

Part One: MONETARY RELIEF

I. REMEDIAL CHOICE: INTEREST AND PURPOSE

A. INTRODUCTION

- **Monetary relief:** common law remedies - P is entitled to a common law remedy if successful
- **Specific relief:** equitable remedies (injunctions, specific performance) - awarded at courts discretion, P is never entitled to specific relief
- **Importance of remedies:** give meaning to legal rights (*Ashby v White*)

OBJECTIVES OF DAMAGE AWARDS

- Torts: restore P to pre-tort position
- Contract: restore to P to same position as if K was performed

Outcome determined by

- Judicial Discretion
- Balancing Competing interests
- Social and Economic interests
- Public policy considerations

Relevant Factors Affecting Remedy or Quantum

- Nature of P's interest
- Nature of D's conduct
- Motive behind D's conduct

INTERESTS PROTECTED BY DAMAGE AWARD

1. **Restitution Interest**
 1. to prevent unjust enrichment
 2. focus on what D has gained and not what P has lost
 3. quantum: value of D's gain from wrongdoing
2. **Reliance Interest**
 1. undo harm caused by D's wrong
 2. undo loss P suffered due to reliance on D
3. **Expectation Damages**
 1. Restore P to same position as if there was no breach
 2. distributive justice as per party's undertakings
4. **Punitive Damages**
 1. Punish D and deter wrongful conduct
 2. premised on retribution
 3. no correlation with P's loss

OVERARCHING POLICY CONSIDERATIONS

- Social utility of what D was doing
- must consider which party was in the best situation to protect themselves at the time of the contract (*Canlin*)
- certainty in contractual relationships (*Dupont Heating*)

B. EXPECTATION DAMAGES

- **includes:**
 - pecuniary and non-pecuniary losses
 - wasted expenses (also recoverable via reliance or restitution)
 - lost profits
 - consequential losses
- **method of assessment:**
 - difference between P's expected financial positions absent breach and actual position due to breach
- **relevant evidence:**
 - P's past sales, predictable profits

1. LOST PROFITS

- *includes past and future losses directly caused by breach including lost opportunity to earn a profit (Canlin)*
- The key to recovering lost profits is establishing causation and that the lost profits were a direct consequence of the breach and that the losses were reasonably foreseeable and not too remote
- The question is whether the lost profits were foreseeable at the time the contract was made
- in commercial transactions lost profits are likely foreseeable (**Canlin**)
- when newly established venture: court will look at what is fair in the circumstances and will consider expert evidence re market conditions and competitors sales (**Agribands**)
- court will also consider contingencies that would have affected the P's profits (**Magnussen**)
- Court will make a deduction for expenses that P would have incurred, will award P what their NET profit would have been but for the breach (**Magnussen**)

- **Mitigation and Recovery of lost profits**
 - P has a duty to mitigate and court will not award compensation for lost profits unless P can convince court that they did all they could to mitigate
 - court especially reluctant to award P damages for future lost profits
 - Depends on the opportunity to mitigate, court will consider the nature of the goods, the timing of the breach and the nature and effect of the breach (**Canlin**)
 - *Loss of reputation:* can indicate that losses were not limited to immediate transaction, in **Magnussen** the court recognized that when a company's reputation is hurt, losses can extend into the future

- **Duration for Lost profits**
 - until reasonable mitigation becomes effective (**Sunnyside Greenhouses**)
 - not entitled to lost profits for what would have been the useful life of the product (panels) absent D's breach (**Sunnyside Greenhouses**)

- **Avoiding Double Recovery in Assessing Lost Profits**
 - P can claim both net profits and also wasted expenses (reliance damages) (**Ticketnet Corp.**)
 - can recover wasted expenses included in developing product before breach as well as expenses spent trying to mitigate (**Ticketnet Corp.**)
 - just cannot claim reliance and gross profits - this would give P an unjustified windfall - need to deduct the expenses that P saved from the breach (both capital and operating costs)
 - also need to think about the present value of money if claiming losses into the future, in **Ticketnet** the P was claiming money that they would not have received for 5 or 6 years if the K had been fulfilled

2. DAMAGES FOR BREACH OF CONTRACT WITH ALTERNATE MODES OF PERFORMANCE

- **when minimum level of performance specified:**
 - when D has discretion regarding performance of a contract (ie within a range) then the P will be awarded for the lost profit based on the minimum level of performance that D was obligated to conduct on under the contract (**Hamilton Window**)
 - when assessing expectation damages a factual inquiry about mode of performance is not necessary where contractual terms unequivocally state the minimum level/mode of performance (**Agribrand Purina**)
 - no matter how D behaved, when clear stated minimum duty of performance, not going to read a duty of good faith into K (**Agribrand Purina**)
 - But note still possible expectation damages
 - based on the assumption that when assessing damages no worried about unconscionability or unequal bargaining power, this would have be addressed when evaluating the formation of the K - oncer at the damages stage we are assuming that the K is valid
- **when minimum level of performance ambiguous**
 - Court will assess damages in a reasonable context that is more favourable to the D (**Paula Lee**)
 - past performance is also a relevant factor in the factual inquiry (**Durham Tees**)
 - mode of performance must be commercially reasonable and consistent with D's interests (still award damages based on the minimum level or performance within the reasonable range) (**Durham Tees**)

3.DISCRETIONARY BENEFITS IN EMPLOYMENT CONTRACTS

- Issue: is **wrongfully dismissed** employee entitled to discretionary benefits during reasonable notice period?
- **Consistent past benefits**
 - is these situations contrast 2 leading cases: **Bardal versus Ditmars**
 - in **Bardal** the court held that where an employer voluntarily paid bonuses as a measure of goodwill and the bonus was not contemplated at time of contract, the bonus was not recoverable for wrongful dismissal - focus was on expectation when K was made
 - In **Ditmars**, the court said need to pay more attention to the quality inherent in the employment relationship and not be too formalistic - need to pay attention to the actual practice that was involved, particularly if the benefits were necessary to augment the salary of the employee to make salary competitive in the industry
- **Conditional Benefits**
 - no entitlement to bonus when it is dependent on terms and conditions (**Zeidel**)
 - where question re annual increase added to salary on paid medical leave, the court in **Lewis** decided that the employee was not entitled to annual increase because it was performance based/based on success of company, and the employee was able to contribute to the company during his leave
 - People likely to be detrimentally affected by this position
 - problematic for any type of leave
 - when re wrongful dismissal:
 - lost the chance to even try to prove they could meet the target during the notice period

- could have argument of loss of chance - should be compensated for loss of chance to meet targets
- counter argument: D forced to compensate when no opportunity to evaluate

4. NON-PECUNIARY DAMAGES FOR BREACH OF CONTRACT

- **non pecuniary losses:** non-financial losses and punitive damages, non-pecuniary means type of damage, still compensated in pecuniary form
- **Mental Distress Damages for breach of Contract**
 - **Fidler** moved away from classical position (that in the context of breach of K only compensated for financial losses) and said that contract is governed by reasonable expectations
 - **Hadley** further developed this principle as stipulated that courts should focus on what parties contemplated as likely consequences of breach at the time they made the contract
 - no distinction between pecuniary and non-pecuniary losses > single rule: reasonable foreseeability
 - Reasonable Foreseeability of Mental Distress
 - **Peace of Mind Contracts:**
 - are contracts that involve intangible benefits as part of P's expectation
 - contracts with non-economic subject matter
 - *as long as the promise in relation to state of mind is part of the bargain in the reasonable contemplation of the contracting parties, mental distress arising from its breach are recoverable Fidler*
 - non-pecuniary damages are recoverable when non-economic benefit important object of K, and the breach does not have to result in physical inconvenience **Farley**
 - in these situations no need for IAW (**Fidler**)
 - workers compensation coverage and disability insurance contracts count as peace of mind contracts (**Branco**)
 - **Ordinary Commercial Contracts**
 - mental distress damages are generally unavailable (**Mustapha**)
 - unless there is an IAW
 - mental distress damages are only recoverable if within parties reasonable contemplation at the time of the contract > for example the D had actual or constructive knowledge that P would likely suffer mental distress due to breach (**Dupont Heating**)
 - no thin skull rule in contractual relationships
 - *policy: unfair to impose liability on D when had no way of knowing vulnerability, D could not build risk into contract price - so unfair to hold them responsible*
 - Extent of Mental Distress
 - mental distress from contract breach must be sufficiently serious to warrant compensation (**Fidler**)
 - question of fact to be determined in each case
 - Independent Actionable Wrong (IAW)
 - IAW not required when mental distress is reasonably contemplated at time of contract (ie non-economic benefit) (**Fidler**)
 - IAW required if mental distress not reasonably contemplated as likely consequence of breach
 - IAWs are NOT limited to tort, broader than that (**Whiten**)
 - breach of good faith in insurance context is one example of an IAW (**Whiten**)
 - breach of implied duty of good faith in exclusivity K = IAW (**Agribands Purina**)

- **Punitive Damages for Breach of Contract**

- Court not interested in punishing D for breaking K- because in some case it is in fact desirable not beach the k - notion of efficient breach
- therefore often need an IAW in order to get punitive damages in contract cases
- in **Fidler** no punitive damages because there was no evidence of bad faith by Sun Life
 - problem in this case is that insurance company blatantly ignored doctors notes saying P could not go back to work
- Surreptitious, deceitful and aggressive conduct aimed at undermining exclusivity contract and exploiting P's financial vulnerability was found to be reprehensible and warrant punitive damages in **Agribrands Purina**
- Note re human Rights codes
 - No common law action for breach of human rights violations
 - not an independent cause of action to ground P's claim for punitive damages

- **Employment Contracts**

- *Mental distress damages are not available for wrongful dismissal cases unless the manner of dismissal constitutes an IAW. (Wallace)*
 - There is an obligation of good faith and fair dealings in manner of dismissal
- In **Honda**, mental distress damages were recoverable because the manner of dismissal constituted an IAW
- Failure to act with good faith during dismissal may give rise to foreseeable compensable losses (**Hadley**)

C. RELIANCE DAMAGES FOR BREACH OF CONTRACT

- **Purpose:** restore P to same position absent breach
 - measure of tort damages and secondary measure of damages in contract law
- **Tort remedy**
 - Purpose of tort law to protect legally protected interests of others
 - basis of reliance damages: expectation of careful conduct to avoid interfering with legally protected interests of others
 - goal of tort damages: restore P to same position absent D's wrong
- **Reliance damages for breach of Contract**
 - purpose: compensate P for expenses incurred in reliance on contract and waster due to breach
 - goal: restore P to same position as if had no entered K
 - what is included: wasted expenses and opportunity cost
 - opportunity costs can bring reliance damages close to expectation damages
 - availability in contract cases
 - *complement to* expectation claim for net profit or
 - *alternative to* expectation damages > this is what we will focus on

1. ALTERNATIVE TO EXPECTATION DAMAGES

- **Expectation Damages are uncertain or speculative**
 - When a business has not been in business long enough to predict profits , the court will assume that they would have made enough to confer their capital loss
 - Court will assume that P would have made enough to break even, but this is subject to D proving on a balance of probabilities that P would not have broken even (**Sunshine Vacation**)
- **P's claim is framed in tort**
 - P is entitled to bring an action in tort or contract, as long as terms of K do not preclude P from bringing an action in tort (**Rainbow Caterers**)
- **What can be claimed in reliance for breach of contract**
 - Relevant questions:
 - was the expense incurred in reliance on D's undertaking?
 - was expense wasted due to D's breach?
 - were there any reasonably incurred post-breach expenses in mitigation? (**Ticketnet**)
 - Pre-Contract Expenses
 - only time can recover pre-K expenses is if it was reasonably foreseeable at time of K that pre-K expenses would be wasted if breach of K, if loss was within reasonable contemplation of the parties at the time of K, then P is entitled to compensation (**PreMD Inc.**)
 - P can only recover pre-K expenses when P can prove that pre-K expenses could have been in the reasonable contemplation of what would be wasted in event of breach (**Anglia TV**)
- **Limitations on Reliance Damages**
 - P cannot recover expenses that P would have incurred and would have been wasted even in the absence of a breach (**PreMD Inc.**)
 - Additionally, P cannot recover any expenses that can benefit the P notwithstanding the breach, court will consider any valuable property obtained by in an attempt to fulfil a K (**McRae**)

- policy:
 - P should not be restored to a better position than if the K had been performed
 - **Break- even Presumption**
 - P entitled to benefit of break-even presumption absent evidence to the contrary - onus on D to show that K would not have profited P (**Sunshine Vacations v. Bay**)
 - **Reliance Can NOT exceed Expectation Damages**
 - damages are limited to expectation(net loss) if P would suffered net loss absent breach
 - onus on D to prove loss inevitable even absent the breach (**Bowlay Logging**)
 - only have a right to election until D proves P could not recover expenses
 - **Consequential or Increased Losses Due to Breach**
 - need to distinguish expenses that incurred from performing the K from expenses that were incurred due to breach
 - P is entitled to recover expenses wasted on attempted mitigation
 - ie in **Bowlay Logging**: P could recover increased losses due to breach but not expenses spent in performing the K because D demonstrated that K would not have been profitable even absent breach
 - In **Pacific Playground**, the P was entitled to recover increased losses, the cost of securing an alternate water supply for development
2. CONTRACT AND TORT: DAMAGES FOR NEGLIGENT MISREPRESENTATION AND NEGLIGENT PERFORMANCE OF CONTRACT
- different limitation periods for contract and tort
 - in K- time begins to run at the beginning of k
 - In tort-discoverability principle - clock does not begin to run until misrepresentation is reasonably discovered

Damages for Negligent Misrepresentation

- negligent misrepresentation is a tort- so damages limited to reliance plus consequential losses (**Beaver Lumber**)
 - P will only be entitled to losses if the misrepresentation cause losses and losses are not too remote
 - negligent misrepresentation induced P to enter into K, and there is the assumption that P would have avoided losses otherwise
 - D can rebut this presumption on a balance of probabilities
 - P is not required to prove causation or lack of remoteness (**Rainbow Caterers**) - P was restored to financial position absent misrepresentation and no contract
 - McLachlin dissented: thought should have to prove a causal link and losses not too remote, all evidence pointed to numerous reasons for P's losses
 - but consider that its not like P is hoping D will breach, because no breach of K, rather misrepresentation at beginning
 - policy: assume people do not enter into Ks to lose money
- When P claim Expectation damages for Negligent Misrepresentation
 - P can claim lost profits for negligent misrepresentation where representation constitutes a contractual guarantee (**Varvis**)
 - this case is distinguished from **Beaver lumber**, because in **Vorvis** the D clearly profited from misrepresentation

3. NEGLIGENT PERFORMANCE OF CONTRACTUAL SERVICE IN RELATION TO LAND TRANSACTION

- basis of P's claim is detrimental reliance on professional advice or service
- plaintiffs loss: overpayment, loss of anticipated benefit
- issue: what is appropriate measure of damages
 - depends on nature and consequence of D's wrongdoing
- **Defendants Negligence Causes Defect**
 - **measure of damages:** Value P would have received but for D's negligence (expectation), plus consequential losses, eg cost of fixing problem caused by negligence (**Kienzle**)
 - *in this case court found that lawyer had to pay cat for clearing the problem (paying sister) and cost of getting good title, also awarded P one year of lost profits but did not award him profits he would have made if he had bought another property*
 - found that what P would have done with profit was too speculative, and the court will not engage in guessing how P could have used the money (**Kienzle**)
- **Failure to Notice Defect/ Bad Advice**
 - D's negligence deprives P of opportunity to avoid loss
 - **measure of damages:** difference between purchase price and fair market value of property at time of purchase + any consequential losses if any (**Toronto Industrial Leaseholds**)
 - P entitled to actual cost of remedying defect inspector negligently missed, and the court will not speculate about how vendor and purchaser would have resolved the issue in light of past dealings regarding another defect (**Varadi**)

D. RESTITUTIONARY REMEDIES

- restitution refers both to a particular type of remedy and a body of substantive law regarding civil liability
- as a type of remedy restitution is available in specific common law and equitable causes of action to strip gains from a wrongdoer
- based on **corrective** not **compensatory justice**

THE AVAILABILITY OF RESTITUTIONARY REMEDIES

- examples of situations where Ps will tend to prefer a restitutionary remedy
 - 1. where the claimant has suffered little or no loss but the D has clearly and wrongly obtained a benefit in the circumstance
 - 2. where compensatory damages are inadequate to vindicate the interests at stake
 - 3. where harm to the P is uncertain or difficult to measure
 - 4. where the P would likely have obtained an equitable remedy

Breach of Contract

- generally restitution is not a remedy for breach of K
- in ***Bank v America Canada*** the SCC endorsed the idea of efficient breach
- However some exceptions:
 - **1. complete failure of consideration**
 - has to do with payment for services, and inadequate service performance
 - recovery in these situations is based on the return to P what she has given D
 - **2. strip D of profits made through commission of a crime**
 - 3. restitution maybe available where D's conduct is cynical and calculated to make a profit and damages will not be an adequate remedy to protect the P's interest
 - **4. breach of confidence arising from a contractual relationship**
 - relief may be warranted when the P has a legitimate interest in preventing D's profit making activity and depriving him of profit
 - in these cases P's interest could be characterized as proprietary

Unofficial Conferral or Benefits

- where goods or services rendered at a person's request or in circumstances that clear expectation that they will be paid for - court may order restitutionary recovery
- claims are made when there has been no price set for services, and often no promise to pay but a reasonable expectation of payment

Gains from wrongdoing

- a) *Waiver of Tort and Trespass*
 - where as part of trespass the D removes things of value from the land
 - the P may sue in conversion of the price receive by the D for timber or minerals
- b) *Economic torts, Misappropriation of IP and Breach of confidence*
 - restitution remedies are frequently use in cases involving misappropriation of trade secrets (**Peter Pan**)
 - in ***Lac Minerals Ltd*** the SCC affirmed the availability of restitutionary remedies in this context
 - deal anticipated bw parties was 50/50
 - but MAJ awarded P entire property
 - policy: that if breaching an obligation of confidence one party is able to acquire an asset entirely for itself, at a risk of only having to compensate the other for that the other would have received

in a formal relationship bw them was concluded - the D would be given a strong incentive to breach the obligation and acquire the asset,

- Third parties can also be liable for breach of confidence (**Guardain Newspaper**)
- b) **Breach of Fiduciary duty**
 - where a fiduciary makes a personal profit of gain form her position the principal may see restitutionary remedies such as an account or constructive trust even though the principal may have suffered no loss
 - basis of remedy is the benefit obtained by wrongdoer, not loss sustained by P

Domestic Relationships and Future Development

- **Remedy is available when:**
 - 1. there has been an unjust enrichment of one party
 - 2. no corresponding deprivation of the other
 - 3. there is no juristic reason for the deprivation
- the court affirmed that the required benefit or contribution does not need to be monetary (**Peter**)
- courts have to consider whether to award constructive trust or monetary award - usually money sufficient to reverse the unjust enrichment

REMEDIAL OPTIONS FOR UNJUST ENRICHMENT

- courts may make monetary and specific orders
- **monetary order:** orders D to pay sum to P
- **specific order:** relates to specific property

1. Monetary Restitution

- Gain to D is measured by the benefit received (and therefore lost) by P

2. Accounting

- **its effect is to require the D to account to the P for an unjustly acquired profit**
- **accounting is attractive hen when the P has suffered little or no damage and D has proffitte from wrongdoing**
- **remedy is commonly used in cases where:**
 - D has obtained a secret commission or bribe **Fawcett**
 - made a person profit through the misuse of trust property **Solloway**
 - breach of fiduciary duty **Strother**
 - wrongly exploited belonging to principal **Canadian Aero**
 - improperly use confidential information **Mcleod**
 - where D;s wrongdoing allowed him to obtain a head start - accounting may then be used to strip the D of profits for relevant period **Stonetile**
- accounting may be ordered where D has deliberately misappropriated the Ps property and showed disregards for P's rights and this yields substantial profit for D

3. Rescission

- has the effect of terminating contractual rights of the parties and restoring the status quo
- traditionally such relief is said be available only when it is possible to make perfect restitution to both parties and not available when benefits can not be returned
- however in practice courts will ignore minor difficulties or make monetary adjustments where there has been some irreversible deterioration in the condition of the property to be restored
- courts will refuse restitution if the agreement has been affirmed of third party rights have been affected

4. The Constructive Trust

- both a basis of liability and remedy in situation involving family property
 - subjects the person holding title to an equitable duty to convey it another on the ground that would be unjustly enriched if allowed to retain it
- it may now be used in any situation where the principles of unjust enrichment indicate that P should be entitled to property owned by D **Lac Mineral**
- whether appropriate remedy: is there a substantial and direct link between plaintiffs contribution and the acquisition, maintenance preservation of improvement of property LAC Minerals
 - The SCC in **Kerr** affirmed that when cohabit contributes in money or services towards the acquisition of property by the other, the principle of unjust enrichment may require a restitutionary remedy
 - liability in this context turns on the autonomous principle of unjust enrichment, has nothing to do with K
 - Remedy is available when:
 - 1. there has been an unjust enrichment of one party
 - 2. no corresponding deprivation of the other
 - 3. there is no juristic reason for the deprivation
 - > enrichment arises from the conferral of a tangible benefit on the defendant, absent a juristic reason
 - in **Garland** -court said absence of a juristic reason requires a 2 part analysis:
 - 1. the P must show that the circumstances under which the benefit was conferred does not fall within one of the established categories of juristic reasons (include contract, disposition of law, donative intent, other valid CL , quotable or statutory obligations)
 - > if established prima face case for restitution arises
 - 2. a de facto burden of proof is then placed on D to show some other reason why should retain the benefit
 - 2 important considerations: the parties reasonable expectations and public policy
 - the benefit may be positive or negative
 - it is irrelevant if the D does not retain the benefit permanently, subject to change in position defence
 - note creditors
 - if D has insufficient funds to satisfy all creditors - constructive trusts gives priority over other creditors - important consideration
 - if monetary remedy sufficient that will usually be preferable remedy to constructive trust (**Antrobus**)

MEASURING THE ENRICHMENT

- restitutionary remedies are based on unjust enrichment and are measured by the benefit wrongfully obtained by the D
- however measuring the benefit wrongfully obtained can be complex
 - Choice of Approach: Relevant Factors:
 - Nature of D's conduct
 - Position of parties
 - only one approach may be used
 - what method is most favourable to P (EBCO)

1.Net Profit Method

- most favourable method for P
- difference between the D's gross receipts and the expense in acquiring them

- The D is entitled to deduct the costs of doing business, but the burden rests on D to show what should be deducted **Pro Arts**
- this method is rarely used because of complexities of assessing action profit from the Ds activities and bc some of the profits may be attributable to D's own skill effort etc
- based on the assumption that the D's gain from enterprise is attributable to the wrong
- has been used in:
 - infringement of intellectual property rights
 - misappropriation of confidential information
 - **Stonetile** - the D was ordered to account for entire net period during the relevant period
- net profit awarded in **Peter Pan** where D knowingly used Ps information to make a product (*distinguished from Copydex where court awarded opportunity costs because there was an inadvertent use of information*)
 - Should Net Profits be Awarded in Breach of Contract Cases?
 - Available only in exceptional cases where P has legitimate interest in preventing profit-making activity and deprive D of profits from wrongdoing (**Blake**)
 - Relevant consideration of whether exception circumstances include :(Blake)
 - **1. Nature of subject matter of K**
 - D did exactly what he was not supposed to do
 - **2. purpose of contractual provision**
 - was it commercial or fiduciary K?
 - **3. Circumstance in which breach occurred**
 - espionage
 - **4. Consequences of breach**
 - national security ramifications
 - **5. Circumstances in which remedy sought**
 - want to discourage books that breach national security

2. Apportionment Method

- D misappropriates P's property combines it with own property to produce something
- D benefits from use of P's property- better product, increased profits etc.
- P is entitled to increased profit attributable to use of its property - but P's recovery is limited to profit attributable to infringement (**Edward v Sims**)
- D can rebut and has the burden of separating profits attributable to the wrong from profits attributable to other factors

3. Savings Comparison Method

- focus on negative benefit to the D, their financial benefit from wrongdoing
- cases where the D's entire net profit cannot be attributed to the wrong because the wrong was only a small element of an otherwise lawful enterprise
- Remedy or choice for restrictive covenants (**Wrotham Park**)
- Hypothetical negotiation between the parties, consider how much D would have saved **Arbutus Park Estates**
- Wrongfully acquired confidential information
 - focus on savings not profit from wrongdoing (**Apotex**) - attractive when no profits from wrongdoing
 - the court may charge the wrongdoer the R&D costs would have incurred to acquire the information legitimately (**Apotex**)
- in **IBM** - Court measured how much money Telus saved based on how long it took employees to achieve what IBM achieved - and evaluate the difference in time

4. Opportunity-Cost Model

- focus on D's benefits from misappropriation of P's property
- assumes that D's wrongdoing deprived P proprietary interest and/or opportunity to bargain
- damages determined based on what willing seller would have demanded and willing buyer would have paid for property/interest in question
- loss to P: is opportunity to charge a fee of D
- based on fair market value or highest price P could have demanded
- irrelevant if P suffered no pecuniary loss from D's wrong (**Whitwham**)
- has been used in cases
 - involving the refusal of tenant to vacate premises (**Swordheath Properties v Ltd**)
 - the unauthorized use of P's sewer system (**Daniel**)
 - for trespass and removal of topsoil (**Wigle**)
- Misappropriation of unique confidential information
 - capitalized value of reasonable royalties (**Seager**)
 - P had carpet formula, shared with D in attempt to get D to buy it > D used it > now had to pay for it
 - Relevant Factors for Calculating license fee:
 - 1. Time and energy invested to create idea
 - 2. amount for unique idea, R & D plus amount for unique idea (**ICAM**)
 - 3. Effect of sale on P's other interests (**Seager**)
 - if p has other product now competing with D?

5. Valuing Non-monetary Benefits and Issues in Domestic Property Cases

- in family context P will usually ask for a constructive trust but simply a strategy because really divorced/separated people don't want to be co-owners, they want % of property value
 - try to be strategic by asking for a constructive trust and then a money judgment
- where the benefit to the D is in the nature of services, its value is measured on a quantum merit basis
- where the services are available on the market, the court will use the market value to assess the benefit
- where the services not commercial in nature - more difficult evaluation questions arise
- **Kerr** says lets get rid of constructive trust analysis, its all about money lets go directly there
- so can skip analysis of constructive trust
 - the P is required to pass the test in **Kerr**
 - **Remedy is available when:**
 - 1. there has been an unjust enrichment of one party
 - 2. no corresponding deprivation of the other
 - 3. there is no juristic reason for the deprivation
 - The Issue of Mutual Benefit
 - In family context there is usually a mutual conferral of benefits bw parties
 - In **Kerr**, the court clarified that mutual conferral of benefits may be relevant
 - either to finding a juristic reason against finding unjust enrichment
 - or when determining a remedy for successful claim
 - or as defence by the defendant
 - But it should NOT be addressed at the benefit/detriment stage (stage 2)
- **Two Key Issues in Domestic Relationships:**
 - > court in **Kerr** stressed that we need to keep these two questions separate

- **1. Appropriate Remedy/Form of the Award**
 - Form of the Award
 - court may order cad based on the assessment of the value of services rendered
 - or may order p has interest in property (constructive trust)
- **2. Measuring the Enrichment**
 - Value survived versus value received
 - value received: seeks to measure and put place a cash value on the specific services provided
 - value survived: starts with the resulting value of the property and determines what portion of that value is attributable to the claimants contribution
 - In Kerr, the SCC stated that in may cases a value survived approach may be preferable
 - **If the P can demonstrate 2 things should be entitled to monetary remedy in value-survived basis:**
 - 1. that there was a joint family venture
 - 2. that there is a link between their contributions and the accumulation of wealth
 - Advantages of Value survived
 - consistent with the reality of couples lives and reasonable expectations re accumulation of wealth over time
 - Assessing quantum under value survived
 - increase in value of asset during relationship
- in **Kerr**, court stated that should be no presumption of joint family venture in relation to cohabiting couples - but each case must be assessed on its facts and
 - but no longer a problem because no under BC Family Law Act - parties who cohabited for more than 2 years are common law
- all circumstances should be considered including: mutual efforts, economic integration, actual intent and priority of the family **Vanesse**
- **Set off**
 - Mutuality of enrichment does not need to be specifically pleaded - court should automatically evaluate in a family context

E. AGGRAVATED AND PUNITIVE DAMAGES

Aggravated Damages:

- compensation of intangible injuries arising from manner wrong committed
- compensates injuries to P's interests "not properly compensable by ordinary damages (**Whiten**)
- evidential basis: unusual suffering/hurt from wrong
- available when deliberate and malicious wrongdoing
 - **Hill** - wrong was motivated by malice (defamation)

Punitive Damages Distinguished from compensatory damages

- Punitive damages are intended to punish the wrongdoer for particularly egregious conduct, promote respect for the rule of law and provide additional deterrence
- punitive damages are not grounded in compensation or corrective justice
- are grounded in retributive justice: and serve the goals of punishment, deterrence and denunciation
- availability and quantum are determined by the Rationality TEST
- Overlaps between Punitive and Aggravated Damages
 - same conduct may justify both aggravated and punitive
 - but serve different purposes
 - aggravated damages are part of general compensatory damages, while punitive damages are a separate head of damage

Reasons for limited availability of Punitive Damages

- argued that punitive damages confuse the functions of civil and criminal law and introduce public condemnation into private sphere
- risk unfairly penalizing the D without the procedural protection in criminal setting
- the rules of evidence and burden of proof are not designed to protect the rights of D in civil litigation and do not rigorously guard against error in judicial process
- punitive damages are a windfall to P - should windfall not go to the state

AVAILABILITY OF PUNITIVE DAMAGES -Whiten

- punitive damages are awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency
- SCC has recognized that punishment is a legitimate objective of civil law **Whiten**
- but that punitive damages should be awarded in exceptional circumstances and with caution
- The court in **Whiten** explicitly stated that the control mechanism for punitive damages is not by restricting the category of case, but rather by ensuring that punitive damages are only awarded in circumstances where the damages are rationally connected to the circumstances that warrant a addition of punishment in addition to plaintiff compensation

A. Nature of Defendants Conduct - Types of Actions warranting Punitive Damages

- 1. Intentional Torts
 - often attract punitive damages
 - disregards P's well being
 - or constitutes a breach of trust **Jefflin**
 - malicious prosecution -**Pate Estate**
- 2. Negligent Conduct
 - punitive damages rarely awarded - not available re good faith conduct

- no subjective fault
- but will award punitive damages where:
 - malicious and outrageous conduct in disregard of P's wellbeing, unequal power (**Vancouver Hockey Club**)
 - Deliberately exposing P to serious risk of harm (**McIntyre**)
- 3. Product Liability
 - inadvertent conduct not targeted at individuals,
 - punitive damages are usually targeted
 - but court will award punitive damages when there is disregard or indifference of others safety, and behaviour deserves condemnation (**McIntyre**)
- 4. Other Instances
 - breach of fiduciary duty, ie breach of trust and abuse of power
 - oppressive action by government officials
 - **Uni-Jet Industrial Pipe Ltd.** punitive damages appropriate to show how reprehensible conduct is
- **B. Quantum of Damages**
 - Rationality test determines both availability and quantum
 - proportionality is key - award must be connected to goals of punitive damages
 - lowest amount possible to achieve these goals
- **C. Rationality TEST**
 - 1 Nature of D's Conduct
 - does it deserve condemnation and punishment, what is the degree of oral turpitude
 - was actual or potential harm directed at P
 - Did D benefit from wrongdoing (ie in **Whiten** had something to gain, save money)
 - Relative vulnerability of parties
 - in **Whiten**, insurance company exploited P's vulnerability
 - Source of vulnerability
 - in **Civic Life** P was vulnerable but court said not punitive damages because D was not the source of P's vulnerability, P had put themselves in a vulnerable situation
 - Why did the court award punitive damages in **Whiten** but not **Slyvan lake**?
 - in **Whiten**, not a commercial contract D exploited P's vulnerability
 - in **Sylvan lake** court said punitive damages were not appropriate because P was not vulnerable - was a commercial contract between 2 commercial entities
 - 2. Sufficiency of compensatory damages
 - compensatory damages inadequate to punish D?
 - note that compensatory damages already hurt the defendant
 - evaluate compensatory damages first - then evaluate punitive
 - 3. Advantages/Benefit from Wrongdoing
 - did D benefit?
 - can overlap with restitutionary damages - in **Austin v Rescon** court said D had to pay the amount they had saved (trespass to land case)
 - 4. Defendants Financial Means
 - **Hardship:** court will not consider financial situation of D, unless D brings it up - it is D's responsibility to demonstrate financial problems
 - **If D's wealth influenced conduct:** what amount of damage is necessary to achieve goal of deterrence
 - in **Hill, Branco** - D had a lot of money - court had to hit them hard in order to send a message

- re large awards: court will only award large awards against institutions not individuals, because even if individual have insurance only cover compensatory not punitive damages **(A.B)**
- 5. Expressions of Remorse and Apology
 - in Muir, court did not award punitive damages because D had apologized profusely and waived limitation defence
 - in Hill, D's failure to apologize partly justified punitive damages
- 6. Prior Penalties
 - general rule: no double jeopardy > note this means that whether a person can obtain punitive damages may depend on timing in relation to other proceedings
 - note refers to no punitive + other punishment but can still have compensatory + other punishment
 - in **Whiten**, court said prior sanctions important considerations but not bar to punitive damages
 - unless confident that exactly the same wrongdoing that was punished in criminal proceedings, punitive damages will still be available (**Flachs**)
 - Meaning of Other Punishment Liberally Interpreted
 - Bad public relations can count as punishment (**Sylvan Lake**)
 - Disciplinary proceedings by professional bodies (**McGillvray**)

PROPER DEFENDANTS

- even when Ds are jointly and severally liable in tort they may not be equally culpable of malicious conduct
- courts have asserted authority to order punitive damages against guilty parties only (**Townsvie Properties**)

Multiple Defendants

- when there are 2 or more parties liable for the same tort - their liability for aggravated and punitive damages is not typically joint and several but rather individual
- these damages must be assessed on the basis of the particular malice of each joint tortfeasor (**Hill**)
- Quantum based on each D's conduct (**Plint**)
- Ramifications of Canadian Position
 - Accountability for wrongdoing
 - reality of several liability - potential lack of satisfaction

Vicariously Liable Defendants

- where employers are innocent of any wrongdoing but are vicariously liable for compensatory damages
- punitive damages cannot be awarded against vicariously liable D in the absence of reprehensible conduct specifically referable to the employer (**Plint**)
- however such an award may be justified on the basis that it provides incentive for employers or principals to control the behaviour of their employees or agents
- the Nova Scotia Court of Appeal in **Hollett** held that a principal or employer is liable for punitive damages when:
 1. the employer authorized the employee to do the acts
 2. the employer knew the employee was unfit and was reckless in employing the employee (**Peeters**)
 3. the employee or agent was employed in a managerial capacity (**Clark**)

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- 4. the employer ratified the act of the employee

Joint and Several Liability

- liability for aggravated damages: joint and several
- liability for punitive damages: several (**Plint**)

II. LIMITING PRINCIPLES

SUMMARY: Devices for Limiting Defendants Liability Include

1. **Remoteness:** reasonably foreseeable losses
2. **Certainty and Causation:** nexus bw wrong and loss
 - past losses: balance of probabilities
 - future losses: real or substantial chance of loss occurring
3. **Mitigation:** reasonable steps to minimize losses from D's wrong
 - both avoided and avoidable losses are not recoverable
4. **Time of Assessment:**
 - losses assessed at time of wrong or at time reasonable to mitigate

A. REMOTENESS AND UNCERTAIN FUTURE LOSSES

- limits on recoverable damages in tort and breach of contract
- compensatory principle subject to limiting principles
- purpose: fair allocation of risks, concerns about potential unlimited liability for D
- whole area driven by policy not logic

A. REMOTENESS

- Recovery limited to losses directly caused by D's wrong, remote losses are not recoverable

Remoteness in Tort

- loss is limited to what was reasonably foreseeable at the time of the wrong

Remoteness in Breach of K

- recoverable loss is limited to what was within the reasonable contemplation of the parties at the time of the contract as likely consequences of the breach
- question is whether a reasonable person would have contemplated the loss in question to result from a breach in K (**Hadley**)
- Determining losses reasonably contemplated at time of K
 - **presumption:** D accepts normal risks associated with type of K
 - Objective knowledge:
 - whether reasonable person could have foreseen loss as a likely consequence of breach (**Purolator Courier Ltd.**)
 - actual knowledge of D's enterprise irrelevant (**Ziai**)
 - Unusual Risks
 - not recoverable absent D's actual or constructive knowledge
 - Question is whether reasonable person with D's knowledge of special circumstance at the time of contract would contemplate that breach would result in loss in question (**Turczinski**)
 - if there is adequate communication re the purpose of importance of subject matter then will hold that D had sufficient knowledge and loss was reasonably contemplated (**Cornwall Gravel Co.**)
- Parties Reasonable Expectations
 - focus on risks not specifically allocated in K
 - Relevant Factors:
 - D's expertise and knowledge of P's operation (**Munroe Equipment**)
 - Custom of trade (**Transfield Shipping**)
 - Which party would normally insure risk in question

- Proportionality between extent of risk, D's undertaking and contract price (**Kienzle**)
- Degree of Likelihood of Loss
 - Parties do not need to contemplate the precise manner or the actual extent of the loss at the time of the K
 - correct legal question is whether if parties had considered the possible breach, they would have foreseen the consequences (**RBC Dominion Securities Inc**)

B. UNCERTAIN FUTURE LOSSES

Lost chance to avoid a loss in breach of K

- P need to show causal link between losses and D's breach on a balance of probabilities using the "but for test"
- no recover for losses that were likely to have occurred even without the D's breach (**Matheson**)

Past and Future losses

- past and present losses are recoverable on a BOP
- Future losses: are recoverable in appropriate cases (need to consider the duty to mitigate) - availability will depend on the nature of P's business and the effect of the breach (**Canlin**)
 - **Canlin**: tarnished reputation, 4 years lost profits reasonable
 - **Magnussen**: Damaged reputation, 2 years lost profits and market opportunity

Extent or Quantum of Loss

- *Past or Present Losses*
 - consider evidence of P's past records, competitors profits and/or experts opinions
 - full recovery where P proves losses on BOP (**Houweling Nurseries**)
 - no recovery for purely speculative lost profits (**Sunshine Vacation**)
- *Future lost profits speculative*
 - uncertainty regarding amount per se not bar to recovery
 - estimate lost profits based on available evidence (**Ticketnet**)
 - **Loss of Chance in Contract (Reardon)**
 - A P can recover damages for a loss of chance if 4 criteria are met:
 1. P must establish on a BOP that **but for** the D's wrongful conduct, the P had a chance to obtain a benefit or avoid a loss
 2. The P must show that the chance lost was sufficiently real and significant to rise above mere speculation
 3. the P must demonstrate that the outcome depended on someone or something other than himself/herself
 4. the P must show that the loss of chance had some practical value
 - there can be no allowance for a loss of possible profits or diminution in value where there is no realistic evidence of a potential sale (**1664550 Ontario**)
 - The chance must be real and substantial but does not need to be probable, need at least a 15% chance probability of occurrence (Kipfinch)
- **Contingencies**: future events affecting P's profits, eg. economic conditions, delays, setbacks and project not as successful as anticipated
 - these uncertainties are dealt with as by assessing them in a probabilistic fashion

Effects of Post Breach Events on Assessment of Damages

- when assessing damages that extend far into the future, court must grapple with a variety of contingencies
- but what happens when contingencies become realities before trial and uncertainties become certainties? > courts will take these certainties into account when assessing damages
- However the effect of post breach events on the assessment of Damages differs depending on whether the the action is for personal injury or for damages to property
- **Personal Injury Cases**
 - the approach to post-breach events in personal injury cases depends on whether the 2nd event was tortious or non-tortious

- When second event was non-tortious
 - if after a P is injured an event unrelated to the D's negligence intervenes so as to affect the nature of the P's injury, that event will be taken into account when fixing damages (**Jobling**)
 - ie in **Smith** D caused P to have a ankle injury, then P had a disabling knee injury - knee injury was taken into account to reduce P's damages for lost earning capacity, bc the knee injury had essentially obliterating the effects of the ankle injury
- When second Event was Tortious
 - Approach depends on whether events are classified as indivisible or divisible
 - *Indivisible:*
 - if determined that injuries from multiple events are indivisible in the sense that the subsequent event aggravated injuries from the earlier incident - the tortfeasors are jointly liable for the P's injuries and no apportionment is permitted between the different causes of the P's indivisible injuries
 - the result is that P can recover entire damages from any one tortfeasor
 - *Divisible:*
 - where the P's injuries from multiple events are found to be divisible, where the different events resulted in distinct injuries - the appropriate method for determining damages attributable to each tortfeasor is the devaluation approach - that results in several or independent liability (**Bradley**)
- **Property Cases**
 - Two contrasting lines of reasoning in regards to the effect of post breach events in the assessment of damage to property cases
 - The SCC has held in **Sunrise** that the damage to P's property crystallizes at the time of D's wrong or shortly thereafter and the P's recovery is not affected by post-wrong event
 - The court in **Sunrise** held that it was irrelevant whether or not the subsequent event was tortious or non-tortious as the D remains liable for the entire loss regardless
 - Sunrise is inconsistent with the approach taken in personal injury cases, and LHD makes it clear that this approach should only apply to damage to property cases
 - Other ways of Addressing Post-Wrong events in Damage to Property cases
 - when second even is tortious: in **Abraham** the COA in Quebec held that in the event of 2 tortfeasors, the second tortfeasor is only liable only for the additional damage to property if any - **consistent with Sunrise?**
 - when second event is non-tortious: In **Carsologie**, the House of Lords took the view that when the subsequent event is non-tortious and the event duplicates losses for the D's wrong, this obliterates D's liability subject to the injuries that would not have incurred "but for" the D's behaviour
 - "but for" analysis is consistent with approach to subsequent events personal injury

C.MITIGATION AND AVOIDED LOSSES

Duty to Mitigate

- post breach events affect plaintiffs ability to receive compensation
- P is obligated to take reasonable steps to minimize or eliminate losses resulting from D's breach
- duty to mitigate arises both in breach of contract and in tort

Consequences of Mitigation Duty

- both avoided and avoidable losses are not recoverable (***British Westinghouse Electric***)
- **avoidable losses:**
 - losses P could have prevented through mitigation
 - not recoverable because it the P who has the ability to control the loss
- **avoided losses:**
 - are losses that P has in fact avoided through mitigation
 - not recoverable because the purpose of damages is not to punish D

Rationale for Duty to Mitigate

- encourages efficient use of resources and encourages P t act responsibly after D's breach
- Damages intended to compensate P not punish D
- P controls post breach situation - best position to avoid loss

Onus of Proof

- onus on D to establish that part or all of P's losses were avoidable or avoided
- onus on D to show the extent to which any mitigation would reduced the damages and how the P could have reasonably avoided some part of the loss claimed (***Conros Corp***)

Reasonable Conduct

- is a question of fact and is based on common sense given P's particular circumstances
 - Losses could have been avoided had P not proceeded with production when D cancelled order of custom-made goods before production began: ***Corflex Partitions v Unimac Group Ltd***,
 - Seller to sell goods, especially perishable items, after breach, including selling at a discount where necessitated by the situation: ***Barber v Vrozos***, 2- P mitigated by selling goods at discounted rates.
 - P to accept reasonable offers from D or reach compromise to avert greater losses
 - Wrongful dismissal - P make reasonable efforts to find alternate employment including accepting to work for same employer provided reasonable to do so, e.g. work environment hostile; P embarrassed and humiliating to continue working for employer - ***Evans v Teamster Local Union 31***

Cost of Mitigation

- reasonable cost of mitigation is recoverable and it is irrelevant if attempt at mitigation was successful or if it exacerbated the loss (***Ticketnet***)
- Onus on P to prove that expenses were reasonably incurred and there was a close relationship between D's wrong and expenditure

Scope of Mitigation Duty

- P is expected to perform reasonable but not exceptional efforts to mitigate loss
- **Asamara**: P not expected to buy shares when highly speculative
- P is not expected to risk its reputation to avoid losses from D's breach (***Zorin International Corp***)
- Ps conduct will not be judged with the benefit of hindsight (***Banco de Portugal***)
- if risky venture to mitigate damages and efforts were successful the court will still consider that the P was able to avoid loss (***Redpath***)

Inability to Mitigate

- Depends on whether inability to mitigate was reasonably foreseeable or caused by the breach (**Turczinski**)
- was it within the reasonable contemplation of the parties that P would not be able to mitigate (**Turczinski**) - *in this casino bc D had no actual or constructive knowledge of P's condition*

Avoided Loses

- profits from substitute transactions are relevant when assessing P's losses
- **TEST: would P have had the opportunity to earn profits but for D's breach (Erie County)**
 - in **Erie County** key that P would not have thought about buying gas without the breach
- Wrongful Dismissal: if termination gave P more time for other activities, the income from this enhanced capacity will be considered and can reduce damages for wrongful dismissal (**Korol**)
 - In **Cockburn** the D wrongfully dismissed the P, but the P was not awarded any damages because he took steps that were far and beyond what was necessary to mitigate the loss and he was denied compensation on the basis that his subsequent transactions had eliminated his loss
- purpose of failed transaction may be relevant in determining whether losses from breach could be avoided in subsequent transactions (**Shapiro**)
 - Court said hard to believe that one of properties that P bought was not in substitution
 - just because loads of cash and could have bought additional property - does not mean that goals have been achieved
- Lost Volume
 - one aspect of avoided loss is the problem of lost volume where the D refuses to take delivery of goods to another customer and the plaintiff is able to resell those goods to another customer
 - the second sale does not necessarily cancel the loss of the first sale and whether the second sale mitigated the loss from the first sale depends on the state of supply and demand
 - in **Windmill** the SCC held that where the second transaction is independent of the first it will sometimes be referred to as collateral and will not be taken into account (deducted) when assessing the loss
 - in this case the court held that the subsequent transaction had not in fact mitigated the P's loss since portions of the warehouse were still vacant
 - in contract in **Shapiro** the court dismissed the P's argument that it would have purchased properties in any event because it had the funds to do so

D.TIME OF ASSESSMENT

- **general rule:** breach date rule: Damages assessed on breach or soon thereafter
- **rationale:**
 - encourage timely mitigation
 - avoid post-breach speculation
 - certainty in damage assessment

EXCEPTIONS TO BREACH OF DATE RULE

- court has discretion to depart from the breach of date rule in exceptional circumstances
- onus on P to convince the court that not possible to mitigate at the time
- **2 questions:**
 - Need to identify exceptional circumstances
 - Need to determine alternative appropriate time to assess damages

1. Inability to Mitigate at time of breach or soon thereafter

- Damages assessed by reference to time when P could have mitigated with reasonable efforts, should consider the circumstances surrounding the breach including the subject matter of the K, any prevailing conditions at the breach date that made mitigation unreasonable
- **Asamara:** wrongful retention of shares assessed 7 years after breach, unrealistic for P to mitigate earlier, but not assessed time of action, bc P should have mitigated when opportunity arose
- **Damage to Property:**
 - **in Dodd,** D was denying liability and P was unable to pay for repairs - P was able to recover higher building costs 10 years after the incident
 - this case indicates that court will consider if D denied liability and if there was uncertainty about whether mitigation costs would be recoverable as well as P's financial situation when evaluating when the time assessment should be
 - issue: P not an individual, was a company should have had insurance?

2. P entitled to Specific Performance

- for most part when P claims SP, claim damages in lieu because SP not realistic
- if P would have been entitled to specific performance > then reasonable for them not to mitigate/not to look for another property > if this is the case damages will be assessed at the time of trial or at a time clear to a reasonable person that specific performance would not happen
- if reasonable claim for specific performance then no reasonable expectation to mitigate (**Wroth**)
- **Limited Availability of Specific Performance**
 - P cannot claim SP to obtain favourable assessment date
 - Claim for SP must be fair substantial and legitimate. SP not to be used as a shield for mitigation (**Asamara**)
 - D should not be made to be P's insurer
 - therefore when P makes a claim of SP - P needs to satisfy the court that there is a good reason that they are insisting on SP
 - P needs to show 2 things: good reason why deserve SP in circumstances and also legitimate interest (interest cannot be served in some other way) (Southcott Estate)
 - No automatic claim to SP - available only where subject matter of K is **unique**, land or chattels (**Semelhago**)

- **Concept of Uniqueness:**
 - courts tend to find uniqueness more in residential real estate cases
 - commercial and mass produced real estate generally not unique (**Southcott Estate**)
 - but corporate entities are not precluded from obtaining SP where subject property unique (**Griffnit**)
 - even corporate entities can have specific reasons for wanting a particular property
 - Uniqueness does not mean singularity - it means that property has a quality that cannot be reasonably duplicated elsewhere (**John E. Dodge Holdings**)
 - uniqueness is NOT not simply the opportunity to make money - that could be made elsewhere
 - Uniqueness must related to subject property and not business opportunity (**Toronto Catholic Schoolboard**)
- Time for Assessing Damages in Lieu of Specific Performance
 - Damages assessed at time of judgement or when SP became impossible (**Lalani**)
 - If P made any gain in time between time of breach and judgement/assessment of damages - this will be ignored (**Semelhago**)
 - Ie if didn't sell your house and increased in value
 - but SCC said should not deduct appreciation of P's home because policy is to give a remedy that mirrors specific performance
 - >>windfall concern:
 - P can benefit from not selling old house, its increased value + and the increase of value in property they were not allowed to buy

E. MEASUREMENT ISSUES: COST OF REINSTATEMENT OR DIMINUTION IN VALUE

- measurement issues arise in torts and breach of K cases - focus will be on tort cases
- restore P to pre-tort position

1. DAMAGE TO CHATTELS

- *Repair costs exceeds replacement cost - Can P insist on higher repair cost?*
 - two lines of authority
 - in **Darbishire** - P was limited to cheaper alternative: replacement cost + consequential losses if any
 - exact replacement was not required, could get a similar chattel in similar condition that reasonably met P's needs
 - court held that it was irrelevant that chattel was already repaired
 - **consequential losses**: are possible if it is an income generating chattel, or if need to rent substitute while looking for replacement
 - in **O'Grady** the court allowed P to recover repair costs even though they were higher than replacement cost
 - higher repair cost will be justified for unique items and reasonable to repair
 - in this case difference in cost was not extreme
- Reasonableness considerations
 - amount of economic waste
 - key difference between Darbishire and O'Grady
 - intention to repair/restore
 - no windfall for P
 - if any evidence that P has no intention to repair and would just keep extra money - no replacement
 - benefits of reinstatement to P weighed against burden on D to pay higher cost

2. MISAPPROPRIATION OF CHATTELS

- Wrongful detention of Chattels, P entitled to replacement cost
- Time of Assessment
 - crucial issue is at what time should the court assess the replacement cost?
 - value of item might be subject to market fluctuations
 - law does not provide straightforward answer > seems to depend on type of action
 - 2 types of action for intentional wrongful possession of goods: Detinue or Conversion
- Detinue
 - wrongful possession of goods, demand, and refusal to return
 - continuing wrong
 - purpose of action: demand return of goods or equivalent value
 - Assumption: P reasonably believe D is in possession of chattel and demanding its return, assumption that P was hoping item would be returned
 - Damages: value of goods at time of judgment
 - but P is exonerated to replace goods when it became reasonably clear that chattel no longer existed or no legitimate expectation of return - if this is the case damages will be assessed at time when P reasonably should have replaced the item
 - no expectation for P to replace goods when they are unique or P has a legitimate expectation they will be returned
- Conversion
 - intentional and substantial interference with P's possession or right to immediate possession of chattels

- wrong crystallizes at time of conversion
 - reasonable replacement cost at time of conversion or when replacement possible
 - Damages for conversion subject to duty to mitigate - damages are assessed when P should have reasonably replaced chattel (**Asamera**)
 - Election of Remedy
 - same conduct of D for detinue or conversion
 - strategic choice: nature of goods; value rising or falling
 - would elect Detinue if goods increasing in value
 - would elect Conversion if goods decreasing in value
 - election is a gamble given market unpredictability
 - but P may be entitled to consequential losses whether claim is for conversion or detinue - can help avoid technical disparity in remedies based on form of action
 - Consequential Losses
 - reasonable financial losses, rental charges, loss of use (**O'Grady**)
 - income generating chattels: lost profits (**Sunrise**)
3. DAMAGE TO REAL PROPERTY
- general rule:
 - if repairs costs are equal or less than diminished value > reinstatement/repair cost
 - if repair cost exceeds reduction in value: higher reinstatement cost if repairs reasonable
 - **Determining Reasonableness**
 - **1. Nature of P's Interest in Land**
 - *Commercial*:
 - P will usually be awarded diminution in value of land (**Trafalgar Trucking**)
 - *Residential Property*:
 - make a distinction between principal residence and vacation property
 - principal residence:
 - will award reinstatement
 - in **Jens** court considered that it was P's home and had personal reasons such as family nearby and long term residence
 - but in **Ovens** - the court held that the cost of restorative work was not recovered even though was Ps principle residence because cost was prohibitively expensive
 - vacation property
 - reinstatement is unlikely (**Kates**) - court said Ps spent little time there, higher reinstatement cost was not justifiable
 - **2. P's genuine interest in restoration**
 - **Kates**- P's unlikely to replant wanted to punish D
 - when court does not believe that will undertake remedial work will not award higher cost of repair
 - **3. Reasonableness of what is intended**
 - TEST: will reasonable person spen amount on remedial work if damage did not arise due to a tort? (**Kates**)
 - expenditure must be "reasonable, practical and fair in all the circumstance" **Kates**
 - Meaning of Reinstatement
 - reasonable remedial work necessary to bring property to acceptable standard of P's needs (**Dodd**)
 - Ps cannot be extravagant at D's expense, modest restorative work to make property functional to P's purpose (**Dodd**)

- Compensation for Non-pecuniary Losses
 - subjective interests in property
 - only natural persons can be entitled to non-pecuniary losses relating to damage to real property because corporate entity does not experience suffering or grief (**Prince Rupert (City)**)
- 4. BETTERMENT
 - purpose of compensation is to restore P to the status quo
 - exact replacement is often impossible, ie when exchanging new for old
 - betterment: is the potential enhanced value of property
 - Question: should there be a deduction in damages for the enhanced value in P's property?
 - Implications of Deductions
 - less money for P, might not be able to or forced to finance part of cost for replacement or repair
 - Implications of non Deduction
 - unjust enrichment of P, windfall at D's expense
 - **Principles of Betterment:**
 - no assumption of betterment - no automatic deduction when damage to property (**James Street Hardware**)
 - no betterment when it is reasonable for P to repair property
 - In order to justify a deduction for betterment, the D must prove betterment and the value of the improvement (**Varadi**)
 - case with pillars - not just better quality but provided better support and had lifetime warranty - court was satisfied that P in a better position - But considered that P should be compensated for unexpected/premature expenditure
 - Betterment for Property Asset
 - there will be no deduction absent any enhanced value (Penn West Petroleum)
 - if betterment is found it is limited to useful life of object
 - compensation for pre-mature expenditure is unlikely

F. REMOTENESS, MITIGATION AND IMPECUNIORITY

- when P suffers higher losses due to impecuniosity or impecuniosity prevents timely mitigation
- **general rule:** impecuniosity is not an excuse for failure to mitigate
 - losses due to impecuniosity are treated as too remote and not caused by D's wrong
- **Commercial Entities**
 - general rule is strictly applied and impecuniosity is not seen as an excuse for a failure to mitigate (**Southcott Estates**)
 - in **Freedoff** the court held that P's claim for loss of property was partially attributable to D's breach of K and partially due to P's impecuniosity was too remote - denied P's claim
 - however in **Dodd**, the court allowed P to recover higher repair costs 10 years after (criticism re this case-did P not have adequate insurance?)
 - **exception:**
 - where D's wrong has caused P's impecuniosity (for example inability to obtain financing to mitigate loss from breach) then D will be responsible to compensate P for higher loss/ P will not be punished for failure to mitigate
- **Non-Commercial Entities**
 - additional losses due to impecuniosity more readily available in tort case
 - **thin wallet rule**
 - more common in tort, but can apply in breach of K
 - rule: losses are recoverable even if P failed to mitigate due to impecuniosity as long as the higher costs were reasonably incurred and P had no choice (**Ladgen**)
 - > post **Ladgen** - Application is all about the facts - whether P had a choice is a Q of fact:
 - if could afford without making personal sacrifices then P will not be compensated (**Lovell**)
 - insurance: no expectation that P should have more than basic insurance, but can expect basic insurance
 - P unable to afford recommended treatment: courts are more sympathetic to impecuniosity argument
 - inability to afford treatment is not a failure to mitigate (**Spurgeon**)
 - failure to mitigate must be reasonable and P obligated to take reasonable steps to obtain funding for recommended treatment, if does not do this will count as failure to mitigate (**Olynyk**)
 - D is not liable for P's pre financial vulnerability (**Campbell**)
 - Loss resulted from P's pre financial situation and not caused by D's wrong - not recoverable - courts relied on remoteness argument
 - policy:
 - ultimately it must be fair to be liable for additional losses due to P's financial situation, whether commercial or non-commercial - recognize unequal access to resources

Part two: DAMAGES FOR PERSONAL INJURY OR DEATH

A. PERSONAL INJURY

PERSONAL INJURY DAMAGE ASSESSMENT

- **purpose of personal injury damages:** restore P to same position absent D's wrong
- meaning of loss: financial consequences of injury
- compensation for economic and non-economic loss

- **Lump Sum Payment**
 - common law default: lump sum unless parties agree otherwise (**Watkins**)
 - past losses are calculated and predicted future losses are assessed at the time of the judgement, there is no opportunity for future reviews
 - advantages of lump sum:
 - finality, certainty, judicial economy
 - disadvantages of lump sum:
 - difficulties assessing P's injuries and needs
 - inaccurate prediction about the future
 - P could be over or under compensated - experience indicates that Ps are usually under-compensated (**Andrews**)
 - risk of dissipation of awards

- **Alternatives to Lump Sum Payment**
 - periodic payments: P receives part of award periodically, possibility of future reviews based on P's needs
 - structured settlements: P receives initial lump sum (partial award) - purchase annuity with balance to fund periodic payments based on P's ongoing needs
 - payments are non-taxable
 - no risk of dissipation or reliance on social safety net, D does not need to worry about tax gross-up or management fees

- **Current Practice**
 - structured/PPO with parties consent
 - courts will not order PPO if Ds unable to fund payments or will not fully compensate P
 - **Determining what is in P's best interest > consider:**
 1. D's solvency
 - important but not conclusive - does D have a plan that will guarantee payment in the future?
 2. Practicality of PPO re Ps needs
 - in **Chesher** court said PPO would not satisfy P's needs because need bulk payment to pay off debt
 - in **Lee** - P needed corrective surgery, needs money as soon as possible
 3. Full Compensation
 - in **Chesher** court said no PPO because would amount to less than lump sum and not fully compensate (PPO builds in inflation and cost of medical equipment's tend to outstrip general rate of inflation)
 4. P's fiscal responsibility - risk of dissipation?

5. Personal Characteristics / Socio-economic background
 - Does P have people to look after their money? if so do not need a PPO
 - **Lee**: awarded lump sum had a fiscally responsible family who would hire investment professionals to look after award
- legislation can mandate structured/PPO in certain circumstances
- examples of legislation:
 - **B.C. Insurance (Vehicle) Act, 1996 RSBC c. 231, s. 99** – PPO mandatory where
 - (i) Pecuniary damages exceed \$100K and is in P's best interest, or
 - (ii) P requests tax gross and PPO not contrary to P's best interests
 - **Ontario - Courts of Justice Act, s. 116** – PPO where parties consent or P requests tax-gross up and PPO is in P's best interest
 - Relevant factor for determining whether PPO is in P's best interests – s. 116(3): D's ability to fund PPO scheme
 - Discretion to order future review and revisions with parties' consent – s. 116(4)
 - Tax gross up where PPO denied: s. 116(5); s. 116.1(9)
 - *Medical Malpractice Cases* – s. 116.1:
 - Future care cost exceeds prescribed amount (currently \$250K or more) and a party requests PPO
 - No PPO: P can prove PPO unjust or payments fail to meet needs – s. 116.1(8)
- Who really benefits from period payments
 - protects society from having to bear the burden if money runs out
 - evidence suggests that when P has a choice will choose lump sum over PPO because they do not want to have to deal with D on ongoing basis

SUMMARY OF ITEMIZATION APPROACH - **Andrews**

- **Andrews** changed the way we think about personal injury damage assessment, prior to this case was a global amount, now award is broken down into different elements:

1. **Special damages**
 1. **Pre-Trial Pecuniary losses**
 1. *Inability to work*
 2. *Pre-trial cost of care*
 3. *Pre-trial Consequential losses*
 2. **General Damages**
 1. **Non-Pecuniary losses**
 1. *Pain and Suffering (functional approach)*
 2. **Future Pecuniary losses**
 1. *Impaired Working Capacity*
 1. lost earnings
 2. impaired homemaking ability
 3. loss of interdependent relationships
 2. *Cost of Future Care*

SPECIAL DAMAGES

Pre-Trial Pecuniary Losses

- for expenses/financial losses incurred prior to trial
- requires correlation new tort and financial losses

- expenses must be reasonably incurred (ie reasonable cost of retraining for suitable career post-injury) (**Neigel**)
 - note cost of retraining can benefit both P and D bc P could potentially earn more than previous career, also help reduce non-financial losses if P get fulfilment from new career
- What is Included:
 - 1. *Inability to work*
 - includes both paid and unpaid work and is subject to environmental factors that would have affected P's ability to work (positive or negative)
 - if chance of factor affecting ability to work - will be treated as contingency (even though past event) - will be evaluated on the basis on chance
 - 2. *Pre-trial cost of care*
 - medical expenses and cost or caregivers (paid or unpaid)
 - In Trust Awards:
 - compensation to service provider
 - in CL - no independent right of action
 - P's injuries must have necessitated services and services must have occurred due to the diminution in Ps ability to care for themselves
 - services must be significant and exceed minor adjustments of duties expected in reciprocal relationships following injury
 - services must actually be necessary (**Bradley**)
 - if P would have had to purchased services, likely award an in trust award (**Kahlon**)
 - valuation of in-trust awards:
 - reasonable replacement cost or actual opportunity costs whichever is less
 - problems: if low income family going to get less bc opportunity cost will be less than replacement cost - prejudice to low-income and women
 - 3. *Pre-trial Consequential losses*
 - Litigation and **non-pecuniary** damages are not included

GENERAL DAMAGES

NON-PECUNIARY LOSSES

- Intangible losses - loss of amenities, pain and suffering and loss of life-expectancy
- Not awarded for lost years
- global assessment for past and future losses
- no contingency deductions
- Nature of Intangible losses
 - incommensurability
 - recognize that intangible losses not alleviated by money - so what to consider what difference can money make re P's losses
- **Basis of Award : FUNCTIONAL APPROACH**
 - purpose: reasonable solace for Ps injured state
 - physical arrangements to make life bearable and comfortable
 - severity of injuries is NOT supposed to be a relevant consideration in determining quantum (Andrews)
 - but in practice courts consider similarity situated Ps in determining amount and relevant factors include:
 - seriousness of Ps injury,
 - effect of injury on P's lifestyle and personality

- duration of losses
- extent to which money can ameliorate the effects
- **Limit on Non-Pecuniary Damages (aka THE CAP)**
 - upper limit \$100 000 in 1978 - adjusted for inflation now about \$330 000
 - exceeded only in exceptional circumstances
 - Exceeding the Cap:
 - CAP will not be exceeded in negligently inflicted personal injury (**Ter Neuzen**)
 - Rationale:
 - incommensurability, large amounts unnecessary, avoid windfall for P's estate, social cost of extravagant awards, uniformity
 - Quantum of Non-Pecuniary Damages (within Cap range)
 - individualized assessment - relevant factors include: severity and duration of P's injuries, P's ability to appreciate what has been lost, extent to which P can appreciate expenditure of money (cognitive awareness), will expenditure ameliorate condition, impairment of social relationships and lifestyle changes
- Unconscious Plaintiffs
 - implications of functional approach for unconscious Ps
 - unclear from trilogy because none of those cases involved unconscious P
 - emphasis on award making a difference in Ps life hard to justify with unconscious Ps
 - when there is a chance that P might appreciate solace, court will consider damages for non-pecuniary losses (**Semenoff**) - 25K
 - also if there is a slight possibility of P gaining consciousness in the future, court will award some non-pecuniary damages (**Knutson**) - 15k
 - if P seems to derive pleasure from interactions and family can involve P in activities that can provide comfort (was infant in this case when got cerebral palsy) court has awarded the max of the cap - **Steinbach**
- Current Practice
 - the current trend regarding the quantum of non-pecuniary damages is not consistent with the underlying rationale of the functional approach because in reality courts are focusing on catastrophic nature of P's injuries and resulting pain and suffering more than they are focusing on the ability of money to ameliorate the P's situation
- Applicability of the Cap in Other areas
 - Cap does not apply in defamation cases (**Hill**)
 - in sexual wrongdoing cases conceptually the Cap is not applicable but unlikely damages for sexual wrongdoing would ever come close to cap (bc no insurance company will pay for sexual wrongdoing)
 - Cap will not apply in situations of negligently inflicted pure economic loss (**Young**)
- Continuing Justification for the Cap?
 - argument that CAP is discriminating against severely injured/disabled people from preventing them from getting more damages than the Cap
 - **Lee v Dawson** challenged the Cap - court held that Cap was not inconsistent with charter values (note this was not a charter case but in **Dolphin Delivery** the SCC said charter values reflect Canadian values)
 - Arguments against the Cap

- alleged conceptual underpinnings of the Cap no longer valid after 25 years
- possibility of extravagant awards due to difficulty of assessment not valid reason for cap
- no empirical evidence re increasing awards - no evidence of high social costs of awards
- stifles development of law
- AT - Thinks that the CL has always paid more attention to physical rather than mental injuries, and mental injuries have almost been feminized
- cap undermines principle of full compensation
- amount of Cap arbitrary and not grounded in logic
- the BCCA said in **Lee** that maybe time to reconsider cap - but leave to SCC was denied
 - why didn't BCCA change- probably want a uniform approach across Canada
 - one thing that did come out of **Lee** - is that jurisdictions can legislate to lift the Cap
- Minor Injuries Cap
 - non-pecuniary damages for minor injuries capped in some jurisdictions
 - regulations for capping non-pecuniary damages for minor injuries are constitutional (**Morrow**)
 - problem: hard to determine when minor injury - ie soft tissue

FUTURE PECUNIARY LOSSES

Impaired Working Capacity

- **Lost Earnings**
 - impaired working capacity not necessarily indicative of loss of earning capacity (Perren)
 - just because ability to work has been impaired does not necessarily affect the Ps earning capacity (Perren)
 - focus on compensation and the capital asset that was impaired by the injury (Andrews)
 - evaluate loss of work P would likely have done and not mere potential to work
 - impaired working capacity is treated as a loss of chance: real and substantial chance that impaired working capacity due to injury will negatively impact P's future future earning ability, that results in a pecuniary loss
- Measuring the loss > 2 Approaches
 - 1. Earnings Approach
 - use when extent of loss is readily measurable in monetary terms
 - based on math-oriented approach focusing on annual income x P's pre-accident working years - contingencies
 - pre-accident working years: professional lifespan, how many years they would have worked but for the injury - courts will compensate to reasonable retirement age
 - if total impairment - ability to earn totally eliminated - use Earnings Approach (**Andrews**)
 - if partial impairment - use difference between P's pre and post injury earnings (**Steenblok**)
 - based on assessment of what P can earn with injuries
 - 2. Capital Asset Approach
 - use when extent of loss is less certain or not readily measurable
 - when the P suffered a diminished earning capacity or career options - overall P less attractive as employee, lost competitive edge
 - if P has to work more to earn the same amount, court will compensate for lose leisure time (**Ibbitson**)
 - when real and substantial possibility of future income loss but amount not readily quantifiable due to unknown contingencies - damage assessment must be fair to both parties - (**Nguyen**)

- in this case awarded difference bw what was making as a logger to what earned by running a gym
- but P incurred losses setting up the gym and court did not compensate start up costs
- Inability to perform an occupation that is not a realistic alternative is not proof of a future loss (**Perren**)
 - this assumes people do not change careers
- Duration of Lost Earnings : Retirement Age
 - usually 65 years or earliest p would have retired (ie with full pension) (**Andrews**)
 - if P argues would have worked longer than 65 - court will consider this as a loss of chance and consider relevant factors such as: type of work, when person starting working, if health militated against working over 65 (**Kean**)
- Lost Years
 - Difference between P's pre and post injury life expectancies
 - compensation consistent with basis of impaired working capacity based on pre-accident lifespan
 - but will make deductions for living expenses/necessities during lost years (**Toneguzzo**)
 - range of deductions living expenses during lost years is inconsistent (33%-85%) - should be based on realistic assessment of P's lifestyle
 - essentially only giving award during lost year for net - argument windfall for Ps estate but not if you believe capital asset approach - likely if person had worked would have left money for people in their life - nothing wrong with estate benefiting
- Impaired Homemaking Ability
 - economic evaluation of unpaid housework
 - note this in the context of the benefit for the P themselves, not the beneficiaries
 - homemaking capacity is divided into: direct labour and management functions
 - only impaired functions are compensable (**Fobel**)
 - valuing the loss
 - replacement cost: global sum or value of service
 - duration: pre-accident lifespan subject to contingency deductions re reduced ability
 - still compensated for lost years, but court will consider that ability will diminish with age
 - tax gross up for replacement cost services
 - *if the P does not hire replacement services:*
 - law is inconsistent
 - one view that irrelevant whether P has actually paid for services
 - another view if P does not hire replacement services, then the loss fits under non-pecuniary (ie now have to live in a dirty house and thats upsetting) - and therefore loss is subject to cap
 - > Lawyers will always advise P to hire as many replacement services as possible
- Loss of Interdependent Relationship
 - loss of opportunity to form a long-term r/ship of financial interdependence compensable (Reekie)
 - gender, sexual orientation, type of relationship is irrelevant
 - burden on P to demonstrate the extent that that injury has diminished opportunity to form form such a r/ship
 - evidence need to demonstrate this - P can get family friends to testify
 - if P is in a relationship:

- have to assess the chance that the relationship will end
- if no chance - no compensation
- if chance that in aftermath of injury relationship will not continue then P will be compensated (**Fenn**)
- **Catastrophic Injuries:**
 - may be assumed that P unlikely to form such a relationship
 - some people who are paraplegic upset with this assumption
 - but just because catastrophic injury no assumption that P has suffered financial loss due to lack of interdependent relationship - P needs to demonstrate evidence of financial benefit in relationship (**Labrecque**)
 - ie in this case found that the P contributed way more to her relationships, evidence that in past relationship she was always the one looking after her partner

SIDEBAR: Equity Issues: Age Gender Race and Socio Economic Status

- P's with limited or no working history (children)
 - predictions about future career path based on gender family background, including parents socio-economic status, race etc.
 - big problem in residential school trials - felt like P's family was on trial
 - Teno - Is an example that gendered statistics result in depressed awards for females Ps , even more pronounced for girl
- Redress effect of Gender on Damage Awards
- statistics reflect historical earning patterns based on discriminatory practices and assumptions about women's labour force participation rates
- unfair to rely on historical information to assess future losses
- 3 Approaches to assessing value of women's working capacity
 - **1. Female earnings statistics grossed up for trend towards wage parity (Toneguzzo)**
 - critique: premised on social injustice about women's labour force participation
 - **2. Male statistics discounted to reflect reality - wage parity has yet to be achieved**
 - **MacCabe:** female-specific contingency deductions justified as reflecting reality of women's lives, basis of tort damage is corrective not distributive justice
 - **Mah:** gender wage gap narrowing but not eliminated - women continue to choose typical female occupations - appropriate to assume that infant P would not have been different and her earning would have been consistent with stats on female earnings
 - Critique:
 - ignores income replacement schemes during periods of withdrawal from paid labour force (ie maternity leave)
 - not adequately attentive to increasing number of women in traditionally male dominated professions
 - ignores trend of stay at home dads
 - ignores systemic under evaluation of women's work
 - assumes women's choice are natural
 - **3. Average stats for all Ps with no work history regardless of personal characteristics with no deductions (Walker) - current law??**
 - egalitarian approach - lower than men but higher than female
 - concern: only used for women

Cost of Future Care

- **Problems of Proof, Lost Chance and Mitigation**

- Proof of Liability and Loss

- P needs to prove D's fault on a balance of probabilities that P losses are a result of D's breach (**Perren**)
- no automatic entitlement to compensation

- Past Losses

- if P can establish on balance of probabilities that past losses result of D breach that entitled to full recovery
- law takes the view that anything that has happened in the past should have enough information to establish a causal link

- Future Losses

- Standard of proof: simple probability of realistic chance
- If P can establish that there is a real and substantial chance that will suffer loss in the future due to D's breach and this chance is not merely speculative then the court will take chance into account and compensate accordingly based on chance (**Schrump**)
- summary: *it is necessary for a P to prove on a BOP that the tortious act or omission was the effective cause of the harm suffered, it is not necessary for P to prove on a BOP that future losses or damage will occur, but only that there is a reasonable chance of such loss or damage occurring* (**Schrump**)
- this means that if P can establish that more than 50/51% chance of injury > will get full compensation
- if P can establish real and substantial chance - still get compensation based on chance
- *benefits of probabilistic damages*
- avoids all or nothing approach, useful in personal injury
- *concerns of probabilistic damages*
- inconsistency in claims between past and future loss
 - (when Ps come from rough backgrounds and considering possibility of wrong affecting employability - Ps might not be able to establish on a BOP that abuse made it difficult for them to achieve work in the past but can maybe establish that probabilistic chance that in the future abuse will make it hard for them to get a job)

- **Mitigation**

- A. Reasonableness of P's Failure to Mitigate: The Risk-Benefit Analysis

- purpose of mitigation: fairness to both parties - compensation should fully protect P's interests without unduly burdening D beyond what they should reasonably be liable for in the circumstances (**Janiak**)
- **Objective TEST: would a reasonable person in P's position have taken the recommended course of action?**
- recommended action does not need to cure Ps condition, it is sufficient that it would have given P an opportunity to improve their condition (**Cochrane**)
- Relevant Factors of Reasonableness Include:
 - **degree of risk**
 - P is expected to act reasonably but not to make heroic efforts in mitigation (**Bourgoin**)
 - **chance of success**
 - **seriousness of consequences of refusal to undergo treatment**
 - **reliance on medical advice**

- if P followed treatment recommended by healthcare professions (even in conflicting medical opinions) - P's behaviour will be considered reasonable even if it aggravates P's damages (**Bougoin**)
- **B. Objective-Subjective Dilemma and Psychological Thin-Skull Rule**
 - failure to mitigate may be due to P's personal or psychological characteristics as in **Janiak**
 - **Modified Objective TEST: How would a reasonable person behave in the circumstances? But allowance is made for some subjective factors affecting P's ability to make reasonable treatment decisions**
 - **Psychological Thin Skull Rule:** pre-existing infirmity (pathological condition) affecting P's ability to make rationale treatment decision will excuse them from the duty to mitigate
 - this only relates to pre-existing conditions that prevent P from making a rationale decision
 - distinguish between pathological versus non-pathological condition
 - pre-existing medical disorders such as schizophrenia sufficiently prevent D from making rationale treatment decision and failure to mitigate will not result in a reduction of compensation (**Elloway**)
 - however non-pathological conditions such as a fear of surgery will not relieve the P from a duty to mitigate (**Janiak**)
 - **Other Pre-Existing Conditions:**
 - Religious or cultural beliefs: **Abdalle** suggests in orbited that relevant factors in making that determination may include the sincerity of P's beliefs, whether the beliefs are part of formal tenants of P's religion and whether conviction is widespread among members of the faith
 - inconsistency with criminal law: refusal of treatment on religious grounds does not affect criminal liability (**Blaue**) but relevant for tort damages
 - also difference - in tort the fact that accused was convicted does not necessarily can bring an action for wrongful death - consider in **Blaue**, JW victim could have lived if taken blood transfusion
 - **C. Consequences of Failure to Mitigate**
 - if P fails to mitigate, will be compensated for the chance the mitigation would not have been successful (**Janiak**)
 - if the effect of treatment was uncertain - there will be a modest deduction based on loss of chance to avoid/minimize loss (**Cochrane**)
 - > risk of over/under compensation if P decides to undergo treatment after trial - problem with lump sum payment
 - **Effect of Subsequent Events on Assessment of Damages**
 - in personal injury context damage does not generally crystallize at time of wrong and post-wrong events will not be ignored (remember difference from property damage cases above!)
 - subsequent events: non-tortious even related to D's wrong and results in same loss (lost income, creased care cost etc.)
 - if contingencies become realities, damages will be reduced (**Jobling**)
 - in this case P was injured at work due to D's negligence, after injury but before trial P suffers disabling illness - D was only liable for lost income bw injury and onset of illness
 - however if the first tort contributed to the subsequent injury there will be no reduction in damages
 - rationale
 - P would have suffered losses even absent D's wrong, avoids windfall for P
 - Indivisible injuries:

- where Ps injuries result from combined effect of all events - Ds will be jointly and severally liable for Ps injuries (**Groves**)
- Divisible Injuries
 - Different results in distinct injuries
 - Each D liable for injuries from their specific tort, no joint and several liability
- > whether injury indivisible or divisible is a question of fact and post **Groves** litigation focuses on this question
- **Collateral Benefits**
 - where P receives benefits in cash or in kind from third parties and benefits appear to offset some or all of Ps losses
 - issue: should benefits be considered or ignored when assessing Ps injuries
 - argument for deduction: windfall for P contrary to purpose of tort damages
 - argument for no deduction: tortfeasor subsidized, unfair especially if P paid for benefit
 - **General rule:** collateral benefits are generally deductible from damage awards
 - 2 Exceptions - where not deductible:
 - Gifts/Charity
 - Private insurance benefits
- Gifts/Charity
 - includes services provided by friends and family (anything not paid for)
 - re future care costs: no deduction for possibility of gratuitous case, possibility of mother helping not a relevant consideration (**Andrews**)
 - rationale:
 - D should not benefit from benevolence of third parties
 - do not want to discourage kind acts toward P
 - practical difficulties - value of such benefits not easily ascertainable
- Private Insurance Benefits
 - not deductible
 - includes mandatory insurance schemes as long as P paid for it
 - Direct payment not required
 - subrogation right is sufficient to trigger non-deductibility (substitution of insurance company for P as a party)
 - rationale:
 - P paid for benefits - unfair for D to benefit from Ps foresight and thrift

Other forms of Benefits

- Employment Benefits
 - **Ratych** held that income replacement is deductible *unless*:
 - 1. P paid for benefits, or made a contribution to the fund equivalent to an insurance premium
 - 2. P obligated to reimburse collateral source
 - 3. where third party was entitled to reimbursement on the principle of subrogation, irrelevant if right not exercised
 - > question after this case became what counts as “payment” > **Cunningham** took a very liberal approach to the concept of “payment”:
 - direct or indirect benefits count as payment
 - direct evidence of quid pro quo not required

- judicial notice of payment possible - employees give up something for employee benefits
- > given such a liberal interpretation, almost all employment benefits will be deemed similar to private insurance benefit and will not be deducted on the basis that the P “paid for it”
- State Benefits
 - **Health Care**: obligation to repay/subrogation/direct action (Healthcare Recovery Act, SBC 2008)
 - money has to go back to the province, or province might have a direct cause of action
 - **Employment Insurance**: non deductible because P has an obligation to repay (Employment Insurance Act)
- Social Assistance/Welfare
 - welfare benefits are deductible (**M.B.**)
 - welfare benefits based on financial need - but important distinctions from charity:
 - difficult to know value of charity - not a concern with welfare
 - don't want to discourage acts of charity - not a concern with welfare
 - policy
 - both welfare and damages paid for by insurance companies are paid for by the public
 - once relieve general need, should not double compensate
 - tort law is about loss distribution - deductibility in welfare case is consistent with this
 - assumption/questions
 - injury necessitated receipt of benefit
 - should welfare benefits be deducted where D is private

Care Cost and Social Security Benefits

- P not expected to incur care costs
- publicly funded care - so P should not need to recover anything
- but some recovery may be warranted where P might require more than provided under government program
- **challenges:**
 - program must be universally available with guaranteed funding (**Fullerton**)
 - no care cost where P already receiving discretionary benefits and situation unlikely to change (**Mah**)
 - uncertainty in future benefits treated as a contingency, will be assessed based on chance (**Krangle**)
 - in Ward, there was a new government program and future funding was uncertain - so P received 50% of future care cost - was compensated for the chance of program not being there

Discounting to Present Value

- premature payment for future losses, P expected to invest money
- amount adjusted based on real rate of return, ie difference between long term interest and inflation rate
- current practices is that there are standard practices or statutory rates - this reduced litigation cost no need for expert evidence and encourage uniformity
 - B.C. - **Law and Equity Act**, 1996 R.S.B.C. c. 253
 - s. 56 – authorizes Chief Justice of the BC Supreme Court to enact regulations setting the discount rate
 - **Law and Equity Regulation**, B.C. Reg. 352/81.
 - Lost earnings: difference b/n investment rate of interest and rate of increase of earnings due to inflation and general increases in productivity - 2.5 %

- Other awards for future losses, e.g. future care: Difference b/n investment rate of interest and inflation rate - 3.5%
- Discretion to vary rate where discount rate fairly predictable and different from regulated rates

Management Fees

- P expected to invest for better returns
- management fee not automatic but court will award if evidence P needs service (**Mandzuk**)
- but expected returns from investment may offset management fees, wholly or partially (**Mah**)
- it is irrelevant how P spends money and irrelevant if P has already spent some of award, management costs can still be awarded for whole award (**Townsend**)

Taxation

- lost earning capacity - award not taxable
- for future care cost - tax implications considered
 - CL: tax gross-ups appropriate if award likely to be affected by tax liability (**Watkins**)
 - legislative chance - PPO may be mandated where P requests tax gross up
 - Ont - tax gross up where court denies PPO
 - BC- tax gross up if PPO denied

B. FATAL INJURIES AND THIRD PARTY CLAIMS

PERSONAL INJURY	FATAL INJURY
Claimant: primary accident victim for personal losses due to D's tort	Claimants: 3 of family member caused by D
Common law or Statutory claim	Statutory right
Compensation for victim's losses	Financial and other Support from deceased
Lost income: P's gross earnings	Deceased's net earnings - k Q how much \$ benefit for third party after deductions of life expenses (will consider tax)
P's pecuniary and non-pecuniary losses	Pecuniary losses unless otherwise provided by legislation (don't get non-pecuniary unless statute specifically says you do)
Contingencies: future changes affecting P's working capacity, earnings, health condition, etc	<ol style="list-style-type: none"> 1) Contingencies affecting deceased's life or working capacity 2) Changes affecting support r/ship, e.g. possibility of r/ship breakdown r/ship, P forming another r/ship; etc
Collateral benefits: no deductions for private insurance benefits	No deductions for private insurance benefits

- at common law: survivors had no right of action for losses due to death of family member
- statutory right of act - now recognized by legislation in all provinces

Eligible Claimants

- determined by appropriate legislation
- *BC Family Compensation Act s.1 (Spouses, common law partners, parents, child (includes step children if parents stood as loco parents such as adopted child), grandparent, stepparent, anyone who acted as a parent)*
- siblings
 - are excluded in some jurisdictions- e.g. B.C and Nova Scotia

Basis of Award

- **purpose:** protect interests of surviving family members in continued existence of deceased
- the pecuniary loss due to death and compensation for personal losses
- basis of the award is the loss of past and future support from the victims death, not the need of the plaintiff (**Keizer**)
- loss of all valuable series , regardless of gender, is in **Morrison** wife and children compensated for loss of husbands services who was primary homemaker
 - irrelevant if deceased not full time homemaker
- amount should provide at the least the equal of what might have been expected to have been provided by the deceased person but for the accident (Skelding)
- financial support at time of death and legal requirement to confer benefits on claimants is not required

- reasonable expectation of pecuniary benefits is sufficient

Value of Support:

- deceased's net income after taxes and personal expenses - court has discretion to award tax gross up and management fees
- include employment and pension for P's benefit
- Range of Recovery
 - See relevant legislation
 - mostly compensated for pecuniary losses, ie anything of value that the claimant would have received from the deceased
- Non-Pecuniary Losses:
 - Recoverable in some jurisdictions (AB,SASK,MAN, ON, NB)
 - **Loss of Care, Guidance and Companionship**
 - often claimed by children re parents death -loss of guidance and direction that deceased parent would have provided
 - may be awarded to specific family members and availability and quantum may be automative (AB,MAN)
 - In Ontario and New Brunswick - awarded when supported by evidence and court will conduct an individualized assessment
 - **To:** ontario case - death of 14yrs old - 50K for loss of guidance based on evidence of strong family bonds
 - concern re individualized assessment: disparity in awards and no uniformity > suggestion award be capped similar to non-pecuniary in personal injury
- BC: *Family Compensation Act* : Recovery is limited to pecuniary loss
 - but pecuniary is interpreted liberally and loss of care, guidance and companionships is recoverable as pecuniary loss
 - usually awarded to children and sometimes parents, can be awarded to other family members - but subject to new relationship contingencies

Contingencies

- **Keizer:** 2 types of contingencies
 - 1. Affecting deceased's earning profile
 - same as those considered under personal injury - likelihood change in career etc
 - 2. Support relationship change
 - chance in nature of support, relationship breakdown, subsequent support relationship
- New Relationship Contingency
 - contingency becomes reality - claimant in a new relationship
 - this is difficult for court to ignore and evidence of a new relationship at trial is relevant
 - loss can be reduced or eliminated by another relationship - **but no automatic deductions**
 - onus is on d to prove level of financial and other support from new partner
 - **assumption: same level of support -adjusted up or down based on evidence**
 - **Claimants with no partners at time of trial**
 - possibility of future support relationship may be ignored (Keizer)
 - rationale: no guarantee claimant will form such a relationships and/or benefits from future partner and distasteful to assess prospects of claimant finding a new partner
 - inappropriate to consider remarriage contingency, especially when unlikely couple would have divorced (**Morrison**)
 - but note Edwards was a CL relationships with history of numerous relationship before and after death - 40% contingency deduction for possibility of remarriage

- **Children**

- in **Skelding**, children only awarded nominal damages for loss of future support because father remarried and there was no evidence that house making services to children would be any less after remarriage
- concerns:
 - potential prejudice if circumstance change
 - loss of parental guidance, care and companionship not necessarily replaced through another relationship

Collateral Benefits

- private insurance benefits not deductible - same rationale as under personal injury
- accelerated inheritance is deductible

Death of a Child

- predominant view: Actual loss to parents from death of child especially very young children are mostly non-pecuniary (Mason)
- award would be pressed by extension of contingencies too hard to predict (To)
- pecuniary losses
 - will usually be minimal unless evidence of financial dependence
 - adverse factors include: extreme youth of child, possibility of injury or death from other cause, possibility parents might not have survived child, parents unlikely to benefit financially from child
 - but in **Cox**, evidence suggested that kids would have supported parents - damages awarded for pecuniary
- **Relevant factors include:**
 - **cultural traditions of support and dependency (ie evidence of Filial Obligation)**
 - readily recognized re Ps of Chinese origin
 - but claim not automatic - need evidence that P would have followed tradition (**Desire**)
- Non-Pecuniary
 - but may be entitled to special damages due to inability to work after death of child

Surviving Adult Children

- Non-pecuniary losses
 - generally limited to modest amount for loss of guidance, care and companionship
 - however can get decent compensation if evidence of strong relationships and high degree of interdependency (**Bjornson**)
- Pecuniary Losses
 - evidence of financial dependence on deceased parent (**Bjornson**)
 - court will recognize that level of support from parents will likely decrease with age

Part Three: EQUITABLE REMEDIES

I. INJUNCTIONS

INTRODUCTION

- CL: remedies: damages/monetary relief: substitutionary remedies
- Equitable remedies: injunctions and Specific Performance
- **specific performance:** contractual remedy - compels D to perform undertakings instead of damages for P's disappointed expectations
- injunctions: remedy for past or prospective wrong, D ordered to refrain from act (prohibitory) or take positive steps to remedy a wrong or fulfil unperformed obligation (mandatory)
- but no strict demarcation bw prohibitive and mandatory - focus on the effect of the order > does it compel D to do a particular thing or constrain D?
- this is because prohibitive order that indirectly compels particular conduct may be mandatory (National Commercial Bank)
- injunctions restraining conduct are more readily available compared to orders requiring particular conduct

Timing and Duration of Injunctions

- **Temporary** (Interlocutory)
 - pre-trial orders for specified period or until trial
 - mechanism of managing litigation to ensure justice can be done at end of trial
- **Perpetual Injunctions** (Final Order)
 - tends to be a remedy for trespass to land or nuisance, or misappropriation of information
 - granted after final judgment as appropriate to protect interests/rights at stake
 - prevents future interference with P's interest

Monetary relief contrasted with equitable relief

- monetary relief is available as a right
- equitable remedies are discretionary - today was used when Ps interest can not be adequately vindicated with a monetary award and when there are no discretionary reasons for denial of equitable relief
 - ie **defences** such as: deal in seeking relief, Ps own conduct, hardship to D etc
- *Advantages/Disadvantages of equitable/specific remedies*
 - perfect remedy: no guesswork re assessment of damages
 - no risk of over or under compensation
 - equitable remedies are preferred for actions that involve real property
 - but equitable remedies are not generally available because can be really onerous on D and may have difficulties specifically defining the order
 - also disadvantage or possibility of contempt if D disregards the order - this implies to anyone how aids the D and can have potential implications for numerous third parties

A. QUIA TIMET INJUNCTIONS AND PROBLEM OF RIPENESS

Quia Timet Injunctions

- forward looking: restrains conduct that threatens to infringe Ps rights before harm occurs
- can be interim, interlocutory or perpetual
- can be mandatory or prohibitive

Problem of Ripeness or Pre-maturity

- no CL remedy for anticipated wrongs, injunction is Ps only option to prevent threatened harm (**Hooper**)
- difficulty is that it is hard to assess then QT is appropriate absent evidence of harm to P

Requirement for QT injunctions

- likelihood or irreparable harm to P should be balanced against D's right to pursue legitimate activities
- **Palmer** - QT injunctions require high probability of threatened harm occurring
- **TEST:**
 - **1. Imminent Harm**
 - "ripeness" threatened harm imminent (**Fletcher**)
 - high probability of harm if injunction denied
 - threatened harm inevitable but does not need to be immediate
 - **2. Irreparable harm**
 - strong probability of substantial/irreparable harm in injunction denied
 - *Magnitude of harm is balanced against likelihood of occurrence, if extent of harm is too great then should trump low risk of harm occurring* (**Hooper**)

Timing

- Prior to Commencement of D's Activity
 - P alleges probability of irreparable harm should D proceed with planned activity
 - less likely where activate yet to commence and or effect on P uncertain (**Palmer**)
 - concern re cautious approach: injunction may be unnecessary after harm occurs
- Activity Underway
 - no harm yet- P alleges probability or irreparable harm should D's activity continue
 - court in **Fletcher** did not award injunction and relined on reasoning that don't know yet if there will be harm
- Conduct Complete
 - readily available where conduct complete but P has yet to suffer harm (**Hooper**)
 - this case inevitable harm just a matter of when - P was given money to restore support

B. MANDATORY INJUNCTIONS: Definitions and Supervision

- D take positive steps to remedy wrong
- restorative - D to undertake work to undo damage caused by D's wrong
- Concerns:
 - requires expenditure of additional resources
 - greater judicial interference, high likelihood of hardship for D
- not readily granted compared to prohibitive injunctions (**Redland Bricks**)

THRESHOLD REQUIREMENT: Cautionary Approach (**Redland Bricks**)

- **Strong probability of serious damage if injunction denied**
- **Inadequacy of Damages**
- **P could have obtained prohibitive injunction to restrain activity; not impossible for D to restore status quo**
- **Cost benefit Analysis**
 - disproportionate hardship to D compared to benefit to P
 - **irrelevant P could have obtained prohibitive injunction**
- **Parties Conduct**
 - hardship to D not determinative
 - Relevant only if D acted innocently (**Redland Bricks**)
 - if unreasonable behaviour then cost-benefit analysis is irrelevant (**Earle**)
 - if D ignores P's objection or acts with impunity - regardless of the cost D should fix damage (**Delight Textiles**)
 - P's conduct- delay re complaint - P not entitled to remedy
- *>must be fair for court to grant injunction in the circumstances - injunction denied if it would serve no useful substantive benefit to P and would be oppressive, harsh, illegal or contrary to public policy (**Allard v Shaw Communications**)*
- **Definition of Order**
 - order must be explicit
 - if difficult to state specifically in terms - injunction will be unlikely
 - injunctions can be dissolved if the terms are ambiguous (**Redland Bricks**)
- **Supervision of Order**
 - if order require supervision then injunction unlikely
 - supervisory difficulties per se not conclusive and court will consider creative solutions re problems of supervision

C. INJUNCTIONS TO PROTECT INTEREST IN LAND: TRESPASS

- remedial options for interference with Ps possession of Land: Trespass and Nuisance

TRESPASS	NUISANCE
Right to exclude others from land	Reasonable/competing land use
D directly interferes with P's possession D's conduct unlawful interference may be temporary or continuing	Indirect and continuing interference with P's use & enjoyment of land from D doing legitimate activity on their land, e.g. noise, fumes, smells, pollution
Remedy: Exclude D; enforce P's exclusive possession	Balance competing interests; Cost-benefit analysis; reasonableness of interference – Liability & remedial stages – <i>Miller v Jackson</i>
	<i>Shelfer</i> : primacy of injunction but damages in lieu where appropriate, for e.g. minor interferences Why was injunction denied in <i>Shelfer</i> ?

SIDEBAR : WHEN CAN DAMAGES BE AWARDED IN LIEU RE INTEREST IN LAND

- ***Shelfer v City London Electric*** - court noted the primacy of injunctive relief
- but ask the court set out 4 conditions for award damages rather than an injunction in nuisance cases - arguable also applicable to trespass case
 - **When these 4 conditions are present damages should be given in lieu of injunction:**
 1. if the injury to the Ps legal right is small,
 2. it is one which is capable of being estimated in money
 3. if it is one that can be compensated by a small money payment and
 4. it would be oppressive to the D to grant an injunction
- Also in ***Boomer*** Jasen J. (dissenting) thought that public interest and private interests should be distinguished and D should only be allowed to pay damages in lieu when activity is for the public interest, or when injunction would be detrimental to public interest
- if award damages in lieu of injunction
 - damages for past and future nuisance
- effects of damages in lieu of injunction
 - constitutes private expropriation of Ps property rights but justified by utilitarian goal of D's activity - courts not comfortable leaving D at mercy of P
 - re servitude on land (permanent damages)/private expropriation (*Boomer*) - these run with the land - subsequent owners will not be allowed to bring an action - potential problem if the future owner might not know that damages have already been paid

TRESPASS TO LAND

- traditional position: if continuing or prospective wrongs - injunction warranted
- Trespass:
 - purpose of trespass to land action to protect property interests
 - trespass is actionable per se - do not need proof of harm

- if trivial interference with P's property then injunction is unlikely (Wrotham Park)
- but if substantial interference with P's property - injunction is likely (Delight Textiles)
- benefits of injunction: avoids re-litigation, reinforced property rights (exclusive control over land, no private rights of expropriations, preserves property owners right to bargain)
- rationale for injunction:
 - property rights sacrosanct
 - P entitled to exercise property rights without interference
- **Goodson v Richardson - leading case**
 - not a trivial issue to lay pipes, also continuing so permanent trespass - court said pipes should go
 - court upheld Ps proprietary interest with an injunction because stressed that part of being a property owner is the right to decide who has access to use and enjoyment of your property
 - must likely in this case that D will not remove pipes -force D to negotiate price
 - this case established the primacy of injunctive relief for trespass to land
 - injunctions are not contingent upon material damage
 - hardship to D is irrelevant
 - continuing trespass distinguished from transit interference, suggested injunction better limited to continuing trespass (obiter)

Temporary vs. Permanent Interferences

- permanent trespass is distinguished from transit interference with no damages to Ps property (**Didow**)
- typical situations - overhanging crane
- Remedy for Temporary Interferences
 - Goodson indicated in obiter that injunctions are better limited to continuing trespass
 - in **Lewvest** court said don't cadre that was temporary - interfered with Ps property right - injunction granted even though balance of convenience favoured D
 - **John Trenberth**: court granted injunction even though trespass necessary for repairs and P refused to negotiate with D
 - **Woolerton**: suspended injunction until project was complete because court said that although P had a right to unreasonable with property - was being too unreasonable - result was D could invade Ps airspace without paying
 - Suhterland in **Vaz** - disagreed with this approach - thought monetary damages should be awarded when trespass does not interfere with Ps use of land
- Implications of injunctions for transfer interference
 - chilling effect on Ds activities - expose D to possibility of extortion

Post-Judgement bargaining and Potential for Extortion

- D may be forced to bargain with P to avoid injunction
- possibility of extortion where no realistic alternative to using Ps property
- consider that extortion can be avoided with damage award for lost opportunity to bargain (opportunity cost approach)
- court might suspend injunction when clear that P is unreasonable and has an extortion motive (**Woolerton**)

Bona Fide Mistake Re Ownership

- court has discretion to permit D to retain encroached land upon payment of appropriate compensation
- but not always successful - D must show a bona fide mistake (**Zambri**)

- D's behaviour was deliberate and outrageous, D should not be allowed to benefit from unlawful conduct
- Legislation
 - BC Property Law Act s.36: Building/fence encroaches on adjoining land -discretion to order judicial sale or easement for judicially determined amount or injunction to remove encroachment
 - judicial sale must be fair in the circumstances (**Oyelese**)

Temporary Entry to Effect Repairs: unreasonable neighbours

- respect for property right should seek permission - if adjoining property refuses permission or consent cannot be obtained (**Trenberth**) >
- legislative response
 - discretion to permit entry
 - duration and purpose of permission: liability for damages cause to owners land and terms court deems fit (BC Law and Property Act S.34)

Deliberate trespass

- Injunction not automatic - but likely compensatory and punitive damages (**Dempsey**)

D. INJUNCTIONS TO PROTECT INTEREST IN LAND: NUISANCE

- **nuisance:** unreasonable interference with P's use and enjoyment of land - indirect and continuing interference

Nuisance Balancing Competing Interests

- **1. Liability**
 - actionable nuisance depends on degree of interference with P's use and enjoyment of land, ie reasonable land use and assessment of relative value of D's conduct and P's land use and public and private interests at stake (Miller)
 - Miller -cricket case -court held no actionable nuisance
- **2. Remedial Selection > focus on this**
 - traditional opinion is that when nuisance is established this warrants an injunction (Canada Paper)
 - but **Shelfer** - not automatic right to injunction - Damages will be awarded in lieu where injury minimal, damage can assessed in monetary terms and damages will be adequate compensation and injunction oppressive to D

Remedial Options for Nuisance

- *question of whether there should be automatic right to injunction once actionable nuisance is established*
- *Canada Paper v Brown*
 - In **Canada Paper:** the SCC mandated an injunction but reached this decision based on two different forms of reasoning. **Idington J.** supported the view that there is an automatic right right to injunction once actionable nuisance is established and **Duff J.** supported the view that he court should conduct a cost-benefit analysis to determine whether an injunction is appropriate where nuisance has been established.
 - assumptions underlying and consequences of automatic injunction
 - protect property interests - interference only with P's consent
 - effect of injunction on D and 3ps is irrelevant
 - cost-benefit analysis
 - duff emphasizes discretionary nature of injunction
 - and that should consider social and economic considerations
- Post- Canada Paper
 - **Automatic right to injunction**
 - in **McKie** - Ontario High court supported automatic right to injunction and stressed that an affront to property rights should be resisted
 - **Cost-Benefit Analysis**
 - *predominant view*
 - because court thinks it is appropriate to balance competing interests and focus on communal benefits
 - the court will deny injunctions where it will detrimentally affect Ds and 3Ps
 - Examples:
 - Preserving Employment:
 - **Bottom:** injunction was dissolved bc would destroy local industry resulting in massive unemployment - "the public good can never be absent from the mind of the court when dealing with a matter of discretion"
 - Public Interest in Arts and Culture:

- **Palmer:** injunction denied because would be detrimental to the public interest would end concerts that were enjoyed by many members of the public.
- Environmental Protection
 - **Woodworth:** injunction was denied bc of potential detrimental environmental consequence that would flow from removing the dam
 - consider implications of this on private property rights - P did not want money just wanted to protect natural beauty of property - intangible interest - maybe award damages for loss of amenities ?
 - Legislative Intervention re Industrial Pollution:
 - N.B Judicature Act s.33 :property owners right to seek injunction to abate nuisance may be contained - leave of AG required to seek injunction for nuisance that could negatively impact the construction or operation of any manufacturing or industrial plant on the ground that the discharge from such plant is injurious to some other interest
 - BC Farm Practices Act S.2: normal farming activities protected provided consistent with specified legislation and regulations

Coming to Nuisance

- Q of whether coming to nuisance should be a relevant consideration - ie nuisance was there first
- **Miller v Jackson:** (cricket) said irrelevant for liability but many determine remedy
- **Sammut** (golf course there first): said should not allow private enterprise to subrogate property interests - no cost-benefit analysis is warranted
 - > these 2 cases distinguished because in Miller court stressed public purpose of cricket pitch while in **Sammut** the court stressed that golf course was a private enterprise

Compliance with terms of permit for Ds activities

- if permit for Ds activity specifically states type and scope of permissible activity
- In **Thomas** the court held that compliance with permits cannot be used to limit private law right re use and enjoyment of property

Forms of Injunction- Balancing Competing Interests

- uneasiness with automatic injunction -discretion to determine terms of injunction to make it feasible for D
- remedial flexibility - can balance competing interests
- **1. Suspended Injunction**
 - give Ds opportunity to abate nuisance (**Geoffrey Lane**)
 - whether appropriate?
 - consider Ds past behaviour and feasibility of abating nuisance (**Boomer**)
 - should Ps be awarded damages for period of suspension?
 - no always -balance competing interest
- **2. Partial or Qualified Injunction**
 - compromise between parties
 - parties directed to negotiate terms of injunction (**Ward**) - pragmatic approach but not always feasible
 - whether or not it is preferable for court ot define terms or allow parties to negotiate depends on power imbalance and types of parties

II. INTERLOCUTORY INJUNCTIONS

A. ACCESSIBILITY THRESHOLDS

- Interlocutory injunctions are particularly risky for D because D must stop doing something or do something before a civil wrong has been established. They are designed to protect P from risks associated with delay.
- The traditional approach was that courts did not grant interlocutory orders – they are draconian, interfere with people’s rights before rights even established, violate basic concepts of due process. The view was that there should be a trial before granting a remedy, particularly one which has contempt of court as a potential consequence. This caused the courts to put in very strict requirements for getting one. An interlocutory injunction was only granted where a) there would be a significant delay before the trial and P would suffer irreparable harm in the meantime and b) P had a very strong prima facie case. This all began to change in late 60s/early 70s as a result of legal change (delay and complexity) and technological change (computers, internationalization of business and banking).
- Interlocutory injunctions are awarded pre-trial and direct D to behave in ways that are consistent with P’s interests. The purpose is usually prohibitive (preserve status quo) but can be mandatory (restore status quo). They ensure that the subject matter of the dispute still exists at the time of trial.
- Purpose: is to protect P from imminent irreparable harm pending trial, minimize risk of injustice to P and preserve the integrity of the justice system by avoiding empty judgments
- Outcome of interlocutory applications do not reflect the case on its merits, instead focus on which party risks the most hardship (**Hunt**)
- Relevant Factors:
 1. Prejudiced to P or D if injunction denied or granted
 2. Likelihood of such harm occurring and possibility of compensation by monetary damages
 3. Preservation of Status quo (**Arrowsmith**)
 4. Damages Undertakings available to protect unsuccessful party
 5. If D undertakes to behave in was that preserve P’s interest, avoid prejudicing P if they should be successful at trial
 6. Interest of 3rd Parties
- Key question: which party will risk the most injustice if the injunction is awarded or denied?
- **Threshold: American Cyanamid** - lowered from the prima facie case standard – focus on balance of risks
 - o 1) Serious Issue for Trial: low threshold - action must not be frivolous, vexatious, or impossible
 - o 2) Irreparable Harm: risk of irreparable to P or D if denied
 - o 3) Balance of Convenience: who risks the **most** harm
 - o 4) Risks equally balanced: merits considered – who is likely to be successful at trial?
- Rationale behind lower threshold:
 - o Fairness to P
 - o Dangers of essentially adjudicating (parties often govern their relationships on result of injunction) on incomplete and untested evidence

- o Maintains purpose of interlocutory injunctions (preservation of rights pending trial) not decision on merits
- **Yule: American Cyanamid** Test not suitable in all cases – but serious question test approach should be used when there is conflicting evidence

B. IRREPARABLE HARM

Irreparable Harm and Balance of Convenience

- • **Irreparable Harm:** Irreparable harm may be established when the harm feared cannot be quantified in monetary terms. Additionally can occur when damages are quantifiable but it is unlikely that other party can pay.
We are concerned with the nature and not the magnitude of the harm. We will first consider irreparable harm to P and then to D (**American Cyanamid; Yule**).
 - o **Examples of Irreparable harms:** Damage to business reputation (**Yule**), lost chance to secure market position (**American Cyanamide**), a permanent loss to natural resources (**RJR**), ability to earn a living and/or defend oneself in legal proceedings threatened (**Steed**) harms not compensable or curable (**Shehrazad Non-Profit Housing Inc.**) Failure to give statutory notice of meeting to consider school closures (**Bellamy**). Damage to star athletes future prospects or ability to play in tournament (**Rudder**). Risk of irreparable harm to 3rd parties dependent on D's services (**Arrowsmith**). Damages quantifiable but unlikely to be recovered (**Hunt**). Aboriginal peoples loss of right to negotiate or be consulted (**Musqueam Indian Band**). Threat to Aboriginal rights and culture including evidence necessary to support title and rights claim. (**MacMillan Bloedel**).
 - o **Not Irreparable Harm:** Loss of market share and damage to business reputation where potential losses are ascertainable. (**Bell Canada**)
 - o Also consider whether D will be adequately compensated by P's undertaking in the event that D succeeds at trial.

Balance of Convenience: Assessing the balance of convenience requires balancing risks as between the parties. Where both P&D risk irreparable harm, whoever risks the **most** hardship will succeed, with reference to a desire to preserve the status quo (**American Cyanamid; Yule**) and interests of 3Ps.

- **Ongoing interactions:** The court will try to avoid compelling an ongoing relationship between the parties that requires co-operation, trust and confidence.
 - o However note in **Yule** the court granted an interlocutory injunction even though ongoing interaction – noted that as no mutual trust required – hostility would not affect performance
 - o Also in **Arrowsmith** even though on going interaction required –the court granted an interlocutory injunction and noted that parties were professionals and should interests of 3P's (children) ahead of their dispute
- The **American Cyanamide** test applies to general litigation and for Charter litigation (**RJR**) However, there is a strong presumption that the gov represents the public interest in the balance of convenience component (**RJR**) and that getting an interlocutory injunction wrt legislation would harm the public interest. This does make it more difficult to get an interlocutory injunction in Charter cases.
- Two **exceptions** to the **American Cyanamide** test (where prima facie case still required and the situation is looked at on the merits):
 - o Where the injunction will in fact be the final determination of the matter (i.e. picketing)
 - o Facts not in dispute -pure questions of law (court can look at the merits b/c no contested facts) (**Yule**)

- **Damages Undertakings:** are a commitment to the court that asserts that P bears the risk if injunctions are wrongly granted. In order for D to actually collect the undertaking they must show a causal link between damages claimed and wrongly obtained injunction.
 - o 2 special circumstance where court will not award damages for a wrongly granted injunction: (**Vieweger**)
 1. Public authority
 - a. When public interest trumps any losses D might have sustained due to injunction
 2. D won on technical grounds
- **Impecuniosity:** D's inability to satisfy a judgment may justify an injunction (**Iskin Inc.**) Conversely, an injunction might be denied if a P has insufficient assets to satisfy a damages undertaking. This raises concerns impecunious individuals may not be able to have their rights adequately protected due to their lack of means. The court nevertheless has discretion to relieve applicants of undertaking, under the *Supreme Court Rules*.
 - o Courts may use discretion to relieve applicants of undertaking when:
 - Crown/public authority seeks injunction to protect public interests (**Hunt**)
 - Individuals raise issue of public interest or constitutionality (**Bellamy**)
 - P has compelling case but lack financial resources for damages undertakings (**Bellamy**)
 - First Nation groups seeking to protect Aboriginal rights/title (**Platinex**)

C. UNDERTAKINGS

- **Damages Undertaking:** A damages undertaking is when a P undertakes – or makes a commitment to the court - to compensate D for losses (either in the execution of the injunction or if it is established at trial that the injunction was not justified). Interlocutory injunctions typically involve an undertaking as to damages. The amount should be proportionate to damages D risks should the injunction be wrongly granted. The court has discretion to waive the undertaking. (**Vieweger**)

Vieweger Construction v. Rush

- P's obligation to pay the undertaking to D if P loses at trial doesn't turn on D having a cause of action, or on P having done anything wrong. Here P tried to argue that it wasn't P's fault that they wrongfully got the II – it was the court's fault in granting it. SCC says no, the court is not saying that you are likely going to win at trial by granting you the II. You have to pay the undertaking regardless of anything else.

D. **SPECIAL SITUATIONS**

Special Situations:

- Restrictive Covenants
- Mandatory Orders
- Free Speech

Restrictive Covenant

- **Covenants in Restraint of Trade:** Are restraints on trade/non-compliance clauses in employment K or K for sale of business. Note that in these cases what applicant really wants is an injunction, not the case to actually be determined on its merits. Injunctions have serious consequences on D's ability to earn a living – consequentially, the higher threshold of a strong prima facie test is appropriate (**AMD Diagnostics Inc. v Bozza**)
- The granting of an interlocutory injunction to enforce an RC depends on reasonableness (geographic coverage, length of time, and the scope of the restriction)
- Employment: restrictive covenant depends on whether there is a *specific term* or *employment status* (fiduciary duty/high level employees with access to confidential information). A higher threshold of strong prima facie case is test where injunction has serious implications for D, in that impacts ability to engage in chosen vocation and earn livelihood. A covenant must be reasonable and consistent with public policy. Reasonableness will be assessed with reference to the nature and duration (**Cantol; Towers**). For *fiduciary employees*, an injunction may be granted even w/o direct evidence of competition (**Taylor**). The test is trust, and vulnerability resulting from that trust. (**Taylor**) The clause must be unambiguous and the court will not re-draft the K for the parties to get rid of the ambiguity (**Shafroon**) The court is generally more willing to enforce covenants in business than in employment Ks, since employees are considered more vulnerable (**Shafroon**). Furthermore, in sale of business Ks, not only is there is lower chance of unconscionability but D is actually being paid for the fact that he will not compete. A significant portion of the sale price is goodwill (brand value, reputation, and relationships). (**Shafroon**)
- To get an II in a case of Restrictive Covenant typically requires a strong prima facie case. (**Cantol**) Courts are not unanimous, but it is thought to be an exemption to the **American Cyanamide/RJR** test.
- Policy: tension between freedom of K and public policy against restrain of trade (**Shafroon**)
- Relevant Factors Include:
 - o Nature and duration of employment, **Cantol**.
 - o employees awareness of covenant (**Cantol**).
 - o **Fiduciary employees:** injunction may be granted even absent direct evidence of competition (**Cygnal**)
 - o Nature, geographic coverage and duration of covenant (non-solicitation v non-competition)
 - o Clause not broader than necessary to protect P's interest (**Phoenix Restorations**)
 - o **Ambiguous** covenants are unreasonable and void
 - o Court will not revise unreasonable/ ambiguous covenants (**Globex**)

- o In **Cantol** the court viewed inability to work as irreparable harm and dissolved the injunction.
- o However in **Towers**, court upheld the injunction because D knowingly breached the covenant, and court emphasized that D's right to earn a living not a reason to deny an injunction.
- o Also courts are more willing to enforce covenants in sale of business contexts compared to employment contracts.

Mandatory Orders

- **Mandatory Orders:** require D to take positive steps to (1) restore previous situations or (2) perform positive obligation whether contractual or statutory. Interlocutory mandatory injunctions constitute specific performance of K. Availability of an interlocutory injunction that amounts to a mandatory order depends on the nature of the obligation and the impact on D. Should focus on the consequences of the injunction and which party bears the most irreparable harm should an injunction be granted or withheld. There has been an inconsistent application of the threshold test. The serious question test has been applied in BC, Nfld, NS, Sask and the *prima facie* test has been applied in Ontario, AB, MB.
- Mandatory injunctions likely more drastic than a prohibitory injunction. Timing matters. If P waits until D has already completed, the court will be more reluctant to order the mandatory injunction where it would involve hardship and economic waste. If P should have applied earlier for a prohibitive injunction, that will be a factor in D's favor.
- It can be difficult to distinguish between a mandatory or a prohibitive injunction. Often the injunction can be framed either way. Thus, it is appropriate to take a nuanced approach. Consider the burden that will be placed on D if the injunction is granted. If it will put D in a situation where D will have to continue taking positive actions and continuing a relationship that D does not want to maintain, the threshold will be higher, recognizing that the continuance of the hostile relationships is more burdensome to D. A further reason for the higher threshold to obtain the injunction is that these situations will likely put the court into a position where they will have to intervene over and over again to supervise the relationship. Thus, the court recognizes their institutional limitations.
 - Rationale for Higher Prima Facie Test:
 - o Intrusive, exceeds preservation of status quo – changes status quo
 - o Injunction likely determinative
 - o Difficulties of formulating order with precision
 - o Due Process – unfair to interfere with D's rights in this manner w/o opportunity to present case
 - o Potential hardship re forcing reluctant party to deal with other party (**Prairie Hospitality Consultants Ltd.**)
 - o Problems of interpretations
 - o Problems of supervision in a relationship of mistrust (**Prairie Hospitality Consultants Ltd.**)

Free Speech

- **Free Speech Injunction to prevent defamation and injurious falsehood:** when interlocutory injunctions have impact on free speech the courts *should not* apply the

balance of convenience test or consider the risk of irreparable harm. (**Canada Metal**). This is because the risk of irreparable harm to P is easily established and if D had no personal interest in publication to justify risk of harm to P, balance of convenience will easily favor P. Consequentially, Interlocutory injunctions to prevent P from being defamed are rarely granted. However injunction may be granted where information is clearly defamatory or impossible to justify. Injunction will be refused if D intends to defend action, unless the defense is clearly unreasonable and D is motivated by malice (**Canadian Liberty Net**).

- Where free speech is at issue and threatened by a requested injunction (usually to prevent defamation), the courts favors the right to freedom of expression, and use a higher threshold test.
- An injunction will only be granted in the **CLEAREST** of cases. Court must be satisfied that the words are **beyond doubt defamatory, clearly untrue, and are not fair comment on true or admitted facts**. If not, P is limited to a remedy of damages at trial. (**Canada Metal**) There is an obligation to comply with the spirit of the order (**Canada Metal #2**)

G. THE MAREVA INJUNCTION

- **Mareva injunctions** are pre-trial/interlocutory injunctions that restrain D and 3Ps from removing or dissipating D's assets, pending trial or judgment.
 - Can include money and goods (**Aetna**)
- **Purpose:** Protects P against risk of empty judgment, protect the integrity of the civil justice system by preventing empty judgments,
- **Effect on D:** Significant interference with D's rights and usually comes with reputation damage. D likely to settle with on unfavorable terms.
 - This is a nuclear warhead of civil procedure – the potential oppression to D is great. The courts must be cautious in granting Mareva injunctions so that “litigious blackmail” is avoided (**Mareva**). The harshness of the *Mareva* injunction, issued usually ex parte, is relieved against or justified in part by the Rules of Practice which allow D an opportunity to move against the injunction immediately (**Aetna**)
 - **Scope of MI:** freeze limited to assets necessary to protect P's interests – D's still allowed to pay reasonable living expenses, ordinary business costs and legal fees.

TEST: The requirements for a Mareva injunction were set out by the SCC in Aetna:

- **1. Strong prima facie case. However, BC courts have been somewhat liberal, granting Mareva injunctions based on a good arguable case (NuCare)**
 - **2. Real and substantial risk of asset dissipation to frustrate execution of judgment**
- **1. Strong Prima Facie Case:**
 - **Patko:** emphasizes discretionary nature of MI
 - Strong prima facie case of fraud may lead to an inference of risk asset dissipation (**Patko, Silbey**)
 - Although **Aetna** favored strong prima facie case – **Tracy** in BC appeared to leave considerable room for courts to frame test as they see fit in particular applications
 - Aetna did not preclude granting MI in cases of inter-provincial transfers absent fraudulent intent. (**Gateway Village**)
 - **Real and substantial risk,**
 - the mere transfer of assets between provinces in the normal course of business is insufficient – should focus on the purpose of the transfer
 - P has to show something more – that D is moving their assets for an improper purpose (**Aetna**)
 - P must provide evidence about a “smell” about the transaction, using affidavits. And the affidavit has to state the grounds for the belief – i.e. certain behaviors, past practices, etc. ****BC courts may take a more relaxed approach here!**** (**Gateway Village**)
 - *Court noted that MI should be treated flexibly and not to require P to show that D intended to frustrate an eventual judgment. (Mooney No.2)*
 - **Asset Transfer:** The purpose of the asset transfer must be to avoid judgment, meaning there must generally be some fraudulent intent.
 - though in BC this is not necessarily so when other pragmatic factors, such as the amount of money involved and the likelihood of

- interprovincial enforcement, weigh in favour of granting the order.
(**Gateway Village**)
- The BC courts have taken a liberal approach, awarding Mareva where there is no deliberate attempt to frustrate execution of judgment, noting concern that the emphasis on the purpose of the transfer could be detrimental to P. (**Silver Standard** and **Mooney**, discussed in **Nucare**)
 - No risk of dissipation where Ds moving assets internationally in normal course of business (**Marine Atlantic**)
- **Fundamental Question:** in each case is whether granting an injunction is just and equitable in all the circumstances (**Mooney No.2**)
 - **Jurisdiction:** General Powers under provincial rules of court – courts can grant an II where it is just and convenient to do so
 - o Court can assume jurisdiction provided there is a real and substantial connection to court’s jurisdiction – Focus on things D has done in jurisdiction (**Obegi Chemicals**)
 - o B.C. *Law and Equity Act* s.39
 - S.39(1): an injunction or an order in the nature of mandamus may be granted or a receiver manager appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made
 - **Domestic Defendants:** Original targets were foreign Ds. But Domestic D’s possible when *substantial risk* of dissipation of assets pending trial to P’s detriment (**Aetna**)
 - o BC courts, recognizing that it is not realistic for P to chase D to another province unless it is for a great deal of money, because of the costs involved. (**Gateway Village**)
 - o Available when assets likely to be removed from court’s jurisdiction or dissipated (**Statefarm Insurance**)
 - **P’s obligations:**
 - o (1) full and frank disclosure of facts actually known to P, and those that could have reasonably known including weaknesses in his case (**Aetna**)
 - o (2) give particulars and grounds for application;
 - o (3) undertaking in damages, (protect D and 3P)
 - o (4) P may only very rarely be relieved of damages undertaking. **Tracy** – where representative P in class action
 - **In Personam:** A MI is an order *in personam*. All D’s assets subject to MI –regardless of location. D is restrained from disposing of his assets in the sense that if he does dispose of his assets, he is in contempt of court.
 - **joint accounts** are normally, but not always, protected.
 - **Third Parties:** A MI may have negative repercussions for 3Ps, such as financial institutions, holding D’s assets. As a result, there are **safeguards** in place: (**Z. Ltd.**)
 - o Indemnity: The P must indemnify 3Ps for the cost of compliance,
 - o Notice: give precise notice of the assets covered by MI,
 - o Search: pay for 3Ps to conduct searches for D’s assets,
 - o Third Parties Named: provide names of 3Ps to be served
 - o Maximum Amount: Asset to be held not to exceed value of P’s claim
 - o Return Day: order may specify fate that D or affected 3P may return to court to be heard

- o Undertakings: give damages undertaking to D and 3Ps.
- o Discovery: D will also be provided the opportunity to show that he has sufficient assets to satisfy the judgment. Failure to disclose reinforces the perception that D is evading judgment.
- **Liability of Third Parties:** failure to prevent D from moving assets from court's jurisdiction
 - o **TD Financial Group:** suggest that 3rd part could be liable to P for negligence breach of FD and breach of trust
- **Creditors:** The MI order does not give P any priority over other creditors. It only allows him to join the line (**Aetna**). D's creditors remain unaffected.

H. ANTON PILLER INJUNCTIONS

- AP injunctions are ex parte interlocutory injunctions that permit entry to inspect and or remove property or evidence that is vital to P's case, in some ways similar to a civil search warrant.
- **Purpose:** It operates to prevent irreparable harm to P either where P **claims ownership** of the material and wants to stop infringement or remove items from the market (must clearly ID property in questions and substantiate the proprietary claim) (*Fila*), or where P has an **evidential interest** and there is a real risk of destruction or concealment of evidence such that the ordinary civil process is insufficient. The AP preserves the integrity of the civil justice system, but threatens D's rights and should thus only be used as a last resort. AP may compel disclosure of sources of information, the location of materials, or the identity of accomplices.
 - Not a fishing expedition – limited to asset preservation where there is real risk of D destroying incriminating evidence (**Factor Gas**)
- **Requirements (Celanese)**
 - 1. **Strong prima facie case**
 - 2. **Very serious actual or potential risk of irreparable harm**
 - Procedural impact test: P unable to prove claim against D if injunction denied (evidence preservation)
 - Adverse financial impact test
 - 3. D is in **possession of incriminating materials**
 - 4. **Real risk or possibility of destruction**
- **Obligations:** P must make full and frank disclosure, including weaknesses in P's case (*Fila*). The usual damages undertaking applies (*Celanese*).
- **Result of non-disclosure – automatic discharge or court exercised discretion?**
 - **Ritter v Hoag:** court held that failure to discharge was a serious matter and information not disclosed > warranted setting aside AP injunction
 - **Pulse Microsystems:** AP discharged when P failed to discharge material information including prior co-operation between parties
 - **Bell Expressvu Ltd Partnership:** court said injunction dissolved only in exceptional cases – e.g. material non-disclosure or scandalous or abusive behavior
 - *b* Injunction would have been granted even with full disclosure – injunction continued.
- *Charter* not applicable, but even if it was and violated *Charter*, justified under s.1 due to purposes and the significant safeguards that apply (*Celanese*). These include the form of the order, the execution of the order, the post search procedure, and sanctions for improper execution, or removal of counsel if presumption that solicitor-client privilege has been violated is not rebutted (*Celanese*).
- **Rolling Anton Pillar Orders:** AP orders may be **rolling**, sought against “fly by night operators”, and operating as a sort of injunction in your pocket for use as of need (*Fila*). They present a high likelihood of abuse and will usually not exceed a year. The court is reluctant to award them and very high safeguards are in place.
- **Safeguards:** AP will be granted only in the clearest of cases; executed in presence of P's lawyer, acting as an officer of the court; D will have an opportunity to challenge P's claim in court (*Fila*), P must file an execution report, and must justify continuance of the order. See requirements in *Celanese*.

Anton Piller K.G. v. Manufacturing Processes Ltd.

- Developed what is essentially a private search warrant that allows P to go onto D's premises, search for evidence, and take the evidence away. The difference between an Anton Pillar order and an actual search warrant is that a search warrant authorizes a PO to break down your door. With an AP order, P cannot use any force. D can refuse entry to P, but then they are subject to contempt of court. P's solicitor often has to be there – as an officer of the court to make sure that P doesn't go beyond the order, and the solicitor can also be subject to contempt or professional sanctions.

Celanese Canada Inc. v. Murray Demolition Corp.

- Docs seized via an AP order are typically held in custody by P's lawyer or by an independent lawyer. Here, P's lawyer got into the docs and violated S-C privilege. Remedy: remove P's lawyers from the case.
- **Basic Protection for the Rights of the Parties**
- **1. Form of Order**
 - o The order should appoint a supervising solicitor who is independent of the plaintiff or its solicitors and is to be present at the search to ensure its integrity. The key role of the independent supervising solicitor was noted by the motions judge in this case "to ensure that the execution of the Anton Piller order and everything that flowed from it, was undertaken as carefully as possible and with due consideration for the rights and interests of all involved". He or she is "an officer of the court charged with a very important responsibility regarding this extraordinary remedy".
 - o Absent unusual circumstances the plaintiff should be required to provide an undertaking
 - o The scope of the order should be no wider than necessary and no material shall be removed from the site unless clearly covered by the terms of the order.
 - o A term setting out the procedure for dealing with solicitor-client privilege or other confidential material should be included with a view to enabling defendants to advance claims of confidentiality over documents before they come into the possession of the plaintiff or its counsel, or to deal with disputes that arise...
 - o The order should contain a limited use clause (i.e., items seized may only be used for the purposes of the pending litigation).
 - o The order should state explicitly that the defendant is entitled to return to court on short notice to (a) discharge the order; or (b) vary the amount of security.
 - o The order should provide that the materials seized be returned to the defendants or their counsel as soon as practicable.
- **2. The Conduct of the Search**
 - o In general the order should provide that the search should be commenced during normal business hours when counsel for the party about to be searched is more likely to be available for consultation.
 - o The premises should not be searched or items removed except in the presence of the defendant or a person who appears to be a responsible employee of the defendant.
 - o The persons who may conduct the search and seize evidence should be specified in the order or should specifically be limited in number.

- o On attending at the site of the authorized search, plaintiff's counsel (or the supervising solicitor), acting as officers of the court should serve a copy of the statement of claim and the order and supporting affidavits and explain to the defendant or responsible corporate officer or employee in plain language the nature and effect of the order.
- o The defendant or its representatives should be given a reasonable time to consult with counsel prior to permitting entry to the premises.
- o A detailed list of all evidence seized should be made and the supervising solicitor should provide this list to the defendant for inspection and verification at the end of the search and before materials are removed from the site.
- o Where this is not practicable, documents seized should be placed in the custody of the independent supervising solicitor, and defendant's counsel should be given a reasonable opportunity to review them to advance solicitor-client privilege claims prior to release of the documents to the plaintiff.
- o Where ownership of material is disputed, it should be provided for safekeeping to the supervising solicitor or to the defendant's solicitors.
- **3. Procedure Following the Search**
 - o The order should make it clear that the responsibilities of the supervising solicitor continue beyond the search itself to deal with matters arising out of the search, subject of course to any party wishing to take a matter back to the court for resolution.
 - o The supervising solicitor should be required to file a report with the court within a set time limit describing the execution, who was present and what was seized.
 - o The court may wish to require the plaintiff to file and serve a motion for review of the execution of the search returnable within a set time limit such as 14 days to ensure that the court automatically reviews the supervising solicitor's report and the implementation of its order even if the defendant does not request such a review.
- o Note Sanction for Improper Execution
 - Damages awarded against P against breaches of order when seized property not covered by order (**Geophysical Service Inc.**)