During an ice storm, a man's car slipped down an embankment and became lodged against a large tree. The man called a towing company and told the company's manager that the car was 100 feet down the embankment. "That's lucky," said the manager, "because our winch only goes 100 feet." After the manager and the man agreed on a price, an employee of the company attempted to reach the car but could not because the car turned out to be 120 feet down the embankment.

Is the towing company's performance excused on the grounds of mistake?

A. No, because both parties were uncertain about the distance.

B. No, because the towing company assumed the risk by the manager's failure to examine the distance himself.

C. Yes, because at the time of contracting, both parties were mistaken about a basic assumption on which the contract was based.

D. Yes, because the agreement did not allocate the risk of mistake to either party.

Explanation:

When party assumes risk of mistake

Express	Contract allocates risk to party
Conscious ignorance	Party enters contract despite conscious ignorance of facts related to mistake
Adjudication	Court allocates risk to party because reasonable under circumstances

When both parties enter a contract based on the same mistake (ie, **mutual mistake**), the contract is voidable by the **adversely affected party** if:

- the mistake relates to a **basic assumption** of the contract
- the mistake **materially affects** the agreed-upon **exchange of performances** (ie, the adversely affected party cannot fairly be required to carry it out) *and*
- the adversely affected party **does not assume** the **risk of the mistake**.

Here, both parties entered the agreement based on the erroneous belief that the man's car was 100 feet down the embankment **(Choice A)**. That mistake relates to a basic assumption of the contract since the towing company's winch only goes 100 feet. And it materially affects the agreed-upon exchange because the towing company cannot be expected to tow a car that its winch cannot reach. Therefore, the towing company's performance will be excused because it also did *not* assume the risk of the mistake—ie:

- the agreement did not expressly allocate the risk of the mistake to the towing company
- there is no indication that the towing company knew that the man's car was probably more than 100 feet down the embankment and contracted to tow it anyway *and*
- it would not be reasonable for a court to allocate the risk of the mistake to the towing company when its winch cannot even reach the car **(Choice D)**.

(Choice B) A party's failure to know or discover facts before entering into a contract (eg, the manager's failure to examine the distance himself) does not prevent the party from avoiding the contract.

Educational objective:

The adversely affected party can avoid a contract on the grounds of mutual mistake if (1) the mistake relates to a basic assumption of the contract, (2) the mistake materially affects the agreed exchange of performances, and (3) the adversely affected party does not assume the risk of the mistake.

References

- Restatement (Second) of Contracts § 152 (Am. Law Inst. 1981) (when mutual mistake makes a contract voidable).
- Restatement (Second) of Contracts § 154 (Am. Law Inst. 1981) (when a party bears the risk of a mistake).