relating to tender arrangements
- A portion of that contract says that if a tender is withdrawn before the Commission considers all of the tenders, or when they withdraw it right before, or after they want to choose this tender, the Commission can retain the tender deposit, and can accept any tender, get new ones, negotiate a contract, or not accept any tender.
- As such, the contractor was required to lose his deposit
- Therefore, the mistake was relevant to the tender agreement contract, and not the contractual obligation.

Tercon Contractors Ltd. V. British Columbia, 2010

- BC won

http://www.fasken.com/supreme-court-canada-decision-tercon-construction-case/

Equitability

1963 Canada Case - Conwest Exploration Co. Ltd. et al. vs. Letain

- Option agreement was in place relating to certain mining claims owned by the person who created the agreement (optionor)
- This option agreement had a time limit
- The optionee had to take some steps by a due date to be entitled of the option of acquiring the mining claims due to this agreement
- Before the agreement's expiry, the optionor became aware that the optionee could not be able to fulfill his obligations by the expiry date
- Optionor implied that the due date was actually extended
- This promise, however, was not accompanied by consideration, and was not strictly binding
- After that, the optionor went back on his word and insisted that the original expiry date must apply.
- The Supreme Court of Canada said that it's inequitable if the optionor were to enforce the original expiry date
- Optionor is therefore **estopped** from reverting back to the original date

- For contract law, consideration (or a seal) must be present to make an amendment to a contract enforceable
- Otherwise, this amendment is simply a gratuitous promise
- The above case is an example where if the terms of a contract were amended without consideration, there may be relief to the party that relies on this promise.
- **This relief may be provided and is called "promissory" or *"equitable estoppel"***.
- Court will only apply this concept to avoid an obviously inequitable result

1968 Canada Case – John Burrows Ltd. vs. Subsurface Surveys Ltd. et al.

- Plaintiff wanted to enforce the terms of a promissory note
- Payment was to be made of $42,000 over 9 years and 10 months, payable the first of every month untl it's done
- It also said that the payer can change the principal owed for the particular month within 30 days notice
- If after 10 days that one installment was due and the payment didn't come, the full amount would be owed
- Even though payments were paid late, the holder of the note didn't enforce all of the terms
- 11 payments were made more than 10 days after they were due
- Parties eventually had a falling out
- When one of the payments was 36 days overdue, the holder decided to insist on the default clause and request the total amount of what was left of the note, and the falling out was probably the reason why the plaintiff called the default clause
- The defendant decided that the plaintiff should be equitably estopped from enforcing this clause

- They argued that the holder of the note was contradicting the agreement between the two parties
- The default clause had not been enforced several times (as mentioned above)
- The defendants protested and did not want the plaintiff to be entitled to the full amount, and should be equitably estopped.
- The plaintiff accepted these payments without any protest and without invoking the default clause.
- Because of this acceptance, he should not be entitled to the default clause, because he didn't enforce it when he should have
- Court said that equitable estoppel here can't be invoked, unless there's some evidence that one of the parties entered into negotiations and tried to lead the other party to think that the contract wouldn't be enforced.
- The evidence here says that it doesn't show that the plaintiff entered into any negotiations with the defendants, and lead them to think that the plaintiff had agreed to disregard that part of the contract.
- Court allowed the plaintiff to honour the note

1979 Ontario Case – Owen Sound Public Library Board vs. Mial Developments Ltd. et al.

- Breach of contract happened
- A construction contract was created, and payments to the architect (hired by the contractor) were to be made by the owner 5 days after an architect's certificate has been presented
- If the owner fails to pay the the sum to the contractor within 7 days, the contract created would be terminated between the contractor and owner.
- The architect said that payment was due
- After, the parties agreed upon certain action, and the owner assumed that the due date of payment was extended
- Instead of making a payment, the owner requested the contractor to have a corporate seal of one of its subcontractors to the document
- This seal was to support the architect's certificate
- Contractor went to get this seal
- Payment date passed, but the contractor didn't obtain the corporate seal
- Contractor wanted to terminate the contractor because payment was overdue
- Court of Appeal concluded that the contractor's conduct to get the corporate seal had led the owner to believe that the time limit was extended untilt he subcontractor's seal had been affixed to the document
- Court held that the owner's assumption was reasonable
- Contractor was therefore estopped from invoking the termination rights to the contract
- Contractor was attempting to take advantage of the owner's contractual default, but the default had been induced by the contractor's conduct.
- If an engineer forgoes any particular contractual rights, the engineer may be faced with the argument that the engineer should be estopped from reverting to those rights that he or she waived
- The success of this argument will depend on the circumstances of each case

Implied Terms of Contract

The Moorcock Case

- Plaintiff was the owner of a steamship called the Moorcock
- He paid for space at the defendants' wharf and jetty on the Thames river
- When the Moorcock was docked, there was heavy tide, and the Moorcock settled on a ridge of hard ground and was damaged
- Plaintiff argued that the managers of the wharf were responsible to ensure that his vessel would remain safe while it was docked, since he paid for the space
- The wharf managers, in their defense, said that there were no provisions in the contract to ensure the vessel's safety, and did not foresee that damage could arise
- The court ruled in favour of the plaintiff
- The judge ruling the case said that by looking at the agreement between the parties, the wharf managers were in a position where they knew that there was a risk of damage to the ship, and would be in the best position to judge the safety of the vessel.
- Thus brings the **implication of terms** up, where they were under an obligation to ensure the ship was safe to complete a transaction, even if it wasn't explicitly said in the contract.