The Judicial Treatment of Disclaimer Clauses in Sale of Goods Transactions in Canada

Peter A. Cumming
Osgoode Hall Law School of York University

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/ohlj
Article

Citation Information
http://digitalcommons.osgoode.yorku.ca/ohlj/vol10/iss2/1

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.
THE JUDICIAL TREATMENT OF 
DISCLAIMER CLAUSES IN SALE OF 
GOODS TRANSACTIONS IN CANADA*

By Peter A. Cumming**

INTRODUCTION

This article provides an analysis of the treatment of disclaimer clauses by the courts in Canada in respect to sale of goods transactions. The term "disclaimer clause" is used throughout to describe the type of clause employed in a contract to cut down or to exclude obligations otherwise arising on the part of one of the parties to the sale transaction, or to modify or exclude the remedies which are otherwise available to the innocent party upon the breach of an obligation by the other party. In the case of the consumer sale, the clause is invariably for the advantage of the seller or manufacturer. Such clauses are often referred to as "exemption", "exclusion", "exception", "exculpatory" or "limited liability" clauses. However, the term "disclaimer clause" is commonly employed to embrace all of the possible variations of clauses of the type under consideration. The same principles of law are applicable in respect to all the variations of the "disclaimer clause", although when the clause under consideration simply modifies or limits the remedies otherwise available to the innocent party there is perhaps a greater chance that it will be asserted successfully by the party seeking to rely upon it.

*The writer acknowledges with appreciation the assistance received through research done for the writer by Ronald Dash and James Hodgson, graduates of Osgoode Hall Law School of York University. This article was originally prepared as a background working paper to a larger research undertaking by an Osgoode Hall Law School of York University group, including Professor Jacob S. Ziegel and William A. W. Nielson, and the writer.

**Professor of Law, Osgoode Hall Law School of York University.
Although disclaimer clauses are found in virtually all types of contractual transactions, discussion will be limited mainly to a consideration of disclaimer clauses in sale of goods transactions. However, the same principles of law are applicable to disclaimer clauses in all types of contractual transactions.

The judicial approach in Canada has been constrained by the continuing myth of freedom of contract and the principle that contractual obligations are of a voluntary nature because disclaimer clauses have been dealt with within the framework of the common law of contract, apart from those instances of statutory regulation. The language of the decisions is cloaked in acceptable traditional principles of construction of the terms of the contract. The court construes the supposed intentions of the parties in respect to the voluntary obligations presumably assumed under the contract.

Although the courts have shown creativity in coping with the phenomenon of the disclaimer clause, the limitations of the traditional private law context for regulation thereof have often led to tortuous reasoning in judgments, uncertainty in the event of breakdown of contract, and unpredictability in the planning of contractual obligations. The discussion has taken place for the most part at a level of abstract reasoning incomprehensible to most lawyers, and undoubtedly to all consumers. The aversion of the courts to disclaimer clauses has lead to commendable results in most instances, because the courts are inclined to follow their impulses as to fairness. However, the means employed to arrive at a just result usually leaves a great deal to be desired.

With the standard form contract and the inequality of bargaining power on the part of the consumer in the market place, the consumer is either unaware of the disclaimer clause or, if aware, does not appreciate the legal consequences. Even if he is aware and fully understands the legal effect of the disclaimer clause, often his only real choice, for example, as with the purchase of a new car, is to purchase the item on the terms offered by the seller, or to do without. There is little opportunity to negotiate in respect to the "boiler-plate" provisions. The consumer needs protection from the literal contract and needs to be afforded the appropriate remedies, through a convenient and inexpensive medium, for the enforcement of his substantive expectations under his contract.

The results achieved through the courts have for the most part been satisfactory, and the results are consistent with traditional contract law.

principles. The innocent party is provided with the remedy of damages so as to put him in the position as though the contract has been performed,\(^2\) or alternatively, there is a discharge of his obligations under the contract and he is put in the position he was in before the contract was made.\(^3\)

Although the impulse of the court is to consider what the expectation of the consumer was, and to provide a remedy to fulfill the expectation in the event of the seller’s default, the courts are reluctant to simply speak in such direct language. The courts have dealt with the problem through traditional rules of construction as to contractual intention, or by acceptable labels (for example, “fundamental breach”) rather than through language which speaks directly to the actual issues.

First to be discussed will be the principles employed to decide whether and when a disclaimer clause is in fact a term of the contract. The three basic approaches of the courts in dealing with the disclaimer clause determined to be a term of the contract, will then be discussed. Finally, consideration will be given to the judicial treatment of disclaimer clauses on the basis of such clauses being contrary to a substantive rule of common law. The legislative reaction to disclaimer clauses will be left for a subsequent article.

There is a discernible pattern to the historical development of the treatment of disclaimer clauses by the courts. In the earlier years of this century the courts employed the traditional rules of construction to construe the meaning of the wording of the disclaimer clause by considering it within the context of the language of simply the disclaimer clause itself. Later, the courts more frequently used and relied upon the traditional rules of construction to determine the meaning of the language of the disclaimer clause by construing that language within the context of the language of the agreement as a whole. More recently, the courts have adopted the modern doctrine of “fundamental breach” or “breach of a fundamental term”. Therefore, it is convenient to separate the case law into these three, albeit interrelated and overlapping, approaches. It should be noted in this regard that the Canadian courts have relied heavily upon the British common law development in respect to all approaches employed in dealing with disclaimer clauses.

THE JUDICIAL TREATMENT OF DISCLAIMER CLAUSES ON THE BASIS OF THE TRADITIONAL RULES OF CONSTRUCTION

A. Construction as to the Terms of the Contract

As a matter of first principles of contract law, the factual situation must be construed to determine whether the asserted disclaimer clause is in fact a term in the contract before proceeding to the further question whether, as a matter of construction, the clause effectively prevents or limits liability.

Contracts are voluntary obligations, and a party should not be held to have assented to a term of the contract unless he should reasonably have


thought the contract included such term, and similarly, the other party therefore reasonably thought, and presumably relied upon the assumption, that the terms of the contract were on the given basis. The common law requirement is that a term is only incorporated in the contract by signature or if reasonable notice of its existence has been given to the party adversely affected by it at, or before, the time of the making of the contract. In particular, disclaimer clauses in carriage and bailment contracts have often been held to be inoperative for failing to meet this test because the contract often consists of more than one document, or is partly oral and partly written. The approach has also been used by Canadian courts in respect to sale of goods transactions.

In Canada Building Materials Ltd. v. W. R. Meadows of Canada Ltd. the disclaimer clause was held not to exclude the implied condition of section 15.1 of The Sale of Goods Act, as the disclaimer clause was “contained in general sales literature which remains unread”. Similarly, in Fillmore's Valley Nurseries Ltd. v. North American Cyanamid Ltd. the court held that the implied condition of being fit for a particular purpose was not excluded as the asserted disclaimer clause was contained in an “[a]cknowledgement of order form” received by the purchaser after receipt of the chemical purchased, and an invoice containing the disclaimer clause was received even later. A disclaimer clause contained within the printing on the labels of the cans containing the chemical purchased was also held to not be part of the contract.

In the sale of goods transaction the disclaimer clause is, of course, usually contained within the actual sales document(s) which is asserted to be the contract. Moreover, the purchaser often puts his signature to the contract document(s).

If the document provides reasonable notice of the disclaimer clause, or the purchaser signs the document below the wording containing the disclaimer clause, it is thereby incorporated as a term of the contract, it being irrelevant whether it was read, or understood, by the purchaser. In other words, there is a duty upon the purchaser to read and understand, and if he fails to

4 A person who signs a document constituting a contract is bound by the terms thereof even though he has not read them. L'Estrange v. Graucob, [1934] All E.R. 16, 18, 19, [1934] 2 K.B. 394 (C.A.); Advance Rumely Thresher Co. v. Lester, [1927] 4 D.L.R. 51 (Ont. C.A.); but see McCutcheon v. David MacBrayne Ltd., [1964] 1 W.L.R. 125, 133 (H.L.).


7 (1968), 66 D.L.R. (2d) 674 (Ont. H.C.).

8 Id., at 680.


10 Id., at 306.


12 Id., at 307, 321.

13 Note however that the contract may consist of a number of sales documents.

14 Supra, note 4.
do so it is at his peril. The purchaser is bound if he knows the general nature of the document, that is, simply that it pertains to the sale.

Although this traditional approach of the law is based upon a policy of giving greater certainty to contractual expectations (that is, both parties can, or should reasonably expect, each other to be bound by the written terms), in the modern era of the standard form contract it is a fiction to suggest that the consumer has read the contract and, even if it has been read, that he has understood the meaning of the disclaimer clause.

The traditional approach, in the absence of further, modifying, principles, therefore tends somewhat paradoxically to subvert the true substantive expectations of the purchaser (and such expectations are known, or should be known, to the seller) which may well not accord with the asserted terms of the written document(s).

Even if the purchaser acted because of misrepresentations by the seller or his salesman, the purchaser may well still be unsuccessful. Unless the misrepresentation was fraudulent, the consumer may be met with two problems. First, the parol evidence rule prevents a purchaser from adding to, varying, or contradicting the written terms of the document(s), unless the purchaser can establish that he falls within an exception to the rule.

---


16 The purchaser can assert a non est factum defence when there is a mistake as to the nature of the entire document, although this is, of course, only very rarely the situation. L'Estrange v. Graucob, [1934] All E.R. 16, 18, 19, [1934] 2 K.B. 394 (C.A.).

17 See, for example, Case Threshing Machine Co. v. Mitten (1919), 49 D.L.R. 30, 31 (Sask.) (S.C.C.).


20 A party may be able to establish that he falls within one of the exceptions to the parol evidence rule. E.g. Wiebe v. Butchart's Motors Ltd., [1949] 2 W.W.R. 688 (B.C.C.A.); Long v. Smith (1911), 23 O.L.R. 121, at 127, 128 (Ont. C.A.); Beck v. Brody, [1943] 1 W.W.R. 360 (Alta. S.C.); McLachlan v. Horner, [1937] 4 D.L.R. 188 (Ont. C.A.) (that there is a collateral oral contract to the written contract); Ferland v. Keith, [1938] O.W.N. 445, 446 (C.A.); Francis v. Trans-Canada Sales Ltd. (1969), 69 W.W.R. 748 (Sask. C.A.). The court is given a great deal of discretion in these situations, and it is impossible to predict the outcome of a case, because there is never any ostensible intention by the parties to enter into a collateral contract. If the court's impulse is to find for the purchaser, a collateral contract may be easily established. However, if the court's impulse is to find for the seller the court can just as easily invoke the parol evidence rule.
Secondly, there is often a disclaimer provision which asserts that the written document(s) constitutes the “entire agreement.” There is often, as well, a further disclaimer provision which states that the salesman has no authority to make representations, or terms of the contract, on behalf of the seller. Thus, although the consumer is often solely or primarily induced by, and relies upon, oral representations made by a salesman of the seller, his expectations may be frustrated by such provisions which he has neither read nor understood, nor would imagine to be contained in the written document(s).

If evidence is held to be admissible in respect to the oral representations, the consumer is met with a further problem in respect to available remedies. If the representations are held to not be a term of the contract, then the only remedy is rescission, and there is uncertainty as to when this will be given in the event that the contract has been executed, as will, of course, usually be the situation.

B. The Judicial Treatment of Disclaimer Clauses Through the Use of the Traditional Rules of Construction as to the Meaning of the Language of the Contract

The rules or cannons of construction employed to interpret the meaning of the words within a contract, and the resulting legal effect of such contract, have afforded the courts some flexibility in dealing with the disclaimer clauses. The wording of the disclaimer clause is considered within both (1) the context of the wording of the disclaimer clause itself and also (2) the context of the general wording of the entire document(s) constituting the contract.

In the absence of any language suggesting the contrary, the implied conditions and warranties of the Sale of Goods Act will, of course, be terms of the contract by operation of law. Similarly, in the absence of any language

---

21 See, for example, the disclaimer clauses in *F & B Transport Ltd. v. White Truck Sales Manitoba Ltd.* (1965), 51 W.W.R. 124, at 126 (Man. C.A.); and *Canadian Acceptance Corp. Ltd. v. Mid-Town Motors Ltd.* (1970), 72 W.W.R. 365 (Sask. D.C.). In both of these cases the courts did not give effect to such a clause.

22 See, for example, the disclaimer clause in *R. W. Heron Paving Ltd. v. Dilworth Equipment Ltd.* (1963), 36 D.L.R. (2d) 462, at 470, 473 (Ont. H.C.) where such a provision was held to be operative to exclude representations made prior to the contract, although the purchaser was successful in its action on other grounds; see also *Canadian Gas Power and Launches Limited v. Orr Brothers Limited* (1911), 23 O.L.R. 616 (Ont. C.A.).

23 Doubt has been expressed that the remedy of rescission for innocent misrepresentation applies at all to a contract for the sale of goods. Atiyah, *Rescission of a Contract of Sale of Goods* (1959), 22 M.L.R. 76. But see P. Atiyah, *Sale of Goods* (3rd ed., Pitman and Sons, London: 1966) at 225. However, there is authority supporting the view that a contract for the sale of goods can be rescinded for an innocent misrepresentation, *Leaf v. International Galleries* (1950) 2 K.B. 86 (C.A.). However, there is confusion as to the extent to which the remedy is available upon execution of the contract. The law has, of course, changed somewhat in England with the passage of the Misrepresentation Act, 1967, c.7, s.3(U.K.). For a discussion of the problems in this regard in Canada, see *O'Flaherty v. McKinlay* (1952), 30 M.P.R. 172, at 181-183 (Nfld. C.A.) where the court had to employ imaginative reasoning to allow rescission of a contract in respect to a used car represented to be “new” which the consumer had driven 7,000 miles before learning of the misrepresentation.
suggesting the contrary, the obligations assumed under the contract will not
be modified nor will the normal remedies for non-fulfilment of those obliga-
tions be modified or excluded. The rules of construction (within the context
of the disclaimer clause problem), therefore, only need receive consideration
when there is language (i.e. a disclaimer clause) which suggests a derogation
in respect to obligations otherwise presumed to be present under the contract.

The rule of construction most often referred to in this regard is that of
contra proferentem, that is, if there is any ambiguity in the language of the
document(s), with resulting doubt, the language will be construed least
favourably to the party who is relying upon it.\footnote{24} Often the court simply
applies the rule as one of strict construction and restrictive interpretation of
the disclaimer clause, without reference to any issue of ambiguity. Therefore,
the disclaimer clause will be ineffective unless express, clear words are
employed to negative or modify obligations, the presumption in interpreta-
tion of the language of the contract being against the operation of the dis-
claimer clause. This presumption is supported by the fact that the Sale of
Goods Act provides that all of the provisions of the statute apply, including
the implied conditions and warranties, unless "negatived or varied by express
agreement"\footnote{25} and further that:

\begin{quote}
[an express warranty or condition does not negative a warranty or condition im-
plied by this Act unless inconsistent therewith.\footnote{26}]
\end{quote}

However, the presumption against the operation of the disclaimer clause
has often been stretched by the court in favour of the purchaser because the
court considers the merits of the particular case to be with the purchaser, and
the only framework for regulation of the disclaimer clause rests within the
traditional rules of construction. Thus, the decisions of the courts have led
to what can almost be called a game with sellers' draftsmen of standard form
contracts. In many situations it seems apparent to a bystander that the seller's
intention was to disclaim but, because in the courts' view "apt language"\footnote{27}
was not used, the court states that the presumed intention of the seller must
have been not to disclaim or, at the least, the purchaser's presumed intention
must have been that there was no disclaimer on the part of the seller. In fact,
the purchaser is probably oblivious to the particular language of the disclaimer
clause, notwithstanding the fiction of presumed intentions through construc-
tion, whether or not "apt language" has been used.

1. The language of the disclaimer clause is to be construed within the context
of the language of the disclaimer clause itself.

To successfully disclaim the implied conditions and warranties of the
Sale of Goods Act "there must be between the vendor and the purchaser a
clear distinct contract resulting in that effect".\footnote{28} In the absence of words of

\footnote{24}{For a discussion of this rule of construction, and other rules as to construction,
see generally, \textit{Studies in Canadian Business Law}, (Fridman ed., Butterworth and Co.:
Toronto, 1971) at 1-25.}
\footnote{25}{See, for example, R.S.O. 1970, c. 421, s.53.}
\footnote{26}{R.S.O. 1970, c.421, s.15A.}
\footnote{27}{Wallis, Son & Wells v. Pratt & Haynes, [1911] A.C. 394.}
\footnote{28}{Windsor v. Simmons et al., [1908] 5 E.L.R. 139 (P.E.I. S.C.).}
exclusion the implied conditions apply even if there is no express agreement on the point. In the words of Lord Loreburn, “If it is desired by a seller to throw the risk of any honest mistake on to the buyer then he must use apt language”. However, once apt language is used, the court, in Allcock v. Manitoba Windmill and Pump Company explains why the implied terms imposed by the Sale of Goods Act are then excluded.

The legislature provided for Purchaser’s certain protection; but that protection the plaintiff in this case set aside when he signed the contract containing a clause expressly taking it away; and, the plaintiff having signed the contract, the law holds him to what he expressly agreed to. The Court cannot make agreements for the parties ... [P]eople ... are allowed ... to enter into these contracts if they feel disposed to; and ... the Courts cannot do anything except hold that the parties are bound by their provisions.

A problem arises because the courts are inconsistent in the construction of the language of disclaimer clauses. Undoubtedly this is in part because the construction is often artificial and requires subtle reasoning to achieve the adverse construction and desired result. Subsequent courts sometimes find it difficult to find their way through the maze, and may enforce a clause simply because the wording of the clause has met with previous approval.

Nevertheless, the construction of the language of the disclaimer clause simply within the wording of the disclaimer clause itself has afforded courts a significant tool with which to avoid the operation of disclaimer clauses.

Thus, the particular wording of the disclaimer clause in The Canadian Fairbanks-Morse Co. v. Teightmeyer destroyed its intended effectiveness. The clause said: “the above terms and conditions and the warranty herein described ... contain all the representations, conditions and warranties, general, express and implied and made to me by the vendor or its agents during the negotiations for sale.” Since the statutory implied conditions arise by implication of law and therefore were not “made ... during negotiations”, the disclaimer clause was held not to exclude the implied terms. Similarly, Freeman v. Consolidated Motors Ltd. presents another example of ineffective wording. The buyer had made known his particular purpose to the seller, but the car was unsafe to drive at high speeds due to a twisted frame. The Purchase Order contained a clause which read: “Vendor shall not be liable for any defects in material or workmanship pertaining to the said goods not known to the vender at the date hereof”. It was held that this would not be effective to contract out of the implied conditions for the disclaimer clause did not mention, at least literally, contracting out of the implied conditions.

---

29 Supra, note 27 at 396.
30 (1911), 18 W.L.R. 77 (Sask).
31 Id., at 82.
32 (1921), 60 D.L.R. 272 (Alta. C.A.).
33 Id., at 274.
35 Id., at 239.
36 Id., at 239.
Sawyer and Massey Co. v. Thibart involved the sale of a thresher and the contract contained a disclaimer clause which limited liability to defective parts or replacement of the machine. The court held that on a strict construction the limited liability clause only related to an express warranty given, namely, that the machine would “do as good work as any of the same size sold in Canada”. It was held that the express warranty was not inconsistent with the implied condition that the machine be fit for a particular purpose made known to the seller. The court relied upon the statutory provision similar to section 15.4 of the Ontario Sale of Goods Act. Therefore, as there was a breach of the implied condition that the goods be fit for a particular purpose, the purchaser was given damages.

Similarly, in Sawyer and Massey Co. v. Thomas G. Ritchie the Supreme Court of Canada considered a disclaimer clause which provided inter alia that the purchaser of a threshing machine give “ten days notice after starting” of dissatisfaction, and the court held on a strict construction that this provision did not apply to an express warranty that the threshing machine was “made of good materials” and would be “durable with good care”.

The House of Lords decision in Wallis, Son & Wells v. Pratt & Haynes is the most often cited case in a line of cases which have held that the implied conditions are not excluded by simply excluding all “warranties”. In Wallis, the seed delivered did not correspond to the kind of seed described in the contract. There was a clause in the contract asserting that “seller gives no warranty, express or implied as to growth, description, or any other matter”. This was held to not exclude the implied condition requiring the goods to correspond with their description. Lord Alverstone, C.J., in discussing the various conditions of the Sale of Goods Act, said:

I think every section shows that the distinction between ‘condition’ and ‘warranty’ is clearly understood and recognized and that different remedies are intended to be given in the one case and in the other. For that reason I submit it is impossible for the respondents to contend that when the sellers said they gave no warranty they meant to say they would not be responsible for any breaches of condition.

His Lordship then pointed out the various sections of the Act which show Parliament’s intention that conditions and warranties are two separate types of terms, with different ramifications for their respective breach.

---

37 (1907), 5 W.L.R. 241 (N.W. Provinces H.C.).
38 Id., at 243.
39 Id., at 248.
40 Id., at 255.
42 Id., at 625.
43 Id., at 622.
45 Id., at 395.
46 Id., at 396-97 [emphasis added].
47 Id., at 397-98.
In Marshall v. Ryan Motors Ltd.48 the car purchased was not fit for the particular purpose because it kept breaking down. There was a 30 month defective parts warranty which had expired and a clause saying “that no other warranty, guarantee or representation whatsoever has been made”49 other than the standard warranty printed on the back of the contract. The Saskatchewan Court of Appeal held that the implied condition that the car be fit for a particular purpose was not excluded by these words.

In Cork v. Greavette Boats Ltd.50 the disclaimer clause only excluded implied warranties and Henderson J. A. concluded therefore that the implied condition of fitness for a particular purpose was not excluded when, in respect to a boat which was meant to be a pleasure boat, the engine, exhaust and steering were never installed properly.51

In the recent Ontario case of Canada Building Materials Ltd. v. W. R. Meadows of Canada Ltd.52 there was a clause which read:

We warrant our materials to be of good quality and will replace materials proved defective. This warranty is in lieu of all others express or implied and may not be extended by representatives ... We in no way guarantee ... performance under special conditions.53

The warranty containing the exculpatory clause was held not to avail the seller on another ground, but it was added “in any event even if such a limited warranty were held to be applicable it could not include conditions as to fitness for purpose implied under section 15”.54

In Alabastine Co., Paris Ltd. v. Canada Producer and Gas Engine Co. Ltd.55 the Ontario Court of Appeal relied upon Wallis v. Pratt56 to hold that the following clause did not use apt language to exclude liability for breach of the implied condition of fitness for a particular purpose nor for the breach of the condition of the motor to fit the description of 250 h.p.

It is expressly agreed there are no promises, agreements or undertakings outside this contract with reference to the subject matter; that no agent ... has any authority [to impose terms] not herein expressed.57

It was held that:

“The language of the provision is more appropriate to express promises, agreements or understandings than to an agreement or condition which the law implies from a given state of circumstances; and if the appellant intended that such an agreement or condition should be excluded clear language should have been used to express that intention.”58

---

48 (1922), 65 D.L.R. 742 (Sask. C.A.).
49 Id., at 744.
51 Id., at 205, 206.
52 (1968), 66 D.L.R. (2d) 674 (Ont.H.C.).
53 Id., at 679.
54 Id., at 680.
55 (1914), 17 D.L.R. 813 (Ont. C.A.).
56 Supra, note 44.
57 Supra, note 55 at 280.
58 Id., at 281.
Disclaimer Clauses

The court in *McNichol v. Dominion Motors Ltd.* also dealt with a provision in a document which asserted that the document “comprised the entire agreement and no other agreement of any kind, verbal or otherwise, would be recognized,” and held that such provision did not exclude the condition or warranties implied by the Sale of Goods Act, relying upon *Alabastine*. In this case there was a manufacturer’s warranty as part of the agreement, but a provision asserting that this was the only “warranty” was held not to exclude the implied condition of fitness for a particular purpose.

Having discussed cases where apt language was not used it is useful to now discuss some cases which have held that apt language was used and why the language was held to be effective.

There are several cases where disclaimer clauses were held to be operative as the wording of the clauses excluded both express and implied conditions and warranties.

In *Reeves and Co. v. Chase* the clause

the buyer expressly agrees that said machinery is not sold by description and that there are no conditions or warranties either general, express, or implied, other than the conditions and warranty set forth below was held to be enough to negative the implied conditions and warranties that would otherwise arise by operation of law. *Alcock v. Manitoba Windmill Co. Ltd.* dealt with a similarly worded clause and it was held that the clause effectively excluded the implied conditions of the Sale of Goods Act.

In *Advance-Rumley Thresher Co. v. Lester et al.* The Ontario Court of Appeal held that a clause in a contract which provided “There are no conditions express or implied statutory or otherwise other than those contained in the written agreement...” was effective to exclude the implied condition that the goods were fit for a particular purpose made known to the seller. Here the purchaser sought to purchase a tractor capable of pulling a separator up “any of the hills”.

A year later, in *Advance-Rumely Thresher Co. v. Armour* the Ontario High Court followed *Advance-Rumley Thresher Co. v. Lester* although the Court of Appeal reversed the decision on other grounds. In this case there was an express warranty that the goods were “well made and of good material and...capable of performing well the work for which they are intended” but it was limited to complaints made within a certain time and within a certain manner, a procedure which was not followed. The court said that

---

61 Id., at 271.
66 Id., at 459.
67 Supra, note 30.
because there was a disclaimer clause that said “there are no rights, warranties or conditions, express or implied, statutory or otherwise, other than those herein contained”, the buyer was deprived of the benefit of the implied conditions of the Sale of Goods Act.  

Similarly, in Godsoe v. Beatty the implied conditions of fitness and merchantability under the Sale of Goods Act were excluded by another, similar, clause which read:

Purchaser acknowledges that this agreement constitutes the entire contract and there are no representations, warranties or conditions, express or implied, statutory or otherwise, other than as contained herein.

2. The language of the disclaimer clause is to be construed within the context of the wording of the contract document(s) as a whole.

The courts have employed the traditional rules of construction to determine the presumed intentions of the parties by considering the language of the disclaimer clause within the context of the wording of the contract as a whole.

In Hart-Parr Co. v. Jones the court held that a disclaimer clause which asserted that a tractor engine sold was “not sold by description” was held to be ineffective when the tractor engine purchased was used rather than new, as represented. The court held that the defect was “a difference in kind” rather than quality and that the disclaimer clause “cannot be held to alter the subject matter of the sale . . . [as the] order is still an order for a specified engine”.

In Schofield v. Emerson Brantingham Implement Company the contract was for delivery of a tractor capable of producing 30 h.p. and contained a one year defective parts warranty:

Made upon the express conditions that [it] contains all the terms and conditions of the sale . . . and cannot, in any manner, be changed . . . without the written consent of the officers [of the company]

Anglin, J. said that he need not consider whether this clause excluded the implied conditions under the Sale of Goods Act because there was an express term that it would develop 30 h.p. in the contract. In discussing the disclaimer clause, Fitzpatrick, C. J. used Wallis v. Pratt as authority to say that the purchaser would have been entitled to recover damages because if what the seller had delivered “had been something different from what was ordered . . . the conditions of sale have no application”.

---

60 Id., at 621.
71 Id., at 265.
73 Id., at 891.
75 Id., at 209.
76 Id., at 219-20.
78 Supra, note 74 at 205.
Similarly, in *Canada Foundry Co. Ltd. v. Edmonton Portland Cement Co.* 70 the Privy Council held that a clause disclaiming responsibility for loss from delay was ineffective, because to construe the clause literally and give effect to it would mean that the seller would never have to deliver, notwithstanding that an express date for delivery was set forth in the contract. The document had to be construed as a whole and therefore the seller was held to have an obligation to deliver within a reasonable time after the date specified for delivery, and was responsible for damages for the failure to do so, notwithstanding the disclaimer clause. To give effect simply to the literal wording of the disclaimer clause would really result in a failure of consideration.

The written contract of sale contained the following clause:

The Company shall not be responsible or liable for any direct or indirect damage, loss, stoppage or delay which the purchaser may sustain, whether the said plant or machinery is specified for any particular purpose or not. 80

Lord Atkinson held in respect to the clause:

Literally construed it would mean that the appellants might delay the shipment, delivery, or erection of this steel frame as often and as long as it seemed good to them. That would be in itself an irrational result, and besides would be altogether irreconcilable with the earlier provision binding them to deliver the plant and machinery with due despatch. *The document must be construed as a whole, effect being, as far as possible, given to each part.* And the only way in which that can be done is to hold either that the second clause does not at all apply to the plant and machinery mentioned in the earlier clause of the document, or that if it does apply to them it was only intended to protect the appellants from being responsible for consequential damage. Their Lordships are, however, like the learned trial Judge and the Court of Appeal, of opinion that it does not apply to such breaches of contract as the long delayed shipment, delivery, or erection of the steel frame contracted for. It cannot, therefore, in itself, furnish any defence to the respondents' counterclaim. 81

Similarly, in *Massey-Harris Co. v. Skelding* 82 the Alberta Court of Appeal held that where a tractor sold was "valueless" the breach constituted a "total failure of consideration" and therefore the disclaimer clause was ineffective. More recently, in *Arrow Transfer Co. Ltd. v. Fleetwood Logging Sales Ltd.* 83 the British Columbia Court of Appeal held that a disclaimer clause was ineffective, because the "duty ... to deliver the crane in good condition was absolute", this obligation being "the foundation upon which the contract was built". 84

In *R. W. Heron Paving Ltd. v. Dilworth Equipment Ltd.* 85 the Ontario High Court approved of the reasoning in *Schofield*. 86 The purchase in this case was in respect to an asphalt plant under a contract which included a clause "[t]he terms and conditions herein contained represent the complete

---

70 [1918] 3 W.W.R. 866 (P.C.) (Alta.).
80 *Id.*, at 868.
81 *Id.*, at 872 [emphasis added].
84 *Id.*, at 633.
85 (1963), 36 D.L.R. (2d) 462 (Ont. H.C.).
86 *Supra*, note 74.
agreement between the Vendor and Purchaser” and “no salesman ... has any authority to make any others ....”.

The purchasers were held to have made their purpose known, which was to buy a plant capable of producing 4,000 pounds of asphalt per day and to have relied upon the seller's skill or judgment, when in fact the plant could only produce 3,600 pounds.

Although it was held that the disclaimer clause excluded the salesman’s representation regarding delivery and adaptability, it was held that the clause did not exclude the implied condition of fitness for a particular purpose. The court held that the clause and breach was similar to that in the Schofield case.

Similarly, in Sloan v. Empire Motors Ltd. and Vancouver Finance Co. Ltd. in an action for breach of the obligation of the seller to convey title to a used car, the defendant seller relied upon a disclaimer clause which read, in part:

There are no representations, warranties or conditions, express or implied, statutory or otherwise, other than those herein contained nor shall any agreement collateral hereto be binding upon the seller unless it is in writing hereupon or attached hereto, and duly signed by the seller.

The court held that by reason of the words “other than those herein contained” the disclaimer clause did not exclude the warranties contained in the agreement. Therefore, in considering the operative words of the conditional sale agreement, which read that the purchaser “... hereby purchases and agrees to pay for ... the following property ... delivery and acceptance ... hereby acknowledged” with the good being purchased described as a “used ... 1952 ... Ford ... Sedan”, the court held that “the general property [in the car] was the subject-matter of the agreement”, and this interpretation was further supported by clauses in the contract which indicated that the extent of the title reserved to the seller was simply a security interest until payment of the full purchase price. The purchaser was therefore successful in claiming damages.

C. The Fundamental Breach Approach in Respect to Disclaimer Clauses

Although the British courts are credited with the creation of the doctrine of fundamental breach in the early 1950's, British and Canadian courts have really been using the principles underlying the doctrine without the label

---

87 Supra, note 85 at 466.
88 Id., at 464-5, 469.
89 Id., at 469.
91 Id., at 66, 75.
92 Id.
93 Id., at 76.
94 Id.
95 Id., at 66, 76-7.
96 Cf., but query, Gratton v. Forest City Motors, [1954] O.W.N. 167, in which the Ontario Court of Appeal held that the implied condition of title had been successfully excluded.
Disclaimer Clauses

for over fifty years. The doctrine simply represents a new manifestation of the approach of the traditional rules of construction already discussed.

The case law which has asserted as a rule of substantive law that a party could not contract out of his fundamental obligations will be reviewed first, and then the impact of the House of Lords decision in Suisse Atlantique Société D'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale will be discussed. The final task will be to assess what the courts in reality are doing in applying the doctrine of fundamental breach.

1. **Fundamental breach as a doctrine of substantive law**

The decision of the English Court of Appeal in Karsales (Harrow) Ltd. v. Wallis is generally regarded as the beginning of the view that simply as a matter of substantive law a disclaimer clause cannot exclude liability where the seller has committed a fundamental breach.

In that case the defendant inspected a second-hand Buick car in excellent condition and intimated that he wished to buy it on hire-purchase terms. The car was sold to a finance company which then contracted to let it on hire-purchase to the defendant.

About a week later the vehicle was left late at night outside the defendant's garage. He examined it next morning and found that it was the same Buick car which he had previously inspected, in the sense that it had the same body and engine and registration number; but it had been badly damaged. It had evidently been towed in; there was a rope attached to the front bumper; and tyres had been changed, the new tyres being taken off and the old ones put on; the wireless set had been removed from it; the chrome strips round the body were missing; and when the defendant had a fitter look at the engine, the cylinder head was found to be off, all the valves were burnt, and there were two broken pistons. The car would not go.

The hire-purchase contract contained the following clause:

No condition or warranty that the vehicle is roadworthy, or as to its age, condition or fitness for any purpose is given by the owner or implied therein.'

Although the facts seemed to suggest clearly that relief should be granted the trial judge held, employing the traditional rules of construction, that all the representations in the contract were covered by the language of the exemption clause ... and that accordingly, unfortunate as it might be, any condition or warranty in the transaction must be excluded from his consideration; and that after a party had signed such a contract, then, although a car in a totally different condition was delivered, the party could not complain, but was bound by the agreement.

---

97 In Wallis v. Pratt, supra, note 27, Lord Loreburn said at 395: "If a man agrees to sell something of a particular description he cannot require the buyer to take something which is of a different description and the sale of goods by description implies the condition that the goods shall correspond to it."


100 Id., at 938.

101 Id., at 937-8.

102 Id., at 939.
Perhaps relief might have been granted by holding on the particular facts of the case that there was a wilful breach and that such a breach was outside of the scope of the exempting clause. However, this approach would have impliedly sanctified the clause in situations not involving a wilful breach and without a doubt the buyer reasonably expected not only that the seller would not intentionally damage the vehicle, but also that he would deliver to the purchaser the car that he had first inspected.

In the Court of Appeal, Denning, L. J. spoke of a substantive rule of law having been developed in respect to disclaimer clauses:

notwithstanding earlier cases which might suggest the contrary, it is now settled that exempting clauses of this kind no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects. He is not allowed to use them as a cover for misconduct or indifference or to enable him to turn a blind eye to his obligations. They do not avail him when he is guilty of a breach that goes to the root of the contract. 103

Denning, L. J. then set forth the approach by which a court could determine the substance of the seller's obligations (and hence the purchaser's reasonable expectations):

The thing to do is to look at the contract apart from the exempting clauses and see what are the terms, express or implied, which impose an obligation on the party. If he has been guilty of a breach of those obligations in a respect which goes to the very root of the contract, he cannot rely on the exempting clauses . . . The principle is sometimes said to be that the party cannot rely on an exempting clause when he delivers something “different in kind” from that contracted for, or has broken a “fundamental term” or a “fundamental contractual obligation”, but these are, I think, all comprehended by the general principle that a breach which goes to the root of the contract disentitles the party relying on the exempting clause. 104

Lord Justice Denning had no difficulty in holding on the particular facts of the case, the car delivered being in a “deplorable state”, 105 that the breach did go to the root of the contract and accordingly the hire-purchase company was not entitled to rely on the disclaimer clause. 106

Apart from the particular facts of the case, there is some justification in terms of traditional contract principles for the general proposition asserted by Lord Justice Denning. If the purchaser does rely upon the seller's skill and judgment as provided in section 15.1 of the Sale of Goods Act then he is entitled as a matter of law to the protection of the implied condition of section 15.1. Similarly, if the purchaser relies upon express promises to his detriment he is entitled to rely upon the law affording him the necessary remedy so as to provide him with his expectation interest. A disclaimer clause purporting to deprive a purchaser of that protection and reliance can have no validity if it is asserted unilaterally by the seller, but can come about only through agreement. 107

103 Id., at 940 [emphasis added].
104 Id., at 940-41.
105 Id., at 941.
106 Id.
108 As permitted by s.53 of the Sale of Goods Act R.S.O. 1970, c.421. Note, of course, that s.53 is now limited in the consumer sale by the recently enacted s.29a of the Consumer Protection Act, R.S.O. 1970, c.82, as am.
As a rule, when the purchaser signs the contract, the formal requirements of agreement are met. However, that should not conclude the question, for in order to enforce the agreement against the purchaser the seller must show that the consideration which has been promised has actually been received by the purchaser. If the consideration underlying the asserted promise of the purchaser not to hold the seller to his obligations under section 15. 1. (i.e. the disclaimer clause) has failed, the purchaser is entitled to disaffirm or repudiate that obligation. The weakness with this argument is that where the disclaimed clause asserts that no promise has been made at all by the seller, the argument becomes circular. To find a breach going to the root of the contract, it is necessary first to find a promise and the question then is how can such a promise be found where the disclaimer clause expressly says that no promise has been made and the purchaser by his signature has apparently agreed to this. On the other hand, it could then be argued that the purchaser has not received any consideration (unless consideration can otherwise be found) in the first instance and therefore no binding obligation arises on his part.

For example, in the *Karsales* case, Lord Denning found that the seller had promised a car otherwise than a car in a “deplorable state” and Birkett, L.J., found a duty “to supply to the defendant a ‘car’, in the ordinary sense of that term and not something that needed towing, because in the true meaning of words a car that would not go was not a car at all.”

Once the promise had been found, a finding of a breach of that promise could follow as a matter of course. But the question remains as to how such a promise could be found (looking simply at the written contract) in the face of express wording that the seller made no promise that the “vehicle is roadworthy, or as to its age, condition or fitness for any purpose...”.

On the facts of the case it was held that the buyer reasonably expected to receive a car suitable for normal purposes and the seller's obligation was therefore to supply a roadworthy vehicle. The court held the disclaimer clause to be ineffective when it was found that the buyer's reasonable expectation was really to have delivered to him “the car I had seen before and which I would like to have”, rather than as suggested by simply the written words of the contract.

Similarly, in *Knowles v. Anchorage Holdings Co.* Mr. Justice Verchere followed *Karsales* and found the following clause of no value to the seller in the case of “an engine that would [not] operate as it should have”.

---

100 See *supra*, note 4.
101 Cf. Lord Wilberforce in *Suisse Atlantique, supra*, note 98, at 431: “An act which, apart from the exceptions clause, might be a breach sufficiently serious to justify refusal of further performance, may be reduced in effect, or made not a breach at all, by the terms of the clause.” [emphasis added]
102 *Karsales, supra*, note 99 at 942.
103 *Id.*, at 937-38.
104 *Supra*, note 99 at 942.
106 *Id.*, at 178.
The buyer relies solely on his own judgment that the equipment ... is fit for the purpose of which it is required ...\textsuperscript{116}

The clause went on to make the usual disclaimer of warranties implied by law. Mr. Justice Verchere found a breach of a fundamental term:

Applying these considerations to the present case, I cannot escape the conclusion and I find that here the defendant was in breach of a fundamental term of the contract to purchase an engine of workable character, that is to say, an engine that would operate as it should have, and cannot therefore rely on the exemption clause,\textsuperscript{117}

He continued further in construing the clause:

As regards the submission ... that the plaintiff's expressed reliance on his own judgment precluded the arising of any warranty or condition under sec. 20(a) of the Sale of Goods Act, the answer lies, in my opinion, in the lack of any inconsistency between the plaintiff's reliance on the defendant's skill or judgment to provide an engine that would meet the fundamental obligation of an engine of workable character and his reliance on his own judgment that a properly performing engine of the capacity supplied would be suitable for his purpose. This distinction is borne out by the complaint made by him here, which was not that the engine is insufficient or inadequate but rather that it is unsuitable because it has consistently failed to function as it should. The fault with the engine is not that it was, for example, too small or too light to provide adequate power. The complaint concerned the ability of the engine to function as an engine should and this was a matter on which the plaintiff had neither the opportunity nor the ability to form a judgment. In these circumstances, I hold that the words above referred to do not preclude the existence of an implied condition or warranty that the engine would, when supplied, be workable and that as there was a breach of this term the plaintiff is entitled to relief,\textsuperscript{118}

There really could be no doubt that a buyer would expect, at the least, an engine which could perform substantially the function of an engine.

Similarly, it was held in Canadian-Dominion Leasing Corporation v. Suburban Superdrug Limited\textsuperscript{119} that a buyer would, at a minimum, expect an "automated" commercial display case device to be capable of self propulsion.\textsuperscript{120} In Lightburn v. Belmont Sales Limited\textsuperscript{121} it was held that a buyer would not expect a new Ford Cortina to be "so defective and so unreliable ... that it had to be returned for repairs ... no less than 17 times"\textsuperscript{122} in eight months.

Although the courts have sought to define fundamental breach so as to differentiate it from a breach of the condition implied in section 15. 1. of the Sale of Goods Act (which therefore means that the doctrine does not overrule a long line of cases) the fundamental breach cases themselves leave the reader very much in doubt whether in fact there is any real difference. .

\textsuperscript{116} Id., at 176.
\textsuperscript{117} Id., at 178.
\textsuperscript{118} Id., at 178-179.
\textsuperscript{119} (1966), 56 D.LR. (2d) 43 (Alta. C.A.).
\textsuperscript{120} Id., at 50.
\textsuperscript{121} (1969), 6 D.LR. (3d) 692 (B.C. S.C.).
\textsuperscript{122} Id., at 695.
For example, in *Western Tractor Ltd. v. Dyck* the Saskatchewan Court of Appeal found a fundamental breach where a tractor was not capable of doing “the work for which it was purchased” and broke down completely after 1700 hours of use.

Similarly, in *R. G. McLean Ltd. v. Canadian Vickers Ltd.* in which there was a contract for the purchase and sale of a printing press, the Ontario Court of Appeal found itself able to find a fundamental breach where the good delivered certainly was a printing press but was unable to do “the quality of printing contemplated by both parties to the contract when it was made ... In short, the machine simply did not do the job which it had been purchased to do ....".

The following clause was asserted to be effective by the seller:

>This condition [defective parts warranty] is in substitution for and excludes all express conditions, warranties or liabilities of any kind relating to the goods sold whether as to fitness or otherwise and whether arising under the Sale of Goods Act, 1893 or other statute or in tort or by implication of law or otherwise. In no event shall we be liable for any direct or indirect loss or damage (whether special, consequential or otherwise) or any other claims except as provided for in these conditions.

In construing this clause, Mr. Justice Arnup echoed the sentiments of Lord Atkinson in *Portland Cement*.

>Notwithstanding the broad language of subcl. (e), I am unable to construe it in the way contended for. Such a construction would, for all practical purposes, render nugatory the prime contractual obligations of the defendant. It would make those ostensible obligations what Lord Wilberforce called a “mere declaration of intention”: *Suisse Atlantique*, supra, at p. 432. In short, cl. 12 does not exclude liability for a fundamental breach of contract resulting in performance totally different from what the parties had in contemplation. The clause can be given business efficacy if its operation is limited to identifiable defects due to faulty workmanship or use of defective material, which defects can be rectified, and which do not prevent performance of the contract as contemplated by the parties.

It therefore seems that if a buyer has relied upon a seller’s expertise no language will defeat that reliance.

2. *Suisse Atlantique: A return to the traditional rules of construction*

In order to assess the impact of the decision of the House of Lords in *Suisse Atlantique Societe d'Armement Maritime S.A. v. Rotterdamsche Kolen*
it should be emphasized that in post-Karsales but pre-Suisse Atlantique decisions, the court would construe the contract apart from the exempting clause to find the seller's prime obligation, find a fundamental breach of that obligation, and then declare that as there was a fundamental breach the exempting clause could not be relied upon. Although the Karsales doctrine was sometimes asserted as a doctrine of substantive law, that decision and the decisions following it could have been decided on a basis of liberally employing the traditional rules of construction, with the court considering all of the relevant evidence to ascertain and give effect to the true expectations.

The facts of Suisse Atlantique as set out in the headnote were as follows:

On December 31, 1956, the respondents agreed to charter a vessel from the appellants for the carriage of coal from the United States (East Coast) to Europe, the vessel returning in ballast between each voyage. The charter was to remain in force for a total of two years consecutive voyages. Fixed periods of laytime were provided within which the respondents were obliged respectively to load and discharge the vessel on each voyage and demurrage was payable, subject to certain exceptions, at the rate of 1,000 dollars a day. Between October 16, 1957, and the end of the charter the vessel made eight round voyages whereas the appellants alleged that a further six voyages could have been performed if the loading and discharging had been completed within the laytime or a further nine voyages if the respondents had loaded and discharged the vessel with reasonable dispatch.

The written contract provided, in part:

3. The cargo to be loaded into vessel at the average rate of 1,500 tons per running day ... if longer detained charterer to pay $1,000 U.S. currency per running day (or pro rata for part thereof) demurrage.
8. The cargo to be taken from alongside by consignee at port of discharge, free of expense and risk to the vessel, at the average rate of (clause No. 22) tons per day ... if longer detained, consignee to pay vessel demurrage at the rate of $1,000 U.S. currency per running day (or pro rata for part thereof).

In the House of Lords, the appellants (plaintiffs) contended that the breaches of contract which caused the delays amounted to a fundamental breach or a breach going to the root of the contract and accordingly such breach prevented the respondents from relying on the demurrage clause limiting their liability.

The House of Lords found on the particular facts of the case that no fundamental breach of contract had been committed. However, their Lordships undertook a general consideration and review of the doctrine.

The court was unanimous in holding that there was no rule of substantive law that a party to a contract, having committed a fundamental breach of that contract, was not entitled to rely on an exemption clause. The court

132 Id., at 361.
133 Id., at 364.
134 Id., at 392 (Viscount Dilhorne), 399, 400 (Lord Reid), 410 (Lord Hodson), 425, 426 (Lord Upjohn) and 423 (Lord Wilberforce).
was also almost unanimous in characterizing "fundamental breach" as nothing more than a new name for a very old concept.\footnote{135 Id., Lord Reid stating at 397: 
"General use of the term 'fundamental breach' is of recent origin and I can find nothing to indicate that it means either more or less than the well known type of breach which entitles the innocent party to treat it as repudiatory and to rescind the contract."}

The reasoning and the terminology of the earlier cases was disapproved of, although the results were not. It is submitted that what really concerned their Lordships was the suggestion of an inflexible rule of law designed to protect reasonable expectations in the usual consumer type of sale which, loosely applied, might paradoxically defeat true expectations in the circumstances of a truly commercial sale.

Certainly on the facts of Suisse Atlantique,\footnote{136 Id., at 406-07 [emphasis added].} it seems that the appellants possessed the same bargaining power as the respondents and were, in effect, asking the court to release them from what turned out to be bad bargain freely entered into. Lord Reid said:

Exemption clauses differ greatly in many respects. Probably the most objectionable are found in the complex standard conditions which are now so common. In the ordinary way the customer has no time to read them, and if he did read them he would probably not understand them. And if he did understand and object to any of them, he would generally be told he could take it or leave it. And if he then went to another supplier the result would be the same. \textit{Freedom to contract must surely imply some choice or room for bargaining}.

\ldots

At the other extreme is the case where parties are bargaining on terms of equality and a stringent exemption clause is accepted for a quid pro quo or other good reason. But this rule appears to treat all cases alike. There is no indication in the recent cases that the courts are to consider whether the exemption is fair in all the circumstances or is harsh and unconscionable or whether it was freely agreed by the customer. And it does not seem to me to be satisfactory that the decision must always go one way if, e.g., defects in a car or other goods are just sufficient to make the breach of contract a fundamental breach, but must always go the other way if the defects fall just short of that. This is a complex problem which intimately affects millions of people and it appears to me that its solution should be left to parliament. If your Lordships reject this new rule there will certainly be a need for urgent legislative action but that is not beyond reasonable expectation ... The appellants chose to agree to what they now say was an inadequate sum for demurrage ...\footnote{137 Supra, note 131, at 361.}
Lord Reid also made clear that he would not permit a disclaimer clause to defeat a buyer's reasonable expectation.

As a matter of construction it may appear that terms of the exclusion clause are not wide enough to cover the kind of breach which has been committed ... Or it may appear that the terms of the clause are so wide that they cannot be applied literally; that may be because this would lead to an absurdity or because it would defeat the main object of the contract or perhaps for other reasons.188

Put more simply, Lord Reid was saying that the clause in question was consistent with the plaintiff's reasonable expectations in the particular case.

Lord Wilberforce stated:

No formula will solve this type of question and one must look individually at the nature of the contract, the character of the breach and its effect upon future performance and expectation and make a judicial estimation of the final result.1

Like Lord Reid, he also made clear that it was merely the principle expressed in Karsales and in the cases following it suggesting a doctrine of substantive law, and not their results to which he had objection:

The conception, therefore, of 'fundamental breach' as one which, through ascertainment of the parties' contractual intention, falls outside an exceptions clause is well recognized and comprehensible. Is there any need, or authority, in relation to exception clauses, for extension of it beyond this? In my opinion there is not. The principle that the contractual intention is to be ascertained — not just grammatically from words used but by consideration of those words in relation to commercial purpose (or other purpose according to the type of contract) — is surely flexible enough, and though it may be the case that adhesion contracts give rise to particular difficulties in ascertaining or attributing a contractual intent, which may require a special solution, those difficulties need not be imported into the general law of contract nor be permitted to deform it.140

Therefore, it is submitted the House of Lords in Suisse Atlantique was not attempting to place a purchaser at the mercy of disclaimer clauses but rather to preserve the discretion of the courts in situations where the expectations of the parties could be truly said to be qualified in accordance with the disclaimer clause. If a seller, as in Suisse Atlantique, could be said to have paid a "price" for the buyer's undertaking not to exercise his rights to the full, the sanctity of the bargain should be preserved. Like the early decisions of the courts of Chancery dealing with unconscionable transactions141 their Lordships were seeking to protect persons from being victimized, but not to protect someone who had freely agreed to what turned out to be a bad bargain.

Therefore, the only real difference between pre and post Suisse Atlantique cases is in the formula used to achieve the desired results.

For example in R. G. McLean v. Canadian Vickers Ltd.142 Mr. Justice Arnup, rather than holding as a matter of substantive law that the clause in

188 Id., at 398.
139 Id., at 432 [emphasis added].
140 Id., at 434 [emphasis added].
question could not apply in circumstances such as the breach in question, held, construing the contract as a whole, that the parties never intended 'the clause to apply in situations involving "a breach so fundamental as to go to the root of the contract". 143

Similarly, Mr. Justice Ruttan of the British Columbia Supreme Court in Lightburn v. Belmont Sales Ltd. 144 found Ford's standard disclaimer clause presented no real difficulty to the buyer's suit for rescission as "cl. C2 of the sale contract ... was never intended to cover a situation of fundamental breach". 145

The effect of Suisse Atlantique has been to truncate whatever judicial magic the phrase "fundamental breach" may have possessed, and in its place, to use such words as "intended" or "contemplated". 146 As argued earlier, the real reason for the judgments given by the House of Lords was to prevent a doctrine developed to protect persons at a seller's mercy from hardening into a fixed rule of law which would eventually spill over into the commercial situation, as in Suisse Atlantique where it might be used by one party to escape a bad bargain freely entered into. However, the House did not articulate this policy very clearly and, perhaps as a result, lawyers today are faced with the subsequent judgment of Denning, L.J. in Harbutt's Plasticine Ltd. v. Wayne Tank and Pump Co. Ltd. 147

In that case, the defendant had contracted to instal new storage tanks for holding styrene wax in the plaintiff's plasticine factory. The contract provided that until the plaintiffs took over the new plant, the defendant would indemnify the plaintiffs against damage "to your property ... caused by the negligence of ourselves or of our servants but not otherwise, ... provided always that our total liability for loss, damage, or injury shall not exceed the total value of the contract" which was £112,330. 148 As a result of the negligent design and installation of the equipment, the styrene wax ignited and the plaintiffs' factory was destroyed. The plaintiffs (actually their insurance company on a subrogated claim) subsequently sued for £146,581 in damages.

Since the contract was apparently between parties of similar bargaining power, it would appear safe to assume that it was both understood and freely entered into. As the plaintiff was insured, it was undoubtedly in a position to accept the risk offered to it by the seller and economically it also undoubtedly would have been unwise to pay a higher price to have the defend-

---

143 Id., at 211.
144 Supra, note 121.
145 Id., at 697.
146 Implicit in these words is "expectation". See Western Tractor v. Dyck, supra, note 123 at 224:
"I do not believe, therefore, that either the plaintiff or the defendant ever contemplated that the subject matter of the contract was a tractor which would perform with reasonable satisfaction for only 1,700 hours." [emphasis added]
148 Id., at 232.
ant undertake the risk of greater liability since this would have involved, in effect, double insurance.

The Court of Appeal held that the plaintiff was entitled to succeed. Lord Justice Denning said that on the true construction of the limitation of liability clause, it was:

limited to accidents and damage done in the course of carrying out the work of erection, e.g. lorries running away, workmen dropping tools, and so forth ... On this reading of [the clause] it does not apply to damage done by breach of contract, such as faulty design. It does not, therefore, cover this case.1

Had he stopped there, the decision, although perhaps subject to attack on the facts for the reasons stated above, would not have added more confusion to an already confused area of law. However, (with Cross and Widgery L. J. J. agreeing) Lord Justice Denning went on to hold, alternatively, that the defendant's fundamental breach had automatically rescinded the contract and that the limitation clause was then destroyed with the contract, with the result that the plaintiff was free to sue for damages unencumbered by the clause.10 Further, it was not necessary that the plaintiff actually exercise his option to rescind, because on the facts of the case, the defendant's fundamental breach had rendered further performance of the contract impossible and accordingly rescission was automatic.

The question which must be asked is how can the plaintiffs sue for a breach of contract if the subject matter of his action, the contract, has been destroyed? Perhaps what Lord Denning meant was that on the facts of Harbutt's the consideration underlying the plaintiff's promise not to sue for damages beyond the contract price included the delivery of a workable tank and the defendant's failure to perform its promise precluded it from holding the plaintiff to its word.

Harbutt's deserves further discussion because it is illustrative of some of the inadequacies of what appears to be the most recent judicial approach, and will undoubtedly be cited favourably in the future by Canadian courts.

First, the decision confuses and distorts the traditional remedies resulting from breach of contract. Lord Denning states that where there is a fundamental breach and there is still a contract open to be performed (not the facts as held in Harbutt's) the innocent party has an option to affirm the contract which then remains in force for both sides, each being able to sue for past or future breaches, or to accept the fundamental breach and so bring the contract to an end and sue for past breaches.11 If he elects the latter course, the contract is considered to be at an end, and thus the disclaimer clause has fallen aside and the innocent party can sue for his full damages.12

Apart from the abuse of logic in this argument (how can one sue for damages when there is no contract?) there is an abuse of established contract law principles.

140 Id., at 233.
150 Id., at 234.
151 Id., at 233.
162 Id.
The common law provides for three options to the innocent party upon the breach of a promise. Upon any breach which would result in the innocent party receiving something substantially different from what he has contracted for, the innocent party would have the option to:

1. continue on with the contract and sue for damages; or

2. treat his obligations as at an end under the contract and sue for damages; or

3. treat his obligations as at an end under the contract and receive restitution of any benefits conferred upon the party in breach.\(^{153}\)

It is only in respect to the third alternative that the innocent party can, in effect, ignore the contract and the disclaimer clause. In such a situation, the innocent party is put back only in the position which he was in before the contract was made. Similarly, if the equitable remedy of rescission is available as a result of certain circumstances present in the formation of a contract (e.g. misrepresentation, mistake, undue influence), the innocent party is restored to his pre-contract position and no claim for damages will be entertained.\(^{154}\)

It is only in respect to the first two alternatives that the innocent party can sue for damages, that is, sue for loss of expectation and be put in the position as though the contract were performed. In either situation, as the innocent party is suing on the contract, and contracts are voluntary obligations with no right to sue unless upon a contractual obligation, the innocent party should be met with all of the terms of the contract, including the disclaimer clause subject to the over-riding issue of construing the contract to determine the true reasonable expectations and ignoring the disclaimer clause to the extent that it is inconsistent with such expectations.

It might be purposeful for a court in the position of Lord Denning to simply ignore or restrict the disclaimer clause in such a situation, as he suggests, and although it seems an easy path to distort existing principle to achieve the result desired, it is questionable whether the end justifies the means. Suppose that the innocent party wants to continue to perform the contract but sue for damages. Lord Denning says that the disclaimer clause then becomes “a matter of construction”.\(^{155}\) But why, if Lord Denning is to give the disclaimer clause effect to the extent that it accords with the intentions of the parties when the innocent party is continuing to perform the contract but suing for damages, does he not suggest that the innocent party should be similarly governed in accordance with the intentions of the

---

\(^{153}\) Restitution is available as a remedy in an action for money had and received where money has been paid to the defendant for a consideration which has wholly failed. If the benefit consists of services or goods an action for \textit{quantum meruit} or \textit{quantum valebat} may lie. See Goff & Jones, \textit{The Law of Restitution}, (London: Sweet & Maxwell, 1966) at 341-44.

\(^{154}\) Subject of course to the so-called claim for “indemnity” which is probably more properly viewed as available only to effect a proper restoration of benefits conferred. See Goff & Jones, \textit{id.}, at 126-27.

\(^{155}\) \textit{Supra}, note 147, at 235.
parties (as determined by construction) when the innocent party does not wish to continue to perform the contract?

In the latter situation, to the extent that the recovery of damages exceeds the true expectations of the parties through the contract (including the disclaimer clause, subject to construction) there is a windfall and unjust enrichment in favour of the innocent party, or conversely, a penalty (traditionally outlawed) imposed upon the party in breach, simply because he is in breach. This approach amounts, somewhat paradoxically, to a restriction upon freedom to contract with resulting uncertainty in the planning and allocation of risks.

Although the innocent party is discharged in respect to future obligations, the disclaimer clause should exist in respect to past or defectively performed obligations. Therefore, the party in breach may rely upon the disclaimer clause (subject to construction) just as the innocent party may rely upon other provisions of the contract to support his claim for damages.

The present Canadian position, based on *Suisse Atlantique*, appears to be that disclaimer clauses are a matter of construction of the contract. *Harbutt's* has not yet been cited in a reported decision.

3. Summary and Conclusions in Respect to the Doctrine of Fundamental Breach

The doctrine of "fundamental breach" or "breach of a fundamental term" really amounts simply to a further refinement of the traditional rules of construction. The Canadian courts have employed rules of construction in interpreting contracts similar to the British development in this regard. The thrust of the primarily used rule of construction is that a disclaimer clause is strictly construed against the drafter-seller seeking to rely upon same. This is a logical position given the fact that the disclaimer clause seeks to derogate from what would usually be considered the reasonable expectation of the purchaser.

---

156 *Supra*, note 131.

157 However, the recent decision of *Canadian Blackwood Hodge Atlantic Ltd. v. Kelly* (1972), 3 N.S.R.(2) 49 (C.A.) is interesting. Appellants rented a rock crusheand alleged a breach of the implied warranty of fitness. The Court decided in favour of the respondent on other grounds. However, in discussing fundamental breach, without any reference to the *Harbutt's* decision [1970] 1 All E.R. 225, Cooper, J.A. interpreted the *Suisse Atlantique* decision in such a way as to come to the same view of the law as Lord Denning in *Harbutts*, i.e. that if the innocent party elects to bring the contract to an end and sue for damages "the clause excluding liability [does not] continue to apply. ..." (at 59). The court failed to understand that where the innocent party has such an option, it is simply to treat his obligation (rather than all the contractual provisions, including the disclaimer clause) as at an end and sue for damages. Both Lord Denning (at 234) and Cooper, J.A. (at 59) arrive at their view through an interpretation of a confusing *obiter* dictum of Lord Reid in *Suisse Atlantique*, [1967] 1 A.C. 351 at 398. See Denning at 234 [1970] 1 All E.R. 225.

158 Although the court in *Suisse Atlantique* set forth a distinction between "fundamental breach" and "breach of fundamental term" the distinction is unimportant for the purposes of this article.
Therefore, any such clause should be spelled out clearly so that the otherwise presumptive intention of the parties is overborne by the asserted intention as expressed by the disclaimer clause. An ambiguity is to be resolved in favour of the purchaser for the reason that the disclaimer clause derogates from the reasonable expectation on the part of the purchaser presumptively arising from the seller's promise to sell and deliver a given good of a given quality.

The traditional rule of construction includes a consideration of strictly construing the language of the complete agreement, as well as strictly construing the words within the limited context of simply the disclaimer clause. The disclaimer clause must be construed to be rendered consistent with the rest of the agreement, that is, the basic promise to provide and deliver a given good of a given quality. Such construction is in accord with the presumed intentions of the parties based upon the traditional objective theory of interpreting a given contract.

The traditional rule of strict construction approach, notwithstanding its shortcomings, perhaps continues to serve the interests of the courts today as well as the more recent “fundamental breach” doctrine, because the use of the label “fundamental breach” may cause as many problems as it solves.

Employing the traditional rule of strict construction, a court today can (and does, but now often speaks in terms of “fundamental breach”) look at the price term, the description of the goods sold, delivery date, etc. as indicating that certain promises (rather than pseudo-obligations) were given by the seller with resulting reasonable expectations on the part of the purchaser. Therefore, a disclaimer clause must necessarily be construed to not restrict the realization of such expectations. The purchaser expected to get a product of a given quality for the price paid, and the seller would, or should, realize that the purchaser had such expectations. The seller should be bound to fulfill them. Thus, traditional contract principles (construing a contract on the objective theory) can be employed, with discretion exercised by the court in construing what it determines the true expectations to be. There is, of course, often the additional problem presented in respect to the admissibility of evidence as to oral representations, because of the parol evidence rule and disclaimer provisions which seek to exclude oral evidence from being admissible. These may or may not impede the court's discretion in a given litigious situation in its consideration of all of the relevant evidence in determining the true expectations of the purchaser.

It perhaps is easier for a court simply to paste a convenient label, “fundamental breach”, upon such a situation, holding that there cannot be a disclaiming of responsibility by the seller in respect to a given nonfulfilment of contractual expectations. In one sense, this development evidences a significant example of judicial creativity. However, the traditional rules of strict construction when applied liberally to the complete (i.e. written and oral) agreement, deal with the problem as satisfactorily. The court is forced to make some attempt to construe the transaction and the intentions and expectations of the parties. Although the traditional rule of construction approach is open to the criticism that the problem is often disposed of at a
level of artificial analysis (that is, through adverse construction of the literal wording of the contract document(s) so as to fulfil the real expectations of the purchaser), the doctrine of "fundamental breach" is often applied with little or no analysis whatsoever.

The ideal approach would be for a court to say "in our opinion, considering all the evidence, the seller promised a given good of a certain quality and the buyer expected performance of that obligation in respect to which the seller is in breach, with given remedies for non-performance".

The existing approach of both the traditional rule of construction and the modern rule of fundamental breach is necessarily dependant upon the court commencing its analysis from the starting point of a standard form contract in respect to which the literal wording, because of included disclaimer clause(s), asserts that the real expectation of the purchaser in the consumer sale is contrary to that expectation which the reasonable consumer would truly have.

If the court had a statutory set of standards as to quality, etc. setting forth the reasonable expectations in the usual consumer sale, with statutory guidelines as to when a departure from the usual is permissible (e.g. the "as is" transaction) and how a departure is to be accomplished, with the court allowed discretion in considering all the evidence and simply asking the above-mentioned basic question which underlies all of the principles and considerations, greater simplicity, honesty, and consistency would be achieved. As has been emphasized, the basic promises of the contract, in particular, the price term and the description in respect to the goods sold, always suggest that the person paying the price had certain minimum reasonable expectations which should be fulfilled.

It has, of course, always been a purpose of the court in giving the remedy of damages on the basis of fulfilment of the expectation interest to further contractual transactions generally in society by facilitating reliance created by contracts. Through giving effect to substantive contractual expectations, by whatever reasoning, the court is furthering what is considered to be the traditional policy reasons underlying the providing of remedies by the common law of contract.

As with the traditional rule of strict construction, the Canadian courts have employed, without hesitation, the British created doctrine of "fundamental breach". Thus, in Schmidt v. International Harvester Co. of Canada Ltd., a favourable obiter was given, and in Knowles v. Anchorage Holdings Co. Ltd. "fundamental breach" was adopted as a basis for the court's decision. By the time of the Suisse Atlantique case in 1966, there were

---

102 Supra, note 131.
reported judgments of Canadian courts in British Columbia,\textsuperscript{163} Alberta,\textsuperscript{164} Manitoba,\textsuperscript{165} and Nova Scotia,\textsuperscript{166} clearly adopting the doctrine of "fundamental breach". In none of the Canadian decisions is it clear whether the doctrine of fundamental breach is clearly a rule of law or simply a rule of construction. It seems that the courts, although not really conscious of this question, have been employing the doctrine as simply a rule of construction.

A court can only construe a breach of contract where there has been a promise, but once a court construes a breach a purported disclaimer should (simply by reason of there being a breach of promise) be ineffective, at least to the extent that the disclaimer clause suggests that the promissory obligation in question has not arisen. It is a more difficult question if the disclaimer clause seeks to limit the remedy normally available on breach, because such a clause can be consistent with there being a primary promissory obligation upon the seller with the secondary obligation created by the law affording a remedy for breach being modified as intended by the parties.\textsuperscript{167}

With the limited liability clause there is less of an apparent contradiction within the provisions of the contract as to what are the parties' true intentions and expectations. However, when the limited liability clause over-reaches to the point where in substance it is simply a disclaimer clause so that, if enforced, it really renders the primary obligations of the seller illusory, the clause should be similarly attacked and rendered ineffective.

The point is, with either the disclaimer clause or the limited liability clause, a seller should not be able to avoid performing that which he is reasonably expected to perform (and which the seller will, or should, realize the purchaser expects to be performed). A promise has created expectations and once construction has been made as to what those reasonable expectations are (considering all the evidence), the promise should be enforced for those policy reasons traditionally asserted for enforcement of contractual expectations. A determination of the reasonable expectations should be made in every instance, and the result should always be that the construed reasonable expectations are realized.

Anything literally purporting to contradict such reasonable expectations should be irrelevant and ignored, at least to the degree of contradiction. The crux of the issue in every litigious situation may therefore be stated as being simply that the seller must deliver what the purchaser can reasonably assume to have ordered (and what the seller should expect the purchaser to reasonably assume to have ordered).

This analysis of the underlying basis for the judicial approach in respect to the doctrine of "fundamental breach" (i.e. that it is simply a modern rule

\textsuperscript{163} Supra, note 161.
\textsuperscript{165} Western Processing & Cold Storage Ltd. et al. v. Hamilton Construction Company Ltd. and Dow Chemical of Canada Ltd. (1965), 51 W.W.R. 354 (Man. C.A.).
\textsuperscript{166} Pippy v. R.C.A. Victor Co. Ltd. (1965), 49 D.L.R. (2d) 523 (N.S. Sup. Ct.).
of construction) suggests that it should logically follow that the size of the breach does not matter. In other words, even if it is a minor defect (for example, a scratched fender rather than a complete “lemon” of an engine), once the court construes the buyer’s expectation to be that his new vehicle would not have a scratched fender upon delivery then the court should afford protection by providing the traditional remedies for the fulfilment of the expectation.

Although the problem is perhaps relatively more difficult in trying to determine whether the purchaser really assumed the risk of a scratched fender, as opposed to the “lemon” of an engine (which is entirely inconsistent with the price paid), in both instances it is a matter of construction of the true transaction. However, once the label “fundamental” is used as the doctrine by which the court deals with the matter, it becomes difficult to give relief to the purchaser in respect to the new car which has simply a scratched fender. The court tends to get into an irrelevant exercise as to the point at which a breach is “fundamental”. For example, one hundred scratches over the body of the car might be considered to be “fundamental”, whereas simply two or three might not be “fundamental”. This may result in a denial of justice where there are simply minor defects but the true expectation of the purchaser was that there would not be any such defects. It may result also in a meaningless analysis by the court in determining the dividing line for “fundamental breach”. The end effect is confusion of case precedents with resulting uncertainty for counsel in advising clients as to the chances of success of a given action, difficulty in planning commercial transactions and allocating risks with certainty, and ultimately, happenstance justice.

With some breaches the risk of the ensuing loss may be really intended by both parties to be with the purchaser. For example, it would be very unusual for either party in a consumer sale to foresee a loss of pure expectation interest, that is, loss of profit through the failure of the promise. This is not so in respect to the loss through the failure of the seller to deliver goods ordered of a quality of that reasonably expected in respect to such a product, given the price paid for goods of that description, considering all the circumstances, in the market place. Would not the reasonable consumer expect a remedy of the necessary repairs being done at the seller’s expense or alternatively, either suitable replacement or return of the purchase price by the seller, perhaps subject to being off-set by the value of the limited use received, if any from the good?

Although there may be a conceptual and verbal distinction between “fundamental breach” and “breach of a fundamental term” there is no meaningful difference \(168\) because both go to the question of deciding whether the seller is not performing the substantive expectations of the purchaser. The seller should not escape liability if he wilfully breaches a minor promise (even if the risk is literally with the purchaser) because it cannot be said that the true expectation of the parties was that the seller could breach in

---

\(168\) *Supra,* note 159.
such a fashion. Likewise, the seller should not escape liability if he inno-
cently breaches a major promise as it cannot be said that the true expectation
of the purchaser was that the seller could do so with impunity, even in the
presence of a literal disclaimer clause which purports to enable the seller
to do so.

Several criticisms then can be made in respect to the “fundamental
breach” approach. The approach may result in some inconsistency in
justice. The courts tend to approach the problem as a question of the
degree of breach, or alternatively, a question of the significance of the
promise breached, rather than simply construing the contract to see whether
there is a given promise, and a breach of that promise, and what was the
intention of the parties in respect to remedies. The courts may tend to
become bound by precedents in respect to the facts. By employing the label
“fundamental”, rigidity may be introduced in that the court cannot give
redress in respect to minor breaches even though there is an obvious promise
and resulting reasonable expectation on the part of the consumer. To date
the courts have usually overcome this problem by just begging the question
and pasting the label “fundamental breach” in respect to the decision at
hand. Although this provides justice in the particular situation, it causes
uncertainty in both the planning of contracts and the predicting of the
decision which a court will render in the event of a breakdown of a contract.

The “fundamental breach” approach compounds the difficulties in the
calculation of risks for contracting parties, with resultant uncertainty for
both sellers and purchasers. For example, it is difficult to structure the
contract in such a way that the seller can be sure that he is not liable for a
“fundamental breach” when a purchaser is assuming voluntarily virtually all
of the risks (the “as is” transaction).

The implied conditions and warranties of the Sale of Goods Act
only amount to stating what the minimal reasonable expectations of any
purchaser would be in the normal course of events. Therefore, fundamental
breach should cover a breach of the statutory implied condition or warranty,
if “fundamental breach” is simply a rule of construction. However, there are
three problems in so doing. First, the label “fundamental” suggests that the
court can only give redress in respect to major breaches. Secondly, there
are countless precedents where the implied conditions and warranties have
been successfully disclaimed. Thirdly, the parol evidence rule, and the
disclaimer clause precluding oral representations, provide obstacles to giving
protection to an expectation arising from an oral representation.

There is some assertion that “fundamental breach” is simply a rule of
substantive law rather than simply a rule of construction. If this is true,
the court would be departing from traditional contract law and policy in
employing the doctrine, inasmuch as it might impose an obligation as a
matter of law notwithstanding that the intention of the parties as a matter
of construction could be truly said to have the disclaimer deal with the matter.
The decision in the Harbutts’160 case can perhaps be assailed on this basis.

160 Supra, note 147.
The transaction in Harbutt's must be classified as a "commercial transaction" rather than as a "consumer sale transaction". The parties had apparent relatively equal bargaining power. If the intention was to provide for a limited liability provision in the event of failure to perform, such intention was subverted by the court's decision.

If the Harbutt's decision is on the basis that there cannot be a disclaimer for a fundamental breach as a rule of substantive law, then contractual obligations can no longer be voluntary in nature. This flies in the face of fundamental principles of contract law which remain suitable for the commercial transaction. How can the draftsman of the commercial contract today cope in planning to give effect to actual intention as to allocation of risks?

If the "consumer sale" transaction is divorced from the "commercial transaction", through a categorization of the consumer sale by statute and a limitation imposed upon the operation of the disclaimer clauses in the consumer sale, there is greater scope for the court to give effect to the actual intentions of the parties in a commercial transaction through construing the contract, and not unwittingly employing doctrine developed to cope with situations of gross inequality of bargaining power and over-reaching standard form contracts present in the consumer sale transaction. The courts have become somewhat trapped by their own jargon, which is now employed for all types of transactions, notwithstanding the underlying differences in the two types of transaction.

4. The Judicial Treatment of Disclaimer Clauses on the Basis of Being Contrary to a Rule of Substantive Common Law

The courts have not extended the historically developed equitable principles which deny enforcement to the penalty clause on the basis of unconscionability to disclaimer clauses, although arguably disclaimer clauses are often different in form only from penalty clauses.

Consider four possible clauses which may be contained in a hypothetical contract between A (purchaser) and B (seller) in respect to a sale of X tons of goods in exchange for $10,000, delivery to be on a certain date.

(1) A obligates himself as a term of the contract to pay to B "on any breach, the sum of $50,000. as liquidated damages, and not as a penalty". A wrongfully refuses to take delivery.

(2) A makes a deposit of $9,000. A wrongfully refuses to take delivery when same is tendered by B.

(3) The contract provides that B "shall not be liable to A for any damages caused by delay in delivery, for any reason whatsoever". B wrongfully refuses to deliver to A.

(4) The contract provides that B's liability for damages to A caused by B's delay in delivery "for any reason whatsoever, is limited to $1.00 per day". B wrongfully refuses to deliver to A.

Let us consider the extent to which each of the clauses are enforceable at law.
Disclaimer Clauses

(1) The courts have always refused to enforce the clause which is not a genuine pre-estimate of damages (as in the hypothetical) on the basis that the clause is unconscionable when it calls for "a payment of money stipulated as in terrorem of the offending party" to compel him to perform. This refusal to enforce the penalty clause is consistent with the general position of the common law in respect to remedies which is to provide the innocent party with damages so to give him his expectation interest, that is, to put him in the position as though his contract has been fulfilled but not to penalize the party in breach simply for being in breach. Contract law does not provide the innocent party with punitive damages.

(2) Where a "deposit" has been given the courts historically did not provide the party in breach the remedy of return of that portion of the deposit which was in excess of the actual damages of the innocent party, the full deposit being subject to forfeiture on the basis that a deposit is paid as "a guarantee that the contract shall be performed". The standard form contract, of course, often provides as well expressly for forfeiture in respect to the deposit.

In recent years, however, courts have suggested the forfeiture of the deposit will be disallowed where the sum of money forfeited is disproportionate to the damages suffered provided that it is unconscionable that the money be retained. It would be unjust enrichment to allow the innocent party to have a windfall simply because the other party has breached the contract. Therefore, the modern position in respect to deposits is consistent with the historical approach in respect to penalty clauses. In both instances the result is to afford the innocent party a remedy in money

170 Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co., [1915] A.C. 79 at 86 (H.L.) e.g. Shatila v. Feinstein, [1923] 3 D.L.R. 1035 (Sask. C.A.); cf. U.C.C. 2-718(1). The "unconscionability" approach may perhaps be otherwise stated as invalidating penalty clauses on the basis that same are contrary to public policy. However, the discussion in respect to penalty clauses does not usually take place on a public policy basis. See Robophone Facilities Ltd. v. Blank, [1966] 1 W.L.R. 1428, at 1446 (C.A.), where Diplock, J. based the invalidation of penalty clauses on a public policy basis.


173 An example, taken from a Toronto car dealer's retail purchase order, reads: "I agree to pay any balance which may be owing under this contract and to accept delivery of the automobile herein referred to within forty-eight hours after I have been notified that it is ready for delivery. Failure on my part to pay the balance and take delivery of the automobile when notified as aforesaid forfeits my deposit to the Company as pre-estimated damages to cover the Company's loss and expense and permits the Company to dispose of the automobile without any liability to me whatsoever."

damages only to the extent of his actual expectation interest, but not allow unjust enrichment through allowing him to enforce payment, or retain monies, above and beyond such expectation interest.

(3) and (4). The disclaimer clause is present in both the third and fourth situations. The fourth situation involves what can be referred to as a “limited liability” clause, and is provided as a separate example to illustrate that the limited liability clause, although somewhat more moderate in effect as compared with the total or near-total disclaimer clause, can have substantially the same effect as the innocent party is deprived of the normal remedies he would otherwise have, including a claim for damages to the extent of his expectation interest.

Thus, to the extent that the innocent party is deprived of his actual expectation interest in the third and fourth situations the party in breach has received a windfall and is unjustly enriched. There should perhaps be even more sympathy in these situations for it is the innocent party who in effect may be penalized, by not receiving his expectation interest.

Therefore, although the third and fourth situations involve clauses different in form from the first and second situations they are not different in substance because of the similar results through enforcement and accordingly those principles of law providing relief in respect to the penalty clause and forfeiture of deposit should similarly apply to the disclaimer clause in all its variations. The courts have not, however, extended the unconscionability approach to disclaimer clauses.176

This argument can be criticized on the basis that the disclaimer clause is not always unconscionable. The question in the first instance in any contractual breakdown should be, what is the expectation interest of each party. Therefore, with the disclaimer clause (third and fourth situations) it is conceivable that a court can say, considering all the evidence (including, of course, the price paid) that the true expectation of the purchaser was that he would not receive any relief because no obligation truly arose (third situation) or only limited relief for the breach of the obligation (fourth situation).

The penalty clause and the forfeiture of deposit are easier to handle in that the court can be more certain176 that monies are being paid, or forfeited, beyond the true expectation interest. It is, of course, a possibility with the disclaimer clause (particularly when it takes the form of simply a limited liability clause) that it was truly intended to limit what would be reasonable expectations in the usual transaction.

The point to realize is that there are limits to the effectiveness of the rules of construction which constitute the present framework for the courts'
regulation of disclaimer clauses. The exercise of attempting to construe the intention of the particular parties by the rules of construction is often artificial, as the courts are unable to say simply that to enforce the disclaimer clause would be unconscionable or contrary to public policy for the reason that enforcement would defeat the purchaser’s reasonable expectations. The unconscionability approach allows the court to consider more directly all the relevant evidence, including the factor of the inequality of bargaining power.

Many counsel would assert that Canadian courts have often acted upon the impulse that the disclaimer clause is unconscionable and oppressive, and have taken into account the factors of inequality of bargaining power, the adhesion nature of the standard form contract, oppressiveness or surprise. However, courts very seldom, expressly articulate the reasons for their decisions in terms of the above grounds. Canadian courts only occasionally imply that the court’s refusal to consider a disclaimer clause as a term of the contract is on the basis that to do so would be oppressive and unconscionable. An example might be Keelan et al v. Norray Distributing Ltd. et al.\textsuperscript{177} where the contract documents included a clause:

\begin{quote}
It is agreed between the parties that the terms and conditions set forth on the reverse side hereof are part of this contract and are binding on the parties hereto.\textsuperscript{178}
\end{quote}

On the back there was a disclaimer clause which read:

\begin{quote}
There are no representations, collateral agreements, conditions or warranties, express or implied, by statute or otherwise on the part of Vendor with respect to the property or this contract or affecting the rights of the parties other than as specifically contained herein.\textsuperscript{179}
\end{quote}

The purchasers were relying upon the seller’s skill to sell them automatic coin operated vacuum cleaners, which turned out to be faulty.

A finance company, the assignee of the benefits of the sale contract, had caused the clause to be included. The court held:

\begin{quote}
There was no inquiry from the purchasers to ascertain it [what the clause said] was true. Had it been brought to the purchaser’s attention it would, of course, have been repudiated. It was contrary to fact and opposed to common sense. This was not a sale of standard commodities such as automobiles. [The finance company] would understand very well indeed that purchasers of machines of this sort must have had some assurance that they would be of suitable quality ... nor could [the company’s agent] close as he was to the transaction, have believed that [the purchasers] ... were consciously undertaking, as provided in Para. 1 of the Terms and Conditions, that their obligation to pay [the finance company] was not subject to the condition that they were getting something useful for their money.\textsuperscript{180}
\end{quote}


\textsuperscript{178} Id., at 471.

\textsuperscript{179} Id., at 472.

\textsuperscript{180} Id., at 475-76.
The doctrine of public policy has been applied to limit the operation of disclaimer clauses in the United States.\textsuperscript{181} If the doctrine of "fundamental breach" was a rule of substantive common law before \textit{Suisse Atlantique},\textsuperscript{182} it could be classified as a rule of public policy.

\section*{CONCLUSIONS}

The judicial treatment of disclaimer clauses in sale of goods transactions has traditionally dealt with the disclaimer clause in all its variations within the limitations of a private law framework. The rules of construction, including the modern doctrine of fundamental breach, have been applied within that context with commendable results for the most part but with a great deal of artificiality in reasoning and consequential confusion. Happenstance justice occasionally results. There is uncertainty in the planning of contractual obligations and the allocation of risks. Predictability is difficult as to the outcome of litigation.

It is clear that the underlying impulse of the courts, whatever the approach or jargon, is to provide a remedy of damages to fulfil a purchaser's reasonable expectation interest through a contract; or to provide a remedy of restitution. The courts are often prepared to consider all of the relevant evidence, including oral representations, notwithstanding the parol evidence rule or disclaimer clauses, so as to fulfil a reasonable expectation interest or afford restitution.

The courts have carried over the doctrine of fundamental breach, really developed to meet the consumer's reasonable expectations, to the commercial transaction, such that questionable decisions are now being given.

The courts need a framework which allows them to deal with the disclaimer clause in the consumer sale with flexibility, by hearing all the relevant evidence, including evidence as to oral representations, and answering the basic issue in direct language: what was the consumer's reasonable expectation through his contract? To accomplish that it is advantageous to prohibit by statute disclaimer clauses in the consumer sale\textsuperscript{183} and provide a statutory set of standards, supplemented by regulations, so far as possible for the consumer, seller, and court, thus providing a more concrete basis than at present as to what reasonable expectations may be in the typical consumer sale. Although there should still be room for the true "as is" transaction, the statute could provide a channeling function to indicate when this is permissible and to better suggest when such was truly intended.


\textsuperscript{182} [1967] 1 A.C. 361 (H.L.); see discussion \textit{supra}, at pp. 294-99.

\textsuperscript{183} S. 44 of \textit{The Consumer Protection Act}, R.S.O. 1970, c. 82 as am. by S.O. 1971, s.2, makes such a prohibition in Ontario. The discussion of this and other legislative provisions in reaction to disclaimer clauses will be covered in a subsequent article. For other Canadian legislative enactments, see \textit{supra}, note 1.
Remedies can also be strengthened by a statutory base, with the nature of the remedies determined upon functional criteria considering the practicalities of the various situations when there is a breach of contract.

The courts would also be aided by an unconscionability provision to provide a general framework with which to deal with the unusual, but unconscionably oppressive, clause or contract. Such provision would also apply to the commercial transaction, which, unlike the consumer sale, would best continue to be governed primarily by the traditional rules of construction and law.

APPENDIX A

DISCLAIMER CLAUSES: CANADIAN CASES ON OTHER THAN THE FUNDAMENTAL BREACH BASIS

Allcock v. Manitoba Windmill & Pump Co. (1911), 18 W.L.R. 77 (Sask).
Canadian Fairbanks-Morse Co. v. Teightmeyer (1921), 60 D.L.R. 272 (Alta. C.A.).
Case Threshing Machine Co. v. Mitten (1919), 49 D.L.R. 30, 59 S.C.R. 118 (Sask.).
A. J. Frank & Sons Ltd. v. Northern Peat Co. Ltd. et al. (1963), 39 D.L.R. (2d) 721 (Ont. C.A.).
Freeman v. Consolidated Motors Ltd. et al. (1968), 65 W.W.R. 234 (Man. Q.B.).


Johnson v. Relland Motors (Melfort) Ltd. and Ford Motor Co. of Canada (Ltd.) (1955), 2 D.L.R. 418 (Sask. C.A.).


Sawyer-Massey Co. v. Ferguson (1911), 16 W.L.R. 667 (Man.).

Sawyer-Massey Co. v. Thibart (1907), 5 W.L.R. 241 (N.W. Prov.).


Windsor v. Simmons et al. (1908), 5 E.L.R. 139 (P.E.I. C.A.).

APPENDIX B

CASES DEALING WITH FUNDAMENTAL BREACH
LISTED ALPHABETICALLY


  Freedhoff v. Pomalift Industries Ltd. et al. (1971), 13 D.L.R. (3d) 523 (Ont. H.C.),
  aff'm'd on liability, 2 O.R. 773 (Ont. C.A.).
  Hain Steamship Co. Ltd. v. Tate & Lyle, [1936] 2 All E.R. 597 (H.L.).
  Williams & Wilson Ltd. v. O.K. Parking Stations Ltd. (1971), 17 D.L.R. (3d) 243 (Ont. C.Ct.).
* Important British cases.

*Some of the British cases prior to 1953 do not deal directly with fundamental breach but are referred to in later cases and are included merely to make the list more complete.
## APPENDIX C

### CANADIAN CASES ON DISCLAIMER CLAUSES LISTED CHRONOLOGICALLY WITH CROSS REFERENCE TO THE JURISDICTION DECIDED IN AND THE TYPE OF COMMODITY

<table>
<thead>
<tr>
<th>Year</th>
<th>Case Name</th>
<th>Jurisdiction</th>
<th>Commodity</th>
</tr>
</thead>
<tbody>
<tr>
<td>1907</td>
<td>Sawyer-Massey Co. v. Thibart</td>
<td>N.W.T.</td>
<td>thresher</td>
</tr>
<tr>
<td>1908</td>
<td>North-West Thresher Co. v. Andrews</td>
<td>Alta. H.C.</td>
<td>traction engine</td>
</tr>
<tr>
<td>1908</td>
<td>Windsor v. Simmons</td>
<td>P.E.I. C.A.</td>
<td>food</td>
</tr>
<tr>
<td>1909</td>
<td>Reeves &amp; Co. v. Chase</td>
<td>Alta. C.A.</td>
<td>plough</td>
</tr>
<tr>
<td>1910</td>
<td>Sawyer-Massey Co. v. Ritchie</td>
<td>S.C.C.</td>
<td>thresher</td>
</tr>
<tr>
<td>1911</td>
<td>Allcock v. Manitoba Windmill Co.</td>
<td>Sask.</td>
<td>engine</td>
</tr>
<tr>
<td>1911</td>
<td>Sawyer-Massey Co. v. Ferguson</td>
<td>Man.</td>
<td>thresher</td>
</tr>
<tr>
<td>1912</td>
<td>Bell v. Burke</td>
<td>Sask.</td>
<td>thresher</td>
</tr>
<tr>
<td>1914</td>
<td>Alabastine Co. (Paris) Ltd. v. Canada Producer &amp; Gas Engine Co. Ltd.</td>
<td>Ont. C.A.</td>
<td>engine</td>
</tr>
<tr>
<td>1914</td>
<td>Hutchins v. Gas Traction Co.</td>
<td>Sask. C.A.</td>
<td>tractor</td>
</tr>
<tr>
<td>1915</td>
<td>Ontario Wind Engine v. Bunn</td>
<td>Sask. C.A.</td>
<td>engine to pull plough</td>
</tr>
<tr>
<td>1917</td>
<td>Hart Parr Co. v. Jones</td>
<td>Sask. H.C.</td>
<td>tractor engine</td>
</tr>
<tr>
<td>1918</td>
<td>Canada Foundry Co. v. Edmonton Portland Cement Co.</td>
<td>Alta. (P.C.)</td>
<td>steel</td>
</tr>
<tr>
<td>1918</td>
<td>Rivers v. George White &amp; Sons Co. Ltd.</td>
<td>Sask.</td>
<td>farm machinery</td>
</tr>
<tr>
<td>1918</td>
<td>Schofield v. Emerson Brantingham Implement Co.</td>
<td>S.C.C.</td>
<td>tractor</td>
</tr>
<tr>
<td>1919</td>
<td>Case Threshing Machine Co. v. Mitten</td>
<td>Sask.(SCC)</td>
<td>gas engine</td>
</tr>
<tr>
<td>1921</td>
<td>Canadian Fairbanks-Morse Co. v. Teightmeyer</td>
<td>Alta. C.A.</td>
<td>tractor</td>
</tr>
<tr>
<td>1921</td>
<td>Nolan v. Emerson Brantingham Implement Co.</td>
<td>Alta. C.A.</td>
<td>farm machinery</td>
</tr>
<tr>
<td>1922</td>
<td>Marshall v. Ryan Motors</td>
<td>Sask. C.A.</td>
<td>automobile</td>
</tr>
<tr>
<td>1927</td>
<td>Advance Rumely Thresher Co. v. Lester et al.</td>
<td>Ont. C.A.</td>
<td>tractor</td>
</tr>
<tr>
<td>1928</td>
<td>Advance Rumely Thresher Co. v. Armour</td>
<td>Ont. H.C.</td>
<td>thresher</td>
</tr>
<tr>
<td>1930</td>
<td>McNichol v. Dominion Motors</td>
<td>Alta. C.A.</td>
<td>automobile</td>
</tr>
<tr>
<td>1934</td>
<td>Massey-Harris Co. v. Skelding</td>
<td>SCC(Sask.)</td>
<td>tractor</td>
</tr>
<tr>
<td>1937</td>
<td>McLachlan v. Horner</td>
<td>Ont. C.A.</td>
<td>used car</td>
</tr>
<tr>
<td>1940</td>
<td>Cork v. Greavette Boats Ltd.</td>
<td>Ont. C.A.</td>
<td>motor boat</td>
</tr>
<tr>
<td>1948</td>
<td>Bowyer v. Wylie &amp; Burton</td>
<td>Alta. C.A.</td>
<td>tractor</td>
</tr>
<tr>
<td>Year</td>
<td>Case Title</td>
<td>Jurisdiction</td>
<td>Commodity</td>
</tr>
<tr>
<td>------</td>
<td>-----------------------------------------------------------------------------</td>
<td>---------------</td>
<td>------------------------</td>
</tr>
<tr>
<td>1953</td>
<td>Buckley v. Lever Bros. Ltd.</td>
<td>Ont. N.C.</td>
<td>plastic clothes pins</td>
</tr>
<tr>
<td>1954</td>
<td>Gratton v. Forest City Motors</td>
<td>Ont. C.A.</td>
<td>automobile</td>
</tr>
<tr>
<td>1955</td>
<td>Johnson v. Relland Motors</td>
<td>Sask. C.A.</td>
<td>truck</td>
</tr>
<tr>
<td>1956</td>
<td>Sloan v. Empire Motors Ltd. and Vancouver Finance Co. Ltd.</td>
<td>B.C. C.A.</td>
<td>used car</td>
</tr>
<tr>
<td>1959</td>
<td>Godsoe v. Beatty</td>
<td>N.B. C.A.</td>
<td>automobile — used</td>
</tr>
<tr>
<td>1962</td>
<td>Arrow Transfer Co. Ltd. v. Fleetwood Logging Co. Ltd.</td>
<td>B.C. C.A.</td>
<td>heavy crane</td>
</tr>
<tr>
<td>1962</td>
<td>Schmidt v. International Harvester Co. of Canada Ltd.</td>
<td>Man. Q.B.</td>
<td>truck</td>
</tr>
<tr>
<td>1963</td>
<td>A. J. Frank &amp; Sons Ltd. v. Northern Peat Co. Ltd.</td>
<td>Ont.</td>
<td>relay rail</td>
</tr>
<tr>
<td>1963</td>
<td>R. W. Heron Paving Ltd. v. Dilworth Equipment Ltd.</td>
<td>Ont. H.C.</td>
<td>asphalt plant</td>
</tr>
<tr>
<td>1964</td>
<td>Knowles v. Anchorage</td>
<td>B.C. S.C.</td>
<td>boat engine</td>
</tr>
<tr>
<td>1965</td>
<td>F. &amp; B. Transport Ltd. v. White Truck Sales Manitoba Ltd.</td>
<td>Man. C.A.</td>
<td>used truck</td>
</tr>
<tr>
<td>1966</td>
<td>Canadian-Dominion Leasing Corporation Ltd. v. Suburban Superdrug Ltd.</td>
<td>Alta. C.A.</td>
<td>rotating jewellery showcase</td>
</tr>
<tr>
<td>1969</td>
<td>Lightburn v. Belmont Sales</td>
<td>B.C. trial</td>
<td>automobile</td>
</tr>
<tr>
<td>1969</td>
<td>McLean Ltd. v. Canadian Vickers Ltd.</td>
<td>Ont. C.A.</td>
<td>printing machine</td>
</tr>
<tr>
<td>1969</td>
<td>Traders Finance v. Halvorson</td>
<td>B.C. C.A.</td>
<td>tractor</td>
</tr>
<tr>
<td>1969</td>
<td>Western Tractor v. Dyck</td>
<td>Sask. C.A.</td>
<td>sale of tractor</td>
</tr>
<tr>
<td>1970</td>
<td>Barber v. Inland Truck Sales</td>
<td>B.C. S.C.</td>
<td>dump truck</td>
</tr>
<tr>
<td>1970</td>
<td>Peters v. Irving Oil Company Ltd.</td>
<td>N.S. S.C.</td>
<td>heating system</td>
</tr>
<tr>
<td>1971</td>
<td>Freedhoff v. Pomalift Industries</td>
<td>Ont. H.C.</td>
<td>ski-lift</td>
</tr>
<tr>
<td>1971</td>
<td>Robert Simpson Regina Ltd. v. Dominion Electric</td>
<td>Sask. Q.B.</td>
<td>fire sprinkler and alarm</td>
</tr>
</tbody>
</table>
## APPENDIX D

### CANADIAN CASES ON DISCLAIMER CLAUSES SHOWING CROSS REFERENCE TO ALLEGED BREACH AND DECISION

<table>
<thead>
<tr>
<th>Case</th>
<th>Year</th>
<th>Alleged Breach</th>
<th>Did the Clause Successfully Exclude The Seller's Liability?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sawyer-Massey Co. v. Thibert</td>
<td>1907</td>
<td>fitness for purpose</td>
<td>no</td>
</tr>
<tr>
<td>North-West Thresher Co. v. Andrews</td>
<td>1908</td>
<td>f.f.p.</td>
<td>no</td>
</tr>
<tr>
<td>Windsor v. Simmons</td>
<td>1908</td>
<td>f.f.p.</td>
<td>no</td>
</tr>
<tr>
<td>Reeves &amp; Co. v. Chase</td>
<td>1909</td>
<td>f.f.p.</td>
<td>yes</td>
</tr>
<tr>
<td>Sawyer-Massey Co. v. Ritchie</td>
<td>1910</td>
<td>f.f.p.</td>
<td>no breach (but even if breach, excluded)</td>
</tr>
<tr>
<td>Alcoast v. Manitoba Windmill Co.</td>
<td>1911</td>
<td>f.f.p.</td>
<td>yes</td>
</tr>
<tr>
<td>Sawyer-Massey Co. v. Ferguson</td>
<td>1911</td>
<td>f.f.p.</td>
<td>yes</td>
</tr>
<tr>
<td>Bell v. Burke</td>
<td>1912</td>
<td>f.f.p.</td>
<td>yes</td>
</tr>
<tr>
<td>Alabastine Co (Paris) Ltd. v. Canada Producer &amp; Gas Engine Co. Ltd.</td>
<td>1914</td>
<td>f.f.p.</td>
<td>no</td>
</tr>
<tr>
<td>Hutchins v. Gas Traction Co.</td>
<td>1914</td>
<td>f.f.p. and description</td>
<td>yes</td>
</tr>
<tr>
<td>Ontario Wind Engine v. Bunn</td>
<td>1915</td>
<td>f.f.p.</td>
<td>yes</td>
</tr>
<tr>
<td>Hart-Parr Co. v. Jones</td>
<td>1917</td>
<td>failure of consideration</td>
<td>no</td>
</tr>
<tr>
<td>Canada Foundry Co. v. Edmonton Portland Cement Co.</td>
<td>1918</td>
<td>promise to deliver</td>
<td>no</td>
</tr>
<tr>
<td>Rivers v. George White &amp; Sons Co. Ltd.</td>
<td>1918</td>
<td>f.f.p.</td>
<td>yes</td>
</tr>
<tr>
<td>Schofield v. Emerson Brantingham Implement Co.</td>
<td>1918</td>
<td>description</td>
<td>no</td>
</tr>
<tr>
<td>Case Threshing Machine Co. v. Mitten</td>
<td>1919</td>
<td>f.f.p.</td>
<td>yes</td>
</tr>
<tr>
<td>Canadian Fairbanks-Morse Co. v. Teightmeyer</td>
<td>1921</td>
<td>f.f.p.</td>
<td>no</td>
</tr>
<tr>
<td>Nolan v. Emerson Brantingham Implement Co.</td>
<td>1921</td>
<td>implied warranties</td>
<td>no</td>
</tr>
<tr>
<td>Marshall v. Ryan Motors</td>
<td>1922</td>
<td>f.f.p.</td>
<td>no</td>
</tr>
<tr>
<td>Advance Rumely Thresher Co. v. Lester et al.</td>
<td>1927</td>
<td>f.f.p.</td>
<td>yes (reversed on other grounds)</td>
</tr>
<tr>
<td>Advance Rumely Thresher Co. v. Armour</td>
<td>1928</td>
<td>f.f.p.</td>
<td>yes (reversed on other grounds)</td>
</tr>
<tr>
<td>McNichol v. Dominion Motors</td>
<td>1930</td>
<td>f.f.p.</td>
<td>no</td>
</tr>
<tr>
<td>Massey-Harris Co. v. Skelding</td>
<td>1934</td>
<td>f.f.p.</td>
<td>no</td>
</tr>
<tr>
<td>Machlan v. Horner</td>
<td>1937</td>
<td>f.f.p.</td>
<td>no</td>
</tr>
<tr>
<td>Cork v. Grevette Boats Ltd.</td>
<td>1940</td>
<td>f.f.p.</td>
<td>no</td>
</tr>
</tbody>
</table>
### Disclaimer Clauses

<table>
<thead>
<tr>
<th>Case Details</th>
<th>Alleged Breach</th>
<th>Did the Clause Successfully Exclude The Seller’s Liability?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bowyer v. Wylie &amp; Burton</td>
<td>1948 f.f.p.</td>
<td>condition never arose</td>
</tr>
<tr>
<td>Buckly v. Lurr Bros. Ltd.</td>
<td>1950 f.f.p. and merchantability</td>
<td>no</td>
</tr>
<tr>
<td>Gratton v. Forest City Motors</td>
<td>1954 title</td>
<td>yes</td>
</tr>
<tr>
<td>Sloan v. Empire Motors Ltd. and Vancouver Finance Co. Ltd.</td>
<td>1956 title</td>
<td>no</td>
</tr>
<tr>
<td>Johnson v. Relland Motors</td>
<td>1955 f.f.p.</td>
<td>yes</td>
</tr>
<tr>
<td>Fillmore’s Valley Nurseries Ltd. v. North American Cyanamid Ltd.</td>
<td>1958 f.f.p.</td>
<td>no</td>
</tr>
<tr>
<td>Godsoe v. Beatty</td>
<td>1959 f.f.p. and merchantability</td>
<td>condition never arose, (if it did, excluded)</td>
</tr>
<tr>
<td>Arrow Transfer Co. Ltd. v. Fleetwood Logging Co. Ltd.</td>
<td>1962 promise</td>
<td>no</td>
</tr>
<tr>
<td>Schmidt v. International Harvester Co. of Canada Ltd.</td>
<td>1962 fundamental breach</td>
<td>no breach</td>
</tr>
<tr>
<td>A. J. Frank &amp; Sons Ltd. v. Northern Peat Co. Ltd.</td>
<td>1963 rules for attribution of acceptance</td>
<td>yes</td>
</tr>
<tr>
<td>R. W. Heron Paving Ltd. v. Dilworth Equipment Ltd.</td>
<td>1963 f.f.p.</td>
<td>no</td>
</tr>
<tr>
<td>Knowles v. Anchorage</td>
<td>1964 fundamental breach</td>
<td>no</td>
</tr>
<tr>
<td>Pippy v. R.C.A. Victor Co. Ltd.</td>
<td>1965 fundamental breach</td>
<td>no</td>
</tr>
<tr>
<td>F. &amp; B. Transport Ltd. v. White Truck Sales Manitoba Ltd.</td>
<td>1965 failure of consideration</td>
<td>no</td>
</tr>
<tr>
<td>Western Processing &amp; Cold Storage Ltd. et al. v. Hamilton Construction Co. Ltd. et al.</td>
<td>1965 fundamental breach</td>
<td>no</td>
</tr>
<tr>
<td>Canadian-Dominion Leasing Corporation Ltd. v. Suburban Superdrug Ltd.</td>
<td>1966 fundamental breach</td>
<td>no</td>
</tr>
<tr>
<td>Keelan et al. v. Norray Distributing Ltd. et al.</td>
<td>1967 f.f.p./fundamental breach</td>
<td>no</td>
</tr>
<tr>
<td>Freeman v. Consolidated Motors</td>
<td>1968 f.f.p.</td>
<td>no</td>
</tr>
<tr>
<td>Lightburn v. Belmont Sales</td>
<td>1969 fundamental breach</td>
<td>no</td>
</tr>
<tr>
<td>McLean Ltd. v. Canadian Vickers Ltd.</td>
<td>1969 fundamental breach</td>
<td>no</td>
</tr>
<tr>
<td>Traders Finance v. Halvorson</td>
<td>1969 fundamental breach</td>
<td>no</td>
</tr>
<tr>
<td>Western Tractor v. Dyck</td>
<td>1969 fundamental breach</td>
<td>no</td>
</tr>
<tr>
<td>Gibbons v. Trapp Motors Ltd.</td>
<td>1970 fundamental breach</td>
<td>no</td>
</tr>
<tr>
<td>Barber v. Inland Truck Sales</td>
<td>1970 breach of fundamental term</td>
<td>no</td>
</tr>
<tr>
<td>Peters v. Irving Oil Company Limited</td>
<td>1970 breach of fundamental term</td>
<td>no</td>
</tr>
<tr>
<td>Freedhoff v. Pomaift Industries</td>
<td>1971 fundamental breach</td>
<td>no</td>
</tr>
</tbody>
</table>