Remedies CAN – winter 2021

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OVERVIEW OF INTRODUCTION

- "REMEDIES": judicial rulings meant to resolve disputes.
- Substantive law vs remedies vs sanctions.
- Traditional distinctions:
  - Legal remedies: damages, debt, recovery of land.
  - Equitable remedies: injunctions, specific performance, declarations, damages in lieu of specific relief.
- Alternative classifications of remedies as responding to causes of action:
  - Rights-threats.
  - Wrongs
  - Injustices

OVERVIEW OF DEFENCES

- Substantive defences vs remedial defences.
- Remedial defences do not alter one's primary legal obligations.
  - Instead, they relate to the availability of remedies.
- Remedial defences:
  - Res judicata
  - Limitations periods
  - Laches (bars equitable actions)
  - Immunity from action – ie: Crown Immunity: can't get specific relief.
  - Illegality
- Illegality:
  - English approach: standard based on general policies of not allowing parties to profit from wrongdoing & ensuring coherence in the law (*Patel v Mirza*).
  - Canadian approach: rules-based approach that applies only where remedy would allow a party to profit from illegal activity or where a remedy would undermine a criminal penalty (*Hall v Hebert; BC v Zastowny*).

OVERVIEW OF INJUNCTIONS (rights-threats)

- Equitable order to do or not do something (other than pay $ or perform a contractual obligation).
- Traditionally granted by courts of equity.
- Injunctions are always technically discretionary, though in some categories of cases injunctions are granted "as of course."
- Forms of injunction:
    - Interlocutory - preliminary
    - Quia timet – can be granted before rights violation
    - "Ordinary" / "permanent" – granted after rights violation
    - Prohibitory / negative – order not to do something
    - Mandatory – order to take positive steps
- Quia timet injunction – *Fletcher v Beazley* – factors play off against each other, high bar.
    - (1) imminent threat of injury
    - (2) injury likely to be very substantial
- Mandatory injunctions are always discretionary, subject to principles guiding the court's discretion: inadequacy of damages, D's conduct, clear instructions to D, etc.
    - *Redland Bricks*
- Ordinary negative injunction is available "as of course" where D has engaged in trespass or violated P's right of support (*Redland Bricks*; *Woollerton (*some residual discretion – no real injury, P using remedy as bargaining chip, extreme cost to D); *Trenberth*).
- Injunctions to stop a nuisance are no longer necessarily available "as of course"
    - *Boomer*; *Miller v Jackson*; *Lawrence v Fen Tigers*.
    - P may still have a *prima facie* expectation of an injunction to stop a nuisance, but a wide range of factors can guide court's discretion to decline to issue an injunction including:
        - *Shelfer* principles (injury small, can be valued in $, oppressive to D)
        - Conduct of the parties
        - "Public interest" – can be inferred from planning permission.
        - Potential for wasted resources.

OVERVIEW OF DELIVERY UP OF GOODS (rights threats)

- In an action in detinue, a court's power to order the delivery up of goods is discretionary.
- Guiding principle = order for delivery up of goods will only be granted where damages are an inadequate remedy, which will generally be the case for special or unique goods (*Cohen v Roche*).
- Replevin = interim remedy which provides an alternative means for P to recover goods (AB *Rules of Court*, ss 6.48-49).

OVERVIEW OF EJECTMENT & DEBT(legal remedies) (rights-threats)

- Actions in ejectment (recovery of possession of land) & debt give rise to legal remedies that direct the performance of pre-existing substantive legal duties.
- Party w/ superior claim to possession of land is entitled as of right to a judgment directing that possession be turned over (*McPhail*).
- Where P establishes that a sum of $ is due under a contract & that it has not been paid, P is entitled to judgment directing payment of the debt.
- Penalty clauses vs liquidated damages (*Super Save Disposal*).
    - Genuine pre-estimate of damages vs punitive nature of the clause

OVERVIEW OF SPECIFIC PERFORMANCE (rights-threats)

- Order to perform contractual obligation.
- Traditionally granted by courts of equity.
- Specific performance order = discretionary.
- Discretion guided by three main principles:
    - Specific performance will only be ordered where damages are inadequate (*Falcke v Grey*; *Semelhago*).
        - Damages are generally inadequate in contracts for the sale of unique goods & unique parcels of land, such that specific performance is available as of course.
    - Courts will not order specific performance of a personal service obligation (*Lumley v Wagner*; *Warner Brothers v Nelson*).
        - Where negative obligations amount to positive they will not be enforced.
    - Courts will not order the specific performance of an obligation that is too difficult to supervise (*Tanenbaum* – obligations to build or repair will not be enforced unless very precise; *Cooperative Insurance v Argyll Stores*).

OVERVIEW OF EQUITABLE DEFENCES

- Equitable defences or equitable bars are principles that guide court's discretion w/ respect to equitable remedies.
- They can provide a basis for court to decline an equitable remedy even in cases where P could otherwise expect one based on principles set out above.
- Clean hands (*Falcke v Grey*)
- Laches (*Riches v Burns*)
- Absence of consideration (*Riches v Burns*)
- Inadequacy of consideration (*Falcke v Grey*)
- Hardship (*Patel v Ali*)

OVERVIEW OF DAMAGES IN LIEU (rights-threats)

- Damages in lieu of specific relief stems from *Lord Cairns' Act* (1858; enacted in AB at *Judicature Act*, s19).
- That legislation allowed courts of equity in their discretion to award damages in lieu of an injunction or specific performance.
- In many cases, courts awarding damages in lieu will simply follow applicable legal rules for awarding damages for the injury in question (ie: loss due to past nuisance).
- In some cases, there are no analogous forms of common law damages & damages in lieu are distinct from common law damages (ie: damages for future loss due to ongoing nuisance – *Boomer, Fen Tigers*.
- In other cases, distinct principles will apply to the calculation of damages where an equitable remedy has been sought (ie: timing of assessment of damages in lieu of specific performance (matters where land has changed in terms of value – *Semelhago*).

OVERVIEW OF DAMAGES (wrongs)

- Direct injury vs consequential loss.
- Direct injury = monetary value of rights violation
    - *Mediana* (lost right to use ship); *Williams Bros* & *Sale of Goods Act* (difference between contract price & market price); *Dow v Nova* (value of ethylene)
- Consequential loss = loss suffered by P following chain of causation from D's breach
    - *Heron II* (financial consequences of late delivery); *Dow v Nova* (lost profits from reduced polyethylene production), etc.

OVERVIEW OF REMOTENESS (wrongs)

- Negligence: damages must be of a type that would have been reasonably foreseeable (*Wagon Mound II*).
- Breach of contract: test set out in *Hadley v Baxendale*, as developed in jurisprudence.
- *Koufos* formulation of test in *Hadley v Baxendale*:
    - Damages should be such as may naturally & usually arise from breach (objective) OR
    - Damages should be such as in the special circumstances of the case known to both parties may be reasonably supposed to have been in the contemplation of the parties, as a result of the breach, assuming the parties to have applied their minds to the contingency of there being such a breach (subjective).
- What kinds of losses are taken to be in the reasonable contemplation of the parties?
    - "real danger" "serious possibility" "not unlikely" (*Koufos*); foreseeable (*Transfield, RBC v Merrill Lynch*).
- Foreseeable losses can still be held to be too remote where the common intentions of the parties (express or implied) are to exclude liability (*Transfield*).
- *Sale of Goods Act* codifies the *Hadley v Baxendale* standard for remoteness of loss.
- Loss of future business profits can meet the remoteness standard as long as they are a serious possibility (*Canlin*).
- Precise form of breach need not be reasonably foreseeable as long as the loss in question *would have* been reasonably foreseeable, had the parties turned their minds to the breach (*RBC v Merrill Lynch*).

ALTERNATIVE APPROACHES (wrongs – assessing damages)

- Alternative approaches to assessing damages relating to property:
    - Loss in value
    - Cost of reinstatement
    - Loss of amenity (?)
- Measure of damages is generally at the election of P, subject to proviso that if reinstatement is chosen it must be reasonable under the circumstances to incur the cost of reinstatement (*James Street Hardware*, *Ruxley Electronics*).

EXPECTATION VS RELIANCE DAMAGES

- Normal baseline for measuring damages for breach of contract = contractual expectation (situation P would have been in if contract had been performed adequately).
- Courts have awarded damages based on "reliance" measure of damages, based on the loss incurred by P in detrimental reliance on D's performance.
    - Baseline = situation P would have been in if contract had not been entered into at all.
    - Used in circumstances where P, for reasons outside of P's control, is unable to prove what expected gains / profits would have been under contract (*Anglia Television v Reed*).
- Reliance damages not available where reliance measure would exceed expectation measure (including cases where contract would have been unprofitable for P) (*Bowlay Logging*).
- Reconciling jurisprudence: view reliance damages as a form of expectation damages based on a special presumption that contract would have been broken even for P.
    - In cases where P cannot prove what expected profits would have been (through no fault of P), a court may effectively presume that contract would have broken even, allowing P to recover net costs incurred (ie: reliance damages).

DAMAGES FOR PERSONAL INJURY

- Special damages = damages that can be *specified*, in the sense that they have already been incurred by the time of trial (ie: past lost income, past cost of care).
- General damages = losses that are incapable of precise quantification at time of trial.
    - Pecuniary loss = loss that is calculable in monetary terms (ie: future lost income, cost of future care).
    - Non-pecuniary loss = loss that is not calculable in monetary terms (ie: pain & suffering, loss of amenities, lost expectation of life).
- Awarded as a lump sum, even where they are based on future costs due to past injury (*Andrews*).
- "Discount rate" applied to future costs & future income to arrive at lump sum.
    - In some jurisdictions the discount rate is set by statute; in others (including AB) it is a question of fact based on "real rate of return" on capital – ie: how much invested $ will increase in value after accounting for inflation.
- Cost of future care is calculated based on "the amount that may reasonably be expected to be expended in putting injured party in position he would have been in if he had not sustained the injury."
- Prospective loss of earnings is assessed based on (often limited) info available on facts of the case.
- Non-pecuniary damages awarded on "functional" basis to provide reasonable solace for loss suffered by P (*Andrews, Lindal*).
- Court should work to ensure consistency across cases but should also take account of particular circumstances of P (*Andrews*).
- Upper bound for non-pecuniary = $100,000 ($392,000 in 2021 dollars) (*Andrews, Lindal*).

DAMAGES FOR INTENTIONAL TORTS

- Standard approach to remoteness for tort of deceit is requirement of directness (losses arising "naturally and directly")
- Remoteness standard for other torts may vary.
- Reasonable foreseeability is now used in nuisance.
- Applicable standard for tort of conversion is unclear.
- *Kuwait Airways* suggests that standard should be directness for acts of conversion that involve intentional dishonesty & reasonable foreseeability for acts of conversion based on good-faith, mistaken beliefs.

COMPENSATION FOR EQUITABLE WRONGS

- Breaches of equitable obligations can give rise to both proprietary & personal remedies
- Proprietary remedy = constructive trust, personal remedy = monetary award.
- Where trustee breaches fiduciary duty can get compensation (restitution of value of trust property) or accounting of profits (monetary award based on profits wrongfully gained by trustees).
- Courts have recognized fiduciary duties in a variety of contexts outside of trust, giving rise to questions about how to assess compensation.
- Flexible approach that borrows from common law in assessing damages where that is appropriate in light of policies surrounding equitable obligations (*Canson, Hodgkinson*).
- Loss stemming from breach of fiduciary duty need not be reasonably foreseeable in order to give rise to compensation but must generally flow directly from breach of fiduciary duty, rather than from intervening cause (*Canson*).
- Other factors including character of breach of fiduciary duty may also be relevant (*Hodgkinson*).

PUNITIVE DAMAGES

- Exceptional damages awards that aim at retribution, denunciation, & deterrence – not compensation (*Whiten*).
- Canda has rejected "categories-based" approach to punitive damages – in principle they are available in any type of private law action.
- Punitive damage award must be rationally related to objectives (retribution, denunciation, deterrence).
- Punitive damages avoid under-deterrence (licence-fee concern).
- In breach of contracts cases, independent actionable wrong required in addition to breach (ie: tortious conduct, breach of duty of good faith, breach of fiduciary duty).

NOMINAL DAMAGES

- Awards that signify rights violation.
- Awarded where P has established liability but not compensable loss.
- Not possible for some causes of action (ie: negligence).
- Can be awarded for breach of contract, trespass to land, defamation.

EXCLUSION OF LIABILITY

- Clauses that limit or exclude liability for particular forms of damages or damages caused in particular ways are in principle enforceable.
- At least in commercial context, no special principles of interpretation apply to exclusion of liability clauses (ie: no principle of strict interpretation) – give words their ordinary & grammatical meaning, considered in harmony w/ rest of contract & in light of their purpose & commercial context (*Dow*).
- Clause excluding liability. for "indirect" and "consequential" damages likely means no liability except for direct injury (*Dow v Nova*).

MITIGATION

- P generally unable to recover for losses that could reasonably have been avoided.
- Burden of establishing failure to mitigate lies w/ D, who must establish:
    - Opportunity to mitigate loss existed
    - P acted unreasonably in failing to take opportunity
- P seeking specific performance will not be found to have been under expectation to mitigate losses by entering into substitute transaction if P has "some fair, real, & substantial justification" or a "substantial and legitimate interest" in seeking specific performance (*Asamera, Southcott*).

GAIN-BASED AWARDS: TORT

- Where P is deprived of an incident of property as a result of tortious conduct of D, damages may be measured by the market value of the right wrongfully gained by D.
- Wrongful occupation of real property = damages based on market rental rate (mesne profits) (*Inverugie*).
    - Mesne profits available even if they exceed P's likely profits if P had maintained possession (*Inverugie*).
- Thief can be made to divest profits made from selling a stolen item (Weinrib).

GAIN-BASED AWARDS: FIDUCIARY DUTIES

- Where fiduciary breaches a duty owed to beneficiary, personal, monetary award is available based on loss suffered by beneficiary (compensation) OR gains realized by fiduciary (disgorgement).
- Weinrib: in case of both gain-based awards relating to property interests & gain-based awards relating to fiduciary duties, the *gain* is within the scope of the wrong (ie: the rights violation).
    - Like a property-owner, beneficiary is entitled to the profits.

GAIN-BASED AWARDS: BREACH OF CONTRACT

- Where damages are awarded in lieu of an injunction to enforce a covenant running w/ the land, these may be assessed in reference to D's profits (ie: 5% of profits: *Wrotham Park*).
- Disgorgement of profits may be awarded for breach of contract in exceptional cases where other remedies are inadequate (*Blake*).
- Factors to consider in awarding gain-based remedy:
    - Subject matter of contract, purpose of contractual provision, consequences of breach, & circumstances in which relief is being sought (*Blake; Atlantic Lottery*).
- Quasi-fiduciary nature of the duty is a factor justifying gain-based remedy in *Blake* but is rejected by majority in *Atlantic Lottery*.
- Majority in *Atlantic Lottery* limits gain-based awards to cases where they represent the objective value of the right in question.

GAIN-BASED PROPRIETARY AWARDS

- Gains realized by D in breach of fiduciary duty may give rise to equitable proprietary remedy: institutional constructive trust (*Reid; Soulos*).
- Test for institutional constructive trust (*Soulos*):
    - D must have been under equitable obligation in relation to activities giving rise to assets.
    - Assets must be shown to have resulted from deemed or actual agency activities of D in breach of equitable obligation to P.
    - P must show legitimate reason for seeking proprietary remedy: either personal or related to the need to ensure that others like D remain faithful to their duties.
    - Must be no factors which would render imposition of a CT unjust in all the circumstances of the case, ie: interests of intervening creditors must be protected.

INJUSTICES: UNJUST ENRICHMENT

- Based on a number of related traditional causes of action both legal & equitable in origin: *quantum meruit*, mistaken payment.
- Courts have developed general principles of UE:
  - Enrichment of D
  - Corresponding deprivation to P
  - Absence of juristic reason
- *Garland v Consumer's Gas*
- Absence of juristic reason: *Garland*
  - P must establish no juristic reason from established category: contract, donative intent, disposition of law, or "other valid common law, equitable, or statutory obligations"
  - If test satisfied burden shifts to D to show that there is another basis to deny recovery, based on 1) reasonable expectations of parties or 2) public policy considerations.
  - Valid juristic reason must explain D's enrichment AND P's deprivation.
- Remedies:
  - Monetary awards (based on value received or value survived).
  - Remedial CT (value survived)
  - Value received = market value of enrichment
  - Value survived = proportionate share of value of the assets that are the subject of UE
  - CT may be awarded where 1) sufficient direct & substantial connection between P's contributions & property and 2) a monetary award would be insufficient in circumstances (*Peter v Beblow*).
- Other remedies for injustices (?)
  - Division of property under matrimonial property legislation
  - Compensation for damages due to actions privileged by necessity (*Vincent v Lake Eerie*)
  - Damages in lieu of an injunction (*Miller v Jackson*).

Introduction

Traditional ways of categorizing remedies

- Each remedy was categorized on its own w/ specific rules on how to get rulings. No coherent theory of remedies.
- Other the past 300 years, people conceptualized backwards from the remedy.

- Example: if damages are available for trespass, that must mean that we have a substantive duty not to trespass.

Historical distinction of law vs equity in the context of remedies

- In law, we had writs and if the facts didn't fit the writ, no remedy was available.
- Eventually the court of Chancery was able to grant orders where justice required it to do so.
- In the 1870's law & equity merged procedurally (*Judicature Act*), but the substantive law was still distinct.
- Today, it can matter whether a remedy comes from law or equity – different principles can apply.
  - Examples: clean hands doctrine (equity), legal remedies are often 'as of right' while equitable remedies are often discretionary.

Equitable	**Legal**	**Other**
Specific performance – orders to fulfill contractual duties	Damages - ***except damages in lieu of specific relief (this is equitable).**	Division of matrimonial property – statutory.
Injunctions – orders to do / not do something.	Ejectment – recovery of possession of land (shows that not *all* legal remedies are monetary).	Remedies for aboriginal title claims – neither: did not originate in England.
Unjust enrichment.	Action in debt – recovery of a sum due.	
Constructive trusts.	Unjust enrichment.	

S. Smith, Rights-Threats, Wrongs & Injustices: The Common Law's Causes of Action

- Broad definition of remedies = sets right an undesirable state of affairs.
  - This is really the project of all of the law.
- Specific definition = judicial rulings that resolve disputes in private law, such as damages or injunctions.
- Distinction between substantive rules, remedies / rulings, & sanctions.
  - Substantive rules apply to parties & consist of rights & correlative duties that exist before the courts get involved.
    - Example: right to exclude and the corresponding duty of others not to trespass.
  - Rulings come from courts & are structured as commands. They are final rulings that do not involve a bilateral relationship (like substantive rules). What you "get" if you win.
    - This is an exercise of state / public power insofar as it is words coming from the court.
  - Sanctions are state coercion: "physical interference w/ an individual's person, property or liberty." They are the result of failing to comply w/ orders. They are properly the subject of judgment enforcement. Rulings are backed by the threat of sanctions (ie: contempt, seizure of property).
- Are rulings conceptually necessary (ie: can we go from substantive rules straight to sanctions)? Do they provide extra utility?
  - Criminal law works this way – breach of duty leads to immediate sanctions. So conceptually possible.
  - Smith argues no for private law.
    - Rulings conceptually provide another reason to do something – there is the duty associated w/ the substantive rule followed by an order / command from the court and disobeying the court is arguably a more serious kind of disobedience.
    - There is an added information dimension – parties are able to get clarification from the courts about how a law applies.
      - Example: one party sues for trespass; the other party agrees they have a duty not to trespass but disagrees about where the boundary line is – court clarifies this!
    - Efficiency allocation of resources: we want private parties to bear the cost of their disputes. Public resources are scarce & sanctions are expensive! Parties tend to

obey orders, so it makes more economic sense to have them as an intermediary between substantive rules & sanctions.
    - In the context of damages, there is also a communicative role that rulings play. The existence of the order changes the meaning in an important way.
        - Example: if the substantive rule was if you commit a battery, then you must pay damages automatically, this has the effect of giving a 'price' to the tort. It causes people to think that the wrong is committing the tort & not paying, rather than the wrong being the tort itself. Rulings confirm / symbolize the wrong, ie: you must pay nominal / punitive damages *because* you have committed the wrong.

- Framework for causes of action: rights-threats, wrongs, & injustices – cuts across historical boundaries above to link remedies to substantive rights.

Rights-threats	Wrongs	Injustices
- Apply where substantive private law right is threatened. - Example: injunction to stop ongoing trespass. - They are a response to a threat to a right – the remedy protects the right from the threat **going forward.**	- Damages respond to wrongs. - Wrongs are past violations of rights. - They are designed to undo the past violation – **backward-looking.** - Example: in the context of a negligent injury, $ is the redress.	- Applies to fix the **unfair allocation of resources.** - Example: unjust enrichment – mistaken payment. - Not a wrong *per se*. - Smith also includes matrimonial property legislation here – the breakdown of a marriage requires monetary equalization as a matter of fairness.

- Critical analysis – what is the value (or lack thereof) in working toward theoretical coherence? Is this a good project as compared to how things developed historically?

Yes	**No**
- Makes the law easier to understand (and follow) – having good reasons for a remedy or lack thereof (beyond "this is the way it developed historically) is compelling.	- Consistency is good – historical treatment of remedies can be relied upon. - Simplifying fails to account for the complexity of the real world – the historical distinctions work & perhaps there are no neat unifying principles. - Court resources are scarce & reconceptualizing takes time – ie: the time in court taken to argue about what remedy is appropriate based on a competing framework.

- Relationship between rulings & substantive rules:
    - Substantive rules justify judicial rulings.
        - Remedies *enforce* or *protect* R-T.
        - Remedies *redress* W.
        - Remedies fix unfair allocations of resources (I).
    - Remedies are **not** automatic however, and this is due to promoting effective use of the court's limited resources – upholding substantive rights is not the only consideration.
        - Explains why damages, not specific performance is the starting point for breach of contract – specific performance is expensive to enforce.

Defences

S. Smith, Rights, Wrongs, & Injustices: The Structure of Remedial Law

- Definition: court refuses a remedy despite cause of action being made out.

Substantive defence	**Remedial defence**

- Asserts no breach of substantive right / no 'wrong' committed. - Example: consent – battery not wrongful because claimant consented.	- No remedy available despite breach of substantive right / wrong committed for policy reasons. - Example: limitation period expiry – cause of action made out but no recovery b/c statutory time limit for bringing claim expired. o Concern about evidence expiring & defendants worrying about potential claims into perpetuity.

- Why would it matter whether a defence is substantive or remedial?
  - Example: *Statute of Frauds* says contracts for land that are not in writing are not enforceable.
    - This does not mean that there is no contract, but rather that the contract exists & is unenforceable in the courts.
      - This has practical implications for something like unjust enrichment – this cause of action requires a lack of juristic reason. Here there would be a juristic reason – there is a contract! It is just not enforceable as per the statute, so a party would not be able to recover for an unjust enrichment claim because the *Statute* is operating as a substantive defence – no legal rights because no lack of juristic reason.
- Compare limitation periods with **laches**:
  - Equitable defence.
  - Not a bright line rule like the limitations period legislation.
  - Partial defence – bars certain *types* of remedies such as specific performance.
  - *Manitoba Metis Federation Inc. v Canada (Attorney General),* 2013 SCC:
    - "The equitable doctrine of laches requires a claimant in equity to prosecute his claim **without undue delay**. It does not fix a **specific limit** but considers the circumstances of each case. In determining whether there has been a delay amounting to laches, the main considerations are **(1)** acquiescence on the claimant's part; and **(2)** any change of position that has occurred on D's part that arose from reasonable reliance on the claimant's acceptance of the status quo [**Lavoie: detrimental reliance]**."
  - Lavoie suggests there is a substantive element to this defence – that a claimant waiting too long amounts to them waiving their rights but adds that courts have been reluctant to view laches this way.

Crown immunity

- Historically Crown could not be sued w/out its permission.
- This has mostly been overruled by statute: Proceedings Against the Crown Act:
  - Injunctions:
    17(1) When in proceedings against the Crown any relief is sought that might, in proceedings between persons, be granted by way of injunction or specific performance, the court shall not, as against the Crown, grant an injunction or make an order for specific performance but may instead, make an order declaratory of the rights of the parties.
  - Recovery of property:
    18 In proceedings against the Crown in which the recovery of real or personal property is claimed, the court shall not make an order for its recovery or delivery but may, instead, make an order declaring that the claimant is entitled as against the Crown to the property claimed or to possession of it.
- Note that some remedies not available as against the Crown are both CL & equitable in origin.
- The rationale is that some types of remedies depend upon execution by the executive, ie: contempt.
  - This is difficult to enforce as it would involve the Crown threatening proceedings against itself – **this has a fundamentally remedial consideration at the core of it.**
- Declarations are as effective where the Crown is concerned b/c Crown is presumptively supposed to act honourably and will likely act in accordance w/ declarations, making injunctions etc. practically unnecessary.

- Note: declarations are a weird remedy with equitable origins – they are not really a command but rather a restatement / clarification of a substantive right.

Illegality

- *Ex turpi* principle: courts can refuse a remedy where the lawsuit touches on something illegal or is contrary to public policy.
- Can be substantive *or* remedial.
  - Substantive – courts will not insist on performance of a contract for a murder b/c there is no substantive duty to commit murder.
  - Remedial – courts bar recovery for losses arising from going to prison (*Zastowny*).
    - This would introduce inconsistency in the law by rebating part of the punishment ie: lost wages from time incarcerated.
    - Responsibility of D already established in criminal proceeding, cannot allow courts to challenge that in a civil proceeding
      - Similar to **res judicata** principle – bars re-litigation of issues.

Patel v Mirza, 2016 UKSC

Facts:
P gives D $$ intended to bet on price of shares using D's insider information (contract to commit **insider trading**). D's information did not come through and D promised to repay $ but did not. P sues in contract & unjust enrichment to recover his $.
Issue: Can P recover despite illegality ie: contracting to participate in insider trading?
Rule: Rationale for illegality is that it would be contrary to public interest to enforce a claim if to do so would (1) allow a person to profit from wrongdoing OR (2) would result in the law becoming incoherent (ie: condemning & condoning something). Factors to consider:

a) Underlying purpose of rule & whether purpose will be enhanced by denying claim;
b) Any other relevant public policy on which the denial of the claim may have an impact; and
c) Whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for criminal courts.
    a. Additional factors to consider include:
        i. The seriousness of the conduct.
        ii. Its centrality to the contract.
        iii. Whether it was intentional.
        iv. Whether there is a disparity in the parties' respective culpability.

Analysis:

- Court is not being asked to enforce illegal contract, the contract was merely connected to an illegal scheme.
- Ordering repayment is not illegal & will not further the illegal scheme.
- Ordering repayment also does not undermine the policies against insider trading.
- Preventing recovery would not be a just & proportionate response to the illegality.
  - P is only seeking to unwind the arrangement, <u>not profit from it.</u>

Conclusion: P wins, illegality defence fails.

Standard vs Rule

- Court in *Patel* comes up with a flexible test, or a standard to apply.
- Standards can be reviewed after the fact.
  - Example: Obligation to drive reasonably having regard to the circumstances & conditions.
- Rules can be understood in advance of conduct.
  - Example: Speed limit of 50 km / h.

Advantages of a standard / flexible test	**Disadvantages of standard / flexible test**
- Context specific. - Flexibility allows law to respond to unpredictable circumstances which can lead to a more just result.	- No predictability for parties. - Produces lack of consistency among similar facts.

Note: Court in *Patel* suggests that lack of certainty in this context (illegality) is not that big of a deal b/c the need for commercial certainty in illegal schemes is not that important.

Canadian approach

- *Hall* is leading case.
- Same policies as *Patel*, but narrower application:
  - Defence permitted where the award would allow actual profit.
    - Incidental benefit is ok: burglar suing for slip & fall on a property they intend to burgle – the damages for the injury are not profits.
  - Defence permitted where the remedy would undermine a penalty ordered under criminal law.
- Rule-based approach, not a standard.

Comparison of UK & Canadian approaches

- Which approach is better? Where might the distinction matter?
- Example: Two parties enter into a contract where one party is to commit a murder. But as in *Patel*, the murder does not happen & the would-be murdered simply keeps the $.
  - This is outside the parameter of the rule-based Canadian approach – no profit involved & no punishment involved, so the party may be able to recover under Canadian law.
  - UK approach might bar recovery on the basis of the seriousness of the crime.
  - Lavoie suggests that a Canadian court may not order recovery (for some sort of public policy reason) and that this shows that a rule-based approach is a bit illusory.

Limitations Act, RSA 2000, c L-12

3(1) Subject to subsections (1.1) & (1.2) & sections 3.1 & 11, if a claimant does not seek a remedial order w/in:

(a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
  (i) That the injury for which the claimant seeks a remedial order had occurred,
  (ii) That the injury was attributable to the conduct of D, and
  (iii) That the injury, assuming liability on the part of D, warrants bringing a proceeding, OR

(b) 10 years after the claim arose,

Whichever period expires first, D, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

(4) The limitation period provided by subsection (1)(a) does not apply where a claimant seeks a remedial order for possession of real property, including a remedial order under s 69 of the Law of Property Act.

(6) The re-entry of a claimant to real property in order to recover possession of that real property is effective only if it occurs prior to the end of the 10-year limitation period provided by ss (1)(b).

Rights-Threats: Injunctions

- Broadly, an order made against a person telling them to do / not to something **other** than pay $.
- Equitable remedy.
- Backed by threat of criminal sanctions.
- Scope for this course = final remedies, as opposed to interim / interlocutory injunctions.
- Injunctions can be classified in two different ways:

Based on the relationship between the order & the rights violation.	**Based on the content of the order**
Quia timet (protects against future violations).	Prohibitory / negative (an order not to do something – compliance does not require action).
Ordinary (protects against violations that have already happened or are ongoing).	Mandatory / positive (order to do something – compliance requires action). *Can be difficult to define & enforce.

Quia Timet Injunctions

- "Because he fears."
- Rare, granted before an injury to P's rights occurs.
- Helpful for Smith's classification of remedies b/c shows that some types of remedies belong in rights-threat category because they are 'forward-looking'.

Fletcher v Bealey, 1885 UK

Type of injunction: Quia timet + prohibitory.
Facts: D's industrial waste threatening P's paper mill business. P seeking injunction to stop D from storing waste by river. No injury to P has occurred yet.
Issue: Should a Quia Timet injunction be granted?
Rule:
Test for injunctions to stop future rights violations:

1. Proof of imminent danger.
2. Proof that damage will be very substantial.

*These should be considered as balancing degrees, ie: if danger is not that imminent, then damage must be very substantial to justify this type of remedy.
Analysis:

- Substantive rights at play: nuisance – unreasonable interference w/ use & enjoyment of land.
    - No dispute that if waste leaks into river, liability will ensue.
- Court finds that harm is possible, but not imminent enough – 10 years is too long.
- Court also finds even if damage occurs, it will be gradual, ie: not irreparable.

Conclusion: Court does not grant injunction. Instead, grants declaration (another equitable remedy) that P has right to bring an action if injury occurs OR if threat becomes more imminent.
Note: This case likely would have been decided differently today – the perception of the environmental harm might be different.

Mandatory Injunctions

Redland Bricks v Morris, 1970 UK

Type of injunction: Quia timet + mandatory
Facts: D's digging on their property withdraws support for P's land, which starts to slip.
Issue: Should court have granted a mandatory quia timet injunction?
Rule:

- Mandatory injunctions are discretionary & court must consider the following:
    - There must be a strong probability of grave damages w/out injunction.
    - It must be the case that damages will be an inadequate remedy for the loss.
    - D's behaviour:
        - If D was dishonest / unreasonable, the costs of compliance will not be a relevant consideration.
        - If D acted reasonably, court may take the costs of compliance into consideration.
    - If a mandatory injunction is issued, it must be clear.

Analysis:

- Substantive rights at play: neighbouring landowners owe a duty of lateral support based on strict liability.
- Other remedies granted were not controversial:
    - Damages for the land slippage that has already occurred + negative quia timet injunction that says: "no more digging that will cause slippage."
- The issue is the remedy is appropriate for the digging that has already happened but for which land slippage has not yet occurred.
    - TJ granted mandatory quia timet injunction to take all reasonable steps to stop potential land slippage.
        - Court says injunctive relief is not available "as of right" b/c it is equitable (ie: discretionary).
            - Court does note that some equitable remedies have hardened into rule: "as of course" (can't say "as of right" b/c not legal), so next best thing is "as of course."
                - This means that if P meets their case, court does not have to show any kind of discretion for things like cost to D.

        - Examples: *negative* injunctions protecting lateral right of support, trespass. Generally available for past or on-going violations of property rights.
    - **Note:** this discussion shows the legacy of the distinction between law & equity & how this can be overcome.
- Mandatory quia timet injunctions cannot be "as of course" & are always discretionary.
    - The infringement of liberty that arises as a result of the court ordering "do X or be sent to jail" must be taken seriously in contrast to a negative injunction that says, "don't do X that is (probably) illegal anyway or be sent to jail."
    - They are costly to supervise & enforce.
    - It can be difficult to define the content of the obligation compared to the negative injunction that is simply "don't dig."

- Court does not dispute probability of grave injury to P and the fact that damages will likely be insufficient.
- Court says b/c D acted reasonably (in consulting expert, etc.), we can take into account the cost to D [**note:** not relevant for liability (because this is a strict liability tort), but relevant for remedy].
- Court also says that the TJ's order failed to provide detailed instructions.
    - Normally, this would be provided by P's evidence, likely from an expert about what type of steps to take.

Conclusion: Court overrules mandatory quia timet injunction, but maintains that further land slippage will give rise to a new cause of action for P.
Note: this is the court going beyond the substantive rights of the parties when exploring the appropriate remedy & considering practical cost considerations, such as the excessive burden on D.

Ordinary Injunctions Against Trespass to Land

Woollerton & Wilson v Richard Costain, 1970 UK

Type of injunction: Ordinary + negative [note: normally available "as of course"].
- Why "as of course"?
    - Nominal (symbolic) damages would amount to a private expropriation power / license to trespass & this would not be an adequate remedy.
    - This is also a historical protectiveness of property rights at play.

Facts: D's involved in construction project & arm of crane swings over P's property [air space]. No tangible harm.
Issue: Should court grant injunction to P to stop D's crane activities?
Rule: Ordinary negative injunctions are available as of course.
Analysis:
- Substantive rights at play: trespass – note that substantive loss not required to establish liability,
- This is technically an interlocutory (before trial) injunction, but b/c there is no dispute about liability, the considerations are the same.
- Court agrees w/ general idea that the injunction should be available "as of course" despite there being no harm.
- Court refers to *Shelfer* decision for analysis of when damages would be an appropriate substitution for an injunction but distinguishes that case because it was a nuisance case.
- Court grants injunction but elects to delay the injunction until D's construction is complete.
    - The injunction would be very costly to D – they would have to use a completely different type of crane.
    - Ps were offered a non-trivial sum by D (settlement offer).
    - Value of air space is artificial here – only valuable to P b/c D needs it for construction project – they are not using the air space for anything else.
    - The trespass was inadvertent, ie: D did not plan to trespass.
        - Similar to *Redland Bricks*, court is considering the reasonableness of D's actions – had D's actions been deliberate, the injunction likely would have been immediate.

Conclusion: P wins, but sort of loses because D gets what they want (to finish the construction project).

Note: Is this the right result? Would no injunction at all have been better? The court's reasoning here creates the potential for a perverse incentive – if D asks for permission, P says no, & then D trespasses, there will be an immediate injunction. But this case seems to say that if D knows they will be trespassing & pretends not to know and then the trespass appears inadvertent, they can avoid the injunction.

John Trenberth v Nat'l Westminster, 1979 UK

Type of injunction: Ordinary + negative
Facts: 2 adjacent buildings, D's building in in disrepair & they are required to fix. Need access to P's property to complete repair. D asks P for permission & P says no. D trespasses anyway.
Issue: Is it appropriate to grant injunction?
Rule: A deliberate trespass will lead to an injunction almost automatically ("as of course").
Analysis:

- Distinguished from *Woollerton*, where there was bad faith on the part of P (ie: they wanted something from D when they said no to trespass).
- Court notes that *Woollerton* was probably wrongly decided, but if it was not, it can also be distinguished from these facts b/c D's trespass in *Woollerton* was inadvertent / not contemplated, while on these facts, the trespass was deliberate – D asked for permission & proceeded w/out the permission.

Conclusion: P wins, injunction granted.
Note: This perverts the idea that we should follow the law & ask for permission before trespassing if it is the case that an injunction will follow vs. not asking at all & not getting an injunction.

Trespass conclusions

- Direct, intentional, physical intrusion on another's property.
- Injunctions to stop ongoing trespass are available "as of course" typically.
- Court retains some residual discretion & there is ambiguity about whether "as of right" follows where D is acting in good faith or it would be extremely costly to D to comply w/ injunction – see *Woollerton* for both of these analyses.

Ordinary Injunctions to Prevent a Nuisance

- Nuisance = unreasonable interference w/ use & enjoyment of one's property, ie: smells, noises, vibrations.

Shelfer v City of London Electric Lighting Co – not assigned, traditional rule for nuisance

Where injunction would be appropriate to stop nuisance, **damages will be sufficient substitute where**:

1. The injury to P's legal rights is small.
2. The injury to P's legal rights is capable of being estimated in $.
3. The injury to P's legal rights is one which can be adequately compensated by a small $ payment.
4. The case is one in which it would be oppressive to D to grant injunction.

Miller v Jackson, 1977 CA

Note: beginning of the trend of expanding court's discretion to award damages instead of an injunction.
Facts: Cricket case. Cricket field where town has played cricket for 70+ years. New housing development being field. Cricket balls go over fence into P's property 6-9 times per year. P wants injunction to stop cricket from being played. Note: not a trespass case b/c balls going over fence is <u>not intentional</u>.
Issue: Should injunction be granted?
Rule: Traditionally, there is presumption of an injunction in nuisance cases, unless *Shelfer* applies.
Analysis – Lord Denning MR:

- *Shelfer* does not apply – there is no $ that is sufficient to P for them to not be able to use their yard.
- Lord Denning is reluctant to even call this a nuisance, but awards damages anyway.
- Says that P's choice to buy a home behind a cricket field matters.
- Balancing test between public interest of cricket field & private interest of P to use their yard.
- No injunction.

Analysis – Cumming Bruce LJ:

- This is definitely a nuisance.

- Injunctions are discretionary, however.
- Strong public interest reasons for no injunction – cricket field has high value for town.
- P also ought to have known of cricket risks when they purchased the property.

Conclusion: P loses, no injunction. Damages award instead.

Boomer v Atlantic Cement, 1970 NY CA

Facts: Cement plant bothering residential community next to it. Was built there after residential community established.
Issue: Should injunction be granted?
Rule: Economic analysis matters.
Analysis:

- At trial, court finds a nuisance. Awards damages (based on loss suffered prior to trial), but no injunction.
- Granting a negative injunction to stop D from emitting smoke, etc. would require the plant to close – no other way to stop emission currently available.
- Major economic + public policy consequences to granting injunction – would put 300 people out of work + an already built plant would sit being put to no use.
    - Note this kind of cost-benefit analysis did not factor into court's discretionary considerations.
    - Granting the injunction would create public policy & courts arguably should not do that.

Conclusion: P wins (sort of), injunction granted, but conditionally upon D paying $, injunction will be stayed.
Dissent:

- This is granting a private expropriation right – D gets private entitlement to buy P's right to quiet enjoyment. State Constitution says only gov't can do this for a public good.
- Amounts to licensing a continuing wrong w/out an effective remedy.
- Distinguishes *Miller* – the cement plant came after the residential community and did not *have* to be built there.

Notes:

- Absent court's intervention, it is possible for D to approach every P & bargain to purchase their rights. But this would likely entail high transaction costs (200+ Ps means high likelihood of some hold outs). It is simply more efficient for the court to intervene here to require the mandatory transfer of rights for an objectively determined sum of $).
- Majority here is arguably engaged in some judicial activism in favour of industry (+ air pollution). The traditional CL approach to nuisance would actually favour environmental protection.

Lawrence v Fen Tigers Ltd., 2014 UKSC

Facts: Speedway causing nuisance to nearby property owner. Speedway was authorized by local planning authority.
Issue: Should an injunction be granted? Damages in lieu of injunction?
Rule:

- Where nuisance is proven, P is prima facie entitled to an injunction, damages will be at the court's discretion.
- Burden is on D to establish that damages would be more appropriate than an injunction.
- **Ultimately the question of injunction vs damages will be a <u>balancing test</u>.**

Analysis:

- There are factors that should guide discretion.
    - *Shelfer* is not the test now, but the indicia in *Shelfer* matter – injury to P is small, capable of being estimated in $, can be adequately compensated by $, & would be oppressive to D to grant injunction.
    - Conduct of parties will be relevant, ie: where D has had a high-handed disregard for P's interests.
    - Public interest – the effects of stopping D's activities will also be relevant.
        - Wasted resources.
        - Weighed against possible nuisance to many adjacent property owners.
        - **Planning permission.**

- Strong support for activity being in public interest.
- Distinguish between general zoning (ie: doing something that just so happens to not be prohibited) & a planning authority actually *considering* the specific activity in question.

Conclusion: Injunction is restored – D cannot make noise above a certain decibel level.

Note:

- The concept of a balancing test leads to uncertainty in the law, because many interests are at stake.
- The problem is that nuisance is very broad & captures a lot of conduct, so it may be problematic to try & lay down hard & fast rules.
- Injunctive relief "as of course" is receding in nuisance cases in modernity b/c much of the conduct that would be captured by nuisance is now the domain of public law, ie: environmental regulation statutes.

Note 2: court on damages in obiter

- Damages are normally retrospective.
- Declining an injunction means the nature of damages changes – becomes prospective b/c it is considering how to value the permanent reallocation of rights. A few options:
  - Consider change in property value (conventional).
  - Consider the subjective worth to P (courts are reluctant to do this).
  - Consider the lost leverage to P, or the benefit to D of not suffering an injunction – what might they have paid in order to not have the injunction / profit (controversial).

Economic Analysis of Injunctions

Calabresi & Melamed, Property Rules, Liability Rules, & Inalienability: One View of the Cathedral

- Property vs. liability rules.
- Property rules = entitlements protected by requirement of consent for violation – this is what courts protect.
  - Examples: trespass (presumptive injunction) & protections against infringements to bodily integrity.
- Liability rules = entitlements can be violated by paying $, no consent required.
  - Examples: negligence (always damages) & property rights re: gov't (no consent required; gov't can just pay $ to take).
- We can say that pre-*Boomer*, P's entitlement was protected by a property rule (the entitlement to be free from pollution was protected by the legal system).
- Post-*Boomer*, we can see a liability rule emerge – D can violate P's rights if they pay an objective value to P.
- Lavoie suggests that Calabresi & Melamed collapse substantive & remedial law into one consideration: what is the court going to do to you? Start w/ what the court will do & reason back.
  - Where a liability rule exists, you can either abide by the rule, or pay $ - the remedy is built into the duty.
  - This is simpler, but it is also reductive & ignores / doesn't respect judicial reasoning.
- Calabresi & Melamed not suggesting either type of rule is better, rather they are undertaking an analysis of costs / benefits that make one preferable over the other in particular situations.
  - Economic efficiency:
    - Look at society as a whole & weigh the cost of entitlements in order to determine what kind of rules there should be.
      - Economic efficiency says want the rules that have the least amount of cost for the most value.
        - Example: cost / benefit of keeping / closing cement plant.
    - Recall – Coase says that where there are no transaction costs, entitlements should go to whoever values them the most.
      - But we do not have a world w/out transaction costs, so we need property / liability rules to facilitate determining who values entitlement the most.
    - Property rules make sense where:
      - There are low transaction costs b/c consent is required.
      - There is difficulty valuing an entitlement.

        - Example: where it would be hard for a court to assign value because of something like a subjective element – such as the $ value associated w/ being free from pollution.
    - Liability rules make sense where:
        - There are high transaction costs – low confidence that parties will be able to come together to make a deal (ie: *Boomer*).
        - It is easy to assess the objective value of the entitlement, ie: where a market value can be identified.

Categories – who has the right & how is it protected?

Rule 1: right to be free from pollution, protected by a property rule.
- This would entitle a property owner to obtain an injunction.
- The only way for the factory to continue its operation would be to make a deal with every homeowner.

Rule 2: right to be free from pollution, protected by a liability rule.
- This entitles the factory owner to violate the right provided they pay damages (*Boomer*).

Rule 3: right to pollute, protected by property rule.
- Would be no nuisance here, technically.
- The property owners would have to make a deal w/ factory owner to compensate him in exchange for not polluting.

Rule 4: right to pollute, protected by liability rule.
- Factory entitled to pollute, will have to stop if property owners pay an objectively determined amount.

- Each rule *can* make sense in a specific cost-benefit analysis.
- This is a version of utilitarianism / consequentialism – conceives of a bilateral causation concept of harm – both parties are harming one another simply by virtue of being in proximity to one another.
    - We don't normally think of harms this way – we consider that there are some rights that are worthy of being protected and inherently ought to be protected by the legal system.
- This framework leads to nuisance being decided on a case-by-case basis.
    - Leads to unpredictability & inconsistency.
    - Drain on court resources b/c everything will be litigated.
    - Presumes court will be able to undertake this complex economic analysis correctly in every case.
        - Therefore, another way to think about this in this economic context is that because of this potential inefficiency problem, maybe Rule 1 makes the most economic sense for nuisance cases…
        - The corollary is to say no, this economic framework is not the way we want to think about law at all…

Delivery Up of Goods

- Injunction for goods to be delivered to owner.
- Traditional personal property causes of action:
    - Conversion –
        - Where D acts or intends something inconsistent w/ P's right of ownership (ie: acting as owner).
        - Remedy = damages at the time of the conversion.
    - Detinue –
        - Where P has a present right to property, demands it, & D refuses.
        - Remedy = damages & discretionary injunctive relief.
- Counter-intuitive idea that if someone has your stuff, the legal system is not designed / does not always work to have that stuff returned to you.

Cohen v Roche, 1927

Facts: P buys chairs at an auction, plans to re-sell them. They are ordinary. D does not deliver chairs. P sues in breach of contract & detinue.
Issue: What remedy is P entitled to?
Rule: Delivery up only appropriate when damages inadequate.

Analysis:
- Remedy for breach of contract is specific performance.
    - Requires damages to be inadequate, likely not the case here.
    - Note: the fact that title passes from D to P does not affect theoretical availability of this remedy.
- Remedy for detinue is damages, or delivery up (at court's discretion).
    - What guides this discretion?
        - Still a question of damages being inadequate.
        - Where the goods are ordinary articles of commerce / fungible commodities, damages are adequate.
- P not entitled to a different remedy for suing under a different cause of action in this case.

Conclusion: P wins, gets damages, not chairs.
Note: is this a private right of expropriation? Ok to take people's things if you pay them?
Note 2:
- Why would court do this?
    - Efficiency / administration of justice – ordering people to do things is difficult & expensive to enforce.
    - People's rights are still protected, ie: they get damages which allows them to replace goods.
    - Note, the further deterrent is that taking things that do not belong to you constitutes a crime…

Alberta Rules of Court ss 6.48 & 6.49 – replevin

- Ex parte order to turn over goods pending resolution of a dispute.
- Very useful in modern commercial disputes – provides a way for a party to get their goods back where detinue is not available.

Rights-Threats: Ejectment & Award of a Sum Due Under a Contract

Ejectment

- Historically a remedy in **law.**
- An order for D to do something.

McPhail v Persons Unknown, 1973

Facts: Squatters on property who had no right to be on property. Acknowledged but asked court for four-week delay on ejectment order.
Issue: Can court delay ejectment order?
Rule: Ejectment as a remedy is available as of right w/ no discretion to delay.
Analysis:
- Self-help is available b/c there is a legal privilege to remove the trespassers w/ force.
    - The judicial remedy available via the courts cannot be slower than the self-help remedy – would make P worse off for having pursued the matter in court.

Conclusion: Order granted to P w/ no delay for D.
Note: Ejectment protects possession of property just like trespass, except with trespass injunctions are available as of course & ejectment is available as of right. Calabresi would say possession of land is protected by property rules, not liability rules. Contrast this w/ delivery up (see below) – the remedy is discretionary for chattels.

Why are land and chattels treated differently?

- Land was historically important for social status & substantive rights available to a person.
    - But we do not accord this same social status to land anymore.
- Land is more likely to be unique / is more likely to be valued b/c it is unique.
    - If this is the case, we would just apply detinue principles, ie: where the land is truly unique to the claimant, grant specific relief, otherwise just damages.
- Psychological security.
- Administrative efficiency – it is easier to find the land that is subject to a dispute.

- Rules vs standards debate – maybe it is just easier to have a rule re: land?

Award of a sum due under a contract – DEBT

S. Smith, excerpt on 'Action for an Agreed Sum' from Atiyah's Introduction to the Law of Contracts

- CL remedy.
- Contrast w/ damages – asking court to right a wrong.
- Here, we are asking the court to enforce an obligation that already exists / asking the court to make D fulfil their substantive duty.
- P only needs to establish that the sum is due & has not been paid.

Sale of Goods Act, s 48(1)

Provides a statutory cause of action.

White and Carter (Councils) Ltd. v McGregor, 1962 UK

Facts: P & D enter into advertising contract. D repudiates, P rejects repudiation. Contract lives on. P performs & says sum is now due under contract.
Issue: If one party repudiates, can the other nonetheless perform & then sue in an action for debt?
Rule: A party can perform unilaterally & insist on being paid where there is **legitimate interest** in performing.
Analysis:

- Traditional CL contract law says if A repudiates, B can accept & sue for damages OR reject repudiation & insist on performance.
- Problem: this is economically inefficient – it is a waste of resources & no one benefits.
    - Example of court identifying a policy consideration beyond the interests of the parties.

Conclusion: P can insist on performance b/c they have a legitimate interest in performance (ie: advertising their business to potential customers)
Note: Most contracts require cooperation between parties for performance (ie: contract for A to renovate B's home), so this problem does not normally arise & damages is the only remedy available.

Award of a sum due under a contract – STIPULATED DAMAGES aka liquidated damages

- Contracts sometimes have a clause that indicates what happens in the event of a breach – this is not really damages, rather, it is a sum due pursuant to the terms of the contract.

Super Save Disposal (Alberta) Ltd. v Shenwei Enterprises Ltd., 2017 ABQB

Facts: Contract for commercial waste disposal. P misses a few pickup appointments, D repudiates. P accepts repudiation & says liquidated damages clause applies – requires D to pay duration of contract while not receiving service.
Issue: Is this clause enforceable or is it punitive in nature?
Rule: On its face, a clause that demands payment of a party's gross income is punitive. Note however, this is not about the amount – it can be high still w/out being punitive.
Analysis:

- The amount is excessive b/c D is not getting the service anymore & still being expected to pay the full amount.
- Baseline = expectation damages – putting P into the position they would be in had the contract been performed.
    - Problem is that P would have incurred costs performing under contract & these stipulated damages put them in a better position.
- There was no evidence before the court of a difference in gross & net income.
    - P argued that they had many customers & thus the marginal cost of having one more customer is small.
        - Court rejects this – distinguishes between qualitative & quantitative differences.
            - Unfair to permit gross income recovery whether or not there is a difference.

Conclusion: D wins.
Note: In the UK, the test has really come to whether or not the 'purpose' of the clause is to punish.

How to make sense of this interference w/ traditional contract law

- This is a rare principle in contract law where a court refuses to enforce the clause even where the parties are sophisticated notwithstanding no unconscionability, etc.
- Rationale = a punitive purpose is illegitimate as between private parties.
- Rationale = parties have not properly turned their minds to what happens when a breach occurs.
- Rationale = damages are the court's jurisdiction – these clauses function to oust court's jurisdiction inappropriately.
- Counterpoint: these types of clauses can foster business relations ie: proving commitment to performing / establishing reliability. Alternatively, the product can be very important, and the parties want to emphasize performance.

S. Smith, excerpt of 'Agreed Damages Clauses' from Atiyah's Introduction to the Law of Contract

- One restriction on stipulated damages clauses is that they cannot be **punitive**.
    - This is a mandatory rule of law that curtails freedom of contract.
- The classic test is whether the clause contains a genuine pre-estimate of damages – if it is not, then it is presumptively punitive.
- Five principles for the analysis:
    - If the sum due is greater than the likely loss in the event of a breach, it is *probably* punitive.
    - If the sum is due for various breaches of varying significance, it is probably a penalty.
    - If there is a sum payable w/ an additional sum due later on default (like a late fee), the additional sum is likely a penalty.
    - If damages are difficult to assess, this does **not** necessarily mean that the clause is punitive – this situation just highlights a need for a stipulated damages clause.
    - Labelling the clause as a "stipulated damages clause" does not make it so – the court decides & parties cannot contract out of this principle.

Rights-Threats: Specific Performance

Introduction to specific performance

S. Smith, excerpt on 'Specific Performance and Injunctions' from Atiyah's Introduction to the Law of Contracts

- Order to perform contractual obligation.
- Sometimes the word 'injunction' is used – can be understood as a *type* of injunction.
- Principle remedies in contract law are damages or specific performance.
    - Damages are the default remedy, which is counterintuitive to many.
    - SP is the default in civil law systems typically.
- SP is equitable & discretionary, guided by 3 main principles:
    - Inadequacy of damages.
    - No SP for specific performance
    - No SP where performance would be difficult to supervise.

Inadequacy of damages

- Driven by uniqueness of item.
    - Includes considering what buyer wants to do w/ the property.
- The purpose of damages is to be a type of substitute specific performance, though the court does not actually care what a claimant does w/ damages.
- Damages can be seen as inadequate where there is difficulty in actually assessing what the damages are, ie: lack of market price.
- Damages are designed to make a party as well off w/ damages as they would have been w/ the performance of the contract – this is easy enough where the market price is known.
- Where there is no market price, awarding damages is tricky b/c there is a risk that the damages won't actually compensate the claimant.

    - We could ask the claimant what the value is, but this subjective valuation cannot be trusted.
    - Ordering SP ensures that the claimant will be as well off as they would have been had the contract been performed.
    - SP also makes sense where putting a dollar value on something is inappropriate, ie: a family heirloom.

Personal service

- This principle applies even where damages would be inadequate.
- Order people to perform on threat of imprisonment is too much like servitude for the courts.
    - Counterpoint: they would be getting compensated & really it is forcing someone to do what they already undertook to do.
- Other problems: hard to supervise, issues regarding quality – leads to repeat conflict / litigation, which goes to efficiency / use of judicial resources.

SP difficult to supervise

- Where SP is ordered and a party refuses, this requires initiating contempt proceedings – use of state & court resources.
- Counterpoint: damages can be very difficult / complicated to calculate – also a use of court resources.

Efficient breach, or why damages sometimes make sense

- Where breaching a contract is more valuable than performance, to all parties – everyone would be as well off or better than if contract had been performed.
- Counterpoint: if SP were available, contact could be enforced & the buyer could then enter a contract w/ the third party that stood to benefit from the breach in the first place. Or the seller could simply pay the buyer to not seek specific performance.
    - Both of these mean potentially higher transaction costs (b/c more deals required), but that needs to weighed against the risk that the court will get the damages wrong.

Another way to think about damages

- What is the wrong we are responding to? Breaking a legally binding promise.
- Corrective justice paradigm – the remedy should correct the moral imbalance – making P whole.
    - Consider whether damages would be adequate. If so, SP & damages are equivocal. Where damages would not be adequate, righting the moral wrong would require SP.

Falcke v Grey, 1859 UK

Facts: Contract for sale of goods. D's lawyer (under)values goods. D sells goods to someone else for more $. P is seeking specific performance.
Issue: Is specific performance available to P?
Rule: SP is available where damages are inadequate for land & chattels.
Analysis:

- P is arguing he has an equitable interest in the goods b/c the third-party purchaser was not a BFPV.
- Court finds that goods are unique & that damages would not be adequate.
    - However, there is an equitable bar issue here: P knew the goods were worth more – evidence of bad faith.
    - There was also no evidence that third-party purchaser knew of P's contract w/ D.

Conclusion: D wins, no specific performance.

Sale of Land

- Traditionally, SP was available for land 'as of course' & damages were presumptively inadequate.
- Law in Canada now from *Semelhago* is that P must prove that damages are inadequate & that land is meaningfully unique.

Semelhago v Paramadevan, 1996 SCC

Facts: In a volatile real estate market, S & P enter into contract for sale of P's land. P reneges. S was going to sell his house to finance this sale. After P reneges, S does not sell his house. Both houses increase in value significantly. S wants SP or **damages in lieu.**
Note: damages in lieu are a pre-fusion of equity & law remedy. Permitted courts of equity to award damages. Today, distinction between damages in lieu & CL damages matters.
Issue: What is the relevant date at which to calculate damages in lieu?

Rule: Damages in lieu calculated by value at time of trial. But in obiter: **SP is only available for land where the land in question is demonstrably unique.**
Analysis:

- Traditional contract law says where there is breach, there are two options for a claimant:
    - Accept repudiation & sue for damages. Here, the date of breach matters for calculating damages. After contract is dead, P is expected to limit their losses, ie: buying a different house.
    - Refuse repudiation & sue for SP. Here, the date of the trial matters for calculating damages.
        - Small note: this can be exacerbated by delays in justice system.
- Court determines that damages in lieu is meant to be just like SP / the equivalent of getting the house **at trial.**
    - P is thus entitled to the benefit of the increase in value at trial.
        - This can be good or bad depending on the state of the housing market.
- This allows P to sort of 'game the system' in a way by changing the nature of the damages.
- Presumption that land is unique is displaced, SP no longer available as of course unless P can show that land is unique / has special characteristics as opposed to other land available.

Bruce Ziff, "Death to Semelhago"

- P must show why they want / need that specific property as compared to a substitute.
    - Requires examining P's specific purposes for the land.
- This change in the law makes it difficult for parties to predict outcomes and makes litigation expensive.
    - SP for land is simple – transfer of title – not like other SP obligations.
        - Damages can be complex – what substitutes are available, questions about market value, duty to mitigate, etc.
- **Lavoie:** SP for land makes the law regarding law consistent w/ other kinds of remedies for land, ie: presumptive injunctions for trespass, etc.

Other non-personal obligations 'to do'

- Obligations other than deliver goods / land.
- Positive obligations that do not need to be performed by D *personally*.

Tanenbaum v WJ Bell Paper Co Ltd., 1956

Facts: D performs obligation under contract poorly, P seeks specific performance.
Issue: Can the court order SP – does the exception apply?
Rule: Presumption against orders to build or repair. **Exceptions:** (1) where damages are inadequate, (2) the performance is clearly set out / well-defined by contract, & (3) the contract must be one where D gained possession of the land. **Note:** the rationale for (3) is sketchy, but the best explanation is that P cannot use the land anymore, so they cannot do the required work themselves b/c it would be a trespass.
Analysis:

- Court finds the performance to be well-defined enough – length / dimensions / etc. are set out in contract.
- Inadequacy of damages – water main would be P's only source of water – cannot operate his business w/out this.
    - There is too much uncertainty in trying to calculate what this loss would be.
    - **Note:** distinction between inadequacy of damages *in principle* and *practically speaking.* Here, damages are practically too difficult to calculate. As opposed to something P finds invaluable – this would be considered inadequacy of damages in principle.

Conclusion: Order granted – very detailed, drawn from the terms of the contract in order to limit possibility for conflict.

Co-Operative Insurance Society Ltd. v Argyll Stores Ltd., 1998 HL

Facts: D is anchor tenant, in contract w/ P to carry on business as a grocery store. D closes store, P sues, wants SP.
Issue: Is this an instance where SP can be ordered?
Rule: Court will not grant SP where it is unclear what SP would look like.
Analysis:

- Trial judge refuses SP, CA grants.
- HL says no SP.
- Issue is not adequacy of damages – they are probably inadequate.
- Real issue is it is not clear what SP looks like – very ambiguous.
- Forcing D to operate business satisfactorily on threat of contempt is not a satisfactory result.
- Cost to D might substantially outweigh benefit to P.
    - Might require D to operate business at a loss.
    - Might be a situation where efficient breach makes sense.

Conclusion: no order.
Note: Distinction between two types of obligations – carry on an activity & achieving a result. Hard to conceptualize what the bare minimum of carrying on an activity would look like – not a good scenario for SP. Achieving a result is more susceptible to an order for SP – it is possible to define the result w/ some precision.

Personal obligations 'to do'

Lumley v Wagner, 1852 UK

Facts: Contract between P & D for D to perform at P's theatre & to not perform at other theatres. D does not perform; P wants an injunction to force D to perform.
Issue: Appropriate to order SP injunction?
Rule: No SP for personal service.
Analysis:
- Court enforces injunction to not perform at other theatres but will not order D to perform.
- Order to not perform at other theatres may lead D to perform for P, but court does not have an issue w/ this.
    - Not a prohibited personal service obligation per se.

Conclusion: Court orders D to not perform at other theatres.

Obligations 'not to do'

Warner Brothers Pictures Incorporated v Nelson, 1937 UK

Facts: D in contract w/ P, D reneges. It was an exclusive contract for performance with an undertaking to not act for others.
Issue: Appropriate to order SP injunction?
Rule: No SP for personal service – especially if an order not to do something amounts to an order to do something.
Analysis:
- P wants an order saying contract is valid, SP order to enforce non-compete clause, & damages.
- Court says framing SP as a negative order does not necessarily make it not a personal service obligation.
    - If the result of the order is to leave D w/ no reasonable option but to perform for P, then the obligation amounts to a positive obligation (do nothing vs perform personal service).
- D argues that if non-compete is enforced, she would have to work for less $ elsewhere.
    - Court does not accept this argument; it is not the same as being forced to be idle / do nothing.
- There was an SP clause in the contract – court will take this into account, but it will not be determinative.
    - Private parties cannot make remedies that are binding on the court – this amounts to private actors deciding how court resources will be used.
        - We cannot permit this b/c the courts are a state power – a public body w/ public resources.

Conclusion: Negative injunction granted – D cannot act in England for 6 years – court uses discretion to enforce the injunction only for the length of the contract.
Note: This is good law in Canada. Courts are reluctant to enforce non-compete clauses unless the P employer has a particular interest, ie: the D employee has confidential information or special skills.

Equitable Defences / Bars

- Principles that apply where an equitable remedy is sought.
    - Different from defences such as illegality that function to bar both equitable & legal claims.
- Discretionary, just like equitable remedies.
    - Different principles that apply to allow D to negate the equitable remedies that might be available to P.
    - Related to what would be "unjust."
- Examples:
    - Clean hands – if P dishonest in relation to the transaction, this can negate the equitable relief available to P.
    - Laches / unreasonable delay – where D relied upon P's non-exercise of their rights or where P acquiesced to the state of affairs.

Falcke v Grey [as above]

Analysis:

- P entitled to *some* remedy, just not SP.
- Price was inadequate.
    - Court does not normally care about adequacy of price but can matter for equitable remedies.
    - Bar is high for this kind of equitable bar; typically coupled w/ something like clean hands.
- Clean hands.
    - P acted dishonestly – knew the price was mistaken.

Note: This case may be decided differently today – the background assumption operating in the case is about D's inability to look out for her own interests.

Riches v Burns, 1924 ON

Facts: P buys parcel of land from D. D also obtained an option under seal [**ie: enforceable w/out consideration**]to purchase some land from P. Option was to continue until D builds upon or sells land – supposed to give P 3 days' notice & P must write to indicate he wants to exercise his option. D sends notice that he is going to sell, P does not respond, D does not sell. Consideration documented was $1, but never actually paid / intended to be paid.

Issue: Any bars to SP?

Analysis:

- The absence of consideration is a problem for SP.
    - The formality of a seal does not overcome the fact that in substance there is no consideration.
- Equity will not assist a volunteer.
    - Court exercises discretion to decline to enforce SP of contract in the absence of consideration.
    - Damages may still be available, just not SP.
- Passage of time / laches.
    - P waited too long to be properly entitled to SP.

Patel v Ali, 1984 - hardship

Facts: D1 & D2 jointly own a home, each has a spouse & they all live in the home. They contracted to sell home to P. D1's husband was bankrupt, trustee wanted to restrain the sale. Bankruptcy court ordered sale to go ahead. P want SP, cannot serve D2 b/c they have left the country. D1 still in house, disabled, w/ kids, husband in jail. P wants specific performance, D1 argues would cause too much hardship.

Issue: When is the equitable bar of hardship available?

Analysis:

- This is a jurisdiction where SP for land is available as of course (ie: not Canada [*Semelhago*]).
- Concern that if P does not get SP, there will not be $ for damages – this is also unjust.
    - This is remedied by the fact that there was evidence that members of the community were willing to put up $ to pay a damages award.
- P argues that hardship is only available where it is due to P or was present at time of contract or where it relates to the subject matter of the contract.

- Court says no – the bar is high. Parties take on the risk of hardship when they enter into contracts.
    - But there was an extreme delay here (due to other D disappearing) such that D is not really doing what she bargained for – there has been a total change of circumstances during the delay.

Conclusion: No SP. Court prepares creative remedy: D pays $ into court to show that damages are adequate so the SP order can be stayed.

Damages in lieu of specific relief

- By operation of Lord Cairn's Act, courts can award damages in lieu of specific relief.
- This was necessary so that the court of equity could grant monetary relief.
    - Otherwise, parties denied relief in court of chancery would have to go back to court of law to try & get monetary damages.

Cohen v Roche [as above]
Judicature Act, s 19

- AB equivalent of Lord Cairn's Act.
- What is ongoing significance if we don't have the split between law and equity anymore?
    - Some kinds of damages in lieu of specific relief do not have a CL equivalent.
        - Contrast: CL damages for an injury / wrong that already happened – this is a CL damage vs damages for permanent losses of right (*Boomer, Lawrence*).
            - The latter is not a CL damage – it is the result of the court refusing an injunction & anticipating a future injury.

Reflections on Rights-Threats

S. Smith, Form and Substance in Equitable Remedies

Can judicial remedies be property understood without reference to which court historically granted the remedy? Consider arguments for and against with reference to course material.

Is it a problem if our remedial law is historically contingent, ie: if it can only really be understood in light of the historical development of English courts? If so, why? If not, why not?

Should remedies that vindicate the rights of a plaintiff ever be discretionary? Consider arguments for and against, with reference to course material.

Why do courts issue rulings?

What is the appropriate role for economic efficiency in understanding the law of remedies?

Wrongs: Damages

- Traditionally legal remedy.
- Compensatory damages can be divided into direct injury & consequential loss.
- Available in torts & contracts.

Direct Injury

Stevens, Damages & the Right to Performance

- Not being made worse off (factually) **does not** disentitle you to a remedy for a breach of contract.
- Direct injury is about compensating / providing damages based on the right violation (in itself).
    - The **objective value** of the right that was violated.
    - Typically measured by the difference in value between what was promised & what P actually got.
- Consequential loss is about compensating P for how they were factually made worse off via a chain of causation.

- Example to illustrate the conceptual difference & how they overlap: damage to vehicle that takes one month to repair.
    - D is obviously liable to the cost to repair the vehicle.
    - If P needs to rent a vehicle while their vehicle is being repaired, this is compensable via consequential loss.
    - If P decides to walk everywhere & enjoys it (ie: is not really worse off by not having a car), the compensation would be for direct injury (not consequential loss), though the damages calculation would still involve the cost of renting a vehicle.

Mediana v Comet (The Mediana), 1900-03 HL – torts context

Facts: M damages C, owners sue for repairs + the loss of the time they could not use C while being repaired. C's owners have a spare lightship they are using in the meantime, so owners of M argue they do not need to pay for the loss of the time C could not be used b/c there was no real *loss* to owners of C.
Issue: Can Ps be compensated for being deprived of the use of their vessel?
Rule: Loss of right is compensable even if no consequential loss.
Analysis:
- No dispute that cost of repairing the ship is compensable.
- Yes, despite not being out-of-pocket for this loss, they have been deprived of a right they otherwise would have had but for D's conduct.
- The best measure of these damages is market value, ie: the cost of renting a replacement ship.

Conclusion: P wins.

Williams Bros v Ed T Agius Ltd., 1914-15 HL – contracts context

Facts: Respondents sell cargoes of coal to Appellants. Appellants sold one cargo of the coal to a third party. Respondents breach the contract & Appellants sue for damages. Market price of coal at breach was higher than what Appellants paid under original contract.
Issue: How to value damages? Discount the damages to the amount Ps were reselling it for or go w/ market price?
Rule: With respect to direct injury, what actually happened is not relevant for the analysis.
Analysis:
- At the time of the breach, P was getting the coal for cheaper than market value.
- *Traditional expectation damages* – absent the resale contract, measuring damages would be what it would cost to buy coal on the market.
    - Market price is the indicator for goods – in order to make P as well off as they would be had the contract been performed. The difference between the market price & the actual price will allow P to buy the same amount of coal for the same amount of $.
- D argues that the resale contract changes things – P should get the difference between the contract price & their resale price.
    - Court disagrees, distinguishes between direct injury & consequential loss – P is entitled to the value of the right that was violated. What actually happened is irrelevant to direct injury analysis.

Conclusion: P wins.

Smith v Landstar Properties, 2011 BCCA – contracts context

Facts: P invests in corp. D, who promises 8% return & that P's funds will be secured by a mortgage against the properties being developed by D. D did not secure the loan, so P files caveat on D's properties. D eventually pays to P the loan amount + interest. P also claims damages for breach of contract & negligent misrepresentation, seeking the difference between her actual interest amount & the interest amount that would have been payable under an unsecured loan.
Issue: To what damages is P entitled?
Rule: No actual injury required in order to recover damages for direct injury.
Analysis:
- P did not suffer any *actual* loss – loan was repaid.
- P argues that she contracted for a secured loan but received an unsecured loan, ie: not what she bargained for – the interest rate was not appropriate for an unsecured loan.
- Remedy should be difference between what was promised & what was delivered.

- Measure of the remedy should be the difference between the market interest rate for secured loans (what was promised) & the market interest rate for unsecured loans (what was delivered).

Conclusion: P wins.

Consequential Loss

- Recall, direct injury is about determining the objective value of the rights violation, while consequential loss is about actual losses suffered by P via a chain of causation.
- Main issue here is how far to follow the chain of causation.
- The starting point for consequential loss is the **but for test** – but for D's conduct, would P have suffered loss?
    - Sometimes this is not enough – sometimes the loss is simply too remote.

Overseas Tankship (UK) Ltd. v Morts Dock and Engineering Co. Ltd., [wagon mound no. 1], 1961 HL - torts

Facts: Appellants spilled oil into bay which was then set on fire and damaged the wharf.
Issue: Which losses is D liable for?
Rule: Test for kinds of losses is what would have been reasonably foreseeable to D?
Analysis:

- Court finds as a fact that it is not reasonably foreseeable that this type of oil would ignite.
- Therefore, damages are not available for the losses caused by fire.
- Other damages available, such as those for cleaning the wharf.

Conclusion: P gets some damages, but some of the loss was not reasonably foreseeable.

Koufos v Czarnikow Ltd. (The Heron II), 1969 HL – shipping contract

Facts: Contract to deliver sugar by ship. Ship is late and sugar is sold at a lower price than it would have been sold for had it arrived on time. P seeks the difference in amount the sugar would have sold for as damages for breach of contract.
Issue: Is D liable for Ps getting less for their sugar?
Rule: Two-part test: (1) (objective) reasonable foreseeability & (2) (subjective / inter-subjective) knowledge between the parties (from *Hadley v Baxendale*)
Analysis:

- Distinction from torts – rules that govern relations between legal strangers / identify what duties one owes to everyone. In contracts, the parties have a legal relationship already.
- Accepts rule from *Hadley v Baxendale*: in contracts D is liable for losses that arise naturally & losses that would have been in the reasonable contemplation of the parties.
- Even though D did not actually know whether P was going to sell sugar, knowledge that P was shipping sugar & that destination was a sugar market is good enough.

Conclusion: P wins.
Note: Compare to *Williams Bros* case (above) – there was no remoteness problem there b/c the contract was for goods – here, it is a shipping contract at issue, so consequential loss applies, not direct injury & an objective valuation of the rights valuation.

Transfield v Mercator Shipping, The Achilleas, 2008 HL - contracts

Facts: Owners of vessel chartered their vessel, and it was due back on May 2. In April market rates rose and owners entered into another contract to charter their vessel once it was returned. This contract gave the renters the right to cancel if the vessel was not available by May 8. Original voyage was delayed and by May 5 the owners realized the vessel would not be available by May 8. Market hire rates had fallen, so to keep the contract (and extend the cancellation date to May 11), the owners agreed to a reduced rate. Original charterers were not aware of the second charter contract. Owners sue for breach of contract and seek damages of the difference between what the originally contracted for and what they ended up having to contract for due to the delay.
Issue: Are damages for the entire second charter too remote for D's 5-day tardiness?
Rule: Objective & subjective test from *Heron II* remains but note that industry standard can amount to a common intention [subjective element] between parties.
Analysis:

- Court no longer reluctant to use torts language of reasonable foreseeability b/c conduct can amount to a breach of contract & also be a tort.
- Lower court says this is an objectively likely consequence of D's conduct.
- There was an industry standard at the time which held that these types of losses were not compensable – generally understood in the shipping industry.
    - This is treated as an implied term of the contract.
- The loss was foreseeable, but the common intentions of the parties (included implied contractual terms) trumps.

Conclusion: P wins but does not get damages representing the reduction in cost for the entire second charter.

Sale of Goods Act, s 50

Codifies buyer's remedies for direct injury – difference between the market price & the contract price. For consequential loss, the two branches of *Hadley* are codified.

Canlin Ltd. v Thiokol Fibres Canada, 1983 ONCA – loss of future profits

Facts: P needs material to make pool covers with specific requirements, D agrees to supply. Material is defective & causes large loss to P. P wants damages for loss of profits, claiming that D breached warranty that material was fit for its purposes.
Issue: Are the consequential losses of future profits & reputation compensable, or are they too remote?
Rule: Future losses are assessed on the *Hadley* standard.
Analysis:

- Future losses must be estimated based upon evidence.

Conclusion: P wins.
Notes: What if the estimate for future losses is wrong? This can have harsh consequences because there is no way to undo this. It is structured this way for efficiency (court resources) & certainty (especially for D).

RBC Dominion Securities Inc. v Merrill Lynch Canada Inc., 2008 SCC – loss of future profits

Facts: P & D competitors. Almost all employees of P (including and led by branch manager) moved to D in a coordinated effort, taking client info w/ them. Issue at SCC is what damages are available for what losses – specifically whether damages against branch manager should be awarded relating to loss of profits beyond what should have been the notice period.
Issue: Is branch manager liable for loss of future profits?
Rule: If parties *had* turned their minds to the breach, would they have contemplated this kind of loss?
Analysis:

- P argued that branch manager had implied duty of good faith to perform his employment contract which included recruiting employees – he breached this duty by facilitating the exodus of employees.
- Trial judge held him liable, CA reversed saying it was too remote – the parties did not contemplate this breach.
- SCC affirms trial decision.
    - **Consequences** must be in reasonable contemplation of the parties, not the breach.
        - Requires a counter-factual analysis, considering what parties *might* have contemplated.

Conclusion: P wins.
Note: This seems like the right result – we do not want D to be off the hook simply b/c the breach was unusual / outlandish / far-fetched.

Specifics of measuring compensatory damages for specific kinds of losses

- Recall, damages for torts are measured by the **but for** test & limited by the **remoteness** analysis. For contracts, damages are typically measured by expectation – the goal is to put P in the position they would have been in had the contract been performed.
- One exception for contracts is called **reliance damages**.
    - These damages ask what losses did P incur in reliance on D's performance?
    - Puts P into position they would have been in had the contract not been entered into at all, which is controversial.

Anglia Television Ltd. v Reed, 1972 Eng CA

Facts: P planned to produce a play that was to star D & they entered into a contract for same. D ended up repudiating the contract. P tried to find a substitute actor, but was unable to, so they accepted D's repudiation. P sues D for damages – not for lost profit, but for wasted expenditures made prior to the contract w/ D being concluded (ie: for other expenses related to setting up the production).
Issue: What is the extent of damages that P is entitled to?
Analysis:

- P is asking for their expenses back b/c it is extremely difficult to project profits here – it would be totally speculative (no idea how successful play would be).
- Court agrees – P entitled to loss of profits OR wasted expenditures.
    - Wasted expenditures as damages available where profits difficult to ascertain or hard to prove.
- Timing issue: P wants to recover the expenses they incurred prior to entering into contract.
    - Court says this is ok as long as it would have been in the reasonable contemplation of the parties that these expenses be incurred.
        - Surely it would have been in the parties' contemplation that other expenses relating to filming a play would be incurred prior to finding an actor.

Conclusion: P wins.
Note: By the time D breached the contract, it would have been impossible to find a different actor – this is key to the case.
Note 2: This case has been criticized – many argue that incurring expenses prior to entering into a contract is a gamble parties have to make.

Bowlay Logging Limited v Domtar Limited, 1982 CA

Facts: P contracted w/ D to perform logging services. D was to haul the logs but breached contract by failing to provide sufficient transportation. P sued & was awarded nominal damages. P wants to be put into position it would have been had there never been a contract – wants their expenditures back on appeal. Key to this case is the fact that it was an unprofitable contract for P at the outset – P would have lost more $ w/out D's breach.
Rule: The limit on reliance damages is that they cannot put P into better position than they would have been had contract been performed.
Analysis:

- There is no way for P to claim expectation damages here b/c it would be a loss to them, so they would like reliance damages instead.
- Unlike *Anglia*, we know with some certainty that P's profits would be negative.
- Problem w/ awarding reliance damages is that this would not be compensating P for the breach, it would be compensating P for entering into improvident ($-losing) deals.

Conclusion: Court awards P nominal damages on this basis.

Making sense of reliance damages

- Expectation damages are intuitive – they put P in the position they would have been in had the contract been performed.
- Reliance damages are about compensating P as if the contract was not entered into / compensating P for entering into the contract.
- Lavoie: we can think of reliance damages as a sub-category of expectation damages.
    - Where it is impossible to know what P's profits would be due to D's breach, we give P the benefit of the doubt and treat them as if they broke even (which means giving them their expenses back).

Building contracts – damages issues

- Two options: loss in value OR reinstatement.
    - Loss in value of property by failure to meet a contractual specification.
    - Cost to change the property to what was originally specified in contract (reinstatement).
    - Reinstatement always used if it is lower.
- Can be characterized as direct injury but can co-exist w/ consequential loss.

Ruxley Electronics v Forsyth, 1995

Facts: D contracted w/ Ps for them to build a swimming pool + enclosure. Contract included specific depth for pool. Ds breached contract by failing to make pool the requisite depth. Ps sued for remaining sum under contract not yet paid. D wants costs for reinstatement, which would be very high. Trial judge found that pool depth did not decreased its value & awarded sums to Ps & a nominal amount of general damages to D for loss of amenity. D appeals & CA awards damages in the amount of the cost to replace the swimming pool. Ps appeal.

Analysis:

- Instead of deciding between the loss in value or reinstatement for damages, trial judge decided damages should be awarded by measuring how much less the pool is worth to P (ie: the cost of P's dissatisfaction).
    - Lavoie: awarding damages by asking about subjective valuation is not useful – it ends up being a guessing game.
- CA says that damages as loss of amenity is available in principle, but it is rare.
    - Court allowed it here b/c it was not challenged.
    - **Test for cost of reinstatement damages: where it would be reasonable to incur that cost.**
        - Would a reasonable person replace the pool?
            - Court says no, there is no objectively reasonable justification for doing this (key to this is the current pool serves the purposes for which is was built).
            - **Note:** whether P actually plans to do it is not determinative, but it can factor into the analysis – genuine intent would go to reasonableness.

Conclusion: No reinstatement damages awarded.

James Street Hardware & Furniture Co. v Spizziri, 1987 CA – this is property damage, not a building contract but the analysis is similar

Facts: P renovating old building. Contracted w/ a corp. to provide a welder, D. Fire damage occurred as a result of D's negligence. P rebuilt damaged part of building in a superior form b/c exact restoration was prohibited by current building code. At trial, damages were measured by the reasonable cost of restoration had it been feasible, less an allowance for the improvement that would thereby have been effected in the value of the building.

Issue: How to calculate damages?

Analysis:

- Question of reduction in value vs. the cost of repair.
- The reasonableness of the cost of repair determines whether it is available as a measure of damages.
- The type of property also matters, ie: if chattels are easily replaceable, the cost to repair the chattel is not reasonable & therefore not available.
    - Contrast chattels w/ real property – P will often have good (business & economic) reasons to want to repair building where it is (vs. acquiring a building elsewhere – it is not often reasonable to insist on this).
- Court finds P's decision here to rebuild reasonable even though it exceeds the reduction in value.
- Betterment issue: the building was old & the repaired building is new – should damages be reduced to reflect that to prevent a windfall to P?
    - The orthodox view of English authorities says the windfall is unavoidable (can't repair a building w/ old materials) & D was at fault anyway.
    - Court here says there will be a reduction unless P can show that they had to spend $ that they otherwise wouldn't have (ie: building would have lasted 20 more years w/out requiring repair) & D has to show the value of the improvement (the value of the new building minus the value of the old building).
        - Here D did not show this, so no reduction was ordered.
        - Note: this is much more complex than the traditional English view, which is less desirable – it is evidence intensive which leads to greater costs.
- What about costs associated w/ changes to the building code? Can P recover these?

- Court says in principle P should be compensated, but difficult here b/c P rebuilt to completely different specifications vs. comply w/ updates to this particular amended building code.

Kuwait Airways Corp. v Iraqi Airways Co & Anor, 2002 HL – conversion case

Facts: Iraq invades Kuwait & army takes P's planes. Iraqi gov't passes resolution transferring ownership of planes to D. Some planes moved to Mosul for safekeeping & are destroyed by a bomb. Other planes moved to Iran & P has to pay to get them back [**consequential loss**]. P sues in English court, Iraq removed on basis of state immunity.

Analysis:

- Tort of conversion: act & intent inconsistent w/ P's right of ownership.
  - Intent does not go to awareness that property isn't yours, it goes to intent to own / possess the property (& so encompasses good faith acts).
  - Designed to protect property rights of personal property.
- Iranian 6:
  - Trial judge applies standard but for test, says claim fails on this standard.
    - The plans would have ended up in Iran absent D's conduct, ie: gov't of Iraq would have moved plans to Iran anyway.
  - CA overturns trial judge & says loss must (and did) flow directly & naturally from D's actions.
  - HL refuses to give effect to Iraqi resolution.
    - Agrees w/ CA re: liability but not analysis.
    - General rule for damages = direct injury (market value)
      - Could be higher, ie: consequential losses & could be lower, ie: where goods returned to P before trial (then damages would simply be the cost of renting a substitute, or possibly disgorgement).
        - **Note:** after damages for conversion are paid, the tortfeasor owns the chattels (effectively a forced sale).
    - **Test:** but for test for factual causation, then remotes, or is it just to hold D liable?
      - Problem for but for test arises w/ multiple conversions – here, Iraqi gov't converted goods first.
        - HL says the proper question in the but for analysis is: what would have happened but for the owner being deprived of their goods by D?
          - Avoids letting one out of multiple tortfeasors off the hook.
    - Heads of damage
      - **user damages:**
        - gain-based award (like disgorgement) – P sues for wrongful benefit that D gained / derived from property.
        - Damages are typically based on P's loss, but it makes sense in the context of misappropriation of property b/c one incidence of property is the right to receive the benefit from the use of that property.
          - HL rejects this head of damage only b/c not properly pleaded.
      - **$20 million paid to Iran:**
        - If P had retained property, this loss wouldn't have occurred (but for).
        - No remoteness issue – this is a direct result of the deprivation.
      - **Financing new fleet of planes:**
        - HL rejects – not possible to distinguish the cost of replacing the original fleet from the costs P spent on a new mix of planes.
          - This is an evidentiary issue.

Obiter – remoteness principles in conversion

- Not clear that this is the law in Canada.
- Origin of reasonable foreseeability & limiting it via limits on recognizing new duties of care & the requirement that the type of damage must be reasonably foreseeable is in negligence.
- For other torts the remoteness standard is losses that naturally & directly flow from the breach.
  - This is a much less strict standard.
- The negligence standard bled into other torts (which promotes coherence in the law).

- Natural & direct standard lives on in tort of fraud / deceit, meaning courts are more permissive in terms of the types of losses that are recoverable.
    - Rationale is that D is acting in bad faith & therefore it is fair to hold them accountable.
- Court says that where D's conduct makes the conversion more like fraud, we can hold D to the natural & direct remoteness standard.
    - There is a risk that this makes litigation more complex – it might be simpler to have one standard for conversion.
- **Note:** practically speaking, this doesn't matter that often b/c most losses are both natural & direct *and* reasonably foreseeable.

Timing Issues

Golden Strait Co v Nippon Yusen, 2007 HL

Facts: Shipowners chartered vessel. D repudiated contract, P accepted & claimed damages. Contract had a clause which stated that either party could cancel if war or hostilities broke out between certain countries. War broke out after repudiation but before damages determined. Question of whether P's recovery should be limited to the time the war broke out.
Issue: When should damages be assessed in light of subsequent events?
Analysis: Majority says damages should be reduced in light of events that transpired after breach.

Stevens, Damages & the Right to Performance

- Makes sense of the decision in *Golden Strait.*
- We need to think about the breach here a right to future performance
    - This means that we can consider its objective market value & all relevant information up to the trial.
        - Here it ends up meaning that the future right ends up being worth less than we thought.
- Lavoie: what about events after trial? Can those influence damage awards?
    - No, b/c of res judicata – need certainty for parties & to prevent additional strain on judicial resources.
        - But this is really just a line drawing exercise – we can take into account events up to the trial, but *not* after. It could be drawn differently, but for efficiency reasons we draw it here.

Damages for personal Injury

- Andrews: functional approach to assessing non-pecuniary losses, upper limit cap of $394,000 unless exceptional circumstances.

Intro

- Special vs general damages
    - Special: can be specified in precise terms / costs already incurred.
        - Past income loss, pre-trial out of pocket expenses.
    - General: cannot be easily specified in precise terms / compensation for future losses + suffering.
        - Pecuniary: calculable in monetary terms (objective market value)
            - Cost of future case / loss of prospective earnings.
        - Non-pecuniary: no precise objective way to quantify
            - Permanent impairment / loss of life expectancy.

Andrews v Grand & Toy Alberta Ltd., 1978 SCC

Facts: P rendered quadriplegic in a car accident. Trial judge awarded $1,022,477.48 in damages; Court of Appeal reduced damages to $516,544.48.
Issue: What are the correct principles of law applicable in assessing damages where P suffers wholly incapacitating injuries & faces a lifetime of dependency on others?
Analysis:

- "No appellate court is justified in substituting a figure of its own for that awarded at trial simply b/c it would have awarded a different figure if it had tried the case at first instance" (p 236).
    - Must determine that wrong principle of law was applied or that the amount awarded was an erroneous estimate of damage.
- Must assess damages in separate amounts / heads.
    - Gives guidance for future cases & discloses to parties that each head of damage making up claim has been given thoughtful consideration.
- Cost of future care
    - P must be reasonable in making a claim, but CL principle stands that damages in tort are to be reparation for the wrongful act – reinstatement is paramount.
        - No duty to mitigate, ie: accept less than real loss.
    - CA concerned about driving up cost of social burden, ie: insurance becoming more expensive.
        - SCC says this is not relevant to the pecuniary damages analysis.
    - Speculating about what P will do w/ damage award is not appropriate – can spend $ how he likes.
    - Reduced life expectancy needs to be considered when evaluating this amount.
    - Contingencies of life: reduces damages award
        - Ie: P spending time in hospital & not needing home care = can deduct for these types of contingencies.
- Obiter: compensation should be periodic payments so that needs of P can be regularly assessed but - legislature needs to make this change.
    - Note 40 years later this still has not changed – criticisms: high cost of public resources required to evaluate needs of P periodically + encourages laziness / deception (to keep $ high).
- Prospective loss of earnings / loss of earning capacity
    - Difficult when P is young, very speculative.
    - Treated as asset
        - Discounted by mortality rate (likelihood of premature death)
            - Mortality rate **before** accident, not after.
    - Apply negative contingencies, ie: unemployment.
    - Positive contingencies not accounted for, ie: promotion, changing career & making more $.
- Discount rate
    - Determined by rate of return on capital & inflation
    - Giving P lump sum today to account for future circumstances is a problem - $ today is worth more than $ in the future.
    - Inflation means that $ in future is likely to be worth less than it is today.
    - SCC says real rate of return = rate of return on capital MINUS inflation.
        - Take lower risk investments & subtract inflation.
    - In AB: rate of return is still a question of fact.
        - Present value = Future value / (1+ rate of return)$^{\text{number of years}}$
- Non-pecuniary loss
    - Losses do not have market value beyond arbitrary amount court assigns.
    - Possible approaches:
        - Proprietary: assets w/ objective amounts (ie: limb = $x).
        - Personal: subjective value to P of particular loss.
        - Functional: reasonable solace for loss
            - Can take some personal characteristics, ie: pianist losing finger.
            - Responding to concerns about high damages awards in USA.
            - Social burden is relevant: high awards impose a burden on society & the awards don't even make up for the loss.
    - Criticism of cap on non-pecuniary loss: provides consistency but is there enough evidence to do this?

Lindal v Lindal, 1981 SCC

Facts: P injured. Trial court awarded $135,000 for pain & suffering + loss of amenities of life and Court of Appeal reduced it to $100,000.
Issue: Under what circumstances should a trial judge exceed the rough upper limit of $100,000 for non-pecuniary loss established by earlier SCC jurisprudence?
Analysis:

- P here suffered severe mental impairment.
  - Trial court says this is the 'exceptional case' *Andrews* refers to.
- $100,000 upper limit is not about the measure of assets lost.
- Functional approach is not just about severity of injury.

Should we be compensating for non-pecuniary losses at all – essay food

- These are real losses, but it is difficult to put a $ amount on them.
- The burden for these losses ought to rest on tortfeasors – justice & deterrence.
- Accident compensation & value of tort system generally:
  - Pure accidents vs cause by someone else & can't prove vs proving liability in negligence
    - Parties are all hurt in each of these circumstances.
    - Sometimes at fault parties don't have deep pockets – no recovery.
    - Often amounts to luck of the draw for P.
- Alternative to tort law system:
  - Workplace accidents dealt w/ exclusively by WCB.
  - New Zealand: all accidental personal injury captured by insurance scheme.
  - Downsides to getting rid of tort system:
    - Loss of deterrence effect?
      - This is questionable.
    - Redress (liability) has inherent value.

Damages for equitable wrongs

- Trusts & fiduciaries is most important, but focus here is fiduciary breaches beyond this context, ie: doctor-patient, solicitor-client.
- Proprietary remedies = constructive trusts.
- Personal remedies (beneficiary can choose) = compensation OR accounting or wrongful profits (gain-based remedy).
- Remoteness is biggest hurdle for non-trust relationships – not present in trust situation, but absent trust, some harms are too remote to compensate.

Canson Enterprises Ltd. v Boughton Co, 1991 SCC

Facts: Ps suing lawyer & law firm for deceit & breach of fiduciary duty. They purchased land & solicitor acted for P & intermediate vendor which led to that vendor getting a secret profit. Ultimately other issues w/ the property ensued & Ps won a judgment that other Ds could not pay fully. Suing current Ds for the shortfall.
Remoteness issue: but for lawyer's breach, P would not be involved in the transaction & the accompanying breaches.
Analysis:

- Remoteness in law:
  - Tort = reasonable foreseeability
  - Deceit = directness (all losses that are direct consequences)
- Equity: remedy = full restitution of value of trust property
  - P wants this.
- La Forest:
  - Cannot import principles from trust property – there is no subject of obligation to act as a natural measure or limit.
  - Standard from tort of deceit fits better – directness standard.
    - Exceeds mere carelessness.
  - Outcome: losses here not direct – there was a clear intervening cause.

    - P recovers difference between price paid for land & value – this was a direct loss.
- McLachlin:
    - In trusts, foreseeability doesn't matter – the limit is the value of the trust property.
    - We can expand this to other breaches of fiduciary duty by directness: a common-sense view of causation is the limit.
    - Outcome: similar to La Forest – engineer losses excluded.
- **Lavoie:** both judges are saying the same thing but McLachlin is avoiding using the characterization 'legal'.

Hodgkinson v Simms, 1994 SCC

Facts: H hired S specifically for tax advice. S provided investment & tax sheltering advice on the basis that he was an expert. H invested as directed & lost $. Turns out that S was also acting for those in whom H invested. H sued in negligence, breach of fiduciary duty, & breach of contract. Trial court dismissed negligence but awarded damages for breach of contract & breach of fiduciary duty. Court of appeal upheld breach of contract but reversed on breach of fiduciary duty & altered damages to reflect disgorgement.

Analysis:

- Tort of deceit directness standard.
- Losses flow directly from investment P was induced to make.
- Conduct of D was *more* wrong in this case.

Law

- Flexible approach: analogy to CL wrong – use that standard in light of policy considerations of equity.
- Consider wrongfulness of D's conduct.

Damages in lieu of specific relief

- Not originally derived from Equity – granted by *Lord Cairn's Act*.
- Why? Administrative efficiency – only have to go to one court (historically).
- Sometimes analogous to what would be available in law.
    - Ie: damages for past losses where injunction declined.
- Common measure = reduction in P's property value.
- Alternative measure (not supported by *Lawrence*) = what profit is D deriving from this?
    - Gain-based: what would D be willing to pay to continue?
        - Upper limit would be D's profits.
- Remember *Semelhago:* specific performance damages in lieu assessed **at time of trial.**

Lawrence v Fen Tigers [as above]

- Court awards damages for **permanent loss of right**.
    - Licences on-going new injuries.
    - Contrast w/ CL – new injuries in future = new action.

Punitive Damages

- Weinrib: corrective justice as a way to understand private law.
    - D violated P's rights, disrupted equilibrium, & private law should correct.
    - Explains why D pays & why P gets it – related to same wrong.
- Punitive damages don't fit this framework – designed to punish.
    - Reason D is paying = retributive justice, denunciation, deterrence.
        - Why should P get $? That is not how the criminal law works.
            - Reward for identifying & proving socially wrong conduct.
            - Incentive: good to hold D accountable, bring to attention of the court.
- Corrective justice is skeptical of punitive damages.
- They are exceptional, historically only available in torts cases, not contracts.
- **Whiten:** for punitive damages to be available, there must be an independent actionable wrong.
    - Used to have to be a tort, but not anymore – can be breach of fiduciary duty, breach of duty of good faith.

Whiten v Pilot Insurance, 2002 SCC

- Clarifies & expands punitive damages framework

Facts: D trying to pressure P into accepting lower settlement than they are entitled to.

Analysis:

- Compensation = what P entitled to under contract.
- Must be pragmatic – sometimes wrongful conduct isn't being dealt with in any other forum.
    - Response to Weinrib.
- Used to be a categories-based approach – punitive damages only available for intentional torts.
    - Court rejects.
- Punishment = object of criminal law, so punitive damages should be rare.
    - Ie: if D already in criminal justice system, no punitive damages b/c it would be double punishment.
- Objectives: retribution, denunciation, deterrence – must be proportional & rationally connected to these objectives.
- Deterrence: D might treat damages (compensation) as a license fee – ie: paying damages is cheaper than not doing the wrong.
    - Punitive damages try to mitigate this issue where there is conduct that ought to be deterred.
    - **Bedbugs hotel case:** reinforces deterrence as justification for punitive damages.

Takeaways

- Compensation is not the only kind of response to a private wrong.
- Pragmatism: not stuck w/ a single theory of what private law is about – administratively convenient.

Downsides to punitive damages

- Possibility of encouraging frivolous litigation b/c people want a windfall
    - If system not working correctly.
- May encourage more litigation generally – more resources.
- Punitive damages do not have backing of *Charter* protections (in Canada).

S. Smith, from Contract Theory (2004) on 'Punitive Damages'

Nominal Damages

- Liability established, but no loss that gives rise to compensatory damages.
- Meant to signify that wrong has occurred.
- For some causes of action, nominal damages are not available – ie: negligence, where loss is an element of the tort.
- Common torts: trespass to land, defamation (often sought w/ punitive damages b/c cannot seek punitive damages on their own), breach of contract (utility of nominal damages questionable here).

C & P Haulage v Middleton, 1983

Facts: Early termination of licence. Invested $ to improve space, contract made it clear these expenditures would not be compensable. After termination, continued working in own garage, no loss that stems from breach.

Analysis:

- Nominal damages awarded b/c no loss.

Notes:

- No direct injury – why?
    - P was paying periodic rent.
    - If he had paid advance rent up front, there may have been direct injury.
    - The 6 months he lost he didn't have to pay for.

Aggravated damages

- Designed to compensate for intangible / emotional injury where loss is not compensable / undignified.
    - Ie: battery by spitting in someone's face.

Mitigation

- Legal principle that relates to calculation of damages – limiting principle.
- Cannot recover for what you could have reasonably avoided.
- Not a duty per se, more like remoteness – ability of P to recover.
- Applies in torts (including personal injury) & contracts.
- Justification: fairness to D & incentive to better yourself (avoid moral hazard).
- **Southcott: (1)** in order to mitigate, there must an opportunity to mitigate; **(2)** onus on D to raise unreasonable failure to mitigate.
- Mitigation & specific performance are principles at odds: mitigation involves buying substitute & specific performance holds that substitutes are inadequate.
    - Mitigation undermines specific performance (shows that substitutes are available) – possibility for P to end up with two of the thing.
- Issue arises where P is seeking specific performance & court orders damages.
    - Before *Semelhago* this was only an issue for breach of contracts for chattels b/c specific performance was presumptively available for land – this is really the precursor to the issue in *Southcott.*
    - Where court orders damages, this imports a retrospective duty to mitigate – court is saying you should not have sought specific performance.

Southcott Estates Inc. v Toronto Catholic District School Board, 2012 SCC

Facts: P seeking specific performance for land. Trial court declines b/c land was purchased as investment and therefore was not unique.

Analysis:

- Trial judge says there was no expectation to mitigate – it was not unreasonable to seek specific performance.
- Court of Appeal reverses.
- SCC:
    - P argues that it was impossible to mitigate – it was a single purpose corporation.
        - Court rejects this argument – formal corporate structure cannot alter substantive law – it would give an unfair advantage to corporations.
    - **(1)** P must have a fair / real / substantial claim to SP (even if they don't ultimately get SP).
        - Not met in this case – land was not unique
        - **Note:** this is *very* similar to the standard for whether specific performance is actually available.
    - **(2)** Opportunities to mitigate: ie: actual, comparable properties.
        - Evidentiary issues in this case
            - 81 properties presented, but not clear that P could have been involved in or they weren't profitable.
                - P argues that D failed to meet onus to show opportunities.
                    - SCC disagrees: says we can infer that there were *some* substitutes.
                        - Consequence: will be easier to infer substitutes in other cases – less likelihood of specific performance in urban areas.

Exclusion of liability clauses

- Related to liquidated damages clauses (above), except liquidated damages clauses specify amounts.
- Case we are looking at is commercial but look out for waivers on exam.
- Enforceable in principle but heavily scrutinized.
- Excludes some kinds of conduct or losses:
    - Ie: gross negligence (not a term of art, something more than negligence) & wilful misconduct only, so regular negligence would be captured.
    - Ie: indirect or consequential loss.
- **Dow:** authority in AB for exclusion of liability meaning direct vs consequential.

Dow Chemical Canada ULC v NOVA Chemicals Corporation, 2020 ABCA

Facts: Polyethylene process: ethane > cracked into ethylene > turn ethylene into polyethylene. UC enters into joint venture w/ Nova to turn ethane into ethylene. Nova would operate facility. UC merges w/ Dow who is a competitor of Nova. Ethane shortage – Nova limits ethylene going to Dow. Dow doesn't get its contractual proportional share.

Analysis:

- Court finds Nova liable for breach of contract.
- Measuring damages: less ethylene = less profits for Dow b/c they can't make as much polyethylene.
- Value of ethylene VS lost profits from polyethylene.
- In the absence of an exclusion clause, Hadley v Baxendale test: losses naturally arising that parties contemplated means lost profits would be captured.
- Exclusion clause in contract: gross negligence & wilful misconduct
    - Wilful misconduct satisfied here.
- Excluded damages: indirect or consequential damages (including loss of profits).
- Trial judge relies on English case law to hold that clause only excludes branch 2 of Hadley v Baxendale, so lost profits recoverable on this basis.
- On appeal, Nova argues that only value of ethylene is recoverable, NOT lost polyethylene profits.
    - Court agrees – nothing inherently wrong w/ exclusion clauses – should be interpreted like regular contract provisions.
        - Note this would be different in a consumer context.
    - Exclusion clauses serve a valuable purpose: allocating risk – parties can insure against risks.
        - Some skepticism about whether parties actually turn their minds to breaches not matter how well-resourced they are.
- <u>Interpretation of terms:</u>
    - Court of Appeal rejects trial judge's reasoning: Hadley Baxendale doesn't use direct / consequential language.
        - Not even two separate branches really, just an objective / subjective analysis.
        - Trial judge's reasoning means the exclusion clause wouldn't exclude anything that would be recoverable at common law and there is a presumption against superfluous language.
    - Direct = value of ethylene that was the subject of the contract.
        - Value = cost of getting it somewhere else.
    - Consequential = everything else, including polyethylene profits.

Note: Recall *Transfield* and the late ship – the damages were foreseeable, but recovery was barred b/c it was the shipping industry norm – this is an implied understanding. Exclusion clauses are an **express common understanding.** Takeaway is that liability can be limited according to the common intentions of the parties.

Why damages

Ernest Weinrib, Civil Recourse and Corrective Justice

- Corrective justice – backward looking.

Steven Shavell, Foundations of Economic Analysis of Law, Chapter 8

- Forward looking, focus on consequences, incentivizes behaviour of D.

Bigger picture – essay food

- Are damages a reflection of rights of the P or an institutional response?

Wrongs: Gain-Based (DAMAGE) Awards

Tort

Inverugie Investments Ltd. v Hackett, 1995 UK

Facts: P wrongly deprived of property for 15 years. D was renting out property w/ 35% occupancy rate. D sues for disgorgement, wants wholesale occupancy rate for 15 years, no discount for the actual 35% occupancy.

Analysis:

- 3 possibilities:
    - P's lost profits – purely speculative.
    - D's *actual* profits.
    - Market value of occupancy for 15 years.
        - P's *actually* deprived of this right, similar to *Mediana.*
        - User principle: mesne profits – value of occupancy.
        - Not exclusively compensatory or gain based.
            - Not clearly gain-based, but different from consequential loss.

Weinrib, 'Restitutionary Damages as Corrective Justice'

- Theory where awards are not truly compensatory – property rights.
    - Wrongfully deprived of the bundle of rights that is property, ie: exclusive use, deriving profits.
    - Market rental rate = good objective measure.
- Not available for all kinds of torts.
- Loss-based awards do not entitle you to all losses suffered, ie: remoteness, duty of care.
    - Asks whether loss was in the scope of the wrong – ie: not reasonably foreseeable.
    - Profits are not what makes negligence wrong.
- Extend this reasoning to gain-based awards: not everything is in the scope of the wrong.
    - Certain interference w/ property deprives P of right & is wrong – involves D getting benefit based on this deprivation.
    - Interfering, selling property = wrongful deprivation – profits rightly belong to P.
- Extends to other cases: breach of fiduciary duty = accounting of profits.
    - Nature of duty = agent can't benefit / must act in best interest.
    - Profits properly belong to beneficiary – similar to property cases.
        - Wrongful profiting = in the scope of the wrong.

Breach of Contract

Wrotham Park Estate v Parkside Homes, 1974 Ch

- Consistent w/ Weinrib's theory above.

Facts: Restrictive covenant: contractual obligation to not do something, runs w/ land. D violates covenant. After houses built, P wants injunction to have them torn down.

Analysis:

- Court doesn't give injunction, says it would be too wasteful.
- Damages in lieu.
    - Building houses didn't cause any tangible loss to P.
    - Evidence demonstrated that P would have never permitted violation of covenant for any amount of $.
    - Court awards 5% of D's profits from houses.
        - Reasonable b/c P could have acted sooner – ie: before houses were built.
        - 5% is reasonable amount for hypothetical P selling their rights.
            - Though still a bit arbitrary.

Stevens, Excerpt from Damages and the Right to Performance

- Possible to think of this as damages for direct injury
    - Objective valuation of the right to say no to breach of covenant.

- Effectively a forced transfer of rights.

Attorney General v Blake, 2000

Facts: contractual entitlement. British double agent case. Publishes autobiography after Cold War – info in book was confidential but not at time book was published. Basis of claim = breach of employment contract – undertook not to divulge information.

Analysis:

- If info was still confidential, this would have been a breach of confidence case & gain-based award would have been available in equity (account of profits).
- Gain-based award for breach of contract?
    - Court says this is possible where damages and specific performance are inadequate & circumstances are breach of fiduciary duty-like.
    - Must be legitimate interest of P to prevent D from profiting.

Notes:

- Recall efficient breach: sometimes it is beneficial to breach contract – where benefits to D outweigh losses to P & compensation restores D.
- Argument to limit breach of contract damages to compensation: gain-based awards take away the benefits of efficient breach.

Atlantic Lottery Corp. Inc. v Babstock, 2020 SCC

Facts: Class action for VLTs. Motion to strike on basis of no cause of action – note analysis requires court to take facts as true. Ps seeking disgorgement + punitive damages.

Analysis:

- Court finds no cause of action.
- Disgorgement / waiver of tort as cause of action?
    - No, it's a remedy: must establish liability for an established cause of action first.
- Negligence, w/ remedy as disgorgement?
    - Possible, but court skeptical.
    - No negligence here b/c of requirement to show causation of loss (not pleaded here).
        - Acting careless w/out hurting anyone isn't wrongful.
        - P's didn't allege particular losses b/c very onerous for a class action.
- Breach of contract – implied term of contract to provide safe games
    - Possibly a good cause of action, but remedy cannot succeed.
    - No disgorgement despite *Blake* precedent (quasi-fiduciary duty).
        - Court rejects quasi-fiduciary duties – not part of Canadian law.
- Court limits scope of disgorgement as a remedy for breach of contract – wants to follow Weinrib.
    - Flies in face of corrective justice – private law is about undoing injury to P.
    - If D's profits are always available, this moves away from the bilateral relation for corrective justice.
        - Not possible to explain why P gets profits in all cases for corrective justice.
            - Usually only proprietary cases, where profits are the best measure of the wrong done to P.
- Loss-based damages not inadequate here – might be difficult to prove but that is not enough.
- No punitive damages b/c no independent actionable wrong – no duty of good faith b/c not insurance contract.
- No nominal damages b/c not a proportional use of court's resources.

Dissent:

- Breach of contract, remedies = declaratory relief (equity) & nominal damages (law).
- Disgorgement should be available on a case-by-case basis.
- Can't decide w/out evidence.
- Would allow quasi-fiduciary idea (*Blake*).
- Takes issue w/ restriction to objective valuation of right that was violated
- Rejects corrective justice paradigm – punitive – deterrence – gain-based awards.
- Punitive damages require independent actionable wrong
    - *Bhasin*: duty of honest performance
    - Pleadings reveal dishonesty & that should be enough.

Reconciling *Blake* and *Atlantic Lottery*

- In English law punitive damages are not available for breach of contract.
- English law also reluctant to recognize novel fiduciary relationships.
    - Rely on recognition of quasi-fiduciary relationships.
- Canadian law more attached to corrective justice paradigm
    - Connection between doer and sufferer of harm.
    - Corrective justice cannot explain punitive damages
        - They shouldn't be allowed under this theory, but they are a part of Canadian law.
            - Punitive damages punish D & incentivize P to bring claim.

Gain-based proprietary awards

- Constructive trusts = what justice requires – legal device requiring D to transfer property to P.
    - Imposed today as a response to a past wrong – violation of equitable obligations.
- Equity regards as done that which ought to be done.
- Theme of course: law of remedies – historically determined vs rational explanation (conceptual unity).
- **Soulos:** test for (institutional) constructive trust
    - (1) equitable obligation
    - (2) agency activity
    - (3) legitimate reason for proprietary remedy
    - (4) no factors that would render remedy unjust, such as other creditors.
- Why an equitable obligation in test?
    - Weinrib: property-like nature of fiduciary duties (benefits intended to belong to beneficiary).
        - This is w/in the scope of the obligation – ie: recognizing something that already existed.

AG Hong Kong v Reid, 1994

Facts: Prosecutor accepts brings to not prosecute, used $ to purchase land in NZ. P wants constructive trust over NZ property.

Analysis:

- P's argument: D shouldn't have accepted bribes, but if he was going to, he should have accepted them on our behalf (b/c of fiduciary relationship).
    - Therefore, NZ property should beneficially belong to P.
- Court awards constructive trust.
    - This is a gain-based award b/c it is not based on loss to P.
        - Can't quantify loss to P – they lost a justice system w/ integrity.
        - Makes more sense to measure D's gain.
    - Desirable where D has no assets / hides them.
        - Gives P priority over other creditors.

Soulos v Korkontzilas, 1997 SCC

Facts: D buys investment property for himself in breach of fiduciary duty to P.

Analysis:

- Claim for unjust enrichment – where is the deprivation?
    - No financial loss, value of property actually decreased.
    - D's enrichment also did not correspond to P's loss – property didn't really come from P.
- Wrong = breach of fiduciary duty.
    - Constructive trust as remedy – considerations of good conscience (justice) & deterrence (forward-looking, economic incentive to control behaviour).
    - D argues that constructive trusts are only available as a remedy for unjust enrichment
        - Court rejects: two categories of constructive trusts
            - Remedial = UE
            - Institutional = wrongful conduct w/ equitable obligations – no loss required.

Injustices

- Not as significant as rights-threats or wrongs.

Personal Restitution

- Not responding to rights violation or a wrong, simply an allocation that is deemed to be unjust.
- Primary doctrine = **unjust enrichment** & to a lesser degree **matrimonial property legislation**.

Unjust enrichment

- Developed separately in law & equity, commonly called restitution.
- Old categories:
    - Quantum meruit: services rendered absent contract – court required D to pay what the services were worth in the market.
    - Mistaken payment
- Courts moved away from categories & developed broad principles for the cause of action:
    - Enrichment of D.
    - Corresponding deprivation to P.
    - Absence of juristic reason
        - Juristic reasons = contract, donative intent, disposition of law.
        - **Lionel Smith:** proving a negative is tough and not something P is normally required to prove in an action, especially when "juristic reason" is so broad.
            - Big burden on P.
- GARLAND: P must establish prima facie UE by showing no juristic reason (from closed list of categories) & then onus shifts to D to show another reason to deny recovery – either a new category or some other reason that would apply on the facts (public policy & reasonable expectations of the parties)

Royal Bank v The King, 1931 Manitoba King's Bench

- Example of old category UE analysis: **mistaken payment.**
- Old test for mistaken payment:
    - (1) mistake must be honest
    - (2) mistake must be between person receiving & person paying $
    - (3) facts as believed must impose an obligation to make the payment.
    - (4) person who received $ has no legal / equitable / moral right to retain it.

Garland v Consumers' Gas Co., 2004 SCC

Facts: Utility charging 5% for late payments, practice approved by provincial regulatory authority. Late fee applied even if customers were one day late. Turns out this is contrary to the *Criminal Code* to charge this much interest. Class action pursued to recover late payments.

Analysis:

- Contract to commit a crime = unenforceable (defence of illegality).
- Paramountcy doctrine = doesn't matter that regulatory authority approved the charge.
- Cause of action = UE
    - Enrichment of utility company (received late payments)
    - Corresponding deprivation to customers (paid late payments).
    - Absence of juristic reason = b/c rate of interest was criminal; customers had no legal obligation to pay.
        - Only possible juristic reason was disposition of law (ie: the contract), but it was invalid, so prima facie case of UE established.
- Burden switches to D to try and show a juristic reason.
    - D argues **reasonable expectations:** they relied on approval by regulatory authority in good faith.
        - Court agrees, but as soon as action started & D discovered charges *may* not be permitted, no more good faith reasonable expectation.
- Court has to balance expectations of D w/ public policy – cannot allow people to keep proceeds of crime.

    - Splits the difference, D only has to pay back what the received after litigation started.
- **Change of position defence:** D can argue that based on the enrichment, they changed their position such that it would be inequitable to be required to pay $ back.
    - Good faith required to rely on this doctrine.
    - Court rejects in this instance b/c D is a wrongdoer.
- **Remedy:** $ award – order to pay a sum of $. Note, **not** damages b/c not based on a wrong.

Another way to think about UE – essay food

- **Birks:**
    - Remedies for UE reflect pre-existing duties of parties.
    - Mistaken payment gives right to *immediate* duty to pay back $.
    - Conceptually removes the element of judicial discretion.
    - UE in this sense is still an action for a rights violation – similar to breach of contract, action in debt, tortious conduct.
- **Steve Smith:**
    - UE is about reallocating resources to correct injustice.
    - Mistake payment gives rise to liability, but no duty *until* a court so orders.
    - Can't recover consequential losses for unjust enrichment, so doesn't fit traditional damages for wrongs paradigm.
    - Change of position defence should not be available if there is an immediate duty – if keeping $ is immediately a wrong, how can there be a defence?
    - We typically don't assign new duties unless they are voluntary
        - Ie: law of rescue – no duty *until* positive action.

Proprietary Restitution (for unjust enrichment – remedial CT)

S. Smith, Primer on Trusts

Chase Manhattan Bank v Israel-British Bank Ltd., 1981

Facts: P bank accidentally pays D bank twice without realizing. D bank goes bankrupt, P bank wants constructive trust imposed so they get the accidental payment back ahead of D bank's other creditors.

Analysis:

- Payment by mistake = recognized category of unjust enrichment in law.
- Question for the court is whether proprietary restitution is available since that is an equitable remedy.
- Court relies on tracing principles – follows $$ - like in *Reid*.
- Court allows for constructive trust.
- **Rule is that CT will be permitted for UE where damages would be inadequate**.
- Damages inadequate here b/c D is insolvent – that is enough for the court.

Note:

- English courts are more conservative re: CT – viewed as a continuing right of P (Birks paradigm).
- In Canada, court willing to impose CT w/out a pre-existing interest.
    - "Just under the circumstances."
    - Inspired by family law cases w/ unmarried couples.

Peter v Beblow, 1993 SCC

Facts: P claiming UE in family context – P did work on D's property. Raised children, took care of the house, etc. Wants a CT representing her share of the property.

Analysis:

- D clearly enriched, deprivation to P corresponded, no juristic reason.
- Court says two factors required to impose CT: (1) damages inadequate & (2) link between P's contribution & the property.
- What can make damages inadequate?
    - D insolvent / unable to pay
    - Uniqueness of property / P's connection to it.
- How to measure extent of P's interest? Can be whole or something in between.

    - Value received: market value of work done OR
    - Value survived: value of property & proportion of contribution
        - Enables P to get increase or decrease in value of property
- Court says value survived is appropriate for CT
    - Part of what it means to be the owner of something.
- If we were talking about personal restitution, value received OR value survived would be appropriate.

Note: This analysis doesn't fit into the Birksian framework – there is no pre-existing duty. Goes to the competing view of what remedies are about.

Law of Property Act, s 76

- Provision that enables the courts to vest property interests; reallocates property interests.
- Deems B to be the owner, A is no longer the owner.
- Relevant in disputes about who has best title to property.
- This is peculiar, b/c other kinds of remedies (except declarations) are in the form of *commands*.
    - This provision is different, it is self-executing & does not require D to do anything.

Necessity

Vincent v Lake Eerie Transportation Co. 109 Minn., 1910

Facts: Storm, D uses P's dock w/out permission to save his boat and damages the dock.

Analysis:

- Court orders D to pay damages to P.
- Why?
    - Can't be negligence – D acted reasonably; prevented greater loss.
        - Boat likely would have sunk if he didn't use P's dock.
    - Trespass to chattels privileged by necessity.
        - Can't be this either, b/c if it was privileged by necessity, we are saying there was no wrong – this can't ground liability.
    - Intuitive answer: fairness between parties.
        - Don't want to create perverse incentives – if there are no consequences, D has no reason to be careful / not go around wrecking other people's things.

Note:

- Steve Smith: this case is in the injustice section of the course b/c it is remedying an unjust allocation; there is not necessarily a wrong.
    - Another example of remedying injustice is forward-looking damages (ie: in lieu of an injunction).
- Other ways to think about this case:
    - Qualified privilege: can interfere w/ property rights, but you have to pay.
        - Like a forced sale – the "wrong" is not paying.
    - Economic framework: property (permission) vs liability (pay $) rules.
        - Normally, property. Is protected by property rules, but in cases of necessity, we transform it into a liability rule.
            - Why? Because there would be high transaction costs associated w/ property rules in this types of cases.