OFFER AND ACCEPTANCE

1. *Formation of contract* - to have a contract, there must be: (1) offer (2) acceptance (3) consideration; must also relate to the three p's, parties, price, and property.

    a. ALSO, *one mind* - To constitute a contract, minds must be one at same moment in time; offer continuing up to time of acceptance; but, not the case, as both offeror and offeree knew that there was another party likely to purchase the property. {Dickinson}

        i. ALSO, existence of same mind between two parties at the point of making a contract is *essential to the integrity* of that contract. Absent here, ergo invalid. {Dickinson}

2. *Key tension* - is between the need to enforce promises and avoidance of surprising parties with unexpected liabilities. Uncommunicated states of mind are not relevant.

    a. ALSO, task is to determine what offers will be considered legal offers, allowing the offeree to bind the offeror to a contract; achieved through application of the objective *reasonable person* standard.

3. Offers

    a. ALSO, *obligations of offer*- Offer of bargain imposes no obligations on offerer until it is accepted by the offeree according to the terms in which the offer was made. {Eliason}*

    b. ALSO, *revocation* - Offeror does not have to assert freedom only through express declaration amounting to retraction. Constructively withdrew by selling to other party. {Dickinson}

        i. ALSO, *counteroffers* - counteroffers effectively kill the original offer. {Eliason}*

    c. ALSO, *form of offer* - form interpreted broadly; for instance, train timetable offering carriage to a particular city for those who buy a ticket can constitute a good offer and therefore form a good contract through unilateral acceptance. Publication of services amounts to a promise to the public to provide certain circumstances in exchange for a fee. {Denton}

        i. ALSO, *Binding obligations* - ads directed at public can create binding obligations where performance promised in positive terms in return for something requested. {Lefkowitz}

        ii. BUT, *quotation* of prices is not offer to sell; rather, it is merely setting out terms for which a potential sale could occur, pending agreement of both buyer and seller. {Johnston}

            1. ALSO, quotation differentiated from offer based on wording / nature of offer. For instance, where quotation includes possibility of price increase / fluctuation, this is

not sufficiently certain to constitute an offer. {Johnston}

d. ALSO, *reliance on misrepresentation* - person who has made arrangements based on D.'s representations is due damages when this contract is breached through D.'s misrepresentation. The making of these arrangements, and prejudice received is Plf.'s consideration. Where a person makes an untrue statement, knowing it to be untrue, to another who is induced to act upon it, an action lies for damages incurred as a result. {Denton}

e. ALSO, *modification* - advertiser can modify offer *previous* to acceptance, but cannot impose new/arbitrary conditions *after* acceptance; "house rule" invalid. {Lefkowitz}

4. Acceptance

a. Definition - any consideration (price of ticket, going to station) sufficient to support a promise, constitute acceptance {Denton}

b. *Notice of acceptance* - Unless expressly stipulated otherwise, must assume that the offeror must be notified of offeree's decision with regard to an offer (accept/reject/counter). Until this notice is given, the offer can be revoked / modified. {Larkin}

i. ALSO, Until the offeree does something irrevocable towards communicating acceptance of offer, it is at liberty to be withdrawn. Offeror is not bound by the offeror until the offeree has taken an irrevocable step (giving agreement to agent = revocable). {Larkin}

c. *Form of acceptance* - as master of the offer, the offeror can require that acceptance come in a particular form; deviation from this form; enforceable. {Eliason}

d. *Temporality of acceptance* - Where an offer is made in terms which fix no time limit for acceptance, the offer must be accepted within a reasonable period of time in order to form a contract. {Manchester}

i. ALSO, *offer accepted immediately on fulfilling req* - Where offer is made including some request (express or implied) to be fulfilled to signify acceptance, the offer is accepted as soon as the receiving party fulfills. {Larkin}

ii. ALSO, *offer cannot be maintained without consideration to do so* - with expiring offer, No consideration given to keep the property unsold until the expiry date. Therefore, this was only an offer, and could not be yet considered a contract. {Dickinson}

1. ALSO, offer to "keep offer open constitutes *nudum pactum* (naked promise); not enforceable absent consideration; ergo can be retracted at any moment before acceptance. {Dickinson}

iii. ALSO, *Two views might reasonableness requirement*; (1) that offer is presumed *withdrawn* if not accepted within reasonable period of time, or (2) that offer is presumed *refused* if not accepted. {Manchester}

1. ALSO, *presuming offer to be refused* is simpler; involves objective assessment of facts and determination of fairness with a view to both parties. This is therefore the preferable approach. {Manchester}

a. ALSO, *post-offer conduct* -relevant to "deeming an offer refused" - allows us to take into account the communications of the party subsequent to the offer. Eg. if one party says "I'm still thinking about it" and the other party does not object, then it is a reasonable implication that the offer is still open. {Manchester}

b. ALSO, *neither party is in greater need* of protection in such circumstances; until offer accepted, open to the offeror to withdraw, modify, or put a limit on the time for acceptance. Offeree can, for their part, refuse the offer, accept the offer, or make a counter offer. {Manchester}

2. BUT, *Presuming offer to be withdrawn* is complicated, requires consideration of offerer and offeree understanding, which may vary in spite of identical knowledge re: circumstances. {Manchester}

iv. ALSO, *Acceptance w/ modification* - qualification or departure from terms of offer in acceptance by offeree invalidates the offer, unless these changes are agreed to by the offerer. This is effectively a *counteroffer*, and so requires consideration and acceptance by the original offeree in order to form part of valid agreement. {Eliason}*

e. *Types of acceptance*

i. *Bilateral* - acceptance by word/return promise (eg. one party offers to sell boat, other party promises to buy boat).

1. Contract is not completed until the customer has indicated the articles desired to be purchased, and the merchant or agent accepts that offer. Shoppers placing items into receptacles is not a contract; can put items back, exchange them for different items, etc; this is just organizational convenience. {Boots}

ii. *Unilateral* - acceptance by performance/action - like a reward contract (eg. first come / first serve as in *Lefkowitz*)

5. Disputes in formation

a. *Battle of the forms - traditional* - consideration of sequence of: offers / rejections / counteroffers / acceptances. {*Butler*}

i. *First shot approach* (first offer sets terms which underly subsequent negotiation). Applied ITC at trial. {*Butler*}

1. BUT, this approach appears to be out of date, overturned on appeal, either the last shot or the modern approach are preferable. {*Butler*}

ii. *Last shot / performance approach* (last offer sets terms of contract). Usual common law approach; counteroffers kill original offers. Any change or alteration to an offer effectively constitutes a new offer, invalidating all previous offers. {*Butler*}

1. BUT, this approach favours the seller; they will often have last shot, requiring buyer to sign a form in order to take delivery of goods In response, buyers refuse to sign, instead stamp w/ "goods accepted on buyer's terms". {*Butler*}

b. *Harmonious reconciliation - modern* - looks at all documents passing between parties, glean from documents and conduct of parties the nature of understanding and agreement which took place between them. If reconcilable harmoniously, good. If not, *reasonable implication* used instead of contradictory provisions. {*Butler*}

i. ALSO, Provisions such as the "*privilege clause*" must be read in harmony with other documents in the tender to ensure consistency with understanding of parties. {MJB}

1. ALSO, ITC, Rejection of lowest bid does not imply that tender could be accepted on basis of undisclosed criterion; clause simply allows for more nuanced view of "costs". {MJB}

6. Tenders

a. *Overview* - There may be contract between tenderers and those inviting tender, arising on the submission of the tender, with terms of contract defined in tender documents. Not automatic, depends on terms and conditions of tender call. {MJB}

i. ALSO, on breach of tender, it is the damages/profits relating to the contract being bid on which will be awarded, and not the tender contract itself. {Ron}

ii. BUT, tender contract does not arise in all circumstance; depends on the nature of the call for tender, and the tender documentation associated with this. {Ron}

iii. BUT, technical error in bid, which does not change the realistic meaning of bid in view of its compliance with requirements of tender, insufficient to render bid noncompliant. Test for compliance with tender is *substantial compliance*. {DoubleN}

7. Governing rules

a. *Intention* - must be manifestation of *intention to be bound.* Advertisements, general enticements, or invitations to treat (negotiate) are not sufficient, {*Johnston Bros.*}, although

{*Lefkowitz*} is an exception to this rule. Bringing items to cash register is an offer, accepted when cashier takes money {*Boots*}.

b. *Certainty* - the offer must be specific and comprehensive to a sufficient extent that the terms of the agreement can be identified and understood.

c. *Rejection* - offers cease to exist if rejected, and expire after a reasonable time (determined within context. {*Diocesan*}

d. *Revocation* - offers can be withdrawn at any time previous to acceptance. However, such retraction may require notice of revocation. {*Dickinson*} Offeror is master of the offer; they set the terms and conditions under which offer can be accepted.

e. *Binding* - an offer is binding once it is accepted without contingency or equivocation, and thereafter cannot be revoked.

    i. To make offer binding at common law before acceptance, can be made under seal; alternately, can enter into an option contract (create contract out of offer via consideration for keeping option open - eg. paying $1 to keep offer open for a time).

f. *Modification* - acceptance must correspond to the offer; any alteration/modification/ equivocation is a rejection of original offer, and constitutes a counter offer. {*Eliason*}

g. *Communication* - acceptance must be communicated to the offerer previous to the revocation or expiry of the offer. {*Larkin*}. Three rules:

    i. *Method of response* - can be stipulated by offeror.

    ii. *Implication insufficient* - silence is not acceptance, must be explicit.

    iii. *Postal acceptance rule* - not yet covered, will not be on exam.

BREACH

1. Lost volume

a. Relates to sale of goods issues. Governed by the market principle.

i. Market - Market exists where goods can be freely sold, and demand sufficient to absorb all products thrust into it; where demand outstrips supply. {Thompson}

1. Demand > supply - If demand outstrips supply, then breach of contract will not lead to any losses - still sell same number because can find another buyer - ergo, no damages. {Sullivan}

2. Supply > demand - if supply outstrips demand, then breach of contract leads to loss on part of seller; buyer responsible for paying *lost profit* as a result. {Thompson}

ii. BUT, contractual terms are important. Lost profit may rely on express contractual terms. For instance, there may be a lost deposit on a hotel reservation (or not) which would be forfeit when cancelling (or not), but one may receive 100% of money back when returning an item at a hardware store (or less a restocking fee).

2. Substantial performance

a. Equitable doctrine, holds that contract has *not* been breached where it has been, for almost all intents and purposes, substantively performed. A minor or technical breach made in good faith is not sufficient to undermine contract. {*Wunder*}

i. BUT, does not apply where the breacher acts in bad faith. Must come to equity with clean hands. {Wunder}

ii. BUT, may apply financial compensation where necessary. {Wunder}

3. Faith and misinterpretation

a. Acting in good faith or misinterpretation of contract are not valid defences to action for breach / do not alleviate obligations of contracting parties. {MJB}

MITIGATION

1. Plaintiff obligations

a. The rule of law concerning duty to mitigate damages holds that the innocent party must do what a prudent person ought reasonably to do to mitigate loss. {Payzu}

i. ALSO, *principle underlying* is that a Plf. must minimize damages, or alternately, can recover no more than would have suffered if acting reasonably. Same either way. {Payzu}

ii. ALSO, *lack of resources* does not generally justify a lack of mitigation, particularly in commercial cases, unless the breach related to the financing / reason for lack of resources. *Impecuniosity* is far more important in personal contracts (like sale of a house, Wroth v. Tyler).

iii. ALSO, *lost volume* - Where there is a surplus of product and a paucity of demand, the Plf. cannot mitigate by seeking other buyers; owed damages. In opposite circ., has not lost a sale, and therefore not owed damages.

2. Repudiation

a. *Overview* - On repudiation, innocent party has option of accepting repudiation and suing for damages, or alternately, disregard repudiation and hold contract in force. {McGregor}

i. ALSO, *unilateral performance* - innocent party can elect to perform a repudiated contract where this contract can be performed unilaterally (eg. without any cooperation or participation from the repudiating party).

1. ALSO, While in most cases, contracts can't be performed without cooperation of breaching party, doesn't mean this should apply to cases where can be performed. {McGregor}

2. BUT, innocent party must have a *legitimate interest in performance*. So, if one fails to mitigate, makes action for specific performance, one will also no longer be able to sue for damages due to lack of mitigation. {Asamera} Effectively, same criteria that would be required in *specific performance*. {Finelli}

a. BUT, It has never been the law that a party can only enforce contract rights reasonably, nor will the Court refuse to support such rights when they are unreasonable. {McGregor}

i. ALSO, Common law can only relieve parties from oppressive or improvident contracts in limited circumstances. This is properly the purview of the legislature. {McGregor}

ii. BUT, There may be public policy requiring limitation of contract rights to ensure compensatory, not punitive; innocent must have legit. interest in performance. {McGregor}

3. BUT, *bilateral performance* - if the contract cannot be performed without cooperation/consent of the repudiating party, then the innocent party has a duty to mitigate by not performing contract. {Finelli}

ii. ALSO, *temporality of mitigation* – Plf. is required to mitigate within reasonable time of the breach. Timing is context dependent. Where there are unique circumstances damages can be measured at a later time, including the time of the trial or judgment, or some point between the two.

iii. ALSO, *acceptance of a counteroffer* does not preclude action for actual loss sustained; so, innocent party can accept offer and still pursue action for remaining damages. {Payzu}

1. BUT, One cannot turn down an offer where this will lead to incurring a large measure of loss where this would have been avoided by prudent, reasonable persons. {Payzu}

a. ALSO, What is reasonable in such circumstances is not a matter of law, but rather a matter of facts. eg. if an employer wrongfully dismissed an employee after a public accusation of thievery, one could not expect that employee to accept a position with that employer again, even where this would mitigate loss. {Payzu}

iv. BUT, Plaintiff not *obliged* to mitigate, but this will affect claimable damages (although this does not affect specific performance cases).{Payzu}

v. BUT, There will be no damages awarded where the plaintiff is able to avoid a loss completely through mitigation. Contract damages are compensatory, not punitive.

DAMAGES

1. *Definition* - The action taken by the court to address an injury or right a wrong; can include declaration, injunction, damages, overturn decision of subordinate body. Remedies are about protecting the reasonable expectations of the parties on a policy level; protecting the interests of the Plf. without burdening the D. unduly.

    a. *Assumpsit* - a claim based on a contract breach is called an *assumpsit*, because the action stems from an assumed duty due to agreement between parties

    b. *Exclusion clauses* - clauses which limit the extent of liability in contract; for instance, dry cleaners may pay for damage to clothing, but may not pay for loss of wages if this causes one to miss a job interview.

2. *Types of damage* - Claims can be made under multiple causes of action. In any particular wrong, these can be combined as required by the Plf through election. {*Anglia*}

    a. Liquidated damages

        i. Damages can be specified in contract where they may be particularly onerous (disproportionate to diminution) or difficult to define. {Wunder}

    b. Restitution

        i. Based on *unjust enrichment*. As one can make a claim in contract or tort, one can also make a claim in restitution. Occurs where Plf. has given D. some value (good, service, etc.) as a result of a contract, and D. fails to perform promise required by contract.

            1. Calculation - Measured on the basis of the extent of D.'s enrichment. Returns the item or equivalent value to the Plf.

            2. Objective - Attempts to return Plf. to circumstances previous to contract.

            3. Methodology - corrective, retrospective.

            4. Policy - Ordinary standards - ordinary standards of justice would hold restitution interest is of primary importance - in seeking equilibrium. Plf. has lost, D. has gained, ergo the difference between them is two. In reliance, difference between Plf. and D. is one, as former has lost, but latter has not gained. In *expectation*, there is no difference between two, as neither party has lost/gained. *Ogus*

                a. ALSO, *inferential* - Reflects a quasi contract - where the Court can *infer* a contractual obligation. Could also reflect a *constructive trust* (eg. trustee relationship, from equity law) - no formal agreement exists, but Courts construct one based on nature of relationship at hand. However, eventually expanded beyond this limitation, as restitution would then only be in place

when there was an enforceable contract between the parties.

c. Reliance

i. Occurs where the Plf. has relied on the promise of D. in some way, and D. fails to satisfy that promise. Damages in this circumstance will be proportionate to the harm caused to the Plf. by reliance on the contract. Includes expenses incurred previous to the contract, as had the D. not breached the contract, these expenses would not have been wasted. {*Anglia*}

1. *Calculation* - Measured on the basis of the extent of Plf.'s loss / reliance. Expenses incurred previous to contract formation are limited to reasonable contemplation. Must be within contemplation of parties when contract was sign. {*Anglia*}. Cannot exceed expectation damages {Domtar}

2. *Objective* - Attempts to return Plf. to circumstances previous to contract. Of particular importance where expectation damages are improvable or nominal. {*Anglia*}

3. *Methodology* - restorative, retrospective.

4. *Policy - bad bargains* - issue of reliance can be troublesome, as it could be manipulated by Plf.'s to recover from bad bargains. Consider, for instance, that the satisfaction of a contract might put the Plf. in a worse position than if contract had never existed whatsoever. Ergo, reliance allows the Plf. to recover from poorly negotiated deals. By not putting the Plf. in a better position than if the contract had been performed is consistent with doctrine of compensation - leads to assertion that reliance damages should never exceed the value of the expectation. *Ogus*

d. Expectation

i. Presumptive measure. Limited by remoteness, and also by responsibility of the Plf. to mitigate own losses (see mitigation).

1. *Calculation* - Measured on the basis of the Plf.'s expected benefit (profit). Can reflect either the cost of *performance* (remedying the defect) {Wunder} or the *difference in market value* between the defective good and the promised good (market value) {Thompson}.

   a. Test for whether cost of performance applies. If not, then market value is the expectation measure. {Peevyhouse}

      i. Limit - No person can recover greater damages for breach than would have gained by full performance thereof; {Peevyhouse}

ii. Proportion - damages cannot be unconscionable, grossly oppressive in excess of reason; {Peevyhouse}; must not lead to *economic waste*.

iii. Centrality - breach must relate to an ancillary component, and not the main purpose of the contract, otherwise *cost of performance* will apply. {Peevyhouse}

b. ALSO, does not lie with a party to decide not to fulfill a contract because its performance would not be beneficial to value of property. {Wunder}

i. BUT, use of market value rather than cost of performance does not interfere with the right to contract for folly or to decrease value of own property, due to the *centrality* requirement for those damages. {Peevyhouse}

1. BUT, this effectively extends substantial performance even where contractors act in bad faith. {Peevyhouse}

a. ALSO, this approach gives the D. a bargaining advantage over the Plf, because it allows the D. to offer concessions ancillary to the contract to gain consideration; the concessions are unenforceable regardless of whether consideration received. {Peevyhouse}

c. ALSO, Market value does not require that market exist; non-transferable entities may have market value (eg. the value they would have if transferrable) {*Hicks*}

d. ALSO, argued that this could lead to unjust enrichment for Plf., but, cannot be so as result is to give one party only what the other has promised. {Wunder}

e. BUT, cost of performance can only be used as a damage measurement where it is not imprudent or unreasonable, based on *economic waste*. {Wunder}

i. ALSO, does not refer to the value of the real estate, but rather only where a structure would have to be wrecked for the contract to be fulfilled. Underlying principle is *destruction*. {Wunder}

ii. BUT, performance measurement only applicable only where this does not lead to undue expense disproportionate to end - *relative economic benefit*. Further, performance requires that the breach be *central, and not ancillary* to contract. {Peevyhouse}

2. *Objective* - Attempts to put Plf. in circumstance as if the contract had been satisfied.

3. *Methodology* - distributive, teleological

4. *Policy - distributive justice* - Holds that expectation interest is ascendant. This relates to idea that this manner of justice, in discouraging breach of contract, will help to deter such breaches. It isn't so much to compensate damages of promisee, but to punish promisor. This encourages reliance on business agreements, and such reliance is required in order for these agreements to attend to their purpose, namely facilitating economic activity. *Ogus*

    a. BUT, contract damages are not meant to punish, but rather only to compensate for harm incurred. Compensation always excessive remedy rather than market value used for basis of measurement. {Wunder}

e. *Consumer surplus*

    i. Consumer surplus is worth money, neither diminution of value / market value, nor cost of performance, but the value a person places on something *above* market value. {Ruxley}

        1. ALSO, applies where there is *no intrinsic value* in "damaged thing" - ie. no meaningful difference between pool of normal depth vs. pool of defective depth. {Ruxley}

f. *Loss of chance*

    i. Measured using quantum times probability; the amount which would have been realized, modified by the chance that it would have been realized; therefore, if one has lost a 20% chance to profit $100, then one is due $20. {*Hicks*}

        1. Test: Four criteria must be met in order for a plaintiff to collect for loss of chance through a breach of contract by the defendant. {*Folland*}

            a. *Chance lost* - Plf. must show that but for wrongful conduct, Plf. had chance to profit or avoid harm. {*Folland*}

            b. *Reality* - Plf. must establish that chance sufficiently real, significant to exceed mere speculation. {*Folland*}

            c. *Externality* - Plf. must demonstrate that outcome dependent on something other than Plf.'s own actions. {*Folland*}

            d. *Value* - Plf. must show that chance had practical value. {*Folland*}

        2. ALSO, loss of chance is compensable; the difficulty in measuring damages is no justification for not rewarding damages whatsoever. {*Hicks*} {*Willitts*}

g. Disgorgement of profits

i. There is a rule in equity which allows an innocent party to recoup the D.'s profits arising from the breach - *disgorgement of profits,* calculated via *quantum meruit* (what one has earned). {Blake}

1. ALSO, occurs in context of fiduciary (*standard* remedy in this context) or quasi-fiduciary (*exceptional* remedy in this context) relationships. {Blake}

2. ALSO, Plf. should have a *specific interest* in preventing D. from making profit to justify; for instance, ensuring that people who betray state secrets cannot profit from their notoriety. {Blake}

a. ALSO, *need not be financial interest* - *e*ven where there is no financial loss suffered through breach of contract, Plf. may still have interest in having it performed, as in sale of land. {Blake}

3. ALSO, There are circumstances in which damages are awarded for breach of contract beyond merely compensating for the Plf.'s loss (if any): {Blake}

a. Common law, D. trespasses onto Plf.'s property without causing damage, this is still actionable, with damages being measured by a reasonable right of use. Unrelated to D.'s profit, however. {Blake}

b. Equity, Plf. can arrange for injunction against trespass, and further obtain an account of profits arising from this action, to be paid wholly or partially to Plf. Available in trademark and patent cases. {Blake}

c. ALSO, The differences between the common law and equity systems do not appear to serve differing principles, but rather have come about as an accident of history. {Blake}

4. ALSO, grounds for determining whether disgorgement an apt remedy: (1) Deliberate breach (2) allowed D. to enter into more profitable contract (3) which prevented D. from fulfilling contract with Plf. {Blake}

a. BUT, *not* themselves sufficient to determine whether account for profit is an apt remedy, although may be considered {Blake}

5. ALSO, Woolf suggested two categories to assist with determining which scenarios are appropriate for consideration of account of profits. BUT, They are not of assistance. {Blake}

a. Skimped performance - where D. does not provide full extent of services, must pay back expenditure saved through breach. Not necessary to account for profits

in such a circumstance, mere market price sufficient

b. The very thing - where D. does the very thing he contracted not to do in breach. Defined too widely to assist, catches all negative obligations.

6. BUT, only in *exceptional cases*, where injunction, specific performance, and damages provide inadequate response that *accounting for profits* should apply. {Blake}

h. Non-pecuniary / mental distress damages

i. Central distinction is between economic losses (eg. the difference in market price, lost profits, money spent on reliance, etc.) and non-economic losses (eg. mental distress, loss of psychological benefits of contract). Courts have traditionally shied away from mental distress in breach of K. cases, and generally only compensate physically manifested non-pecuniary losses. Does not require IAW. {Fidler}

ii. Pigeon holes - Holidays (Jarvis) wedding photos (Wilson), disability insurance (Warrington)

1. *Pets* - mental distress actionable, but limited (eg. Pezzente), particularly must be in reasonable contemplation (communication of special circ. see: Newell).

a. BUT, warranties given concerning the health of pets are *limited to problems that the pet had at the time* that warranty was given; can't cover all problems, lifetime. {Pezzente}

b. BUT, *must be reasonable economic action* - Plf.'s decision to pursue surgery was not reasonable economic thought, but rather emotional thought. One wouldn't spend $10k to repair $350 stereo. {Pezzente}

c. BUT, damages limited to the value of the dog, or alternately can have a replacement dog (but would have to give Bear to the D.). {Pezzente}

2. *Sensory experience* - physical inconvenience and discomfort caused by a sensory experience is actionable (Wharton). Purchased Cadillac with buzzing in radio; purchased luxury experience.

3. *Others* - Exceptions to rule, where distress damages are acceptable; breach of promise to marry, failure to pay on cheque, vendor failure to make title, physical discomfort. {Addis}

iii. Presumptions against - There are two reasons why mental distress usually not actionable in breach of contract: {Fidler}

1. *Minimal* - while there is usually disappointment from breach of contract, rarely so significant as to warrant an award for damages. {Fidler}

2. *Commerce* - contracts usually concern commercial matters, therefore mental suffering is not in contemplation; expectation of fortitude. {Fidler}

iv.Presumptions for – articulated in {Fidler}:

1. *Reasonable contemplation* – Reasonable contemplation - *no reason* to require "peace of mind" be essence or dominant aspect; minimum need only that it be in *reasonable contemplation*. {Fidler}

    a. ALSO, SCC holds that, in a K. for "peace of mind", it is often within contemplation that a breach of K. will cause the Plf. mental distress. Therefore, this is not an exception to the *Hadley* rule, but rather an articulation and refinement of its application. {Fidler}

    b. ALSO, To view from other side, mental distress damages apt where failure to award them would mean that Plf. not recompensed as if contract had been satisfied. {Fidler}

v. Governing test - for determining whether mental distress damages in a breach of contract action will be recoverable, in accordance with *Hadley*: {Fidler}

1. *Object* - object of the K. must have been to secure a psychological benefit, bring mental distress on breach, within reasonable contemplation {Fidler}

2. *Degree* - the degree of mental suffering caused by the breach must be sufficient in order to warrant compensation. Not merely incidental. {Fidler}

3. *Independent cause of action / LAW – no need* to prove independent cause of action where damages meet *Fidler Test*; however, where distress *not* within reasonable contemplation, must do so. {Fidler}

    a. ALSO, eg. the circumstances which require independent actionability are not those described here; only if fail "reasonable contemplation" of *Fidler Test* is it necessary to prove that damages independently actionable. {Fidler}

vi.Measurement – The correct measure to compensate a Plf. in action for breach of entertainment contract is to compensate for enjoyment promised but not delivered. {Jarvis}

1. ALSO, Difficulty in measuring intangible damages in money is no reason for not awarding them; Court already undertakes difficulty in loss of amenities actions. {Jarvis}

vii.Motive - Motive and conduct are relevant in tort to the extent that they can mitigate or aggravate the amount of damages owed. This is not relevant to contract, however. {Addis}

1. ALSO, in commercial context, common that contracts will be broken. Conduct of individuals should not increase or decrease the amount of money owed. {Addis}

    a. ALSO, eg. a grasping, insulting creditor is not owed less as a result, nor should a party with means of repaying its debt be forced to pay more than owed. {Addis}

2. BUT, in case of malice, fraud, other elements separately actionable, exemplary or vindictive damages are apt in *tort*. If one seeks redress from contract, then one is limited to form of contract actions; pecuniary loss only. {Addis}

    a. *eg.* while there may be tort actionability for malice/fraud/other aggravating circumstances, to avail oneself of this in redress one must make a claim not in contract, but in tort. *{Addis}*

    b. BUT, limitations on damages as in *Addis* are outdated; in some circumstances, it is appropriate to award damages for mental distress in contract breach actions (such as contract for holiday). {Jarvis}

viii.Employment – actionable where there is an *independent actionable wrong* (eg. intentional infliction of mental distress, defamation, fraud, etc.)

1. ALSO, *Wallace damages*, Court may increase period of reasonable notice where dismissal is unfair or in bad faith. {Addis}

    a. BUT, the problem is that this *discriminates between types of employees*; executive distress worth more than clerk distress.

2. ALSO, In *Maw v. Jones*, the Court awarded damages not just for the loss of notice in wrongful dismissal, but also for consideration of time required to get a new job. {Addis}

3. ALSO, Wrongful dismissal is defined as the action relating to termination which lacked both cause and the required notice (by statute or by common law). {Vorvis}

    a. BUT, If employee finds immediate employment, they will have avoided any damages through mitigation. Contract breached, no damage, ergo no awards via action. {Vorvis}

        i. BUT, However, aggravated or punitive damages may extend the scope of awards to be received, in the former where there is an independent actionable wrong (eg. fraud), or in the latter where there is reprehensible

conduct requiring denunciation and deterrence. {Vorvis}

4. BUT, employer/employee relationship can be terminated by either party with notice for any reason (as this relationship is indefinite). Only damages recoverable are for lack of notice. {Vorvis}

    a. ALSO, All damages must flow from actionable wrong, as in *Addis*. Not sufficient to be merely related to actionable wrong. Only actionable wrong in this case dismissal. {Vorvis}

i. *Punitive*

  i. Punitive damages are an exception to the common law rule in that rather than compensating, punish the wrongdoer, and so differ from aggravated damages. {Vorvis}

    1. *Whiten Test for aptness* - of punitive damages in breach of contract actions:, 1. must be *reprehensible conduct*, and, 2. must be *independent actionable wrong* (IAW)

        a. *Reprehensible conduct* is high-handed, malicious, arbitrary, depart from ordinary standards of behaviour to a marked degree. {Whiten}

        b. *Independent actionable wrong* means that act must have been actionable in addition of breach of K., but can also be incidental to breach; does not have to be a tort.{Whiten}

    2. *Whiten policy framework* - for awarding punitive damages. In assessing punitive damages in breach of contract actions, Court must ensure all three are satisfied: {Whiten}

        a. *Exceptionality* - punitive damages are exception to general rule of compensatory damages; must be rational response to repugnant conduct. {Whiten}

        b. *Rationality* - must be linked to the achievement of at least one policy objective: punishment, deterrence, and denunciation to be *rational*. {Whiten}

        c. *Proportional* - the sum of punitive damages should be proportionate to the degree of misconduct. {Whiten}

    3. *Whiten Proportionality Framework* - six components of proportionality are laid out for consideration in the amount of the sum: {Whiten}

        a. *Blameworthiness* - consider the deliberateness of conduct, motives, temporality of conduct, D.'s awareness of conduct, D.'s profit. {Whiten}

b. *Vulnerability* - consider the imbalance of power between the parties (financial or otherwise), whether this was used to exploit weaker party. {Whiten}

c. *Harm* - must be proportional to harm incurred; can also include potential harm in this consideration (what could have happened but did not). {Whiten}

d. *Deterrence* - extent to which deterrence is required for this and future wrongdoers. Should not be calculated to sting D.'s pocketbook, however. {Whiten}

e. *Other penalties* - if criminal penalties and other compensatory damages are sufficient to meet policy objectives, then punitive damages inapt. {Whiten}

f. *Advantage* - punitive damages should be proportionate to the advantage gained; if D. still profits after damages calculated, then insufficient. {Whiten}

ii. ALSO, *not same as aggravated damages* - Aggravated damages are compensatory, and must compensate for aggravated harm received. Punitive damages apt only where conduct merits punishment. {Vorvis}

REMOTENESS

1. Central tension

a. Fair balance between reasonable expectations of the party to whom the promise was made and the risk of unfair surprise to the defendant if to be held responsible for unexpected liability. SCC has reaffirmed that the overarching rule of remoteness in Canada is H&B; what is in reasonable contemplation of parties, imputed based on knowledge of reasonable person in circumstances, and actual knowledge based on communication of special circumstances. Guiding factor is *policy*, and *not* an application of technical legal science.

2. Remoteness test

a. Contemplation - Damages must be within reasonable contemplation of both parties (foreseeable), or else must be expressly covered within contract. *{Baxendale}*

i. ALSO, had full extent of the liability been known (extent of special circumstances), these would have been factored into price *{Baxendale}* {Achilleas}

ii. ALSO, only entitled to damages reasonably foreseeable as liable to result from breach. Loss must be proportionate to the value of contract. {*Newman*}

iii. ALSO, breacher doesn't *actually* have to contemplate what damages may occur as a result of breach - sufficient that conclusion would be reached in hypothetical contemplation. {*Newman*}

iv. ALSO, breach does not necessarily have to lead to damages in contemplation, requires only a likelihood. {Newman}

b. Arising naturally - Loss must be foreseeable within contemplation at time of contract formation (*reasonable contemplation of parties* - critical test). Can be based on imputed knowledge (although actual knowledge also works). *{Baxendale}* Type of damages and not the quantum of damages which must be within contemplation of the parties. {Wroth}

i. ALSO, the D.'s ability to foresee will depend on knowledge D. possessed at time of formation. Engineers know more than laymen. {*Newman*}

ii. ALSO, knowledge can be imputed; minimum requirement for this branch. {Newman}

iii. ALSO, Such a loss must be *sufficiently likely to result* from breach of contract to make it proper that loss flowed naturally from breach. {Heron II}

iv. ALSO, must interpret contract within commercial context in which it was made; must take into account the common practices and understandings of the industry in order to understand what was within contemplation. {Achillleas}

1. ALSO, wrong to be held liable for risks for which people would not reasonably considered to have undertaken within market/*comm. context*. {Achillleas}

2. ALSO, *contextual analysis can be both inclusive and exclusive*; can extend the scope of duty based on nature of industry, or restrict it, where applicable. {Supershield}

3. ALSO, where application of Hadley's general test would lead to unquantifiable, unpredictable, uncontrollable, disproportionate liability where is clear that such liability would run contrary to market understanding an expectations, then liability cannot be extended; damages are too remote. {*Sylvia*}

c. *Not arising naturally* - Special circumstances must be made explicit to promisor to extent that they are effectively a second contract. Based on information given, special loss must be foreseeable. Must be based on actual knowledge. *{Baxendale*}

   i. ALSO, There must be an actual *damages contract* on the part of the D. to bear the exceptional loss for notice of damage to be effective. {*Horne*}

      1. ALSO, Differentiates between tort liability (wide via negligence) and contract liability (narrow via contemplation / special circumstances){Heron II}

      2. BUT, No special contract is required for carrier to be liable for "remote" expectation damages, where these are communicated; overturns Horne. {Purolator}

   ii. ALSO, Where there is great reliance, notice must be made to promisor; cannot automatically be made to indemnify the entire project. {*Munroe}*

      1. ALSO, must be reasonable for person to rely to this extent on product; not reasonable to have entire project rely on second-hand tractor, for instance. {*Munroe}*

   *iii.*ALSO, knowledge must be express; minimum requirement for this branch. {Newman}

      1. ALSO, Sufficient that other party mention nature of reliance; for instance, if known that unreliability on part of product will undermine entire project, and that product required for profit-making project, sufficient, even where product is second hand. {*Scyrup*}

      2. ALSO, must be specific - importance, reliance, extent of potential losses. {Purolator}

d. Policy re: limitation in H&B - arose out of the fact that there were no limited liability companies in 1843, these would not exist until 1855. There was also no insurance available at the time (these were considered gambling at the time). As a result, the instruments available to limit the dislocative effect of damages were not sufficient to meet the liability distribution. Finally, it was not yet settled whether exculpatory clauses and liability waivers

were effective warders of tort actions. {Hadley}

e. Policy re: alteration in Heron - continual refinement of the standard that is set by altering words misses the point; whether or not the damage was within the contemplation of the parties involves policy and facts, not really whether the test involves "liable to result" v."sufficiently likely to result", etc. Disagreement about the words in the test is rather meaningless; judges still characterize whether or not the loss is foreseeable; can be rigged, regardless of the exact test applied. {Heron II}

f. Governing principles

i. Foreseeability - what would ordinarily be expected under the circumstances

ii. Special circumstances - fact of communication, including particulars such as clarity, specificity, and timing; as well as to whom info communicated (CEO vs. frontline employee, for instance). Doesn't require special contract (Cornwall Gravel overwrites Horne).

iii. Defendant's knowledge - generally and of Plf.'s business in particular; if D. has transitory relationship, would have less knowledge of Plf.'s biz, for instance.

iv. Nature of D.'s business - the level of expertise involved, what is being offered to the Plf. (seller of technical equip. vs. courier company - former will have greater expertise concerning possible damages to Plf.)

v. Nature of the product - second hand or top of the line, goes to extent to which product should be relied on. For instance, Purolator advertises that their service is premium, can be relied on.

vi. Sophistication of parties - more sophisticated or knowledgable, more likely that damage was foreseeable.

vii. Ordinary allocation of risk - understandings or expectations in the relevant marketplace. Further, in some industries, more efficient to distribute liability through insurance rather than contract liability.

viii. Proportionality - comparison of contract price and nature of service against the risk involved (eg. the loss claimed) - D. would charge more to indemnify massive biz undertakings (eg. insurance cost in addition to charge for service).

OTHER REMEDIES

1. *Types of remedy* - Presumptive remedy in breach of contract is damages. While other remedies are available, these must be justified by the nature of breach, content of contract, and must also be administratively accomplishable. While Plf. can choose which remedy sought in action, cannot do so in contract; Parties cannot contract themselves out of the law, so a clause which holds that injunction rather than specific damages will apply in breach is not binding. {Nelson}

    a. Damages

        i. *Monetary reward*. Follows expectation measure in contract law. Presumptive remedy in breach of contract. Rule of damages is that victim of a breach is due damages equal to the amount which would have been tendered had contract been satisfied. {Wroth}

            1. ALSO, *temporality* - Temporality rule holds that the Plf.'s are due the damages based on the state of affairs at the time of the breach. {Wroth}

                a. BUT, *consistency* - This appears to undermine rule of damages (eg. had the contract been satisfied...). Where the application of the rule undermines the principle underlying the rule, it is often rightful for the Courts to apply the principle, given strong reasons. {Wroth}

    b. Specific performance for sale of land

        i. *Test* - Request for some specific action to be taken (eg. for a contract to be fulfilled, for instance). Three step test for determining whether specific performance is applicable in building contracts in which conveyance of land contingent on building. Court generally does not order building contracts to be specifically performed. Exception is where the land was conveyed subject to promise of that building: {Tanenbaum}

            1. *Land* - D. must have obtained the lands on which to build works by promising to build them. May also be sufficient that D. possess the lands. {Tanenbaum}

            2. *Clarity* - description of the works must be sufficiently clear and defined in the contract. Must be reasonable to nature and subject matter of the undertaking, and the conditions under which it was entered into. {Tanenbaum}

            3. *Damages* - assessment of damages must not be sufficient to compensate the plaintiff for the injury received. Plf. must have substantial interest in having the contract performed, compensation inadequate otherwise. {Tanenbaum}

            4. *Uniqueness* - the Tanenbaum test applies in circumstances where the land is *not* necessarily unique. Absent the consideration of works for land, the Plf. would have to prove that the land is unique, serves an idiosyncratic interest {Semelhago}

c. *Issues concerning specific performance application*

i. Specific performance is an exceptional remedy as opposed to common law damages, and therefore appropriate only in very particular circumstances. {Argyll}

1. ALSO, *hardship* on the defaulting party not a reason to eschew performance; this is only a consideration where (1) amounts are insignificant, (2) difference between performance and damages is minor, and (3) damages are ascertained easily. {Tanenbaum}

a. BUT, Specific performance can be onerous to defendant, placing operations under a sword of Damocles, leading to expensive litigation for minor breaches thereafter {Argyll}

b. BUT, The loss suffered by the D. as a result of compliance with specific performance may be far greater than what the Plf. would suffer from the contract breach. The purpose of contract law is not to punish, and this would seem inappropriate. {Argyll}

2. ALSO, *difficulty in ascertaining damages* is a major factor in award of performance, due to time factors involved, need to construct long term, complex financial analyses. {Tanenbaum}

a. BUT, Specific performance cannot be entered where the Plf. would gain more through performance than they would have through original satisfaction of contract. {Argyll}

b. BUT, Most losses in the contract arena are quantifiable, and therefore the award of injunction is a rare remedy in this mainly commercial field. {Nelson}

3. ALSO, *substantive performance not determinative* - offering of some measure of performance does not rule out specific performance, to allow this would be to allow breaching party to dictate terms after non-observance. {Tanenbaum}

4. ALSO, *can be substituted for damages* - Legislation holds that, where specific performance cannot be carried out through injunction, the Courts can substitute appropriate amounts of damages. {Wroth}

a. ALSO, *rule for substitutive damages* - The rule for substitutive damages in specific performance is that payment must equal the loss to be occasioned by the act which prevented the injunction; not limited temporally. {Wroth}

b. ALSO, *limitation* - must also fit rule in *Baxendale*, in that must be within contemplation of parties when contract was made. It is *type* of damages and not quantum of damages which must be within contemplation of parties.{Wroth}

5. BUT, equity supplements (rather than supplants) the common law, and is <u>only</u> applicable where *damages are inadequate.*

6. BUT, breach of contract *gives right to damages alone*; the court's role is not to enforce morality of keeping promises (or to punish). Contracts are commercial, commerce is about money, and therefore so should be contract damages.

7. BUT, *administrative difficulty* - courts are reluctant to supervise ongoing compliance due to cost and difficulty. Specific performance will not be awarded where the duty to be enforced is continuous, over a long time, therefore requiring constant Court supervision. {Tanenbaum}

    a. ALSO, *most common failing* - relates to the fact that performance would require long-term, continuous supervision of the courts; untenable. {Argyll}

    b. ALSO, *not in public interest* to bind hostile parties together following breach of contract, this would lead only to further wasted resources. {Argyll}

8. BUT, *undermine policy* - presumptive right to specific performance would mean no requirement to mitigate losses, ergo would undermine policy considerations.

d. Pigeon holes relating to specific performance

i. *Unique goods - Behnke v. Bede Shipping*, concerning a unique Monet painting

ii. *Unique services* - performance can be ordered of corporation (but not persons)

iii. *Unique land* - must show that a substitute is not available, *Semelhago* (SCC 1996)

iv. *Condition of conveyance* - where land obtained in consideration for building works on that land (Tanenbaum v. Bell Paper)

v. *Long-term supply* - long term supply contracts where Plf. may go out of business (*Sky Petroleum).*

e. *Covenants / contract of service* - Negative covenants are enforceable under certain limitations, however; agreement NOT to do something, that something shall not be done. Positive covenants of personal service will never be enforceable through injunction. This would be tantamount to slavery. {Nelson}

i. ALSO, *stringent* - negative covenants are viewed stringently, to ensure that they do not undermine market viability, or pose an undue restraint of trade. {Nelson}

ii. ALSO, *respectful of agreement* - in valid contract, use of injunction to enforce negative covenant ensures respect of original agreement. Convenience, or amount of damage are

not relevant. {Nelson}

iii. ALSO, *substance not form* - any covenant which would not be enforced via injunction in positive form is not enforceable in negative form. Court weighs the substance, not form of contract. {Nelson}

iv. ALSO, requirements for negative covenants:

1. Negative covenant exists in contract;

2. Damages inadequate;

3. Must not amount to compulsion of personal services or undue restraint of trade

v. BUT, *cannot force positive covenant* - negative covenants cannot be enforced where they would force D. to perform positive covenants, or, force D. to remain idle. This is subject to what the Court considers reasonable, however. {Nelson}

1. ALSO, *even party under positive contract cannot enforce provision*. This was not found to be enforceable, as it would effectively amount to enforcing performance of positive covenant in a contract for services. {Nelson}

2. BUT, *earnings differential not forcing* - earning gap between D.'s occupation concerning negatively covenanted actions and other acts isn't relevant. {Nelson}

3. BUT, *more than mere temptation* - The fact that the D. may be *tempted* (but not *driven*) to perform the contract if negative covenants are enforced does not undermine their enforceability. {Nelson}

vi. BUT, *contract for type of remedy* - parties cannot contract themselves out of the law, so a clause which holds that injunction rather than specific damages will apply in breach is not binding. {Nelson}

1. ALSO, such clauses are helpful in determining what was contemplated by parties, what the contract stands for. {Nelson}

vii. Policy - Reflects a number of cases in which negative covenants were enforced through injunction against women, who were seen as deviant, requiring the intervention of courts to minimize the ruin they could wreak on society. {Lumley}

f. Injunction

i. Request for the court to intervene with an order preventing or prohibiting an activity.

FOUNDATIONAL PRINCIPLES

1. Components of a contract

a. *Offer*

b. *Acceptance*

c. *Consideration*

2. Considerations contract disputes

a. *Formation* - deals with whether or not there is a contract, who is party to the contract, and what is the contract for.

b. *Terms* - What is the contract and what are the obligations of the contract?

c. *Defences* - Even if there is a contract specifying obligations between parties, are there other factors which excuse parties from performance of these obligations?

d. *Remedies* - Where there are breaches of a contract which are not defensible, what does the π obtain?

e. Custom - There can be no custom in opposition to an actual contract, therefore the special agreement of the parties must prevail. {MJB}

3. Types of contract

a. *Bilateral contracts* - where actions are required by each party in order for a contract to be formed.

b. *Unilateral contracts* - Contracts which are not mutual.

4. Promissory estoppel

a. Occurs where one contracts *not* to do something.

5. Non est factum

a. The idea that a written agreement is not valid because one party (usually Δ) was mistaken about its character when signing it (eg. π presents a sale contract to Δ as a petition, when it is in fact a contract concerning sale of house). There must be mutual understanding (ie. a meeting of the minds) for a contract to be binding.

6. Oral agreements

a. Oral agreements are just as valid as written agreements (although certain types of contract involving land transfer must be put into writing). This relates to the idea that the agreement is between the party, the written document itself is simply evidence that the contract exists, elucidating the particulars of the contract between the parties.

    i. ALSO, *Parol evidence* - Refers to conflicts between written documents and other statements made on or previous to the contract (eg. discrepancy between written agreement and *statements* relating to actual agreement).

7. Mutuality

a. The mere fact that there is mutuality does not necessarily mean that a contract is enforceable. Mutuality is necessary, but not sufficient evidence that a contract can be enforced. Of course, there are contracts which do not involve mutuality - unilateral contracts.

8. Purpose of contractual agreements

a. *Enforceability* - an enforceable agreement or promise, each party to contract has obligation to fulfill terms of contract by law, consists of promises made by each party to the other. There are mechanisms in place through law which ensure that these promises are fulfilled by each party.

b. *Ordering* - a mechanism for private ordering which facilitates the exchange of goods and services - conditions are imposed, both express and implied.

    i. *Express* - money exchanged for coffee.

    ii. *Implied* - there is a condition in every sale of goods contract that the good purchased is reasonably fit for its intended purpose.

c. *Timing* - a means of providing ground rules for simultaneous exchanges as well as future exchanges.

    i. *Simultaneous* - money exchanged for coffee immediately.

    ii. *Future* - arrange for long-term supply of coffee to a cafe. Future exchanges must account for risk allocation (eg. price fluctuations, supply issues), particularly in long-term supply agreements

d. *Risk* - concerns risk allocation, contract allows risk within an exchange relationship to be allocated to the parties within the contract, and also allows for business or other planning to made on the basis of the contract.

e. Heritage - Rose out of tort and separated from this. Governing market relationships, creating incentives of economic development through distribution of risk in enterprise. The

rules of contract were developed and solidified in the 1800s with the Industrial Revolution.

f. *Interest* - relates to interest protection, the protection of reliance and reasonable expectations. In an agreement, one must be able to rely on this agreement with a view to planning.

g. *Modification* - certain elements of a contract cannot be modified. For instance, some entities cannot become property (eg. one cannot sell one's organ - if one removes one's organ from one's body, this is not converted to property but is still considered a part of the person. Therefore, an organ cannot be the subject of contractual exchange. Nor could a parcel of land become a person.

h. Capitalism - as we live in a market economy, all of our laws reflect the type of ordering which is relevant to a market economy, and compatible with the mechanisms of such an economy. Shaming, humiliation, shunning, persuasion, boycott, violence, intimidation, extortion, loss of trust in consumer - there are social mechanisms external to the law which can be used. Not effective enough to govern complex capitalist society, however.

CASES

- *Wertheim v. Chicoutimi Pulp Co. (PC 1911)*

    - Ratio

        - Expectancy interests trump reliance interests; they are the presumptive and just interests to guide remedy in contract law. This means that the correct measure is cost of performance.

            - Atkinson - In granting damages for breach of contract, the complaining party should be returned to the same position that they would have been in had the contract been performed. It is the state intended by the contract which much be fulfilled, not the state preceding the contract.

- *Anglia Television v. Reed (QB 1972)*

    - Facts

        - Television company given business to film a play. The company hires directors, pays for locations, etc, and incurs expenses. Thereafter they contract with Reed, an actor, to play the lead role. Reed agrees, but drops out thereafter due to a scheduling conflict. Plf. sues D. for reliance damages, including damages before the contract and within the contract. They would have sued for expectancy but could not produce numbers.

    - Rule

        - Denning finds in favour of Plf., awarding pre-contract damages and damages incurred during the contract.

    - Ratio

        - Plf. can choose between reliance (wasted expenditures) and expectancy (lost profits) interest through *election* – expectancy cannot always be proven, reliance will be the measure where this is the case.

            - Relates to the idea that in certain circumstances, expectancy damages may be unprovable, or may be $0 (eg. if contract involves land which may not have increased in value). In these circumstances, Plf. can elect to seek reliance damages. However, this is ultimately decided by the court, and the extent to which each principle will award damages will necessarily affect the court's analysis of the terms, breach, etc. of the contract.

- Expenses incurred previous to the contract must be allowed, as had the D. not breached the contract, they would not have been wasted.

    - It is argued that the party incurs these costs before the contract out of the hope that the contract will be formed and fulfilled. However, these costs must be allowed, as Plf. must choose between expectancy (impossible in this case) or reliance. Further, reliance must include all wasted expenditures, as, if the D. had not breached the contract, these expenditures would not have been wasted. While it is true that the if the contract had never been formed that the Plf. would have wasted the expenditures without redress; however, the contract having been made, it does not "lie within the mouth" of the D. that he is not liable.

- Expenses previous to the contract are limited within reasonable contemplation

    - There is a limiting test to these damages which occur previous to the contract, as the damages preliminary to a contract must be within the contemplation of the parties when the contract was signed - it would have to be known by the D. when contract signed that the money would likely be wasted were the contract to be broken. This is not a limitation on the measurement of damages, or type of damages that can be lumped in with interest, but rather whether any such damages can be included whatsoever.

- *Hawkins v. McGee (NHSC, 1929)*

    - Facts

        - McGee (D.), surgeon, convinces Plf. to undergo skin graft operation on burned hand, holds that it will be one hundred percent good following operation, and other warranty statements concerning recovery etc. Operation is apparently unsuccessful in fulfilling warranty, as Plf. sues for damages.

    - Rule

        - Appeal held (D. wins), new trial ordered.

    - Ratio

        - Expectancy interest rather than restitution interest required, in accordance with Wertheim principle.

            - Aesthetics or damage to hand did not affect Plf.'s ability to earn income - this is an intangible loss (psychological, non-monetary). Rule of damages for breach of warranty in sale of chattels must apply. The measure of damages is the difference between the value of the article according to

the warranty, and the value of the article delivered along with incidental losses that the parties knew would probably result from failure to comply with terms of warranty. In this case, the measure of damages is the difference in value between the value to him of a perfect/good hand (warrantied) vs. the hand which was delivered by the D.

- Suffering should not factor into damages in this case

- The pain incurred by the Plf. in this circumstances is simply part of the cost paid in order to receive a "perfect hand" - that is to say that it was an expected part of the process which would have occurred whether or not the D. delivered a "good hand".

- *Bowlay Logging v. Domtar (1978)*

- Principle

- Reliance damages cannot exceed expectation damages.

- If the extent to which the Plf. relied on the contract (reliance) created damages greater than the amount the Plf. would have profited had the D. satisfied the contract (expectation), then the latter/lesser amount should be used. One cannot gain more out of pocket than one would have received in total. Therefore, if the Plf. cannot prove that the contract would have created profits, or at least broken even, then reliance damages cannot be recouped. If one would expect to lose money if contract would be satisfied, it does not follow that one is still entitled to recoup expenses that would never have been earned back anyways.

- *Groves v. John Wunder (MSC, 1939)*

- Facts

- D. contracts with Plf. to remove gravel from Plf.'s land, giving D. use of Plf.'s plant for extracting gravel, profits a prendre, and one less competitor on tha market, with the D. paying $105k to Plf. as well. D. agreed to leave land flattened with overburden removed. D. did not fulfill this last term in bad faith, wilfully, leaving land broken and uneven, in a state requiring $60k of work to be put into state that Plf. contracted. Plf. sues, trial judge awards only difference in property value. Plf. appeals, holding that damages insufficient - Plf. seeks cost of rendering property in state contracted.

- Rule

- D. owes Plf. the cost of completion, not just the difference value of land had the work been completed.

- Principles

    - Equitable doctrine of *substantial performance (*eg. that contract has been completed for most intents and purposes, ergo no breach) does not apply when a contractor acts in bad faith.

        - While some deviation from the terms of a contract is allowable (subject to financial compensation where necessary) and will allow the contractor to be paid, this does not extend to circumstances where contractors act in bad faith, eg. willingly flout the terms of a contract to their own advantage. In this case, the D.'s bad faith means that he has no right to this doctrine (one must come to equity with clean hands). Therefore, D. is in breach of contract and has no right to profit or be compensated by contract.

    - The cost of remedying the defect (performance), and not the difference between the value of the promised article and the delivered article is the proper measure of damages in contract.

        - One may contract to have a folly built on one's property, which does not positively affect the value of one's property, or even decreases it. It does not lie with a contractor to decide not to fulfill a contract because its performance would not be beneficial to the plaintiff / property. Unlike torts, where for instance, trespass damages are proportional to property damage. Further, if the shoe were on the other foot, the contractor would be suing for what he has lost - his profit. The Plf. must have the same protection to sue for what he has lost - the fulfillment of the performance which he has been promised. Therefore, it is the cost of fulfillment which must be returned to the Plf.

    - The cost of performance can only be used as a damage measurement where it is not imprudent or unreasonable, based on *economic waste*.

        - Economic waste does not refer to the value of the real estate, but rather only where a structure would have to be wrecked, or nearly wrecked, in order for the contract to be fulfilled. For instance, if it requires that a completed structure be torn down to remedy the defects, then this cost is considered imprudent and unreasonable - economic waste. The underlying principle is *destruction*.

    - Liquidated damages can be specified in contract where they may be particularly onerous (disproportionate to diminution) or difficult to define.

- Certain contracts can include liquidated damages (eg. specified damages relating to breach of contract within the agreement).

- Policy

- It has been argued that land owners may be unconscionably enriched by the measurement espoused in this decision. However, there can be no such enrichment where the result is to give one party to a contract only what the other has promised. To measure damages otherwise is to give contractors leave to breach any portion of a contract concerning work which will not increase value of land.

- On the other hand, the dissenting opinion in Groves argued that the basis for damages in contract is compensation for the harm, and not punishment - therefore, where damages exceed compensation, the wrong rule must have been applied. According to the dissent, compensation is always exceeded where the remedy (rather than the market value) is used as a basis for damage measurement.

- *Peevyhouse v. Garland Coal & Mining Co. (OKSC, 1963)*

- Facts

- Plf. contracts with D. to strip mine for coal on their farm, stipulating that the property be returned to a specific condition on cessation of the five-year lease. While all other elements of the contract were fulfilled, the D. did not attempt to return the land to the condition required by contract. Plf. sued for the cost of performance, $29k. Received $5k, the value of diminution of the property. Appealed for more damages.

- Rule

- Plf. not entitled to performance measurement, as this is grossly disproportionate to the damages incurred (diminution of $300 or so in property). Ergo, entitled to diminution, $300.

- Principles

- Disproportion between performance cost and return due to the fact that situations (like Peeveyhouse's proposed improvements) are artificial; artificial situations are ill suited to rules designed around reason, and so tort measurement more useful than contract measurement for such damages.

- Rules based around reason and reality are not applicable to situations which involve unreasonableness, unlikeliness.
It is unlikely that Plf. would ever spend $29k to improve property in a

manner which only increases land value by $300. Therefore, this justifies the use of damage measurement principle from tort law (eg. damages relating to diminution) within a contract framework, because unrealistic situations can create damages far out of proportion with diminution.

- Performance measurement only applicable only where this does not lead to undue expense disproportionate to end - *relative economic benefit*. Further, performance requires that the breach be central, and not ancillary to contract.

    - Plf. entitled to money required to complete work (ie. cost of performance) except for where this is grossly out of proportion of value of good (where it will be diminution as a result).

    - Further, the breach must be central, and not ancillary to the contract; in the case at hand, the coal mining was the central aspect of the contract, the improvement of the land afterwards an ancillary aspect.

- *Peevyhouse test* for applicability of cost of performance vs. difference in market value measurements, three parts.

    - No person can recover greater damages for breach than would have gained by full performance thereof; damages cannot be unconscionable, grossly oppressive in excess of reason; breach must relate to an ancillary component, and not the main purpose of the contract, otherwise cost of performance will apply.

- Use of market value rather than cost of performance does not interfere with the right to contract for folly or to decrease value of own property.

    - This measurement does not give contractors free will to flout contracts which they understand to render no increase, or render a decrease in value to contractees property. Where the object of the breach is the primary article or purpose of the contract, the cost of performance is the correct measure (eg. the primary article of a coal mining contract is to mine coal; the stipulations concerning the condition of the land are secondary to this aim; however, if the primary article was the improvement of the land, then performance would have been the measure). Effectively, Peeveyhouse extends equitable substantial performance to contractors even when they act in bad faith.

- Policy

    - Extends equitable doctrine of substantial performance even where contractors act in bad faith, undermining the fundamental principle of law requiring that one must come to equity with clean hands.

- *Sanctity of contract* - As the dissent notes, this approach gives the D. an immense bargaining advantage over the Plf. The Plf. would not have entered into the agreement if not for the concessions concerning the improvement of the land by the D. Therefore, to remove this burden on the part of the Plf. is effectively negotiating on the Plf.'s behalf, to their detriment. The interference of the court in a contract should only occur where it is immoral, tainted with fraud, etc. - as this was not the case in this contract, then the court has no right to interfere.

- *Responsibility of D. to avoid grossly disproportionate liability* - Yes, the cost of improving the land is onerous - however, it was within the power of the D. to contemplate this cost at the time that they entered into the contract. Therefore, the court has allowed the D. all of the benefits of the concessions granted (the Plf.'s performance of the contract) without having to render all of the concessions that they agreed to in exchange.

- *Thompson (W.L.) Ltd. v. Robinson (Gunmakers) Ltd. (CA 1955)*

- Facts

- D. agrees to buy Vanguard vehicle from Plf., later refuses delivery of goods, no longer wants to purchase vehicle. Plf. returns vehicle to manufacturer, sues D. for profit lost from sale. D.

- Rule

- Market conditions were such that supply exceeded demand, therefore the vehicle could not have otherwise been sold. D. owes Plf. profit from vehicle sale.

- Principles

- Where a sale of goods contract is breached, the damages are measured through expectation, and in particular, the difference between the contract price and the market price of the goods

- Market exists where goods can be freely sold, and demand sufficient to absorb all products thrust into it; where demand outstrips supply.

- Market answer to volume problem. There must be the ability to sell a good, and demand must outstrip supply, in order for a market to exist as set out in Sale of Goods act. In this case, as there were more Vanguard vehicles than the market demanded, the only way for Plf. to not take loss on vehicle was to mitigate by returning to manufacturer. As a result, the car could not otherwise have been sold, supply outstripped demand, and

therefore D. owes Plf. recompense for lost profits.

- *Charter v. Sullivan (CA 1957)*

    - Facts

        - D. agrees to buy Hillman Minx vehicle from Plf., later refuses delivery of goods, no longer wants to purchase vehicle. Plf. returns vehicle to manufacturer, sues D. for profit lost from sale. D.

    - Rule

        - The Plf. was able to immediately sell the car that the D. refused to purchase, in breach of contract. Therefore, Plf. sold maximum number of cars that it could possibly have, in spite of D.'s breach, experienced no damages, therefore deserving of no recompense.

    - Principles

        - Market occurs where goods can be freely sold, and demand sufficient to absorb all products thrust into it.

            - Market answer to volume problem. In this circumstance, as demand outstripped supply by considerable amount, Plf. was able to immediately discharge of itself of good for profit. The Plf. could find a buyer for every Hillman Minx he received from manufacturers; he sold the same number of cars and made the same profit as he would have received had the D. carried out his problem.

- *Ruxley Electronics v. Forsyth (HL 1996)*

    - Consumer surplus is worth money, neither diminution of value nor cost of performance, but the value a person places on something above market value.

        - Contractor makes pool 9" too shallow. There was no diminution of value caused by the difference in depth. Trial judge awarded $4k for loss of amenity, in spite of the fact that the diminution of value difference would have been $0, and there was no unique benefit afforded by the depth of the pool. The use by the consumer was not affected. CA awards cost of performance ($22k), HL restores trial judge's findings; minor deviations mean contract substantively fulfilled, however compensation still owed to cover the factors bargained for by consumer beyond finance: comfort.

- *Chaplin v. Hicks (CA 1911)*

- Facts

    - D. holds contest for acting contract. Plf. gets to final stage, but unavailable for appointment to be selected as winner. As a result, loses contest. Sues D. for breach, holding that reasonable steps were not taken to give Plf. opportunity to present herself. D. concedes, but holds that damages too remote, and immeasurable as rested on chance, not certainty.

- Issue

    - Is the loss of chance compensable?

- Rule

    - Loss of chance is compensable; that damages will be difficult to measure is no reason to preclude paying damages whatsoever.

- Principles

    - Damages sufficiently proximal where they are the result of the breach, must have been contemplated by parties as possible result of breach.

        - As the damage incurred by the Plf. in this case was directly related to the breach, namely that the D. did not take sufficient steps to ensure that she could present herself for selection, damages cannot be too remote.

    - Loss of chance is compensable; the difficulty in measuring damages is no justification for not rewarding damages whatsoever.

        - Does not require mathematical certainty; this does not relieve the wrongdoer of necessity of paying damages for breach of contract. To say that expectation is based on contingency and therefore not recoverable would be too wide; everything is based on probability to some degree.

    - Market value does not require that market exist; non-transferable entities may have market value (eg. the value they would have if transferrable)

        - While no market may exist for a non-transferrable item, if the item were to be transferrable, it would have value (in this case, considerable). Further, the non-transferability of an item does not undermine the fact that the Plf. has been deprived of it via breach.

- *Carson v. Willitts (ONCA 1930)*

    - Facts

- Defendant breaches contract to bore three oil wells, boring only one. Plf. lost chance to profit as a result.

- Principles

- There is a difference between impossibility of proving damages due to lack of evidence (nominal damages awarded) versus difficulty of proving damages; latter case, substantial damages can still be awarded, regardless of difficulties in calculation.

- *Folland v. Reardon (ONCA 2005)*

- Four criteria must be met in order for a plaintiff to collect for loss of chance through a breach of contract by the defendant.

- *1. Chance lost* - Plf. must show that but for wrongful conduct, Plf. had chance to profit or avoid harm.

- 2. *Reality* - Plf. must establish that chance sufficiently real, significant to exceed mere speculation.

- 3. *Externality* - Plf. must demonstrate that outcome dependent on something other than Plf.'s own actions.

- 4. *Value* - Plf. must show that chance had practical value.

- *Hadley v. Baxendale (UK 1854)*

- Facts

- Plf. engages D. to deliver component of mill to Greenwich in order to serve as a model for a new component. In the interim, the mill was unable to operate without the component. D. breaches contract by delivering component only after unreasonable delay; Plf. sues for lost profits as a result.

- Principles

- Remoteness test - Damages must be within contemplation of both parties (foreseeable), or else must be expressly covered within contract.

- Special circumstances are those which would fall outside of the reasonable contemplation of both parties, and therefore require express presence in contract in order to be considered within the scope of damages. In this case, D. could not have known that this one component was in fact obstructing the entirety of operations at the mill (could have assumed that they had a backup, or else that there were other

components which also needed to repair, and thus mill inoperative anyways). As a result, with no other specifications in contract, cannot be held liable for loss of chance; the damages are simply too remote from understanding.

- Had the full extent of the liability been known (the extent of special circumstances), then these would have been factored into contract price

    - Allocation of liability would have been provided for through contract; setting amounts, limits for damages, etc. This is a second kind of contract, specifically for damages, over and above the contract for services to be rendered. Baxendale likely would have charged far more to fully assume / indemnify Plf.'s losses. Carriers could not, at this time, decline service; being so obligated to accept the Plf.'s custom, would be unconscionable to make D. fully liable for Plf.'s remote damages as a result.

- *Hadley* test for expectation damages concerning lost profits or remoteness; meet at least one branch for redress to be proximal.

    - *Arising naturally* - Loss must be foreseeable within contemplation at time of contract formation. Can be based on imputed knowledge (although actual knowledge also works).

    - *Not arising naturally* - Special circumstances must be made explicit to promisor to extent that they are effectively a second contract. Based on information given, special loss must be foreseeable. Must be based on actual knowledge.

- Policy

    - Fuller / Purdue hold that this foreseeability test is circular; (what is reasonable? foreseeable! what is foreseeable? reasonable!). Further, creates a bias in exempting normal or average conduct from legal penalties, which may not align with the idea of just redress required by the Courts.

    - According to Danzig, decisions concerning the amount of damages would previously have been considered a matter for the jury, a matter relating to the facts and not to the law. The Hadley case limits when damages will be available, by reason of concern for the floodgates. There was a concern that one could potentially incur infinite liability through increasingly remote damages.

    - There were no limited liability companies in 1843, these would not exist until 1855. There was also no insurance available at the time (these were considered gambling at the time). As a result, the instruments available to limit the dislocative effect of damages were not sufficient to meet the liability distribution. Finally, it was not yet settled whether exculpatory clauses and liability waivers

were effective warders of tort actions.

- Institutional concern that damages had to be to some degree taken away from the jury, and placed under the control of the courts. Judicial innovation in an age of industrialization; the case itself is a standardization of law, centralization of power by judges over juries, and the mass production of judicial products (standards of common law).

- *Horne v. The Midland Railway Co. (EC 1873)*

  - Facts

    - Plf. have contract to deliver shoes by a certain date; make such provisions to ensure that this is met, but D. fails to make delivery on time, causing Plf. to lose profits. Plf. sues for expectation damages concerning profits / loss of chance, as they gave notice that the contract would be broken were delivery to be late.

  - Issue

    - Can the D. be held liable for loss of chance / expectation damages, where these damages are not within their contemplation at the time of the contract, nor are they otherwise specified?

  - Rule

    - No. This would be tantamount to creating a "second contract" specifically for damages with the delivery service. Loss of chance damage requires more than mere notice for liability to be established.

  - Principles

    - There must be an actual *damages contract* on the part of the D. to bear the exceptional loss for notice of damage to be effective.

      - Notifying delivery service is not sufficient to create a contract which specifies damages for breach. This would be a second contract. It would not be reasonable to expect that so great a risk would be take for so little remuneration - would bring ruin to every company.

    - Common carriers at this point in time could not refuse goods, therefore their liability must be limited. Carrier must explicitly accept addt.'l risk.

- *Victoria Laundry Ltd. v. Newman Industries Ltd. (CA 1949)*

  - Facts

- Plf. contracts to purchase boiler from D., expressing that the boiler is needed immediately for use. D. delivers boiler 20 weeks after expected delivery. Plf. sues for loss of profits, holding that the D. cause their loss through breach. D. holds that these damages are not foreseeable.

- Issue

    - Can the D. be held liable for loss of chance / loss of profits when failing to deliver industrial equipment in a timely manner?

- Rule

    - D. liable for loss of profits; while could not have known exact terms of Plf.'s business arrangements, should still have foreseen that loss of profit would occur.

- Principles

    - Identifies six principles which need to be applied in determination of loss of chance damages, subsuming and refining the *Hadley* Test.

        - 1. Purpose - to put Plf. in circumstances they would have been in had the contract been performed; can bee too harsh, however.

        - 2. Limit - Plf. only entitled to damages reasonably foreseeable as liable to result from breach. Loss must be proportionate to the value of the contract.

        - 3. Foreseeability - the D.'s ability to foresee will depend on knowledge D. possessed at time of formation. In this case, being engineers, had special knowledge concerning equipment at hand.

        - 4. Nature - knowledge can be either actual (eg. derived from express notice from Plf., second branch min. req.) or imputed (eg. engineers know more about technical matters than laymen first branch min. req.).

        - 5. Contemplation - breacher doesn't *actually* have to contemplate what damages may occur as a result of breach - sufficient that conclusion would be reached in hypothetical contemplation.

        - 6. Necessity - breach does not necessarily have to lead to damages in contemplation, requires only a likelihood.

- Munroe Equipment Sales Ltd. v. Canadian Forest Products Ltd. (MCA, 1961)

- Facts

- Plf. rents D. used tractor for hauling wood; tractor breaks down. D. refuses to pay for certain months of rent, Plf. sues. D. counterclaims for loss of chance relating to unreliability of tractor.

- Issue

- Can the renter of a second-hand tractor be held responsible for the loss of profits to a lumber company when the tractor breaks down?

- Rule

- Nature of damages such that explicit and express notice would have to be given to Munroe in order for them to be held accountable for damages; reasonable person would not have allowed such an enterprise to fall on a second hand tractor.

- Principles

- For loss of chance damages to be applied, must either be reasonably contemplated, or expressly made mention of

- In this case, there were circumstances relevant to the extent of CFP's reliance on equipment which were not made clear; that labour dispute meant that all timber would have to be removed during that season; the nature of the contracts made to sell the timber; how much timber would be moved by the rented equipment. As Munroe was not made aware of these elements, it cannot be said that they could have reasonably contemplated the extent of the loss, nor did they make a second contract concerning the loss.

- Where there is great reliance, notice must be made to promisor; cannot automatically be made to indemnify the entire project.

- This would have given promisor the opportunity to contract out of liability, set out a contract with specific damages, or at least to contemplate the extent of liability in negotiating price. Absent this notice, promisor cannot be held liable for such damages, even in the context of a defaulted or breached contract.

- *Scyrup v. Economy Tractor Parts Ltd. (MCA 1963)*

- Facts

- Plf. purchases equipment from D. for fulfillment of contract with employer. Equipment delivered with fault, and this causes Plf. to lose contract. Plf. had made D. aware of reason for purchase (eg. to fulfill contract), sues for loss of

profit. D. argues that as not aware of extent of contract, length, value, should not be held liable as could not reasonably foresee.

- Issue

    - Can D. be held liable for loss of profit when selling faulty tractor equipment to Plf., who informs D. that equipment is required for fulfillment of work contract?

- Rule

    - Was within the contemplation of D. that delivery of faulty equipment would cause Plf. to lose profits as a result, particularly as Plf. pointed out remote area where work was being done, thereby making repairs costly and impractical.

- Principles

    - Hadley test is based on reasonable foreseeability, whether considering the first branch or the second branch. Differentiator is type of knowledge.

        - Knowledge required in first branch of Hadley test is at least imputed knowledge, although actual knowledge furthers this claim. In the second branch, concerning special circumstances, imputed knowledge is not sufficient - actual knowledge is required.

- *Koufos v. C. Czarnikow Ltd (The Heron II) (HL 1969)*

- Facts

    - Plf. charters D.'s vessel for voyage; D.'s actions cause nine-day delay in breach of contract; in time of delay, market price of Plf.'s cargo drops; Plf. sues for difference through loss of chance / expectation damages.

- Issue

    - Can D. be held liable for difference in market price, or are these damages too remote, due to the fact that in delay, market had equal probability of going upward as downward?

- Rule

    - D. liable for Plf.'s loss; reasonably likely that the person in D.'s position would have realized that loss was likely to result; sufficiently likely to make it proper to hold that loss flowed naturally from breach.

- Principles

- Differentiates between tort liability (wide via negligence) and contract liability (narrow via contemplation / special circumstances)

    - D. would have known that loss was "not unlikely" (can be significantly less than even chances that loss would transpire). In contract, one can direct attention to likelihood to protect against risk which would appear unusual, unlikely to be within contemplation. In tort, liability is based on general foreseeability, and duty must be discharged.

- Such a loss must be *sufficiently likely to result* from the breach of contract to make it proper that the loss flowed naturally from the breach.

    - Must be in reasonable contemplation of parties; the bar had been set too low previously (liable to result), ergo desirable to change.

- Policy - it would seem that the continual refinement of the standard that is set by altering words misses the point; whether or not the damage was within the contemplation of the parties involves policy and facts, not really whether the test involves "liable to result" v."sufficiently likely to result", etc. Disagreement about the words in the test is rather meaningless; judges still characterize whether or not the loss is foreseeable; can be rigged, regardless of the exact test applied.

- *Transfield Shipping Inc. v. Mercator Shipping Inc (The Achilleas) (HL 2009)*

- Facts

    - D. charters boat, returns to owners late, causing subsequent contract with another charter to be renegotiated at a loss of $1.3m. Plf. sues for loss of profits. D. contends profits too remote to collect, do not reflect standard practice in industry.

- Issue

    - Does the Hadley test determine damages in all contracts, or does this test face rebuttal in various circumstances in relevant markets, such as the shipping industry?

- Rule

    - Common practice in shipping industry that overruns do not incur cost of subsequent fixtures, but rather the market price of overrun itself. D. could not have foreseen this *type* of damages or liability for this type of damages in contemplation of contract, therefore not liable.

- Principles

- Interpretation of contract is not just the understanding of the agreement itself, but rather within context in which agreement was made

    - Must be construed in commercial setting; the nature of the industry involved, common practices and understandings, where relevant, will be critical in constructing what was and was not within the contemplation of the promisors at the time that the agreement was made.

- It is wrong for one to be held liable for risks for which people would not reasonably considered to have undertaken within market/*comm. context*

    - Contractual liability is based on voluntary obligations undertaken; therefore, it follows that only contemplated damages must be found, and that these are modified by the nature of industry. Further, where one understands that the risk is severe and of great magnitude, there will be a premium in consideration required to offset the risk; therefore, should be made explicit.

- Assessment of damages should start from the *type* of damages one would expect to owe, before the liability itself can be measured.

    - Description for the type of loss liable must precede consideration of measure of damages. This relates to the consequences for which the law regards as giving best effect to the express obligations assumed, and not extending them so far that this exceeds the reasonable contemplation of liability by the D.

- Hadley principle is both inclusive (foreseeable = compensable) and exclusive (type of damage must match contemplation of promisor)

- Policy - Rodger and Hale find that the loss was not foreseeable, due to the fact that the market conditions were unpredictably volatile. Could not have foreseen the unpredictable losses. The "type" of damage approach espoused by Hoffman has danger of becoming arbitrary - eg. creating categories and subcategories until any damage will be sufficiently obscure to be too remote for liability. Endorse orthodox approach.

- *Supershield Ltd. V. Siemens Ltd. (UKCA, 2010)*

- Contextual analysis can be both inclusive and exclusive; can extend the scope of duty based on nature of industry, or restrict it, where applicable.

    - In *Transfield*, contract breaker held not liable even though some loss of that kind probable; stems from analysis of commercial background of agreement. However, can also be inclusive - if loss within scope of duty following contextual analysis, cannot be regarded as too remote, even where this defies "ordinary

circumstances".

- Rather than an understanding of *type of damages*, we discuss the *scope of liability* based on the understanding of parties within market context.

- *Sylvia Shipping Co. v. Progress Bulk Carriers Ltd. (EWHC, 2010)*

    - Test concerning whether or not the damages will be too remote based on contextual analysis of market surrounding contract (market understanding).

        - Where application of Hadley's general test would lead to unquantifiable, unpredictable, uncontrollable, disproportionate liability where is clear that such liability would run contrary to market understanding an expectations, then liability cannot be extended; damages are too remote.

- *Cornwall Gravel v. Purolator (ONHC 1978)*

    - Facts

        - Cornwall told Purolator that bid had to be in by 3pm, or would lose contract; therefore, if Purolator could not guarantee that they could deliver bid in time, the Plf. would deliver it themselves. The bid is delivered late, and rejected. Cornwall would have won the bid had it been delivered on time, profiting them $70k.

    - Issue

        - Can a carrier be held liable for the losses of their client where there is no second, special contract for damages?

    - Rule

        - D. liable for the loss of profit to the Plf. even absent special damages contract.

    - Principle

        - No special contract is required for carrier to be liable for "remote" expectation damages, where these are communicated; overturns Horne.

        - Common carriers are able to refuse bids, unlike in context of Horne, therefore their liability does not need to be limited in same manner.

        - Carriers able to implement exclusion clauses in contracts, so as to ensure that they would not be held liable in this manner in future.

- Employees are not allowed to enter into special contracts, nor vary the terms of the standard form contract; they have no negotiating power (within context of limited liability corp); nor can Purolator be held liable for special damages relating to service.

- Purolator advertised "when it's just got to get there on time", makes prominent extent to which public should rely on their services.

- Communication to employee must be specific; Purolator employee knew of importance of bid, knew extent of losses, etc.

- Policy - to what extent does it matter that the bid would have won? Goes to the lotto skeptic problem; while certainly, the *numeric* chances of winning a bid are better than the same chances of winning the lottery, the fact remains that the Plf. in this case received expectation damages, not lost chance damages. That being the case, same should apply in Lotto Skeptic. It appears that the *ex post facto* analysis of what would have been delivered trumps the loss of chance, where available.

- *Newell v. Air Canada*

- AC refuses to allow dogs on plane, says that they must travel in cargo hold. Plf. offers to buy entire first class to ensure safety (amounts to communication of special circumstances). Awarded mental distress damages.

- *Addis v. Gramophone Co. Ltd. (HL 1909)*

- Facts

- Plf. was employed under contract, dismissed w/ notice, prevented by D. from continuing in contractual role in spite of six month stipulation in contract. Brings action for lost wages, lost commissions, and for period of time in which it would take to find new work - effectively, an intangible injury. At trial, he was awarded large sum as a result of the harsh and humiliating circumstances of his dismissal, and the pain he experienced as a result.

- Issue

- Can a Plf. receive damages for intangible injuries in a contract action?

- Rule

- Exemplary damages are not recoverable in a contract action, and therefore the redress owed in a wrongful dismissal relates only to amount within consideration of failure to provide notice, etc. Can't recover for intangible injuries in contract.

- Principles

    - In *Maw v. Jones*, the Court awarded damages not just for the loss of notice in wrongful dismissal, but also for consideration of time required to get a new job.

    - Damages for breach of contract are in the nature of compensation, not punishment; should put parties in position as if contract had been performed.

    - Motive and conduct are relevant in tort to the extent that they can mitigate or aggravate the amount of damages owed. This is not relevant to contract, however.

    - In commercial context, common that contracts will be broken. Conduct of individuals should not increase or decrease the amount of money owed.

        - eg. a grasping, insulting creditor is not owed less as a result, nor should a party with means of repaying its debt be forced to pay more than owed.

    - Exceptions to rule, where distress damages are acceptable; breach of promise to marry, failure to pay on cheque, vendor failure to make title, physical discomfort.

    - In case of malice, fraud, other elements separately actionable, exemplary or vindictive damages are apt in *tort.* If one seeks redress from contract, then one is limited to form of contract actions.

        - eg. while there may be tort actionability for malice/fraud/other aggravating circumstances, to avail oneself of this in redress one must make a claim not in contract, but in tort.

- *Jarvis v. Swans Tours Ltd. (QB 1973)*

    - Facts

        - Plf. arranges with D. for two-week vacation in Switzerland. The promised amenities and enjoyment are not delivered. Plf, sues not only to recover for the cost of the vacation, but also for lost enjoyment, mental distress, etc., for having wasted the two weeks of vacation that he receives each year.

    - Issue

        - Can a Plf. receive damages for intangible injuries in a contract action?

    - Rule

        - Plf. can recover for intangible injuries in contract actions which relate to contracts for holidays, provision of entertainment and enjoyment.

- Principle

    - TJ holds that the proper measure of damages is the difference in value between the offered vacation and the vacation ultimately delivered, accords with *Addis*.

    - Limitations on damages as in *Addis* are outdated; in some circumstances, it is appropriate to award damages for mental distress in contract breach actions.

    - One such appropriate circumstance involves any contract for holiday or provision of entertainment and enjoyment; intangible injury damage apt here.

    - Difficulty in measuring intangible damages in money is no reason for not awarding them; Court already undertakes difficulty in loss of amenities actions.

    - The correct measure to compensate a Plf. in action for breach of entertainment contract is to compensate for enjoyment promised but not delivered.

– *Vorvis v. Insurance Corp. of BC (SCC 1989)*

- Facts

    - Plf. wrongfully dismissed from law job, brings contract action for damages. Seeks aggravated damages for mental distress (under guise of punitive damages).

- Issue

    - Can a wrongfully dismissed Plf. recover for mental distress?

- Rule

    - Only where these damages stem from an independent actionable wrong, and one which is actionable in a manner so as to allow such damages (eg. tort - wilful infliction of mental distress; not wrongful dismissal *alone*).

- Principles

    - Punitive damages are an exception to the common law rule in that rather than compensating, punish the wrongdoer, and so differ from aggravated damages.

    - Aggravated damages are compensatory, and must compensate for aggravated harm received. Punitive damages apt only where conduct merits punishment.

    - Employer/employee relationship can be terminated by either party with notice for any reason. Only damages recoverable are for lack of notice, therefore.

- All damages must flow from actionable wrong, as in *Addis*. Not sufficient to be merely related to actionable wrong. Only actionable wrong in this case dismissal.

    - eg. Therefore, as there was no other actionable conduct, then recovery limited to circumstances surrounding dismissal.

- At common law, there is an indefinite employment relationship, and therefore either party can terminate at any time (with cause, or with reasonable notice).

- Wrongful dismissal is defined as the action relating to termination which lacked both cause and the required notice (by statute or by common law).

- If employee finds immediate employment, they will have avoided any damages through mitigation. Contract breached, no damage, ergo no awards via action.

    - However, aggravated or punitive damages may extend the scope of awards to be received, in the former where there is an independent actionable wrong (eg. fraud), or in the latter where there is reprehensible conduct requiring denunciation and deterrence.

– *Fidler v. Sun Life Assurance Co. of Canada* (SCC 2006) - mental distress

– Facts

– Insurance company does not pay Plf. benefits owed for period of five years, although acting in good faith. Plf. brings action for recovery of losses, including benefits owed, punitive damages for misconduct (fails, due to good faith of D.), and aggravated damages for mental distress.

– Issue

– Can a Plf. recover for mental distress in a breach of contract action involving insurance?

– Rule

– Disability insurance contracts are formed specifically to prevent mental distress; it follows, obviously, that peace of mind central to such contracts. Further, within reasonable contemplation that breach would cause mental distress, and that this distress was significant (ergo passing *Fidler* test). Mental distress damages awarded. Punitive damages withheld, as D. acted in good faith.

– Principles

- Courts have traditionally shied away from mental distress in breach of K. cases, and generally only compensate physically manifested non-pecuniary losses.

- There are two reasons why mental distress usually not actionable in breach of contract:

    - 1. *Minimal* - while there is usually disappointment from breach of contract, rarely so significant as to warrant an award for damages.

    - 2. *Commerce* - contracts usually concern commercial matters, therefore mental suffering is not in contemplation; expectation of fortitude.

- Other Courts characterize *Jarvis* as "exception" to rule concerning exclusion of mental distress from breach of contract. SCC sees *Jarvis* as expression instead.

    - SCC holds that, in a K. for "peace of mind", it is often within contemplation that a breach of K. will cause the Plf. mental distress. Therefore, this is not an exception to the *Hadley* rule, but rather an articulation and refinement of its application.

- Reasonable contemplation - *no reason* to require "peace of mind" be essence or dominant aspect; minimum need only that it be in *reasonable contemplation*.

    - Other Courts hold "peace of mind" requirement is not only applicable where this is object of contract, but also where it is a major or important object of contract.

- Sets out two-part *Fidler Test* for determining whether mental distress damages in a breach of contract action will be recoverable, in accordance with *Hadley:*

    - 1. *Object* - object of the K. must have been to secure a psychological benefit, bring mental distress on breach, within reasonable contemplation

    - 2. *Degree* - the degree of mental suffering caused by the breach must be sufficient in order to warrant compensation. Not merely incidental.

- No need to prove independent cause of action where damages meet *Fidler Test*; however, where distress *not* within reasonable contemplation, must do so.

    - eg. the circumstances which require independent actionability are not those described here; only if fail "reasonable contemplation" of *Fidler Test* is it necessary to prove that damages independently actionable.

- To view from other side, mental distress damages apt where failure to award them would mean that Plf. not recompensed as if contract had been satisfied.

- *Whiten v. Pilot Insurance Co.* (SCC 2002)

    - Facts

        - Plf. insures house with D. House burns down, D. refuses to pay out policy; pursues arson investigation even after this has been ruled out, lack of payout forces Plf. into circumstances of insecurity, financial hardship, etc. Plf. sues for breach of contract, also for punitive damages relating to reprehensible conduct of D.

    - Issue

        - Are punitive damages appropriate in breach of insurance contract actions, and if so, what principles guide these awards?

    - Rule

        - Punitive damages are apt for breach of insurance contract, as this is a peace of mind agreement. More available through punitive than through mere mental distress, however. Requires reprehensible conduct, denunciation and deterrence objectives, and independently actionable wrong.

    - Principles

        - *Whiten Test* for aptness of punitive damages in breach of contract actions:, 1. must be *reprehensible conduct*, and, 2. must be *independent actionable wrong* (IAW)

            - *Reprehensible conduct* is high-handed, malicious, arbitrary, depart from ordinary standards of behaviour to a marked degree.

            - *Independent actionable wrong* means that act must have been actionable in addition of breach of K., but can also be incidental to breach; does not have to be a tort.

        - *Whiten Policy Framework* for awarding punitive damages. In assessing punitive damages in breach of contract actions, Court must ensure all three are satisfied:

            - 1. *Exceptionality* - punitive damages are the exception to general rule of compensatory damages; must be rational response to repugnant conduct.

            - 2. *Rationality* - must be linked to the achievement of at least one policy objective: punishment, deterrence, and denunciation to be *rational*.

            - 3. *Proportional* - the sum of punitive damages should be proportionate to the degree of misconduct.

- *Whiten Proportionality Framework,* six components of proportionality are laid out for consideration in the amount of the sum:

    - *Blameworthiness* - consider the deliberateness of conduct, motives, temporality of conduct, D.'s awareness of conduct, D.'s profit.

    - *Vulnerability* - consider the imbalance of power between the parties (financial or otherwise), whether this was used to exploit weaker party.

    - *Harm* - must be proportional to harm incurred; can also include potential harm in this consideration (what could have happened but did not).

    - *Deterrence* - extent to which deterrence is required for this and future wrongdoers. Should not be calculated to sting D.'s pocketbook, however.

    - *Other penalties* - if criminal penalties and other compensatory damages are sufficient to meet policy objectives, then punitive damages inapt.

    - *Advantage* - punitive damages should be proportionate to the advantage gained; if D. still profits after damages calculated, then insufficient.

- Policy - punitive damages straddle public and private law, as they pursue denunciative goals (a publicly desirable policy initiative), but do so in the context of regulating private relationships between individuals. A Plf. is a private AG, seeking redress for own losses but in so doing performing socially useful service. This decision criticized for introducing unreckonability into damages (eg. award would have been much smaller for mental distress).

- *Payzu Ltd. v Saunders* (KB 1919)

    - Facts

        - Plf. contracts with D., D. selling quantity of silk to Plf. Plf. fails to pay in timely manner, so that D. holds that contract will no longer be honoured. Makes offer to sell to Plf. COD (sans discount, sans credit). Plf. declines this offer, sues D. for breach and market difference. D. argues that Plf. had obligation to accept counter offer in order to mitigate losses, therefore damages cannot include market price difference, but only costs stemming from cash requirement and loss of discount.

    - Issue

        - Where a contract has been repudiated, does the innocent party have a responsibility to accept a counter offer from the breaching party, where accepting this offer will mitigate the losses incurred through the breach?

- Rule

    - Plf. must take reasonable and prudent action to mitigate loss, even where this involves accepting a counter-offer from breaching party. There are factual circumstances which would render accepting such an offer to be imprudent or unreasonable, and only in such circumstances (or where there would be no mitigating effect on loss sustained) can a counter offer from a breaching party be rejected.

- Principles

    - The rule of law concerning duty to mitigate damages holds that the innocent party must do what a prudent person ought reasonably to do to mitigate loss.

    - Plaintiff not *obliged* to mitigate, but this will affect claimable damages (although this does not affect specific performance cases).

    - Acceptance of an offer does not preclude action for actual loss sustained; so, innocent party can accept offer and still pursue action for remaining damages.

    - One cannot turn down an offer where this will lead to incurring a large measure of loss where this would have been avoided by prudent, reasonable persons.

    - What is reasonable in such circumstances is not a matter of law, but rather a matter of facts.

        - eg. if an employer wrongfully dismissed an employee after a public accusation of thievery, one could not expect that employee to accept a position with that employer again, even where this would mitigate loss.

    - The principle underlying is that a Plf. must minimize damages, or alternately, can recover no more than would have suffered if acting reasonably. Same either way.

- *White & Carter (Councils) Ltd. v. McGregor* (HL Scotland, 1962)

    - Facts

        - Plf. supplies garbage bins, sells advertising to businesses for profit. D. renews contract for three years, repudiates thereafter. Plf. puts advertisements on bins anyways, and sues for damages (entire contract) as a result.

    - Issue

        - Where a contract has been repudiated by one party, can the innocent party continue with the performance of the contract (only possible where breaching party's involvement not necessary, as in this case) and sue for full damages, or is

there a duty to mitigate by ceasing performance, and searching for other potential buyers of the newly available good or service?

- Rule

    - As performance did not require cooperation of the D., there is no principle which restricts the right of an innocent party from performing the contract. They don't have to accept repudiation, as they can perform unilaterally.

- Principles

    - D.'s contentions

        - There are no authorities concerning right of innocent party to perform contract once repudiated (but this is because usually performance requires cooperation)

        - It is against the public interest that a party be allowed to perform a repudiated contract, because this increases the loss without creating any further benefit. This is an unreasonable outcome.

    - On repudiation, innocent party has option of accepting repudiation and suing for damages, or alternately, disregard repudiation and hold contract in force.

    - It has never been the law that a party can only enforce contract rights reasonably, nor will the Court refuse to support such rights when they are unreasonable.

    - While in most cases, contracts can't be performed without cooperation of breaching party, doesn't mean this should apply to cases where can be performed.

    - There may be public policy requiring limitation of contract rights to ensure compensatory, not punitive; innocent must have legit. interest in performance.

        - Where a party is pursuing completion of contract punitively, in order to increase loss to breaching party while conferring no gain to self, this may not be allowable, and should perhaps be limited. Not the case here, unfortunately, as no evidence produced to show that Plf. has no legitimate gain.

    - Common law can only relieve parties from oppressive or improvident contracts in limited circumstances. This is properly the purview of the legislature.

- Policy - in dissent, there is no other remedy for breach of contract than the compensation for loss suffered by reason of breach, mitigated by the victim to the extent appropriate to the reasonable or prudent person. To do otherwise is to require specific

performance (eg. amounts to an injunction forcing one party to fulfill contract - equity!)

- Also, the whole point of repudiation appears to be to give notice to the innocent party that the contract will be breached, so that they are able to mitigate their losses. If, present such repudiation, the innocent party can decide instead to complete the contract and increase the magnitude of the loss, this effectively renders the concept of repudiation meaningless (in circumstances where contract can be performed without cooperation of breaching party).

- Worth noting that in the US, innocent party to anticipatory breach of contract must take steps to mitigate loss. Doesn't make sense that innocent party, by doing something of no value to breaching party, could increase damages that the latter party has to pay.

- *Finelli et al. v. Dee et al.* (ONCA,1968)

  - Facts

    - D. contracts Plf. to repave driveway. At some point after contract made, D. calls to cancel contract. Plf. completes work anyways, unbeknownst to D. Plf. subsequently sues for damages, D. argues that Plf. should have mitigated losses by not completing contract.

  - Issue

    - In an anticipatory contract which has been repudiated by D., does Plf. have duty to mitigate losses by not performing contract?

  - Rule

    - Yes, but only in circumstances where the contract cannot be performed absent the cooperation of the breaching party (see McGregor - that case, could be performed unilaterally, ergo no duty to mitigate). If the contract can be performed without cooperation, then the Plf. is free to perform it. However, in this case, the contract could not be performed without cooperation, and so McGregor is distinguishable.

  - Principles

    - Repudiation excuses the innocent party from performance of the contract, leaves that party free to sue for damages as a result of the breach of contract.

    - While in McGregor, contract could rightly be performed by innocent party in spite of repudiation, distinguished here, as can't pave driveway w/o cooperation.

- Eg. in this case, the Plf. could not have performed with cooperation; completion of work was effectively trespass, and further, Plf. would have to have given previous intimation to D. that work was going to be performed.

- *Pezzente v. McClain* (BCSC 2005)

  - Facts

    - D., breeder of samoyeds, sells dog ("Bear") to Plf., provides warranty. Bear eventually requires $10k in surgery due to unforeseen medical condition. Plf. sues D. for loss. D. argues that Plf. had a duty to mitigate losses, that unreasonable to spend $10k repairing a $350 animal.

  - Issue

    - Is there a duty to mitigate losses concerning the repair of consumer products, regardless of the sentimental or other value that these products might represent (eg. if they happen to be dogs, for instance)?

  - Rule

    - Damages limited to the value of the dog, or alternately can have a replacement dog (but would have to give Bear to the D.). Not reasonable to spend $10k repairing $350 item. Plf. had a duty to mitigate loss, and in failing to do so, must incur all damages in excess of the amount she would have lost had she mitigated.

  - Principles

    - Warranties given concerning the health of dogs are limited to problems that the dog had at the time that warranty was given; can't cover all problems, lifetime.

    - Dogs are consumer goods, and so governed by *Sale of Goods Act*. Ergo, Plf. can pursue damages under breach of warranty, but has duty to mitigate losses also.

    - Plf.'s decision to pursue surgery was not reasonable economic thought, but rather emotional thought. One wouldn't spend $10k to repair $350 stereo.

      - Would be reasonable to decline surgery, or perhaps even to euthanize the dog.

    - Money spent by Plf. in fact reflected a contract between Plf. and the dog, her consideration being the companionship services performed by the animal.

- Damages limited to the value of the dog, or alternately can have a replacement dog (but would have to give Bear to the D.).

- *Tanenbaum v. WJ Bell Paper Co Ltd. (ONSC 1956)*

    - Facts

        - Plf. sells D. parcel of land based on promise to construct a certain kind of roadway / water main system. D. builds an inferior system. Plf. sues for specific performance, holding that damages not sufficient due to the fact that until the roadway is fixed (and on D.'s property, so only D. can do so), the Plf.'s property will be devalued as a result.

    - Issue

        - Can the Court award specific performance for a building clause incidental to a contract conveying land? What are the rules for applying specific performance?

    - Rule

        - Sets out test and requirements for performance damages, awards them in this case.

    - Principles

        - Court generally does not order building contracts to be specifically performed. Exception is where the land was conveyed subject to promise of that building.

        - Three step test for determining whether specific performance is applicable in building contracts in which conveyance of land contingent on building:

            - Land - D. must have obtained the lands on which to build works by promising to build them. May also be sufficient that D. possess the lands.

            - Clarity - description of the works must be sufficiently clear and defined in the contract. Must be reasonable to nature and subject matter of the undertaking, and the conditions under which it was entered into.

            - Damages - assessment of damages must not be sufficient to compensate the plaintiff for the injury received. Plf. must have substantial interest in having the contract performed, compensation inadequate otherwise.

        - Specific performance will not be awarded where the duty to be enforced is continuous, over a long time, therefore requiring constant Court supervision.

- Hardship on the defaulting party not a reason to eschew performance; this is only a consideration where (1) amounts are insignificant, (2) difference between performance and damages is minor, and (3) damages are ascertained easily.

- Difficulty in ascertaining damages is a major factor in award of performance, due to time factors involved, need to construct long term, complex financial analyses

- The offering of some measure of performance does not rule out specific performance, to allow this would be to allow breaching party to dictate terms after non-observance of the contract.

- *Cooperative Insurance Society Ltd. v. Argyll Stores (Holdings) Ltd.* (HL 1998)

- Facts

- D. operates grocery store in Plf.'s shopping centre, decides to close this store before the contract expired. Plf. sues for specific performance.

- Issue

- Can the Court order specific performance for a store to operate at a loss?

- Rule

- No.

- Principles

- Specific performance is an exceptional remedy as opposed to common law damages, and therefore appropriate only in very particular circumstances.

- When denied, specific performance often fails due to the fact that performance would require long-term, continuous supervision of the courts; untenable.

- Specific performance can be onerous to defendant, placing operations under a sword of Damocles, leading to expensive litigation for minor breaches thereafter

- The loss suffered by the D. as a result of compliance with specific performance may be far greater than what the Plf. would suffer from the contract breach. The purpose of contract law is not to punish, and this would seem inappropriate.

- Specific performance cannot be entered where the Plf. would gain more through performance than they would have through original satisfaction of contract.

- Cannot be in public interest for courts to bind hostile parties together following breach of contract, this would likely lead only to further wasted resources.

- *Warner Bros Pictures Inc. v. Nelson (Bette Davis)* (KB 1937)

  - Facts

    - Actress Bette Davis repudiates contract, leaves US for England where she enters into a new contract. Plf. sues for injunction. Law will not enforce positive actions via injunction, but will in some circumstances enforce negative actions. In this case, Plf. wants to ensure through injunction that D. does not act or perform until the contract expires.

  - Issue

    - Can specific performance be ordered in a personal service contract?

  - Rule

    - Negative covenants cannot be enforced where they would force the D. to perform positive covenants, or, alternately, force the D. to remain idle. This is subject to what the Court considers reasonable, however. In this case, D. ordered not to act in motion pictures.

  - Principles

    - Positive covenants of personal service will never be enforceable through injunction. This would be tantamount to slavery.

    - Negative covenants are enforceable under certain limitations, however; agreement NOT to do something, that something shall not be done.

      - eg. non-compete covenants.

    - Negative covenants are often viewed stringently, to ensure that they do not undermine market viability, or pose an undue restraint of trade.

      - Review the subject matter (eg. non-compete in insurance vs. all industries), the geographic scope (eg. in Vancouver vs. worldwide).

    - In valid contract, use of injunction to enforce negative covenant ensures respect of original agreement. Convenience, or amount of damage are not relevant.

    - Any covenant which would not be enforced via injunction in positive form is not enforceable in negative form. Court weighs the substance, not form of contract.

- Negative covenants cannot be enforced where they would force the D. to perform positive covenants, or, alternately, force the D. to remain idle. This is subject to what the Court considers reasonable, however.
    - Would the injunction force the person to perform the positive government in order to pursue their chosen profession? Courts have been unwilling to force parties together via injunction once a relationship (particularly where based on trust, as in agent->performer) has been compromised
- An earning gap between D.'s occupation concerning negatively covenanted actions and other occupations is not relevant.
    - Eg. she may be able to earn more as an actress; but she has other talents, so too bad.
- The fact that the D. may be *tempted* (but not *driven*) to perform the contract if negative covenants are enforced does not undermine their enforceability.
- Parties cannot contract themselves out of the law, so a clause which holds that injunction rather than specific damages will apply in breach is not binding.
    - However, such clauses are helpful in determining what was contemplated by parties, what the contract stands for.
- Most losses in the contract arena are quantifiable, and therefore the award of injunction is a rare remedy in this mainly commercial field.

- *Wroth v. Tyler* (Ch.30 1974)
    - Facts
        - Plf. agrees to buy D.'s home. D.'s wife files a charge against the title under the *Matrimonial Homes Act*, which means that she cannot be evicted from the home. This charge remains after sale. The Plf. requests removal, the D.'s wife refuses. The Plf. sues in accordance with the fact that the house increased in value by a considerable amount between the purchase and the breach, and by nearly double again when the case came to trial.
    - Issue
        - Are the Plf.'s due the damages at the time of the breach, in accordance with the general rule, or the damages at the time of the trial, in accordance with specific performance (eg. if the contract had been performed, they would possess a house worth double)?

- Rule

    - Awarded substitutive damages in lieu of specific performance. As a result, able to claim damages subsequent to the date of the breach.

- Principles

    - Rule of damages is that the victim of a breach is due the damages equal to the amount which would have been tendered had the contract been satisfied.

    - Temporality rule holds that the Plf.'s are due the damages based on the state of affairs at the time of the breach. This appears to undermine rule of damages.

    - Where the application of the rule undermines the principle underlying the rule, it is often rightful for the Courts to apply the principle, given strong reasons.

    - Legislation holds that, where specific performance cannot be carried out through injunction, the Courts can substitute appropriate amounts of damages.

    - The rule for substitutive damages in specific performance is that payment must equal the loss to be occasioned by the act which prevented the injunction.

        - Damages cannot be an adequate substitute for an injunction unless they cover the whole area which would have been covered by the injunction. Eg. but for the breach of the contract by the D., the Plf.'s would possess a house equal to $12k, having paid only $6k for it. Therefore, owed $6k.

        - As a result of this rule, the Court has the ability to award damages in an amount relevant to a date subsequent to the breach, where these are substitutive.

    - Substitutive damages must also fit the rule in *Baxendale*, in that they must be within the contemplation of the parties when the contract was made.

    - In determining reasonable contemplation, it is the type of damages and not the quantum of damages which must be within contemplation of the parties.

- *Great Lakes Steamship Co. v. Maple Leaf Milling Co. Ltd. (1924)*

    - D. fails to lighter Plf.'s ship for three days, breaches contract. Water level dropped, ship hit bottom; anchor resting on bottom unexpectedly, caused massive damage to the ship.

    - The ship hitting bottom was in reasonable contemplation; the presence of an anchor was not. Damages from both still apply; same type of damages - boat hitting lake bottom.

- *Lumley v. Wagner (HL 1852)*

    - Opera singer repudiates contract to sing at Plf.'s theatre, which had both positive and negative covenants. Court refuses to uphold the positive covenant, or encourage the D. to fulfill contract in any way save for granting injunction relating to *negative* covenant.

    - Reflects a number of cases in which negative covenants were enforced through injunction against women, who were seen as naughty or deviant, requiring the intervention of the courts to minimize the ruin they could wreak on society otherwise.

- *Page One Records v. Britton (HL 1968)*

    - The Troggs fired their manager, who sought an injunction to continue working as per his contract. This was not found to be enforceable, as it would effectively amount to enforcing performance of positive covenant in a contract for services.

- *Attorney General v. Blake* (HL 2000)

    - Facts

        - D. was an intelligence officer in the UK during the Cold War, and sold secrets to the USSR. Escapes to the USSR to avoid prosecution. Publishes a book years later, when information no longer confidential, and makes deal to release book in UK. AG brings an action against D. to claim profits.

    - Issue

        - Can a Plf., having suffered no financial damage as a result of the D.'s breach, sue the D. for any profits which have been derived from that breach?

    - Rule

        - D. was acting in the context of a quasi-fiduciary relationship. The standard remedies are insufficient response to his conduct, therefore account for profits is the apt approach. Stripped of profits.

    - Principle

        - There is a rule in equity which allows an innocent party to recoup the D.'s profits arising from the breach - *disgorgement of profits,* calculated via *quantum meruit* (what one has earned). However, it is unclear when this rule should be applied.

        - It is only in *exceptional cases*, where injunction, specific performance, and damages provide inadequate response that *accounting for profits* should apply. Plf. should have a specific interest in preventing D. from making profit to justify.

- Plf. has interest in ensuring that intelligence agents cannot gain any financial incentive through breaching public trust.

- Occurs in context of fiduciary (*standard* remedy in this context) or quasi-fiduciary (*exceptional* remedy in this context) relationships.

    - In this case, there was an immeasurable amount of damage done to public trust. Further, This was a quasi-fiduciary relationship (closely akin to fiduciary relationship)

- Woolf suggested two categories to assist with determining which scenarios are appropriate for consideration of account of profits. They are not of assistance.

    - (1) *Skimped performance* - where D. does not provide full extent of services, must pay back expenditure saved through breach. Not necessary to account for profits in such a circumstance, mere market price sufficient

    - (2) *The very thing* - where D. does the very thing he contracted not to do in breach. Defined too widely to assist, catches all negative obligations.

- Three grounds which are *not* themselves sufficient to determine whether account for profit is an apt remedy, although may be considered:

    - (1) Deliberate breach (2) allowed D. to enter into more profitable contract (3) which prevented D. from fulfilling contract with Plf.

- There are circumstances in which damages are awarded for breach of contract beyond merely compensating for the Plf.'s loss (if any):

    - Common law, D. trespasses onto Plf.'s property without causing damage, this is still actionable, with damages being measured by a reasonable right of use. Unrelated to D.'s profit, however.

    - Equity, Plf. can arrange for injunction against trespass, and further obtain an account of profits arising from this action, to be paid wholly or partially to Plf. Available in trademark and patent cases.

- The differences between the common law and equity systems do not appear to serve differing principles, but rather have come about as an accident of history.

- Even where there is no financial loss suffered through breach of contract, Plf. may still have interest in having it performed, as in sale of land.

- *Denton v. Great Northern Railway Co.* (QB 1856)

- Facts

    - D. no longer offers service to Hull, fails to amend printed timetables to that effect before publishing them. Plf. relies on timetable, and incurs lost business costs as a result. Sues for damages.

- Issue

    - Can a contract be formed between a train company and a passenger based on a printed timetable?

- Rule

    - Plf.'s actions met the requirements for contract formation, which D. then breached through misrepresentation. Ergo, Plf. due compensation.

- Principles

    - Representations made by companies, such as a train timetable, cannot be treated as mere waste paper; they are relied upon by the public, ergo have more meaning

    - Company promised carriage to Hull to anyone who rendered the cost of a ticket, and therefore there is a good contract between the parties. Publication of tables amounts to a promise to public to provide certain services in exchange for a fee.

    - Person who has made arrangements based on D.'s representations is due damages when this contract is breached through D.'s misrepresentation. The making of these arrangements, and prejudice received is Plf.'s consideration.

    - That D. did not own the entirety of the railway line is irrelevant; it is incumbent on the D. not to make promises which they are unable to fulfill. Should have been in D.'s mind when making claims, not Plf.'s mind when purchasing.

    - There are exceptions in contracts for common carriers, eg. for merchantmen from perils of the sea; but that exception is not relevant to these facts. The provision on the tables protects against such perils, not cancellation of service.

    - Where a person makes an untrue statement, knowing it to be untrue, to another who is induced to act upon it, an action lies for damages incurred as a result.

    - Differentiated from cases involving claiming of reward, as in reward the effort all on part of Plf., where in this case, most of the effort came on part of D. *But*, any consideration (price of ticket, going to station) sufficient to support a promise.

- *Johnston Brothers v. Rogers Brothers* (Div. Ct. 1899)

- Facts

    - Plf. bakers; receive letter from D. merchants stating that the latter wish to secure the patronage of the former; quote prices for purchase of flower. Hold that the prices are advancing rapidly, and so to contact as soon as possible so as to avoid further increase. Plf. telegraphs following morning, accepting offer at price offered previous day. D. responds saying that the price had since increased. Plf. sued, holding that D. must honour original price, as the contract had been accepted.

- Issue

    - Did the D.'s price quote constitute an offer, and therefore result in the creation of a contract when the Plf. notified the D. of acceptance?

- Rule

    - The D.'s price quote is not an offer to sell, but merely a provision of the general state of market conditions relevant to a potential commercial transaction between the parties.

- Principles

    - Quotation of prices is not offer to sell; rather, it is merely setting out terms for which a potential sale could occur, pending agreement of both buyer and seller.

    - The D., in mentioning that the Plf. must respond quickly so as to avoid further price increase, was suggesting that the price given was not an offer to sell. This implies that the price is not fixed, which it would be if it had been offer to sell.

        - eg. if this had been an offer to sell, there would be no need to mention the potential of price increase, as the buyer would have the contractual advantage of the price denoted in the offer.

- *Lefkowitz v. Great Minneapolis Surplus Store* (MNSC 1957)

    - Facts

        - D. advertises two sales of fur coats. One advertisement for 3 fur coats, worth up to $100 each, selling for $1 each to the first customer on Saturday. Subsequent ad the next week, fur coat for $1, worth $139.50. On each occasion, Plf. was the first person in the store as required by the ad, but was refused sale - "house rules" not mentioned in add hold that sale only for women purchasers.

    - Issue

- Is the offer by the advertisement unilateral, so that it may be withdrawn without notice by the D.? Or, by fulfilling the requirements of the ad, is the offer bilateral and accepted by the Plf.? Further, can the D. limit the requirements for sale beyond what is in the ad (eg. restrict to women only?)

- Rule

    - There was a contract created between the parties, and this could not be altered after acceptance by the D.

- Principles

    - *Binding obligations* - ads directed at public can create binding obligations where performance promised in positive terms in return for something requested.

        - ITC, fulfilled something requested - $1, being first come / first served; and performance promised was rendering of fur coat; meets criteria.

    - *Modification* - advertiser can modify offer *previous* to acceptance, but cannot impose new/arbitrary conditions *after* acceptance; "house rule" invalid.

        - ITC, Plf. accepted by being "first come, first served" and offering $1.

- *Pharmaceutical Society of GB v. Boots Cash Chemists (Southern) Ltd.* (UKCA 1953)

- Facts

    - Pharmacist supervision required for sale of certain substances which contain small amounts of poison. D.'s pharmacy allows for customers to select these items themselves, place them into a shopping basket or other receptacle, and then purchase them from the cashier; cashier can refuse sale if required. Plf. holds that this is a violation, contending that the "purchase" occurred when a shopper placed the item into the receptacle. D. contends that the purchase is only completed when money changes hands.

- Issue

    - When is a contract formed between a shopper and a merchant - when the item is removed from the shelf, or rather when the items are paid for?

- Rule

    - Sale is not completed until merchant accepts the offer; could refuse if they wanted to, therefore no contract can be said to have formed between parties at this point in time.

- Principles

    - Shoppers placing items into receptacles is not a contract; can put items back, exchange them for different items, etc; this is just organizational convenience.

    - Contract is not completed until the customer has indicated the articles desired to be purchased, and the merchant or agent accepts that offer.

- *Manchester Diocesan v. Commercial & General Investments, Inc.* (Ch. D, 1969)

    - Where an offer is made in terms which fix no time limit for acceptance, the offer must be accepted within a reasonable period of time in order to form a contract.

    - Two views might underly this; (1) that offer is presumed *withdrawn* if not accepted within reasonable period of time, or (2) that offer is presumed *refused* if not accepted.

        - Presuming offer to be withdrawn is complicated, requires consideration of offerer and offeree understanding, which may vary in spite of identical knowledge re: circumstances.

        - Presuming offer to be refused is simpler; involves objective assessment of facts and determination of fairness with a view to both parties. This is therefore the preferable approach.

    - Post offer conduct is relevant to "deeming an offer refused" - allows us to take into account the communications of the party subsequent to the offer.

        - Eg. if one party says "I'm still thinking about it" and the other party does not object, then it is a reasonable implication that the offer is still open.

    - No one party is in greater need of protection in such circumstances; until offer accepted, open to the offeror to withdraw, modify, or put a limit on the time for acceptance. Offeree can, for their part, refuse the offer, accept the offer, or make a counter offer.

- *Larkin v. Gardiner* (Div. Ct. 1895)

    - Facts

        - Plf. sues for specific performance, holding that D. had contracted to purchase a parcel of land from her through an intermediary, Nesbitt. Nesbitt was not authorized to sell directly, and so prepared an "agreement to purchase" which the D. signed. Nesbitt took the agreement to the Plf., who also signed. Then, the next day, the D. gave notice to Nesbitt of intention to withdraw offer to purchase. Nesbitt had not yet informed D. that Plf. had accepted the offer.

- Issue

    - Did the D.'s "agreement" constitute an offer to purchase, or was it in fact a contract which had completed in formation on Plf.'s acceptance? Is the formation of contract precluded by the fact that the D. withdrew offer prior to notice of its acceptance?

- Rule

    - Defendant, not having been made aware of acceptance, and absent "irrevocable" steps concerning notice of acceptance to D. by the Plf., was within rights to withdraw the offer.

- Principles

    - Where offer is made including some request (express or implied) to be fulfilled to signify acceptance, the offer is accepted as soon as the receiving party fulfills.

    - Unless expressly stipulated otherwise, must assume that the offeror must be notified of offeree's decision with regard to an offer (accept/reject/counter).

    - Until the offeree does something irrevocable towards communicating acceptance of offer, it is at liberty to be withdrawn. Offeror is not bound by the offeror until the offeree has taken an irrevocable step (giving agreement to agent = revocable).

- *Dickinson v. Dodds* (UKCA 1876)

    - Facts

        - D. makes offer to sell lands to Plf., with offer expiry given later that week. Plf. tenders acceptance of offer in writing twice previous to the expiry date, but D. had already sold the property.

    - Issue

        - Where an offer has an expiry date, is the offeror bound to abide by that expiry date absent consideration concerning the expiry date specifically?

    - Rule

        - The expiry date of an offer is a naked promise, not enforceable absent consideration for that promise; the parties were not of the same minds at the time of contract formation, due to awareness of third party purchaser. Contract ergo never formed, D. wins.

- Principles

    - No consideration given to keep the property unsold until the expiry date. Therefore, this was only an offer, and could not be yet considered a contract.

    - Offer made by the D. was a *nudum pactum* (naked promise); not enforceable absent consideration; ergo can be retracted at any moment before acceptance.

    - Offeror does not have to assert freedom only through express declaration amounting to retraction. Constructively withdrew by selling to other party.

    - To constitute a contract, minds must be one at same moment in time; offer continuing up to time of acceptance; but, not the case, as both offeror and offeree knew that there was another party likely to purchase the property.

    - Existence of the same mind between the two parties at the point of making a contract is essential to the integrity of that contract. Absent here, ergo invalid.

- *Eliason v. Henshaw* (SCOTUS 1819)

    - *Obligations of offer*- Offer of bargain imposes no obligations on offerer until it is accepted by the offeree according to the terms in which the offer was made.

    - *Acceptance w/ modification* - qualification or departure from terms of offer in acceptance by offeree invalidates the offer, unless these changes are agreed to by the offerer.

        - This is effectively a counteroffer, and so requires consideration and acceptance by the original offeree in order to form part of valid agreement.

    - In this case, Plf. offered to purchase flour, required answer by specific means (message by cart), received answer by alternate means (letter by post), and ergo contract invalid.

- *Butler Machine Tool Co. Ltd. v. Ex-Cell-O Corporation (England) Ltd.* (UKCA 1979)

    - Facts

        - Plf. provided terms for initial offer, including emphatic provision re: price variance in case of changes in production costs. During negotiation process, Plf. signs documents which agrees to accept Plf.'s terms, which do not include this variance. D. refuses to pay difference, Plf. sues.

    - Issue

        - Which terms prevail - the first terms offered (D.), the last terms offered (Plf.), or, on consideration of totality of documentation and communication, should a

reasonable determination of parties' understanding prevail?

- Rule

    - Under either paradigm, the D.'s prevail; their counter offer constituted a rejection of the Plf.'s previous offer which had included price variance (traditional).

- Principle

    - There are two approaches deemed relevant to consideration of prevailing contract terms; *the battle of the forms*:

        - *Traditional* - consideration of sequence of: offers / rejections / counteroffers / acceptances. Counteroffers kill original offers. Therefore, any change or alteration to an offer effectively constitutes a new offer, invalidating all previous offers.

            - Could be *first shot* approach (first offer sets terms which underly subsequent negotiation), or *last shot* / performance approach (last offer sets terms of contract). Last shot is the usual common law approach as applied in this case, however.

        - *Modern* - looks at all documents passing between parties, glean from documents and conduct of parties the nature of understanding and agreement which took place between them. Holds that traditional view is out of date. If reconcilable harmoniously, good. If not, reasonable implication used instead of contradictory provisions.

- *M.J.B. Enterprises v. Defence Construction (1951)* (SCC 1999)

    - Facts

        - D. invited tenders for construction contact, received four; inadvertently awarded winning bid to *Sorochan*, which had violated the rules of the proposal (req. lump sum, *Sorochan* variable sum given). Plf. holds that D. was contractually obligated to award contract to lowest bidder, and to disregard noncompliant bids. D. relies on "privilege clause" which allows for selection of bid at discretion.

    - Issue

        - Is there a contract between an organization inviting tenders, and the companies which make tender accordingly? Was the D. obligated to select the lowest compliant bidder, or alternately can they rely on the "privilege clause"?

- Rule

    - By accepting noncompliant bid, breached duty to other bidders; ergo, D. liable.

- Principles

    - There may be contract between tenderers and those inviting tender, arising on the submission of the tender, with terms of contract defined in tender documents. Not automatic, depends on terms and conditions of tender call.

        - ITC, party inviting tenders offers consideration (to consider bids for construction), in exchange for tenders offered; governed by complex terms. This is a contract.

    - There can be no custom in opposition to an actual contract, therefore the special agreement of the parties must prevail.

    - Provisions such as the "*privilege clause*" must be read in harmony with other documents in the tender to ensure consistency with understanding of parties.

        - eg. ITC, should not be read in this case as allowing the D. to accept noncompliant bids, as this runs contrary to intention of Contract A

    - Rejection of lowest bid does not imply that tender could be accepted on basis of undisclosed criterion; clause simply allows for more nuanced view of "costs".

    - Acting in good faith or misinterpretation of contract are not valid defences to action for breach / do not alleviate obligations of contracting parties.

- *Ron Engineering*

    - Established two-contract approach to tenders/bidding process. Contract A governs the tendering process, and Contract B is the actual contract being bidded for.

        - Contract A does not arise in all circumstance; depends on the nature of the call for tender, and the tender documentation associated with this.

        - Interesting issue with the two contracts: in breach of Contract A, the Plf. is entitled to damages from Contract B (eg. profits from the performance of the second contract).

- *Double N Earthmovers* (SCC 2007)

    - Contract A has two implied terms, to treat all bidders fairly and to accept only a compliant bid; absent express contractual intention, the test for compliance is *substantial*

compliance.

- Mere technical error in bid, which does not change the realistic meaning of the bid in view of its compliance with the requirements of the tender, insufficient to render bid noncompliant.