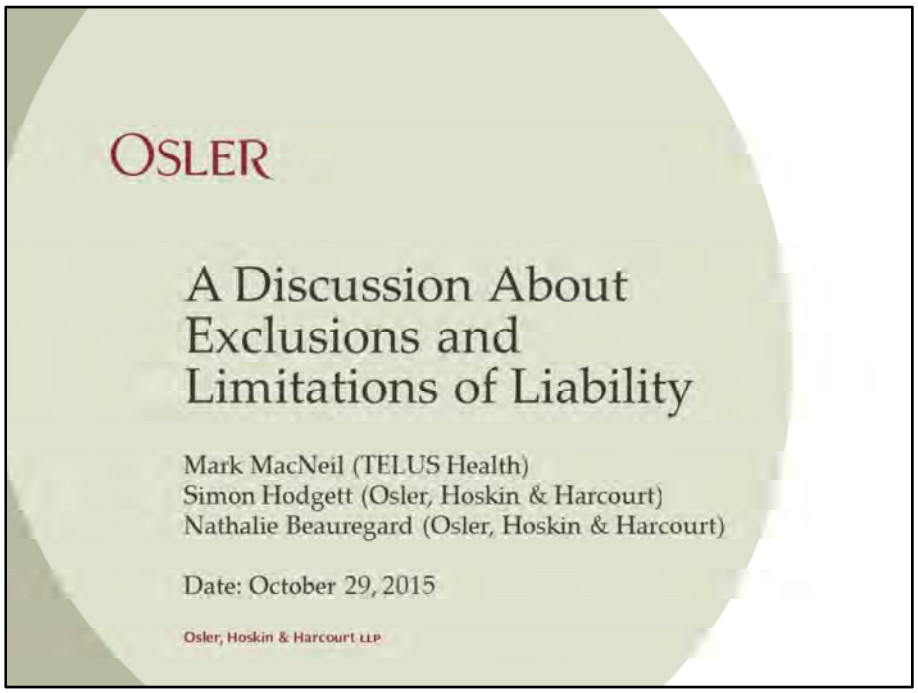
OSLER
A Discussion About Exclusions and Limitations of Liability
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Date: October 29, 2015
Osler, Hoskin & Harcourt LLP

OSLER

Presentation Outline

1. Initial Thoughts
2. Intro to Damages (Civil Law & Common Law)
3. Exclusions vs. Limitations
4. Categories of Damages/Types of Claims
5. Limitations of Liability
6. Negotiating Limitations of Liability
7. Enforcement of Limitations of Liability
8. Trends

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Exclusion of Liability (Example clause)

In no event is A liable for damages on any basis, in contract, *[tort]** or otherwise, of any kind and nature whatsoever, arising in respect of this Agreement, howsoever caused, including damages of any kind and nature caused by A's negligence *[(including gross negligence [defined])]**, or by a fundamental breach of contract or any other breach of duty whatsoever.

***Civil Law**: To be removed to bring into line with Civil law. This provision will be given no effect in case of intentional or gross fault (1474 CCQ).*

Exclusion and Limitation of Liability (Example clause)

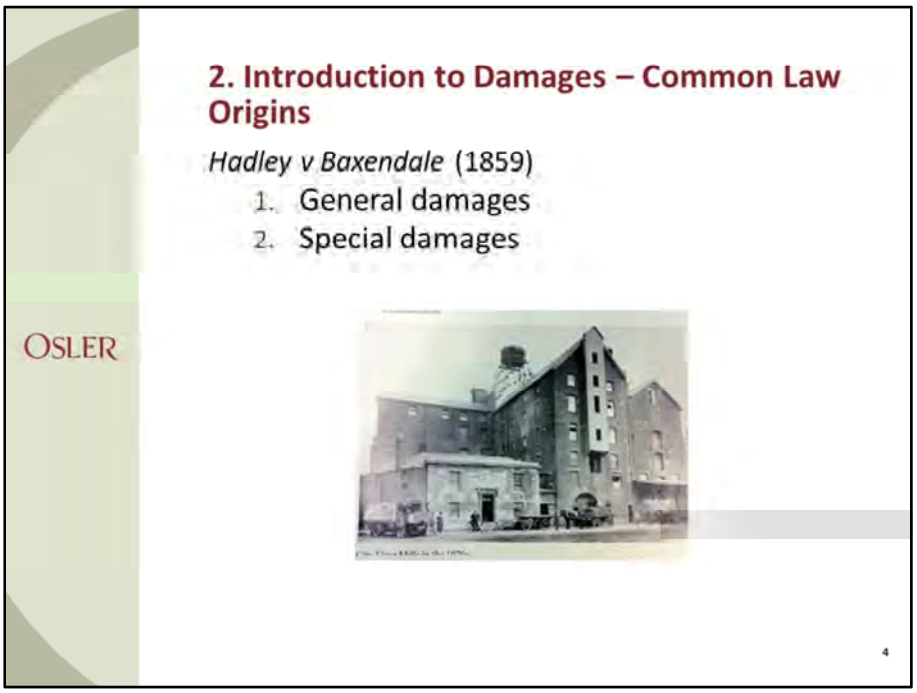
In no event is Seller's liability for any damages on any basis, in contract, *[tort]** or otherwise, of any kind and nature whatsoever, arising in respect of this Agreement, howsoever caused, including damages of any kind and nature caused by Seller's negligence *[(including gross negligence [defined])]**, or by a fundamental breach of contract or any other breach of duty whatsoever, to exceed the fees [royalties, purchase price, etc.] actually paid to Seller by the other Party under this Agreement [during ● period] immediately preceding receipt by Seller of notice of such liability. Purchaser acknowledges that Seller has set its fees under this Agreement in reliance on the limitations and exclusions of liability set forth in this Agreement and such reliance forms an essential basis of this Agreement.

***Civil Law**: To be removed to bring into line with Civil law. This provision will be given no effect in case of intentional or gross fault (1474 CCQ).*

Other Examples

No party shall be liable for any *[indirect, special, incidental or]** consequential damages or damages for business interruption or lost revenue or failure to realize expected savings, even if that party has been advised of the possibility of such loss or damage in advance. The foregoing disclaimer of liability shall apply regardless of whether such liability is based on breach of contract*, [tort (including without limitation negligence), strict liability,]** breach of a fundamental term, fundamental breach, or otherwise.

***Civil Law:** To be removed to bring into line with Civil law. Indirect damages is not recoverable under Québec law. Special and incidental damages are unknown to Québec law. This provision will be given no effect in case of intentional or gross fault (1474 CCQ) and may not have as effect to withdraw the very essence of the contract (Samen Investments Inc. v. Monit Management Ltd. (*C.A. 2014-04-24))



Hadley v Baxendale (1859), 156 Eng Rep 145

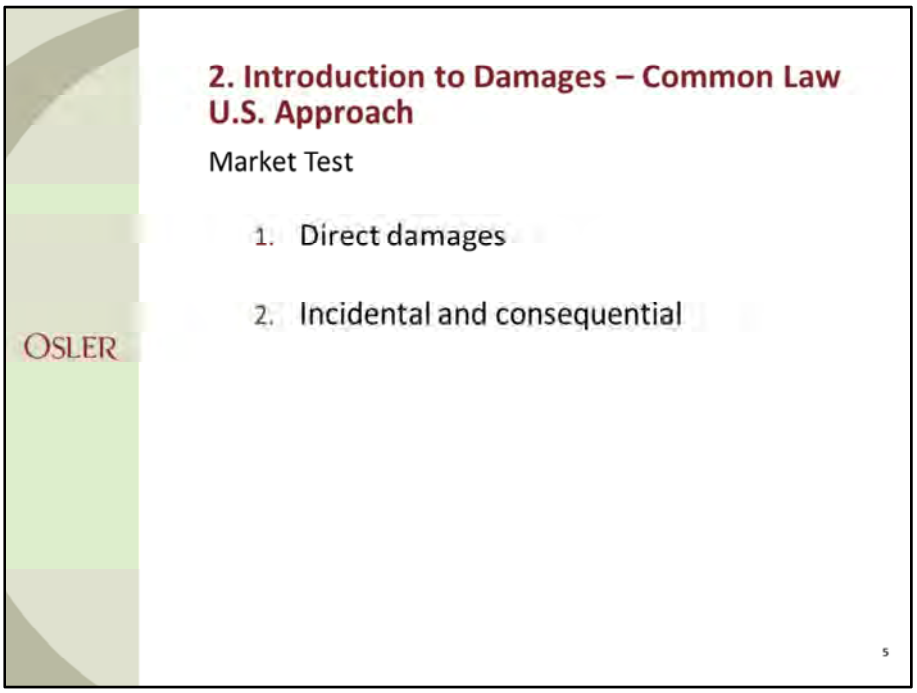
Plaintiff can recover damages for:

1. *General Damages*: Losses that would arise normally and naturally as a result of the breach of any similar contract

2. *Special Damages*: Losses arising from ***special circumstances*** of the non-breaching party to the extent that such special circumstances were ***communicated*** to the breaching party and were in the contemplation of the parties

Now usually boiled down to whether the damages were "foreseeable" objectively (general damages) or subjectively (special damages)

Exclusion and limitation of liability clauses were designed to modify the application of *Hadley v. Baxendale, e.g. special damages disclaimed)*



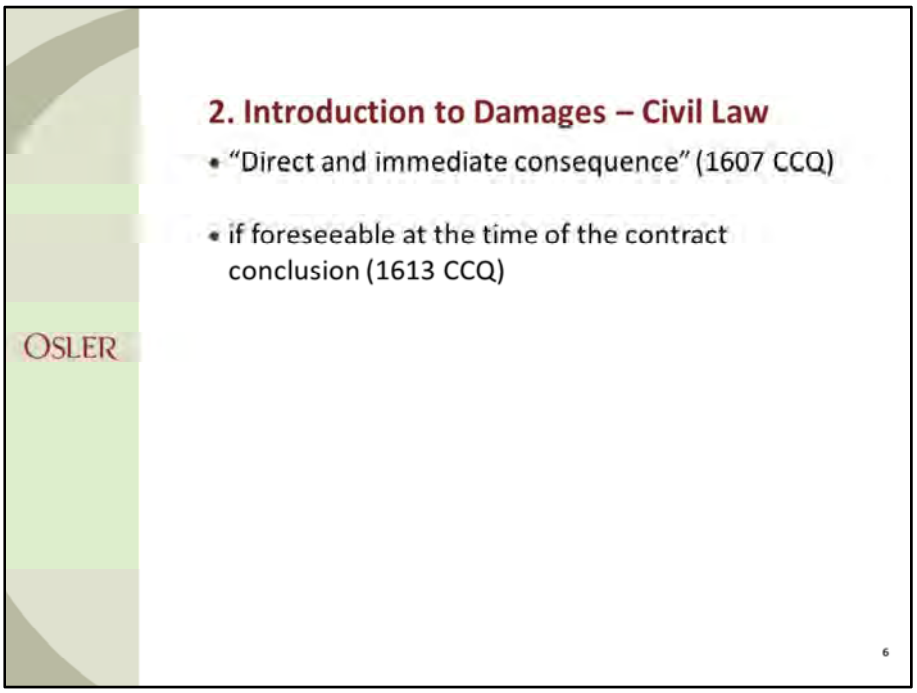
Damages
•US: Market Test: direct damages are the difference between the market value of what should have been delivered and the market value of what was actually delivered; everything else is "special" (*i.e.*, incidental or consequential)

•Not based on reasonable foreseeability

§ 2-714. Buyer's Damages for Breach in Regard to Accepted Goods.
(1) Where the buyer has accepted goods…he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.
(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

§ 2-715. Buyer's Incidental and Consequential Damages.
(1) Incidental damages…include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.
(2) Consequential damages…include
(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
(b) injury to person or property proximately resulting from any breach of warranty.

Confusion
•Canadian "General" damages conflated with U.S. "Direct" Damages
•Canadian "Special" damages conflated with U.S. "Incidental" and "Consequential" Damages



Direct and immediate consequence

- Plaintiff can recover damages which is an "Direct and immediate consequence" of the default.

  1607. The creditor is entitled to damages for bodily, moral or material injury which is an immediate and direct consequence of the debtor's default.

- The assessment of the "direct and immediate" nature of damages is a question of facts which falls within the discretion of the judge (*Gérard* v. *Belcourt* (CA 2013-11-14))
- Damages are direct if, in the view of the court, there is a qualitative sufficient causal relation between such damages and the fault committed. (*Lussier* v*. Bastille* (C.S. 2009-02-09)). The focus is on causation.

Foreseeability

- The extent of the damages that may be claimed is limited to the damages that were foreseen or foreseeable at the time of the contract conclusion, except in case of intentional or gross fault. In case of intentional or gross fault, the party must cover all damages, even if unpredictable, if they are direct damages.

  1613. In contractual matters, the debtor is liable only for damages that were foreseen or foreseeable at the time the obligation was contracted, where the failure to perform the obligation does not proceed from intentional or gross fault on his part; even then, the damages include only what is an immediate and direct consequence of the nonperformance.

- The foreseeability of damages is assessed :
    - at the time of the contract conclusion (*Alpha, compagnie d'assurances inc.* v. *Basque* (CS 2007-03-27))
    - Subjectively: the parties are presumed in a position to foresee, at the time of the contract conclusion, the extent/scope of a potential breach of contract.
    - Objectively: what are the damages that a party reasonably prudent and diligent could foresee in the circumstances?
- The bad faith of a co-contractor enables the plaintiff to claim all damages arising directly from its denial to execute its obligation, regardless of the foreseeability of such damages (*Bahler* v. *Pfeuti* (CA 1987-12-10)

Civil law vs. Common Law: "direct and immediate consequence" and foreseeable = focus on causation (rather than remoteness and foreseeability in Common Law)

COMMON LAW:
The jurisprudence is unsettled on whether exclusion clauses and limitation clauses should be approached in the same way:

•The Supreme Court and other courts frequently refer to exclusion and limitation clauses in the same breath and apply the same principles to each: *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways),* [2010] 1 SCR 69

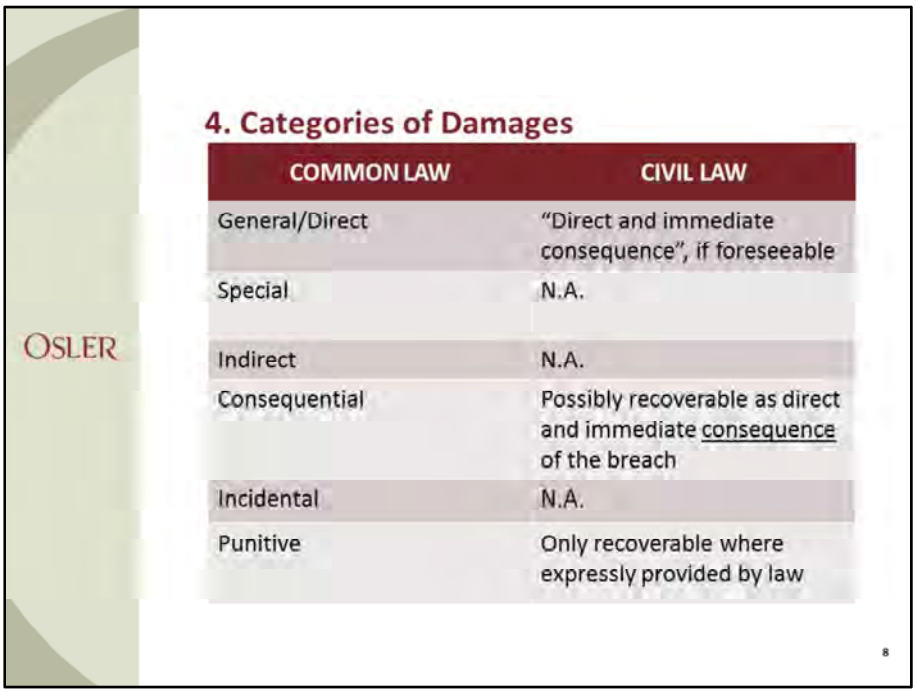
•The B.C. Court of Appeal has held that exclusions that operate as complete defences are different from limitations that operate as partial defences: *London Drugs Ltd v Kuehne & Nagel International Ltd*, 1990 CanLII 3811 (BCCA), (Justice Lambert):

•"Clause 11(b), which limits the liability of Kuehne & Nagel to London Drugs, sets a ceiling on liability at $40. The clause does not deal with the existence, nature or scope of the duty of care of Kuehne & Nagel to London Drugs. It says nothing whatsoever about that duty of care. But, because it limits the extent of the liability rather than excluding liability completely, it is clear that there must continue to be liability on the part of Kuehne & Nagel. If there is liability, there must first be a duty of care. So the clause itself confirms the existence of a duty of care rather than denying the existence of such a duty."

•"Most importantly, the contractual provision in Carey and in Norwich was a provision which completely exempted the contractor and the sub-contractors from liability. The provision was not a provision, such as the clause in this case, that expressly confirmed the existence of a duty and a resulting liability on the part of the contractor, but limited the extent of the damages to a monetary ceiling."

•"The decision in Giffels v. Eastern Construction(1978), 84 D.L.R. (3d) 344 is not contrary to that conclusion. If that case applies under the British Columbia Negligence Act, it only applies where there is a complete defence available to one of the tortfeasors against the person injured. That is not so here."

CIVIL LAW:
Courts in Québec have addressed exclusion clauses and limitation clauses in one same way:
- Provisions limiting or excluding liability must be interpreted restrictively (*Deguise* v. *Montminu* (2014 QCCS 2672)
- exclusion clauses and limitation clauses in contracts recognized as valid since 1897. *Glengoil Steamship Co.* v. *Pilkington* (1897) 28 R.C.S. 146.
- Subject to certain conditions of validity and application (addressed later in this presentation).



Caution (Common Law):

- General v. Direct – distinction now blurred
- Practitioners and judges often not aware of history of clauses and multiple meanings of language used
- Practitioners and judges do not always fully understand the differences between types of damages
- Too much specificity may leave opening for court to award a kind of damage that is not expressly excluded
- Discuss with business clients the nature of the service or subject matter; what damages can occur; how might they arise?

Caution (Civil Law):

- The assessment of the "direct and immediate" nature of damages falls within the discretion of the judge (*Gérard* v. *Belcourt* (CA 2013-11-14))
- The foreseeability of damages is assessed at the time of the contract conclusion (*Alpha, compagnie d'assurances inc.* v. *Basque* (CS 2007-03-27))
- Provisions limiting or excluding liability must be interpreted restrictively (Deguise c. Montminu (2014 QCCS 2672)

DIRECT AND IMMEDIATE CONSEQUENCE

- Direct and immediate:
  - Damages recoverable if they are a "direct and immediate" consequence of the breach (1607 CCQ)

- Foreseen or foreseeable
  - In contractual matters, the debtor is liable only for damages that were foreseen or foreseeable at the time the obligation was contracted, where the failure to perform the obligation does not proceed from intentional or gross fault on his part; even then, the damages include only what is an immediate and direct consequence of the nonperformance. (1613 CCQ)

- Damages recoverable are not limited:
  - Civil law "direct" damages can include common law "consequential/indirect" damages (e.g. lost profit)
  - INCLUDE both the actual loss suffered and the opportunity/gain missed (lost profits) which is assessable/"susceptible d'être évalué" (1611CCQ)

1611. The damages due to the creditor compensate for the amount of the loss he has sustained and the profit of which he has been deprived.

Future injury which is certain and assessable is taken into account in awarding damages.

INDIRECT

- Not recoverable under Québec law.
- Under Québec law, the exclusion of indirect damages does not have any legal effect.

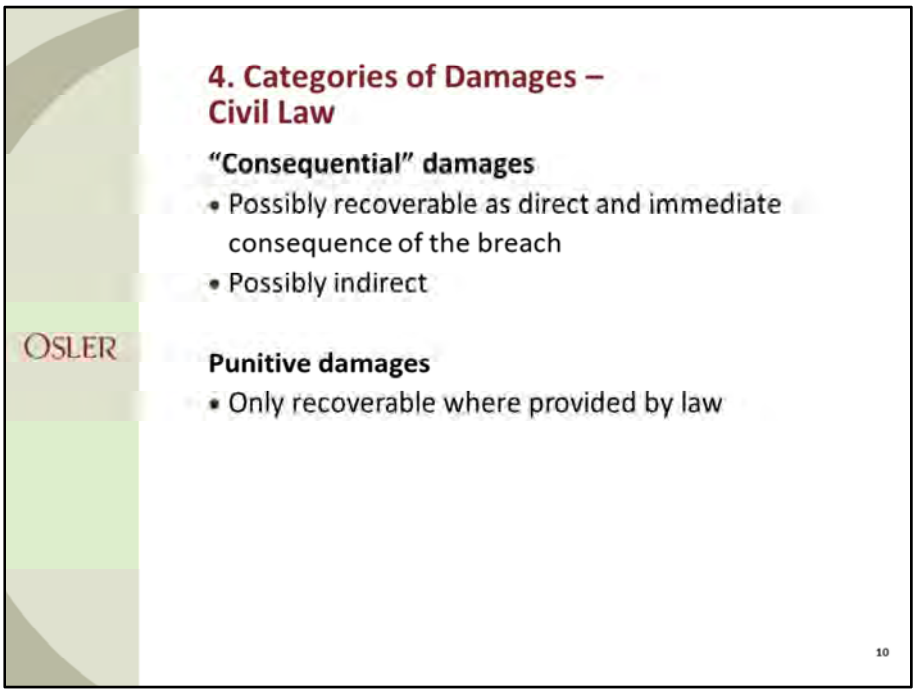
SPECIAL

- Unknown to Québec law.
- May however include certain damages expected or foreseeable.
- Under Québec law, the exclusion of special damages does not have any legal effect.

INCIDENTAL

- Unknown to Québec law.
- Under Québec law, the exclusion of incidental damages does not have any legal effect.

TIP: specify clearly the particular types of damages excluded: lost profits, expenses, lawyers' fees, property damage, etc.



CONSEQUENTIAL DAMAGES

- Confusing. Possibly recoverable as direct and immediate consequence of the breach. However, possibly indirect and therefore unrecoverable.
- *Model provision: "No party hereto shall be liable for any consequential, incidental, indirect, special or punitive damages resulting from a breach of…"* It is important to add*: "including, loss of future revenue, income or profits, any reduction of earnings, etc. … relating to an alleged breach…"*

PUNITIVE DAMAGES

- Punitive damages are recoverable only where expressly provided by law – not recoverable under the *droit common* (despite the reprehensible nature of the defendant's misconduct)
- Statute may define the context or criteria for punitive damages:
    - *Charter of Human Rights and Freedom* (Québec)
        - s. 49: in case of "Unlawful and intentional interference"
        - s. 6: "Each person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law"

- Exclusion of punitive damages will be effective if the breach results in a punitive damages claim under statute, which is not likely in commercial contract
- Legal effect: possibly invalid as renunciation in advance to a public order right

TIPS:

- When you want to exclude the lost profits in a contract governed by Québec law, one must include it expressly.
- The exclusion of punitive damages does not have the same importance under Québec law, and may be declared invalid because it is contrary to public order.
- It may be useful to provide for certain types of damages, for example, replacement cost, and define certain terms which may be ambiguous in a context of civil law (consequential)

General/Direct Damages
•Damages that flow directly and immediately from the breach (and as a result are reasonably foreseeable)

NOTE: The following damages have been found to be direct damages:
- •loss of profits (*Ticketnet* (1993) Ontario)
- •delay damages: wages paid to workers who cannot be productive (standby time), inflation costs and indemnification of subcontractor delay claims (*Croudace Construction* (1978) England)
- •incremental cost of new equipment over cost of supplied defective equipment (*Millar's Machinery* (1935) England)
- •increased production costs (*British Sugar* (1997) England)
- •additional cost of energy caused by defective equipment *(Syncrude v Babcock & Wilcox* (1997))
- •overhead (*Deepak Fertilisers* (1998) England)
- •costs to remove defective equipment (*Hotel Services* (2000)England)
- •mental distress (*Fidler v Sun Life Insurance* (2006))
- •some clauses have an inclusive list as to what is included under the definition of direct damages

TIP: Consider defining what the parties mean by "direct" damages

Special Damages
•Losses arising from ***special circumstances*** of the non-breaching party to the extent that such special circumstances were ***communicated*** to the breaching party and were in the contemplation of the parties
•NOTE: In litigation, "special damages" can mean damages that are calculable before trial. This double use can lead to confusion

TIP: Separate liability for lost profits, lost revenues, lost business and business interruption from indirect/special damages; these damages are not consistently characterized as indirect/special damages, i.e. lost profits can be direct damages.

Indirect/Consequential Damages
•Damages that flow indirectly from breach even if no communication of special circumstances

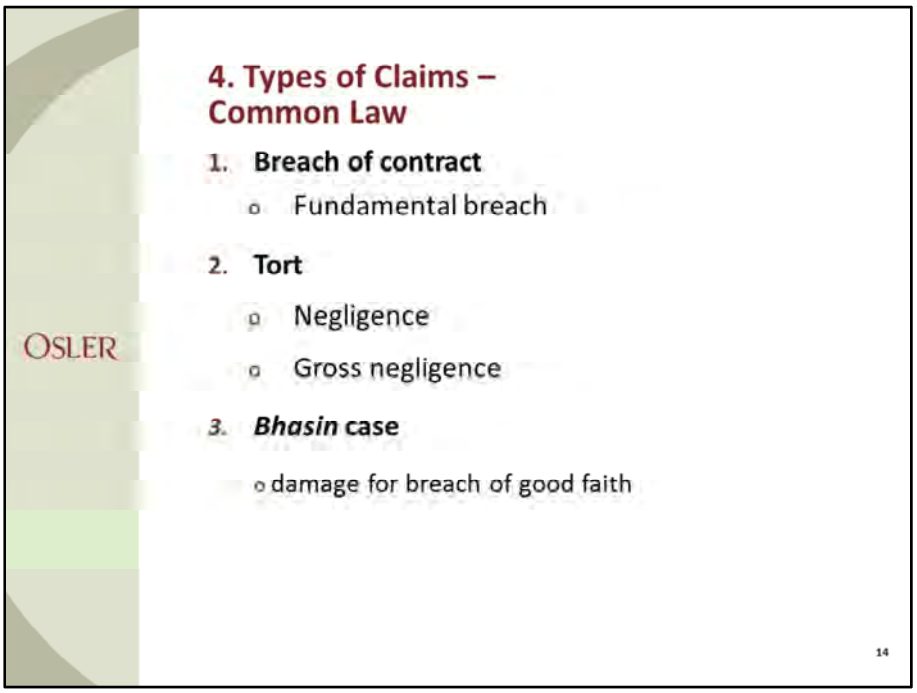
Incidental Damages
•Expenses incurred to fix the problem or return the rejected items

Punitive Damages
•Damages beyond those directly, indirectly or incidentally caused by breach
•Awarded to punish particularly egregious conduct
•Based in tort/good faith and fraud
•Can be awarded for breaches of contractual duties of good faith
•US: Sometimes called exemplary damages
•NOTE: distinction between punitive and aggravated damages. Aggravated damages are compensatory damages awarded where damage was aggravated by manner in which culpable act was committed

Damages

•US: Market Test: direct damages are the difference between the market value of what should have been delivered and the market value of what was actually delivered; everything else is "special" (*i.e.*, incidental or consequential)

•Canada/UK: *Hadley*: reasonable foreseeability: general damages are damages that are reasonably foreseeable; special damages are not reasonably foreseeable but were specifically communicated to the seller

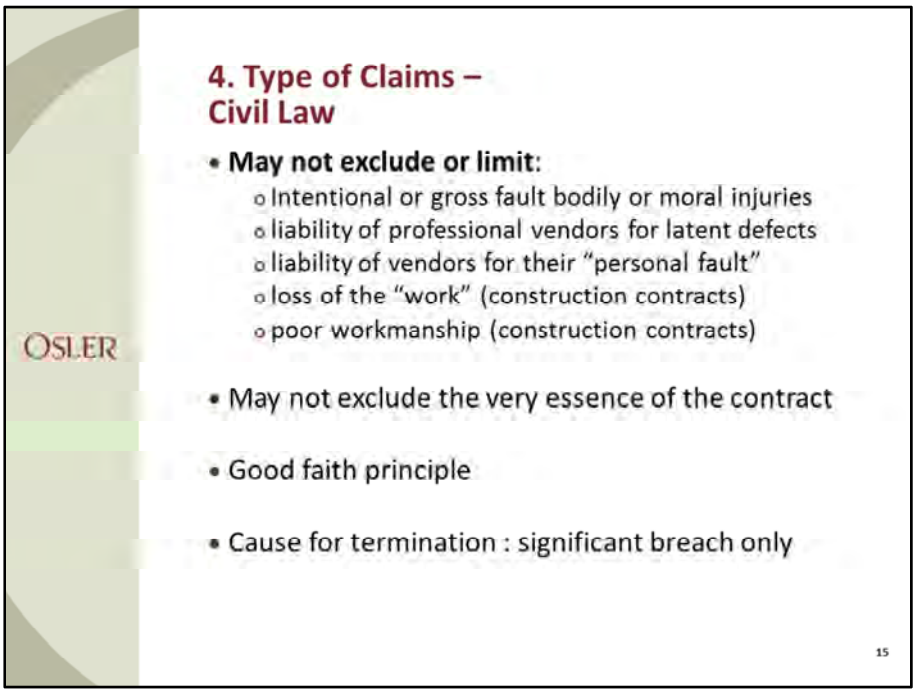


Breach of Contract/Fundamental Breach
•Excludes all damages flowing from the contractual terms
•Despite *Tercon*, fundamental breach is a ground for repudiating a contract
TIP: Despite Tercon keep fundamental breach in exclusion clauses

Tort/Negligence/Gross Negligence
•Older jurisprudence says that unless negligence is specifically mentioned, the court may conclude that the parties did not intend to exclude liability for negligence (*ITO – International Terminal Operators Ltd v Miida Electronics Inc*, [1986] 1 SCR 752)
TIP: Explicitly state intentions regarding negligence

•Gross negligence is not clearly defined in the cases. It is a US concept that has not translated well to Canadian jurisprudence. It is usually characterized as a "marked departure from the standards by which responsible and competent people habitually govern themselves". The "invisible juridical line" between ordinary and gross negligence has been "bent and positioned as the exigencies and justice of the cause persuaded the trial judge or jury [it] was necessary to ensure that justice be done" (*Mayo v Harding* (1993), 111 Nfld & PEIR 271 (SCJ))
TIP: If the contract uses the phrase "gross negligence", define it

Good faith contractual performance is a general organizing principle of the common law of contract. a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations (*Bhasin v. Hrynew [2014] 3 SCR 494*) **TIP: Ensure that the clause on application of the liability cap and disclaimer includes "or any other legal theory" or words to that effect.**



1474 CCQ and its equivalent under Common Law

- **In Common Law and *Tercon*:**
    - Common law considers the gross negligence a level of negligence. Such distinction does not exist in Civil Law.

- **Civil Law**
    - may limit the fault or the damages (consequences of the fault)
    - A provision limiting the responsibility of a co-contractor is not and of itself contrary to public order (*Deguise* v. *Montminu* (2014 QCCS 2672))
    - **1474 CCQ**

        (a) A person may not exclude or limit his liability for material injury caused to another through an intentional or gross fault. A provision limiting or exclusing such liability will be given no effect in case of intentional or gross fault. (*Investissements René St-Pierre inc.* v. *Zurich, compagnie d'assurances* (2007 QCCA 1269).

            - Gross fault:
                - A gross fault is a fault which shows gross recklessness, gross carelessness or gross negligence.
                - A gross fault results from an abnormally deficient, or even inexcusable conduct, which betokens the complete disregard

of the interests of others (*Audet* v. *Transamerica Life Canada* (CA, 2012-09-27); *AMF* v*. Wishnousky, (C.S. 2014-07-15)).*

- False declarations or false representations may exist independently of the gross fault, or may emphasize the gross fault. (*Fonds D'assurance-responsabilité professionnelle de la Chambre des notaires du Québec* v. *Frankl* (C.A. 1997-04-09))

- Intentional Fault:
  - Results from a conduct which asks for the materialization of the risk, and also of their consequences, i.e. the damages caused (*Audet* v. *Transamerica Life Canada* (CA, 2012-09-27))

(b) A person may not in any way exclude or limit his liability for bodily or moral injury caused to another. Any such provision is against public order (*Sugrue* v. *Keller* (C.S. 2010-12-10)

1474 CCQ: A person may not exclude or limit his liability for material injury caused to another through an intentional or gross fault; a gross fault is a fault which shows gross recklessness, gross carelessness or gross negligence.
He may not in any way exclude or limit his liability for bodily or moral injury caused to another.

- Liability of professional vendors for latent defects – presumption difficult to rebut
- liability of vendors for their "personal fault" – art. 10 LPC

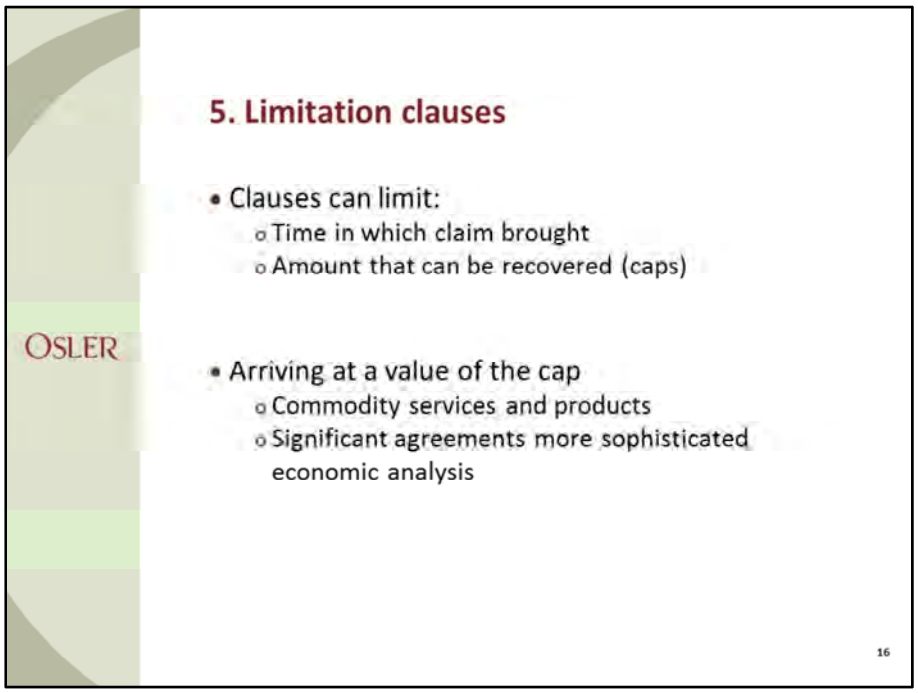
May not aim to exclude the principal prestation of the contract, or exclude the very essence of the contract *(Samen Investments Inc. v. Monit Management Ltd. (*C.A. 2014-04-24))

Termination for cause under Québec law

- **Québec law more restrictive**
  - Significant breach only (1604 CCQ)
    - *1604 CCQ: the creditor is not entitled to resolution or resiliation of the contract if the default of the debtor is of minor importance, unless, in the case of an obligation of successive performance, the default occurs repeatedly, but he is then entitled to a proportional reduction of his correlative obligation.*

  - Good Faith (6,7 and 1375 CCQ)

May not have as effect to remove the very essence of the contract *(Samen Investments Inc. v. Monit Management Ltd. (*C.A. 2014-04-24))



Caps on Damages

•Consider whether there should be different caps for different causes of action

- •If yes, consider whether the clause creates separate damage pools or whether there is a global cap
- •Commercial contracts almost always have aggregate caps

•Consider if a refund of fees paid or payment of damages reduces the cap

- •Commonly used clauses are often unclear but can be improved by adding language "… shall not exceed the fees paid, less any other damages paid or payable by the breaching party pursuant to this Agreement"

•Consider whether cap applies to one event or multiple events

- •If two events happen at different times, are they subject to one global cap (i.e. $5 million total) or are they each subject to the cap (i.e. each is subject to a $5 million cap for a total of $10 million)

•Consider whether and when cap should refresh or reset

- •In long-term commercial arrangements (e.g., outsourcings), the parties may settle on a cap which can be "refreshed" if a portion or all of the cap is used up. Usually, there are limits on how many times the cap can be refreshed, with termination rights on special terms

•Don't link to insurance

- •Separate the requirement to hold insurance from the estimate of damages that may be incurred and the cap applied to damages that can be recovered

•Rationale behind IP exception is that supplier of IP should bear the risk of supplying infringing items. Sometimes a distinction will be made with respect to monetary claims by third parties and the remedial steps required by the IP owner, i.e. the license, replace or refund component of the indemnity clause may be capped

•Note, with respect to limitations of liability and exclusions referring to "damages", indemnities may not be caught. In many cases, performance under an indemnity is not a "damage"

•Courts may not uphold exclusions and limitations of liability in the face of wilful misconduct in any event

•Consider whether the parties intend to exclude liability for abandoning the contract. If yes, be careful about excluding all causes of action except wilful misconduct as abandonment can be characterized as wilful misconduct
TIP: Address whether parties are excluding liability for abandoning contract

•Damages to tangible property and bodily injury are usually viewed as insurable risks
TIP: It is "bodily injury" and not "personal injury". Especially in light of new tort of invasion of seclusion in *Jones v. Tsige*, 2012 ONCA 32. But consider if a recipient of service whether this should be an exclusion

•Liability for confidentiality breaches, security breaches and PI breaches is the current battleground with suppliers
TIP: Consider options for narrowing exceptions to fit circumstances, i.e. it is a wrongful release or use of PI not technical breach of the provision. "Stretch caps" to deal with these issues are becoming common as an alternative to uncapped liability

•Compliance with laws: in certain contracts non-compliance with laws can be an exception (i.e., securities, foreign corrupt practices)

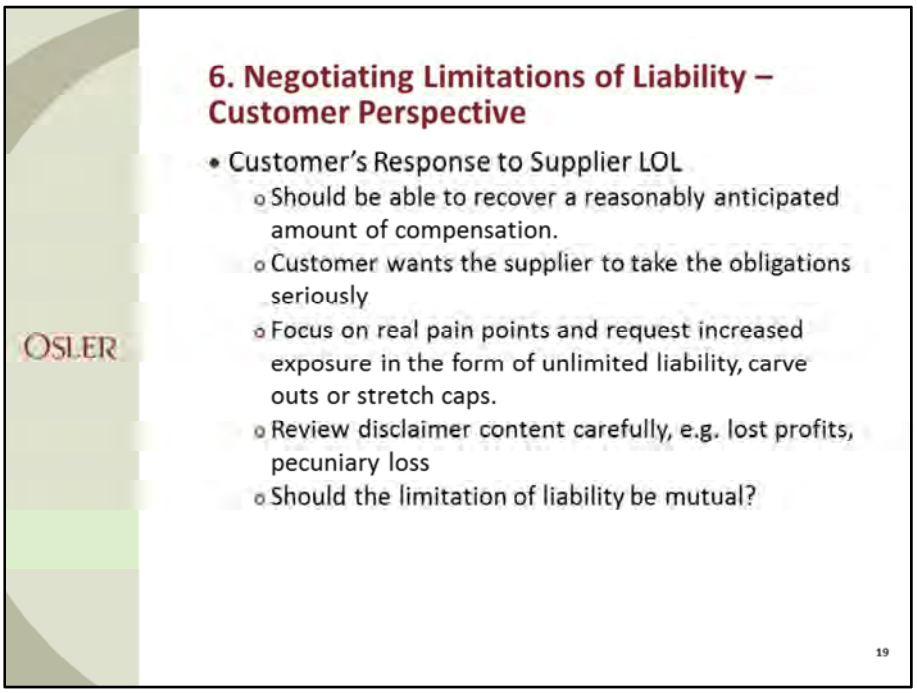
A limitation of liability clauses exist as a way of **sharing risk between the supplier and the customer**. For the supplier, a properly negotiated LOL clause can avoid "sinking the ship" by limiting its risk exposure. A Supplier bears the risk up to the limit (cap) and Customer bears all additional risk. This is consistent with the **risk/reward, economic analysis**.

The logic is if the Customer insourced, it would bear the entire risk. If we this is true, then there is an **assumption of shared risk**. By engaging a supplier , the risks are lessened given Supplier's expertise, but they do not go away. If we use the IT industry as an example, even the most well managed, carefully executed project will result in problems – this risk should be shared, that is the essential purpose of the limitation of liability provision.

An economically rational risk allocation must allocate risk associated with the performance of the services between the parties. The key for the supplier at the time of signing the deal is to have some level of economic certainty related to the performance of its services (performance breaches). Where a supplier believes that

the allocation is not balanced or fair, it is likely taking on additional risk, which is fine, so long as it the risk is properly assessed and assumed by the supplier. So the key is to understand the likelihood and consequences of a potential breach. This would involve identifying the risk, understanding the existing mitigation controls, identifying the consequence, rating the severity of the consequence and then determining likelihood that it will happen. As a result of this exercise, if you are taking on additional risk in a LOL, you may want to implement additional risk treatments (contractual or operational) to further mitigate the risk.

Also, there is a reason why we negotiate limitations of liability at the end of a negotiation. The appropriate allocation also needs to be weighed against the likelihood that a claim in damages will arise. IF the supplier has done a good job in negotiating obligations that it can meet and dependencies are well described, this may allow the supplier to agree to the requested allocation.

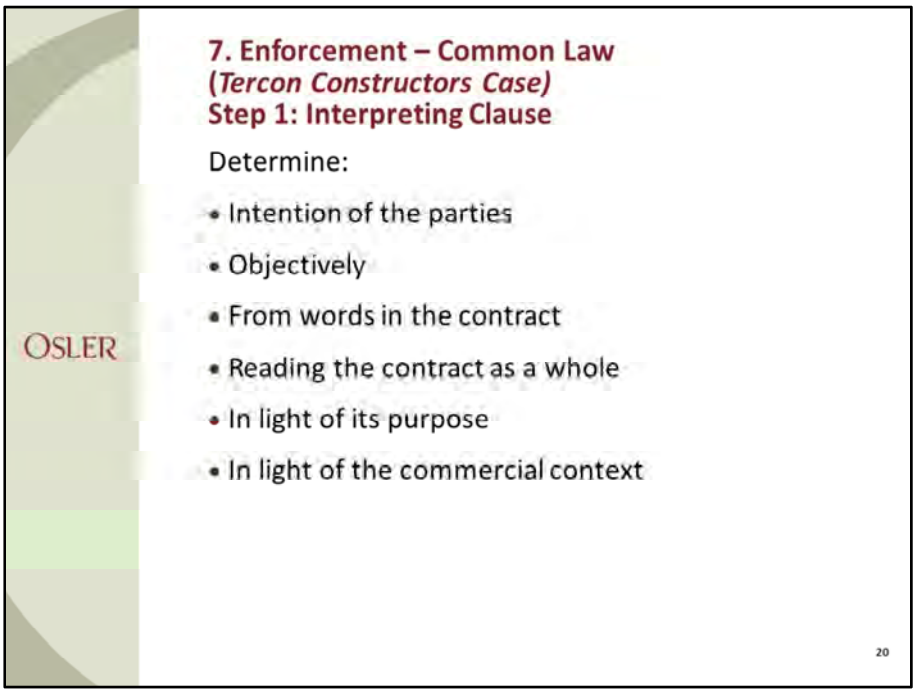


For the customer, in the event of incurred damages, the LOL clause should not prevent it from recovering a reasonably anticipated amount of compensation. And as discussed earlier, the value of the cap will depend on the product or service (commoditized versus custom deal)

If we view liability as a spectrum with unlimited on one side and total exclusion on the other , the Customer must decide whether the value of the cap is appropriate for all types of breaches. A typical example would be breaches of confidentiality. Confidential Information is a company asset which any breach thereof is most likely unrelated to a product failure, or at least this was the thinking. In this type of classic example, we do see deal being made. However, if and when a Customer is demanding unlimited liability tied to a performance breach, and recall that the supplier's general justification for the cap is based on a rational risk/reward analysis, we can surmise that there will be heated negotiations. Depending on the nature of the service, a good example may be breaches of privacy obligations. On one hand, a customer is demanding a transfer of risk because this is an « important » breach, but on the

other hand, the Supplier, is handling personal information in the performance of the services and unlimited liability could sink the ship. By the way, if the contract has interwined the concepts of confidentiality and privacy, the first request for unlimited liability for breach of confidentiality obligations would also be negotiated.

Whether or not a cap should be mutual or rather whether a Customer's liability is also capped is mainly a function of bargaining power and the complexity of the deal. Of course if the Customer is also providing services, it may want to limit exposure for performance breaches. But generally, a customer promises to pay, it promises to respect IP rights and not disclose CI. Arguably, none of those obligations should be limited. However, if there is a mutual cap, the supplier must also determine what should be carved-out (IP, confidentiality etc)

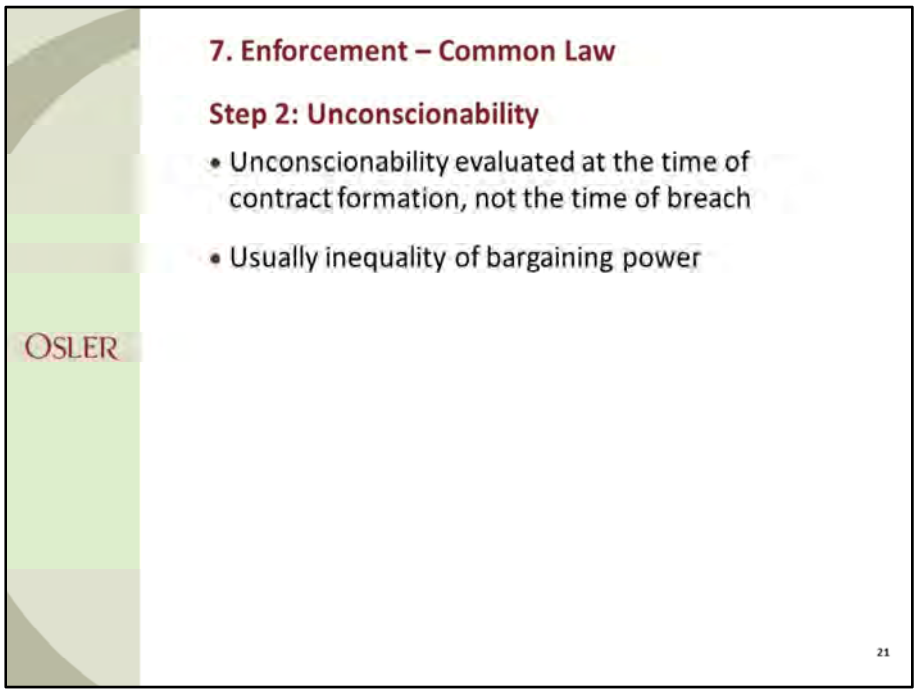


•Standard law of contract interpretation

•NOTE: *Contra proferentem* may be used to limit the application of exclusion/limitation clauses

•As fundamental breach is no longer a tool to avoid exclusion and limitation clauses, the court will use its discretion to interpret clauses in a manner that leads to a fair result

•For example, listing types of damages may not be as effective as stating "any loss, damage or injury" and then including types that a Court might say are not usually in the contemplation of the parties (punitive, direct, etc.)



The Supreme Court clearly states that there is nothing inherently wrong with negotiated exclusions or limitations of liability between sophisticated parties

TIP: Explicitly bring the exclusion or limitation clause to the counterparty's attention

TIP: If there is an imbalance of bargaining power, advise other party to seek independent legal advice

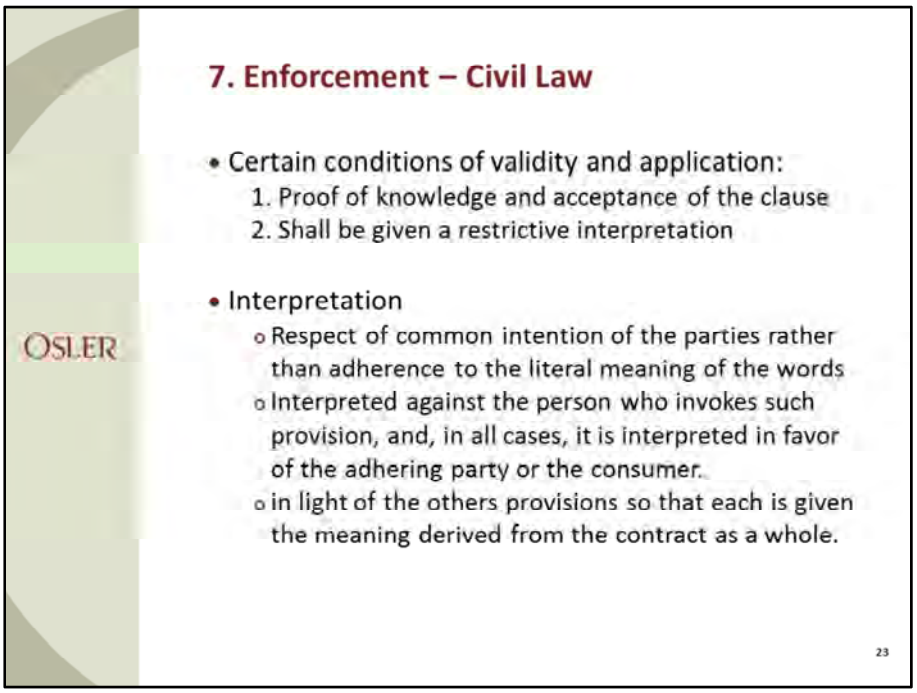
Example of overriding public policy reason not to enforce exclusion clause: *Plas Tex v. Dow Chemical:*

- Dow knowingly supplied defective plastic resin to pipeline fabricator, choosing to rely on contractual limitation clause rather than disclosing defect
- Created significant risk to public health/property resulting

Held: exclusion clause not enforceable, for public policy reasons

Other examples include serious criminality and egregious fraud

Consider: is it contrary to public policy to exclude liability for punitive damages?



Conditions of validity and application

1. Proof of knowledge and acceptance

- In order to invoke a provision limiting or excluding liability, one has to establish that the "victim" has seen, read or otherwise was made aware of such provision. Also, any such provision must be interpreted strictly against the person who invokes it. (*Masliah* v. *Industrielle-Alliance, compagnie d'assurances* (C.Q., 1994-03-07))
- A provision excluding liability included in a contract concluded between a financial institution and a client is valid if and only if it is clear, unambiguous and expressly excludes liability. The fact that the client did not read such provision does not impede its application if there is no evidence that he was prevented from it. (*Optimum Société d'assurances inc. c. Caisse populaire Desjardins de Pointe-aux-Trembles* (C.Q. 2005-05-03))

2. Restrictive Interpretation

- Shall be given a restrictive interpretation (*Deguise* v. *Montminu* (2014 QCCS 2672) and *Marcil* v. *Verreault Automobile Ltée* [1962] B.R. 340, 342 and 346)
- Court is prone to disregard the clause vague or imprecise following the general principle which demands clarity on the part of the person who wishes to restrict or exclude another person's rights. Also, the Court will give a restrictive interpretation to such clause, in order not to extend its application to situations or cases not expressly provided for. (Baudouin, Deslauriers and Moore, *La responsabilité civile*, n.1-812, p.807.)

Burden of proof with respect to the validity of the clause is on the party invoking the clause. However, the burden of proof to preclude the application of the clause is on the creditor (has to prove an intentional or gross fault).

General Interpretation

Greater respect of the intention of the parties

> *1425 CCQ. The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract.*
> *1426 CCQ. In interpreting a contract, the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account.*
> *1427 CCQ. Each clause of a contract is interpreted in light of the others so that each is given the meaning derived from the contract as a whole.*
> *1430 CCQ. A clause intended to eliminate doubt as to the application of the contract to a specific situation does not restrict the scope of a contract otherwise expressed in general terms.*

Interpreted against/in favour of …

- Also, in case of doubt, in all cases, it is interpreted in favour of the adhering party or the consumer. (1432 CCQ)

> *1432 CCQ. In case of doubt, a contract is interpreted in favour of the person who contracted the obligation and against the person who stipulated it. In all cases, it is interpreted in favour of the adhering party or the consumer.*

8. Trends

- Increased complexity
- Tension over confidentiality and cyber breaches
- Willful misconduct (and responsibility for employees)
- Parsing out disclaimer and caps by type of damages
- Defining direct damages

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8. Trends

- Stretch caps and separate caps for certain categories of damages
  - Now common to address privacy and confidentiality breach
  - General erosion of one-size fits all approach
  - Can lead to very complex clauses
- Refreshes
  - Long-term contracts
  - Reset the cap as a condition of not terminating

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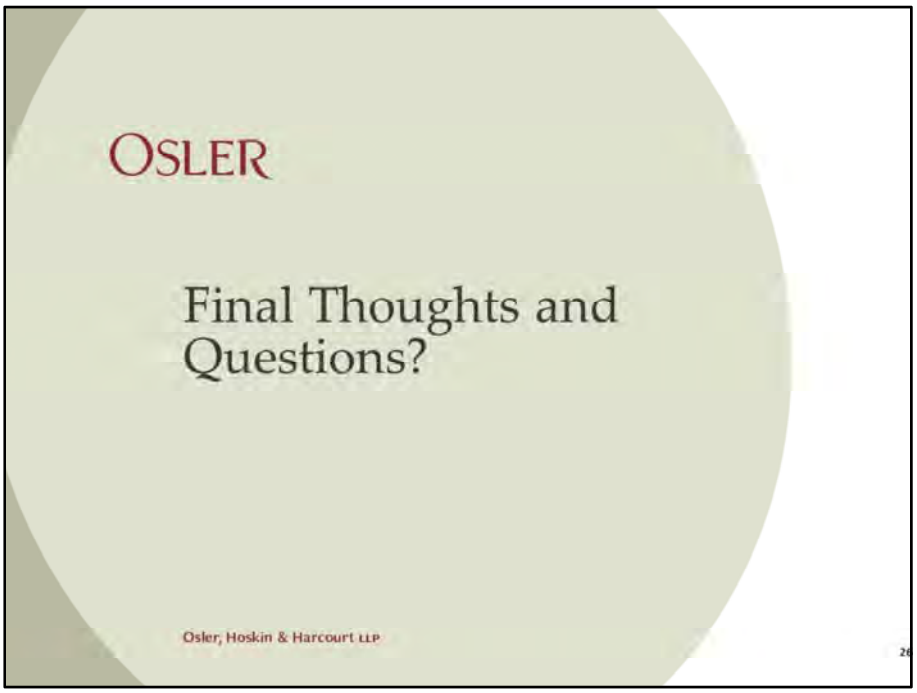
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Final Thoughts and Questions?
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Appendix:

- Additional Notes on:
  - *Hadley v. Baxendale*
  - *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*
  - Different Types of Damages

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Hadley v Baxendale

- Ruling: Hadley was denied recovery for loss profits. The holding was that Baxendale could only be held liable for damages that were generally foreseeable, or if Hadley had mentioned his special circumstances in advance.

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- Principle: A plaintiff can recover for:
  1. *General Damages:* Losses that would arise normally and naturally from the breach.
  2. *Special Damages:* Losses arising from special circumstances of the non-breaching party to the extent that such special circumstances were communicated to the breaching party and were in the contemplation of the parties.

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Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)

- Facts: The BC Ministry of Transportation and Highways issued an RFP to construct a highway in Northern BC. Six bidders eligible to submit responses to the RFP. One bidder, Brentwood, formed a joint venture with another company, EAC, to benefit from its expertise in drilling and blasting. The Joint Venture was not an eligible bidder. BC awarded the contract to the Joint Venture and actively assisted in concealing the existence of the Joint Venture. The runner-up bidder sued, alleging a breach of the bidding contract (Contract A) with BC. BC sought to rely on an Exclusion of Liability clause, which read:
  - Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for any compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a proposal each proponent shall be deemed to have agreed that it has no claim

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Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)

- Key Issue: Does a fundamental breach render an exclusion clause unenforceable?

- Principle: The SCC laid to rest the doctrine of fundamental breach in the context of exclusion clauses. Instead, the Court established a three part test for assessing the enforceability of a contract disclaimer:
  1. Interpret clause: does it apply to the breach?
  2. If yes, was the clause unconscionable at the time the contract was made?
  3. Is there an overriding public policy against enforcement of the exclusion clause?

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Types of Damages: Additional Notes

General/Direct Damages

- Damages that flow directly and immediately from the breach (i.e. damages that are reasonably foreseeable). However, it is hard to know in advance whether courts will categorize damages as foreseeable or not. To illustrate, the following damages have been found to be general damages:
- Loss of profits (*Ticketnet* (1993) Ontario)
- Delay damages: wages paid to workers who cannot be productive (standby time), inflation costs and indemnification of subcontractor delay claims (*Croudace Construction* (1978) England)
- Incremental cost of new equipment over cost of supplied defective equipment (*Millar's Machinery* (1935) England)
- Increased production costs (*British Sugar* (1997) England)
- Additional cost of energy caused by defective equipment (*Syncrude v Babcock & Wilcox* (1997))
- Overhead (*Deepak Fertilisers* (1998) England)
- Costs to remove defective equipment (*Hotel Services* (2000) England)
- Mental distress (*Fidler v Sun Life Insurance* (2006))

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Types of Damages: Additional Notes

Special Damages

- Losses arising from *special circumstances* of the non-breaching party to the extent that such special circumstances were *communicated* to the breaching party and were in the contemplation of the parties.

Indirect/Consequential Damages

- Damages that flow indirectly from a breach even if those losses arise from special circumstances that were not communicated.

Incidental Damages

- Expenses incurred to fix the problem or to return the rejected items.

Punitive Damages

- Damages that are awarded to punish particularly egregious conduct. These are damages beyond those directly, indirectly or incidentally caused by a breach. In the US these are sometimes referred to as exemplary damages.

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Types of Damages: Additional Notes

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Education
HEC (Paris) and New York University (Stern), M.B.A.
McGill University, B.C.L., LL.B.

Bar Admissions
Québec (1989); New York (1989)

Practice Area: Life Sciences, Technology, Energy, Corporate Financing, Mergers and Acquisitions, Franchise and Employment Law.

Languages: English and French

Nathalie is a partner in the Corporate Practice Group. Her practice focuses on financings, mergers and acquisitions transactions and strategic commercial matters. She acts for a broad spectrum of companies including businesses established to commercialize newly acquired technologies. Her practice also includes negotiating and advising in respect of national and international strategic alliances, joint ventures, licensing, distribution, development research, government contracts, procurement, franchising and other similar commercial arrangements. She regularly helps businesses create employment arrangements for their employees and senior executives and advises companies and boards of directors on their executive hires and terminations.

As an adviser to many venture capital funds, Nathalie has been involved in numerous cross-border private financings and mergers and acquisitions transactions.

Nathalie is also a founding member of Réseau Anges Québec.

Notable Matters

- **Publicis Group** in the purchase of an interest in **Le Groupe BCP Ltd.**
- **SCL Elements Inc.** in its sale to **Schneider Electric Buildings, LLC**.
- **Teraxion Inc.** in the purchase of assets of **Cogo Optronics Group Inc.**
- **Lipso Systems Inc.** in its sale to **Transcontinental Inc.**
- **Topigen Pharmaceuticals Inc.** in its sale to **Pharmaxis Ltd.** of Australia and its concurrent financing.
- **Victhom Human Bionics Inc.** in its transfer of all of its assets of Neurobionix division to a newly created joint venture with a concurrent total equity investment by **Otto Bock** of $30 million in the joint venture and the negotiation of its distribution agreement with **Otto Bock**.
- **Resonant Medical Inc.** in its sale to **Elekta AB (publ)** in its financing, licensing and distribution agreements as well as all corporate or employment and labour matters.

- **Accélération de création d'entreprises technologiques Inc.** and **Anges Québec,** in the creation of their funds.
- **Régie municipale de l'énergie Gaspésie – Iles-de-la-Madeleine,** in relation to the formation of a limited partnership in order to operate wind farms in Québec and in its commercial matters.
- **Accedian Networks Inc.**, **AngioChem Inc.**, **Calevia Inc.**, **Inocucor Technologies Inc.**, **Kaneq Pharma Inc.**, **Leap Medical Inc.**, **Leap Medical Lab Inc.**, **Resonant Medical Inc.**, **Yotta Yotta Inc.** and **Ywire Technologies Inc.**, in their Canadian and crossborder financings.
- **Caxton Advantage Life Sciences Fund LP**, **Rho Capital Ventures Inc., Braemar Energy Inc., Cycle Capital Inc.**, **Fonds de solidarité du Québec**, **Real Ventures** and **Fondaction CSN**, in their private financings.
- **metix inc.**, **Ambrilia Pharmaceuticals Inc.**, **Laboratoires Casen Fleet S.L.U.**, **Argex Titane Inc.**, **Bausch & Lomb Inc., Landis+Gyr**, **Milestone Pharmaceuticals Inc.**, **Mimetogen Pharmaceuticals Inc.**, **Leap Medical Lab Inc.**, **Behaviour Interactive Inc., KapCharge Inc.** and **Beyond the Rack Inc.**, in their commercial agreements.

Professional Affiliations

- Canadian Bar Association
- Association of Québec Women in Financial, member of the Development and Professional Advancement Committee from 2005 to 2011
- Association of MBA of Québec
- Canadian Venture Capital Association
- Canadian Information Technologies Law Association

Recognition

- *The Canadian Legal Lexpert Directory 2014 (top rankings in 2 categories):* Technology and Biotechnology Transactions

Publications, Events and Training

- Internet and E-Commerce Law in Canada, volume 14, no. 11, March 2014 : « *Can you carry out Bitcoins activities in Canada without legal risks?* »
- Osler Insights: A Blog on Technology, Innovation and Outsourcing, December 17, 2013 – "*Can you carry out Bitcoins activities in Canada without legal risks* ".
- Nathalie gave on November 5, 2013 a conference - on "*Mergers and Acquisitions Transactions : The Perspective of a Venture Capital Investor* " organized by Osler/ACC.
- Nathalie gave on February 21, 2011 a conference at the University of Sherbrooke (MBA / Entrepreneurship) , on " *Cours introductif sur le droit des compagnies* " and was speaker at " Journées d'études fiscales " organized by the Canadian Tax Foundation, McGill University and the Canadian Bar Association in June 2010 on " *Les conventions entre actionnaires, aspects corporatifs et fiscaux* " . The text of the conference has been published by the Canadian Tax Foundation in TaxFind Online.
- Osler Review– Franchise Review, November 12, 2009. *"National Assembly introduces Integrity in Public Contracts Act* ".
- Osler Review – Franchise Review, October 2009. *"The Charter of the French language and websites* ".

- Nathalie regularly gives workshops on term sheets for group of investors.

Pro Bono/Community Work

- Réseau Anges Québec, Board of Directors, 2008 to 2012.
- Accélérateur de création d'entreprises technologiques (" **ACET** ") and Galerie d'art d'Outremont, Board Member.
- Arion Baroque Orchestra, Ambassador and Arion Baroque Orchestra Foundation, Board of Directors, 2007 to 2010.
- Fondation du Barreau du Québec and Fondation de recherche en administration de l'Université de Sherbrooke, Governor.
- Fondation Armand-Frappier; member of the Organization Committee for 2013 and 2014 "Fête Champêtre".
- McGill Faculty of Law Alumni Mentor, Mentor.
- Club de ski de compétition Bromont, *pro bono*.

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Education
London School of Economics, LL.M.
Osgoode Hall Law School, LL.B.
Memorial University of Newfoundland, B.A.

Bar Admission(s)
Ontario (1992); Newfoundland (1996)

Practice Area): Technology; Outsourcing; eHealth; Procurement

Simon's practice concentrates on technology outsourcing, other complex services arrangements and procurement. He advises enterprises whose businesses rely on technology and complex services. He also advises technology suppliers ranging from large established software providers to early stage technology companies. Simon has been lead counsel on projects in the banking, pension, investment, healthcare, energy and other sectors. His practice includes data agreements, outsourcing arrangements, software licensing, government contracting, e-commerce and payment systems. Simon writes and lectures on various areas of technology law, both in public forums and client education venues.

Simon is a past President of the Canadian Information Technology Law Association (IT.Can).

Recent Matters

- Advising a large utility on outsourcing matters.
- Advising a provincial government agency with respect to complex data distribution agreements.
- Advising on all aspects of a large financial institution's data and voice network contract.
- Advising both providers and customers of cloud computing technology, including advising on intellectual property and location of data risks.
- Advising clients of the firm's early stage company program on critical commercial contracts.
- Advising a pension administrator with respect to procuring a pension administration system.
- Advising a pension administrator with respect to procurement matters and various information technology systems.
- Licensing of health information technology to establish a health information portal.
- A major outsourcing of card processing services for a major Canadian bank.
- Advising on several outsourcing transactions for a major Canadian retailer.
- Providing ongoing advice to a major system integrator on government procurement matters.

- Projects linking a number of Ontario hospitals into digital image repositories, as part of Ontario's electronic health record transition.
- Various licensing and services arrangements on behalf of major financial institutions related to equities trading and account management.

Professional Affiliations

- IT.Can Law Association, former Board Member and President
- Canadian Bar Association
- Toronto Computer Lawyers Group, former Chair
- American Bar Association

Publications/Events

- *How to Effectively Use Contracts to Mitigate the Impact of Data Breaches*, Ontario Bar Association Institute, February 2015
- *Exclusions and Limitations of Liability* (Osler Webinars and Client seminar), 2012-2014
- *Cyber security considerations for public companies*, Internet and E-Commerce Law in Canada, January 2014.
- *Cloud Computing: Minimizing Data Security Risks for You and Your Clients,* co-presenter at the Ontario Bar Association's TECHxpo, September 30, 2013.
- *Mobile Payments Navigating a New World,* Osler Client Conference, April 12, 2012.
- *Security in a Connected World*, Osler client seminars 2011 and 2012.
- *IT Contract Management,* roundtable presentation jointly presented at Canadian IT Law Association Annual Conference, October 2011.
- *IT Procurement: Best Practices for Issuers and Respondents,* roundtable presentation jointly presented at Canadian IT Law Association Annual Conference, October 29, 2010.
- *Cloud Computing Contracting and the Spectrum of Risk,* paper presented at the Canadian IT Law Association Annual Conference, October 23, 2009.
- *Preparing for eHealth Transformation Projects and New Infrastructure Ontario Approach* (ITAC and Osler), panellist, October 21, 2009.
- *Payment Card System Security,* Cardware 2009, June 17, 2009.

Mark MacNeil | Associate General Counsel
TELUS Health Solutions

Mark joined the TELUS Health Legal team in 2009 as Legal Counsel and is now Associate General Counsel.

Mark supports multiple business units by providing legal advice in complex commercial matters involving IT, privacy, consumer law, medical devices etc. Prior to TELUS Health, Mark acquired a solid experience in private practice at Blake, Cassels & Graydon LLP and Fasken Martineau.

Mark earned his LL.B – LL.L in 2002 from McGill University and he is admitted to the Quebec Bar as well as New York City Bar.

Since 2008, TELUS Health has developed a broad cross-section of digital solutions for all major stakeholders in the healthcare system, including hospitals, physicians, pharmacists and extended healthcare providers. TELUS Health is a leader in telehomecare, electronic health records (EHR), electronic medical records (EMR), personal health records (PHR), pharmacy management and benefits management. Its solutions are aimed at improving the patient experience, increasing efficiencies and positively impacting health outcomes by giving health authorities, providers, physicians, patients and consumers the power to turn information into better health outcomes.