CONTRACT LAW
A. NEWCOMBE
MIDTERM OUTLINE - DEC 2011
JAMIE MYRAH

Remedies for Breach of Promise

The Interests Protected

Contract

- legally enforceable agreement/obligation between more than one party
  - enforceable in that it's a mutual promise
- mechanism for proprietary ordering - facilitates the exchange of goods and services
- risk allocation (price, damages, injury, etc.) - functional, economic model
- live in a market economy thus we have law that allows/encourages it to function as such
- provides ground rules for simultaneous exchanges - i.e. goods-money
  - comes with a set of legal terms and conditions - i.e. that the good is reasonably fit - implied condition
- also facilitates future exchanges/projects exchange into the future - i.e. longterm supply contracts
  - mitigates risks - i.e. price fluctuations
  - allows for (business) planning
- interest-based perspective - protection of reliance & reasonable expectations
- contract is the agreement; putting it in writing/signing is an issue of evidence or ambiguity - the challenge of oral agreements is lack of evidence; proof of terms of the agreement

Remedy

- economic loss; intangible loss
  - under the common law we measure intangible loss through money in contracts
  - market-based economy - don't get damages for every time of intangible loss (disappointment, stress, etc.)
  - generally the presumptive remedy is money (not necessarily that someone fulfill their obligation - exception)
- different measures of damages (MOD) protect different interests - the remedy tells you what we're protecting
- judicial decision making - whether there is a breach/type of breach may flow from the assessment of just measure of damages/remedy
  - "tail wags the dog" - remedy can tell you whether there was a breach of contract in the first place
- various ways courts can issue remedies
  - focus: damages; equitable remedies - specific performance & injunction
- general common law rule re: breach of contract is expectation damages
- general policy - what's motivating the court in granting damages?
  - remedies are about protecting reasonable expectations
  - protecting the interests of the plaintiff without undue burden on the defendant

Measure of Damages

- **restitution** - prevention of unjust enrichment/wrongful gain to the defendant (take away a benefit they didn't earn b/c they didn't hold up their end of the promise)
  - strongest case for relief… corrective justice
  - measure of damages in the context of contracts but also a substantive/separate area of law based on the principle of unjust enrichment
    - overlap as there may be multiple claims of action from a single event
- **reliance** - prevention of harm to the plaintiff (returns the plaintiff to the same position they were in before the promise)
  - restores the status quo
  - stronger case for relief than expectation… restorative justice
- **expectation** - secure benefit to the plaintiff (put the plaintiff in the same position they would have been in had the promise been kept)
  - forward thinking - may go further than reliance measure
  - more easily administered measure of recovery… distributive justice
    - more effective sanction against breach of contract - penalizes; deters
  - not only a policy of preventing/undoing harm, but also a policy that promotes and facilitates reliance on business agreements

Compensation

General measure of damages (MOD) in contract law: expectation measure

- *Wertheim v. Chicoutimi Pulp Company* (1911, PC)
  - Ratio: expectancy interests trump reliance interests; they are the presumptive and just interests to guide remedy in contract law; the correct measure is cost of performance
  - Ruling Principle re: breach of contract: "the party complaining should, so far as it can be done by money, be placed in the same position as [the party] would have been in if the contract had been performed..." - Atkinson

Normal measure is expectation damages = cost of performance

- puts the party in the same position as if the contract had been performed
- typical sale of goods context (for both nonacceptance and nondelivery) = difference between the contract price and the current market price (difference in price rule)
- faulty performance context (rather than non-performance) = the value of what was contracted for and what was received
  - ***Hawkins v. McGee*** (1929, US) - unsuccessful hand surgery ("100% warranty")
    - Ratio: expectancy interest rather than restitution interest required (*Wertheim* principle); pain and suffering is not a factor (part of the price the defendant was willing to pay for getting a new hand/part of the deal)
    - MOD: difference in value between the value to him of a perfect/good hand (the value of the article according to the warranty) and the hand which was delivered (along with incidental losses)
      - how do you determine the value of a hand - look to the common law/ precedent

Expectation damages too speculative

- ***Anglia Television v. Reed*** (1972, Eng. CA) - damages for expenses made in preparation for a movie production
  - court awards reliance damages for both pre & post-contractual expenses
  - P. can elect between lost profits (expectation) or wasted expenditures (reliance)
  - can't always determine expectation damages because the contract was never fulfilled - too speculative
  - wasted expenditures are not limited to those incurred after the contract was concluded; P. can claim "expenditures incurred before the contract, provided that it was such as would reasonably be in the contemplation of the parties as likely to wasted if the contract was broken..."
    - reliance must include all wasted expenditures b/c if D. hadn't breached the contract they wouldn't have been wasted; pre-contract expenses are limited to those within "reasonable contemplation" (result criticized)
- ***Bowlay Logging v. Domtar*** (1978, BCSC)
  - reliance damages can't exceed expectation damages
  - whether the loss is the result of breach of contract or bad business is a matter of fact finding

Cost of performance v. diminution in market value

- ***Groves v. John Wunder*** (1939, US) - intentional failure to leave property at uniform grade (gravel extraction)
  - Majority (Stone J.): cost of performance
    - intentional breach - bad faith
      - equitable doctrine of *substantial performance* (that the contract has been mostly completed allowing for some deviations) doesn't apply when contractor acts in bad faith
    - construction contracts - general rule is remedy of the default
    - exception for *economic waste* (underlying principle regarding the unreasonable waste is destruction) does not apply
  - Minority (split): economic value had the contract been completed
    - cost of performance out of proportion to value gained - windfall
    - property has no unique value to plaintiff - commercial; the contract was to put the property in shape for general sale
      - P. receives what the property is worth plus retains the property
    - parties could have provided for a *liquidated damages* clause (specified damages related to breach of contract)

- ***Peevyhouse v. Garland Coal & Mining Co.*** (1963, US) - intentional failure to restore property (strip-mining)
  - Majority (5): diminution in value of the property
    - cost of performance (though the default) is out of proportion to value gained - windfall; tort measurement more appropriate than contract measure

    - reclamation clause incidental - purpose of the contract was economic benefit to all parties
    - remediation expenditure would be disproportionate to "relative economic benefit" gained; cost of performance requires breach to be central not ancillary to the contract
        - essential extends equitable doctrine of substantial performance to contractors even when they act in bad faith
- Minority (4): cost of performance
    - *sanctity of contract* - not the court's role to make a better contract for the parties that the one they entered into; intentional breach
    - reclamation clause essential - Peevyhouses insisted on the provision
    - unjust enrichment - unjust to grant benefits (to Garland) without enforcing their resulting obligations
    - fair - not a surprise; the risk re: cost of remediation was Garland's - experts; had knowledge that cost of performance may be disproportionate

Economic waste

- ***Jacob & Youngs, Inc. v. Kent*** (1921, US)
    - no cost of completion where it is grossly and unfairly out of proportion to the good to be attained; applies to destruction (i.e. mistakes in building contracts); apply difference in value
    - substantial performance over sanctity of contract

Middle ground between cost of performance & loss of value - compensation for consumer surplus?

- ***Ruxley Electronics*** (1996, HL) - swimming pool is 9" too shallow
    - no diminution in value caused by difference in depth; contract substantially fulfilled but compensation still owed to cover factors bargained for by the consumer
    - court recognizes the concept of *consumer surplus*: personal/subjective value a person place on something over and above it's market value
    - "it is a common feature of small building works on residential property that minor deviations from contract may have no direct financial effect and yet the householder is entitled to say that I bargained for more than financial considerations: to make house more comfortable, more convenient and more conformable to my particular tastes..."

Special Problems in Measurement

Lost Volume

Thompson v. Robinson (1955); ***Charter v. Sullivan*** (1957) - Can a car dealer obtain damages for lost profits for breaching a contract to buy a car?

Depends on a *factual* issue - the relationship of supply and demand on the date of contract breach

	Supply Exceeds Demand	**Demand Exceeds Supply**
Cars	I I I I I	I I I
Buyers	A B C	A B C D E
	Lost sale if C breaches	If C breaches, D purchases
	Damages for lost profit	No lost sale No lost profit
	Thompson v. Robinson	*Charter v. Sullivan*
Principle	Sale of goods contract breach (*Sale of Goods Act*): MOD = expectation Difference between contract price and market price Market = demand > supply No market = lost profits	

Loss of Chance

Chaplin v. Hicks (1911, UK, CA) - lost chance for actress to compete in contest

- loss of chance is compensable - does not require mathematical certainty; wrong-doer not relieved of paying damages
- damages were within the contemplation of the parties as a direct outcome of the breach of contract; damage was a direct result of D. not taking sufficient steps to ensure P. could present herself for selection

Carson v. Willitts (1930, Ont.) - breach of contract to bore three wells (only one bored)

- loss measured by the loss of a chance
- difficulty of measuring damages is no ground for refusing damages
- multiple ways of measuring damages

Folland v. Readon (2005, Ont. CA)

- four criteria for a plaintiff to recover damages for a lost of chance:
  - chance lost - P. must show that but for the wrongful conduct of the D. they had a chance to profit/avoid harm (on a BOP)
  - reality - P. must establish the chance was sufficiently real & significant - beyond mere speculation
  - externality - P. must demonstrate that the outcome (benefit gained/loss avoided) depended on something other than the P.'s actions
  - value - P. must show that the chance had some practical value

Remoteness

The Problem: Ripple effect of a breach of contract - Where to stop the ripple?

The Rule in *Hadley v. Baxendale*

Hadley v. Baxendale (1854, UK) - mill owner sues carrier for lost profit due to his mill standing idle during delayed delivery of a broken shaft to the manufacturer

- Rule: entitled to damages which could be fairly and reasonably considered to arise naturally (i.e. in the usual course of things) from such a breach **or** that which could reasonably be contemplated by the parties - at the time of the contract - as a probable result from the breach of contract
  - reasonable contemplation as a result of the notification of special circumstances
  - if the 'special circumstances' are unknown to one party then they can only contemplate losses that arise generally from a breach of contract
  - 'special circumstances' in this case were that the shaft was being sent to serve as a model for a new one that the mill couldn't operate without

Context: "Danzig Article":

- economic context - concern with protection of capital and promotion of investment (no insurance or huge corporations to absorb costs)
- institutional concern with uniformity/predictability of damages awards (re: juries); floodgate concerns
- case as a judicial innovation in an age of industrialization
  - standardization of law
  - centralization of power
  - mass production of judicial products

Fuller & Perdue: "The Reliance Interest in Contract Damages":

- *Hadley v. Baxendale* is a symbol in legal history - stands for two propositions:
  - it is not always wise to make the defaulting promisor pay for all the damage which follows as a consequence of a breach

    - "just as it is wide to refuse enforcement all together to some promises… so it is wise not to go too far in enforcing those promises which are deemed worthy of legal sanction"
- specifically the proper test for determining whether particular damages are compensable is whether they should have been foreseen by the promisor at the time of the contract
    - single test of foreseeability in *Hadley* is too simplified - inappropriate in some circumstances & element of circularity is subject to manipulation (by defining the characteristics of the hypothetical "reasonable man" doing the foreseeing)

Cases: Communication of Special Circumstances

Victoria Laundry Ltd. v. Newman Industries Ltd. (1949, UK) - breach of contract re: late delivery of a boiler - 20 weeks after the time fixed by the contract

- lost profits recoverable but not for particularly lucrative (special) contracts
- distinguished from *Hadley*
    - defendant had knowledge of the product and understood the use of the product by the plaintiff - amount of award was within reasonable expectations
- language re: the test - "liable to result" (p. 58) - gave rise to debate re: linguistic formulation of the test (*The Heron II* - "sufficiently likely")
    - current test: has to be within the reasonable contemplation of the parties
        - more a question of facts
        - semantics/characterization of the test can narrow/broaden the question - misses the point

Horne v. The Midland Railway Company (1873, UK) - claim for difference in price between original contract price (unusually high priced shoes for French army) & the less price they had to sell them for (late delivery; refused by consignee)

- finding for the D. - there was a communication of the special circumstances but timing only/not the lucrative nature of the contract
- context: concern for limiting liability of common carriers
- outcome: it's not enough to communicate special circumstances - need to enter into a special contract
    - the other party needs to accept the additional risk associated with the special circumstances
    - when accepting additional risk they will want to be paid more - risk allocation

Cornwall Gravel Co. Ltd. v. Purolator Courier Ltd. (not assigned) - late delivery of a bid rejected by virtue of being late; had it been delivered on time - as guaranteed - they would have received the bid ($70,000 profits)

- finding for the P. - application of *Hadley* test (reasonable contemplation); no special contract required
- distinguished from *Horne*
    - lots of info delivered to the Purolator employee
    - different social expectations (1977); advertising campaign "if it's got to get there on time"

- Purolator can limit the exposure of it's employees; can include an exclusion clause in their contracts (subsequently changed contracts)

Munroe Equipment Sales Ltd. v. Canadian Forest Products Ltd. (1961, Man. C.A.) - contract for a used (rebuilt) tractor to be used to "open roads"; broke down immediately and only worked sporadically until being abandoned

- P. suing for rental costs; counterclaim for lost profits because D. was prevented from removing 3,500 cords of pulpwood
- lower court: P. received one month's rent & freight charges; counterclaim - partially accepted based on *Hadley* - D's loss "was a natural and probable consequence that ought to have been in the plaintiff's contemplation"
- appeal court: lowered P.s damages slightly and dismissed the counterclaim all together - concluded D. didn't establish that the special circumstances (that the tractor would be used to remove that much wood) were communicated to the P.
  - rental contract was for an indeterminate duration; no specifics re: the extent of the work it would be used for
  - if D. was going to hold P. responsible for the failure of the second-hand tractor they should have made the extent of the work clear
  - representations of P.'s salesman were made in good faith and weren't a "guarantee"; there is no warranty/guarantee in the contract
  - no reasonable person could contemplate that in renting out the tractor they were underwriting/insuring the removal of the wood
  - unlikely P. would risked letting a second-hand tractor bear that sort of responsibility
  - if D. had made it's expectations clear they probably wouldn't have been able to secure the tractor or P. would have contracted itself out of any liability

Scyrup v. Economy Tractor Parts Ltd. (1963, Man. C.A.) - sale of defective hydraulic dozer attachment for a tractor; tractor needed for a separate contract

- lower court: found D. liable for lost profits on the evidence that P. had communicated 'special circumstances' - that he needed the tractor for a contract - upon making the contract to purchase the attachment
- appeal court: split decision
  - majority (Freedman J.A.): dismisses appeal; affirms the judgment/damages of trial judge
    - applies the test from *Hadley*:
      - first rule/branch - damages should be those that arise naturally (usual course of events) from the breach or could be reasonably contemplated as the probable result of a breach
        - knowledge may be imputed
      - second rule/branch - if there are special circumstances relating to the contract and they are communicated by the P. to the D. then the damages are those that are reasonably contemplated by a breach under these known/communicated special circumstances
        - knowledge must be actual

        - damages should be measured by what is reasonably foreseeable as liable to result from a breach; depends on the knowledge of both parties (*Victoria Laundry*) - reasonable foreseeability is the test under both rules
    - test applied to the facts:
        - first rule - defendant should be realistically aware that his breach of contract in selling defective equipment to the plaintiff would in the ordinary course of events result in damages in the form of lost profits
        - second rule - evidence on the second shows the defendant had the required knowledge
- dissent (Millar C.J.M.): appeal allowed; reduced the award to damages stemming only from the repair costs for the defective equipment
    - plaintiff did not communicate sufficient information to the defendant regarding the scope of the contract that he needed the tractor for - size, type, where/when, duration, etc.; only communicated the "possibility" of a contract
    - disagrees that the foreseeability inferred by the trial judge is supported by the evidence or the law
    - doubtful that sufficient information was given to the defendant to indicate the responsibilities to be assumed by the second-hand equipment; no opportunity to contract itself out of liability (*Munroe*)

Shipping Cases: *The Heron II* & *The Achilleas*:

***Koufos v. C. Czarnikow, Ltd.* (*The Heron II*)** (1969, HL) - delay of cargo of sugar to Basrah; market price falls; no special information communicated but shipowner aware of market for sugar in Basrah; claim for lost profits

- umpire/arbitrator: losses not too remote
- trial: losses too remote
- CA: losses not too remote
- HL: losses not too remote
    - loss was clearly caused by breach of contract; the question is...
    - "whether, on the information available to the D. when the contract was made, he should, or the reasonable man in his position would, have realized that such a loss was sufficiently likely to result from breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation..." (Lord Reid, CP, p. 67)
        - does "liable to result" (*Victoria Laundry*) set the bar too low - yes
        - end result: the test is reasonable contemplation - general knowledge (imputed) & actual knowledge (communicated)

***Transfield Shipping Inc. v. Mercator Shipping Inc* (*The Achilleas*)** (2009, HL) - chartered ship returned to owners late; subsequent charterer able to cancel new charter, which was now above market price; charter prices fluctuating wildly; claim for lost profits for period of new "fixture" (charter/lease)

- arbitrator: split; majority - losses not too remote; minority - liability restricted to "overrun period" (not lost profits from new charters) in the shipping market
- trial: for charterer (limited liability)

- CA: for owner (lost profits)
- HL: for charterer (limited liability)
  - Lord Hoffman: "broad approach" - interpretation of the contract as a whole in it's commercial context - courts can imply limits of liability
    - must decide if the loss is the "kind/type" the contract-breaker ought fairly to have accepted responsibility for [para. 15]
    - *Hadley* rule is an inclusive and exclusive principle [para. 21]:
      - inclusive - if losses are foreseeable they will be granted even if large
      - exclusive - not liable for losses not of the type/kind for which the D. can be treated as having assumed responsibility for
    - what was reasonably regarded as significant for the purposes of the risk being undertaken by the contracting party [para. 22]
    - *Hadley* rule is meant to give effect to the intention of the parties not contradict them [para. 24]
  - Lord Rodger: "orthodox approach" - apply *Hadley*
    - type of loss could not have been reasonably foreseeable; was not an ordinary consequence because of the extremely volatile market conditions
    - categorization of types of losses - playing with categories while being less explicit about how decisions are being made
  - Baroness Hale of Richmond: agrees with Rodger that case should be decided on narrower grounds
    - the "wider grounds" of the issue of limiting contractual liability was not argued & should be explored in another case/context
    - imposing limits on liability/limiting assumption of risk depend on a "wider range of factors and value judgements"
- Post-Script:
  - *Hadley* remains the standard rule - reflects the expectation to be imputed ("reasonable person") to the parties in the ordinary case (*Supershield Ltd. v. Siemens Building Technologies FE Ltd.* [2010, Eng. CA])
    - *Achilleas* demonstrates there may be cases (based on the contract & commercial background) where the standard approach would not reflect the expectation/intention reasonably to be imputed to the parties with an exclusionary effect (limitation of liability)
    - but the same principle could have an inclusionary effect (losses not too remote) if on analysis of the contract/commercial background the loss is found to be within the scope of duty even if it wouldn't have occurred in ordinary circumstances
  - the orthodox approach (*Hadley*) remains the general test of remoteness applicable in the great majority of cases (*Sylvia Shipping Co Ltd. v. Progress Bulk Carriers Ltd.* [2010, EWHC])
    - rare cases (i.e. *The Achilleas*) where application of the general test leads to disproportionate liability or liability contrary to market expectations
    - may then be necessary to consider whether there has been an assumption of responsibility; usually the fact that the type of loss arises in the ordinary course of things or out of special known circumstances will carry with it the necessary assumption of responsibility

Policy & Factors for Consideration

General Policy - courts strive to achieve a fair balance between the reasonable expectations of the party to whom the promise was made and the risk of unfair surprise to the D. if they are held responsible for an unexpected liability

Express Contractual Provisions

- rules relating to remoteness of damages act as default rules in the absence of express contractual provisions
- contract may expressly limit the type or amount of damages that can be claimed in a breach - i.e. "exclusion clauses" in standard form contracts
- most standard form consumer contracts limit liability for damages under contract/tort (i.e. dry cleaning, shoe repair, parking tickets, etc.)

Factors re: Determining Remoteness

- degree of probability/foreseeability of loss - what would ordinarily be expected in the circumstances
- communication of special circumstances - the fact of communication plus the particulars - clarity, specificity & timing; to whom...
    - cases can go both ways with respect to the type of "acceptance" required
        - *Horne* - special contract required
        - *Cornwall Gravel* - no special contract required; circumstances communicated
        - *Munroe Equipment Sales* - no specificity in communication of special circumstances
        - *Scyrup* - specific type of work no communicated but clear that delivery of a defective attachment would result in lost profits
- defendant's knowledge - both generally and of the P.'s particular business
    - *Hadley* (carriers) v. *Victoria Laundry* (expertise re: boilers/use)
    - general rule - if the D. only has a transitory relationship with the P. then the scope of liability may be reduced
    - if there is an established relationship then D.'s knowledge of P.'s business will be greater
    - also... where consumer expectations are reasonable and created by the D. then liability may result even when the relationship is transitory (*Cornwall Gravel*)
- nature of defendant's business - expertise and what is being offered to the P.
- nature of the product or service - second hand or top of the line (*Munroe Equipment Sales* - second-hand tractor obtained late in the season)
- sophistication of parties - generally the more sophisticated/knowledgeable the parties the more likely the damages in question will be foreseeable
- ordinary allocation of risk - understandings or expectation in the marketplace (custom of the trade)
    - liability should be based on legitimate understandings of parties - fair and reasonable risk allocation
    - contract terms allocate the risk of specific events (i.e. the contract price allocates the risk of potential changes in market price in a sale of goods contract)

    - where a party may suffer exceptional harm from a breach (i.e. loss of lucrative contracts) then D. is only liable for those losses if they were reasonably/fairly aware of them
    - insurance: in cases like *Hadley* it may be more efficient for business to get business interruption insurance than for carriers to have to carry third-party liability insurance
- proportionality - comparison of the contract price and the nature of the service with risk (ultimate loss claimed)
    - anomalous to impose extensive liability for a breach of contract to provide an ordinary service at a low price (i.e. dry cleaning)

Intangible Injuries & Punitive Damages

Phase 1: Early Times to 1974 (*Addis*)

General Rule (historically): no damages for mental distress/non-economic interests
- commercial transactions
- stiff upper lip/rules of the game
- maintain distinction between contract/tort

Exceptions (*Addis*):
- breach of promise to marry
- breach to pay on cheque
- vendor failure to make title
- plus physical discomfort (i.e. old railway cases - *Hobbs*)

Addis v. Gramophone Company Limited (1909, UK) - manger is dismissed with six months notice but then is replaced/unable to act as manager during the notice period making him unable to earn his commission/salary
- lower court & jury: found for the plaintiff - wrongful dismissal + excess of commissions of replacement manager
- Court of Appeal: found for the defendants
- High Court (Lord Atkinson): finds he was illegally dismissed & agrees with regular damages stemming from the dismissal: wages for the six month notice period; reasonably probable profits/commission for the notice period; damages re: the time that might reasonably elapse until he can find new employment
    - also awarded were additional damages re: the "harsh and humiliating way in which he was dismissed" - this is the focus of the issue
    - punishment is not a consequence of an action in the form of breach of contract (that's for torts)
    - appropriate consequence is adequate compensation in money for the loss of that which he would have received had his contract been kept - no more
        - decision: no exemplary damages for wrongful dismissal

Phase 2: 1974-2005 (*Jarvis*)

Development of pigeon holes: categories where damages are granted

A. Contracts for pleasure/enjoyment/entertainment/peace of mind
   - holidays (*Jarvis*)
   - weddings: photos (*Wilson*)
   - disability insurance (*Warrington*)
   - need not be the "essence of the contract" - sufficient if it is a "major or important part of the contract" (*Farley*, 2001, HL)

B. Pets
   - *Newell* - dogs die in CP air hold
   - *Ferguson* - kennel looses dog
   - *Weinberg v. Connors* - Connors absconds with cat

C. Physical inconvenience & discomfort caused by a sensory experience (*Wharton*)

D. Employment where there is an independent actionable wrong (i.e. intentional infliction of mental distress, defamation, fraud, etc.)

Jarvis v. Swan Tours Ltd. (1973, UK) - plaintiff books a ski holiday to Switzerland based on a brochure issued by the defendant; very disappointed by the trip

- issue: was there a breach of contract? yes - statements in brochures were representations/warranties; there is remedy in damages for misrepresentation/breach of warranty (*Misrepresentation Act 1967*)
- lower court: damages = difference in value between what he paid and what he got (half what was paid) - no other damages
- court of appeal (Lord Denning M.R.): trial judge was in error; appeal allowed; measure of damages is to compensate for loss of entertainment/enjoyment which was promised
  - often been said that damages for mental distress cannot be given for breach of contract (historically only physical inconvenience - i.e. *Hobbs*)
    - these limitations are out of date; in a proper case damages for mental distress can be recovered in contract
    - damages can be given for: disappointment, distress, upset & frustration caused by the breach - i.e. lack of facilities and loss of enjoyment for Jarvis
      - linked back to the purpose of the contract - to provide entertainment & enjoyment

Phase 3: 2006 Onwards (*Fidler*)

Fidler v. Sun Life Assurance Co. of Canada (2006, SCC) - denial of long-term disability benefits that Fidler was entitled to for over five years

- lower court: Sun Life found liable for breach of group disability insurance contract; awarded $20,000 in damages for mental distress caused by the denial; no award for punitive damages (no bad faith on the part of Sun Life)
- Court of Appeal: upheld the decision re: damages for mental distress; found the trial judge had erred in his conclusion that there was no bad faith - awarded $100,000 in punitive damages
- SCC - issue: is Fidler entitled to damages for mental distress? is she entitled to punitive damages?
  - McLachlin C.J.C. & Abella J.: yes to damages for mental distress (upheld award for $20,000)
    - **two-part test** (para. 47):
      - 1) an object of the contract was to secure a psychological benefit that brings mental distress upon breach within the reasonable contemplation of the parties;
        - the damages flowed from Sun Life's breach of contract/were reasonably within the contemplation of the parties
      - 2) the degree of mental suffering caused by the breach was of a degree sufficient to warrant compensation
        - the breach caused a substantial loss over a five year period/the mental stress was to a degree sufficient to warrant compensation
    - no to punitive damages - trial judge's finding re: bad faith shouldn't be interfered with and precludes an award of punitive damages
    - ***leading case** re: principle that one can receive damages for mental distress

Basis for Test for Damages for Mental Distress:

- legal principle: return the plaintiff to the same position as if the contract had been performed - damages assessed according to *Hadley*
  - principle of reasonable expectation - no distinction between types of loss that are recoverable
  - subsequent cases rule out damages for mental distress except in certain defined situations (i.e. physical inconvenience/discomfort)
    - *Addis* - "cast a long shadow over the common law"
    - policy considerations for this "ceiling" re: reasonable expectations
      - perceived minimal nature of mental suffering (shift in *Fidler* - mental distress no longer subject to remedial ostracization; no categorical bar - apply *Hadley*)
      - expectation of a "stiff upper lip" in commercial life - mental suffering upon breach is part of the risk of a business transaction
  - 1970's - shift in the general rule that damages for mental distress didn't apply in breach of contract - began to award damages where the contract was one for pleasure, relaxation, or peace of mind (*Jarvis*)
    - "peace of mind exception" - confined to contracts that had peace of mind object

        - expanded to contracts where pleasure, relaxation or peace of mind were a major/important object (*Farley v. Skinner*) - wide acceptance in Canada
- this "expansion" is an expression of the general principle of compensatory damages in *Hadley v. Baxendale* not an exception (*Vorvis*)
    - peace of mind is understood as a reflection of reasonable contemplation of the parties (Professor McCamus in *The Law of Contracts*)
    - principle is still subject to remoteness principles - court should ask "what did the contract promise?" and provide compensation for those promises (para. 44)
- conclusion: if mental distress were damages that were within the reasonable contemplation of the parties then compensation for mental distress follows the principle of restoring the person to the position they contracted for whether the loss was tangible or intangible
    - but… not all mental distress associated with breach of contract is compensable - i.e. in commercial contracts frustration is incidental
        - no damages for incidental frustration - issue is whether an object of the contract is to secure a particular psychological benefit (para. 45)
    - "The basic principles of contract damages do not cease to operate merely because with is promised is an intangible, like mental security." (para. 46)
        - need not be the dominant purpose/essence of the contract - is it part of the bargain? (para. 48)
- one rule for compensatory damages for breach of contract - *Hadley* (para. 51)
    - recognition of *Hadley* as the single principle/test refutes the argument that an "independent actionable wrong" is a prerequisite for recovery of mental distress damages
    - independent cause of action is only necessary where the damages are of a different sort - based on aggravating circumstances that go beyond what the party expected when they concluded the contract

Employment Contracts & Damages for Termination

Employment Standards Act (BC, 1996)
- liability for compensation resulting from length of service:
    - after 3 consecutive months of employment --> 1 week's wages
    - after 12 months --> 2 weeks' wages
    - after 3 years --> 3 weeks' wages + 1 week for each additional year up to max. of 8 weeks' wages
- liability is discharged if:
    - the employee is given written notice of termination (same schedule as as above)
    - the employee is given a combination of written notice/compensation
    - the employee terminates employment, retires, or is terminated for just cause
- there is a calculation for determining the amount the employer is liable to pay (payable upon termination) - see CP p. 27
- termination begins at the beginning of a layoff

Employment Contracts - Termination

- employment standards legislation provides very low statutory minimums
- written/oral employment agreement with specific terms: termination rights based on the terms of the contract
- common law employment (where there is an indefinite employment relationship) - the employer can terminate anytime:
  - for cause; or
  - with reasonable notice (number of weeks/months of pay or pay in lieu)
- employees also have to give reasonable notice (*RBC Dominion Securities v. Merrill Lynch*, 2008, SCC)
- wrongful dismissal is the cause of action for termination without reasonable notice or cause
- if the employee finds immediate employment they will have avoided any damages (mitigated) - breach of contract but no damages

Mental Stress & Employment

- employment contract is not one of peace of mind
- no damages for mental distress merely because employer exercises its legal right to terminate
- ***Vorvis*** (1989, SCC) - there must be an independent actionable wrong (i.e. tort) to obtain damages for mental distress
    - problem - confusion over what constitutes an IAW
- ***Wallace*** (1997, SCC) - a court may increase period of reasonable notice where the dismissal is unfair or in bad faith - i.e. untruthful, misleading, unduly insensitive ("Wallace damages")
    - problem - compensation based on reasonable notice discriminates between different types of employees (manager gets more notice that the clerk for the same mental distress)
- ***Keays v. Honda*** (2008, SCC) - court revisits the issue:
    - no damages for lost employment other than reasonable notice
    - general rule - <u>no mental distress damages merely for being fired</u> (mental distress not ordinarily in the contemplation of parties as employer has the right to terminate)
    - there is a <u>duty of good faith and fair dealing</u> in the manner of termination - breach is compensable under normal contract damages principles (*Hadley*)
        - examples: attacking employee's reputation; misrepresentations regarding reasons for dismissal; dismissal to deprive an employee of pension benefits, etc.
    - there is <u>no requirement for an independent actionable wrong</u>

Punitive Damages (*Whiten*)

- one of the few areas of contracts that contemplates substantial ideas of "right and wrong" conduct; uncomfortably straddles private and public law
- extremely rare - can only be for <u>highly egregious/reprehensible conduct that is an independent actionable wrong</u> (two part test)

- Binnie J. - plaintiffs/juries/judges in cases of punitive damages are functioning as "private attorney-generals"; seeking redress and performing a socially useful service; aberrant behaviour is punished/deterred and society has the opportunity to express detestation
- principles (see outlined in *Whiten* below) are confirmed in ***Keays v. Honda Canada Inc.*** (SCC set aside the OCA's award of $100,000 in punitive damages):
  - punitive damages are restricted to wrongful acts so malicious/outrageous they deserve to be punished on their own
  - punitive damages should only be awarded in exceptional cases where the award is necessary for denunciation and deterrence (need to condemn behaviour)
  - an IAW is required to establish punitive damages
    - the IAW may be found in the breach by an employer of a separate contractual provision or in another duty (i.e. fiduciary obligation)

Whiten v. Pilot Insurance Co. **(2002, SCC) -** Whitens lose their home to a house fire; insurance company pursues a case against them for arson/insurance fraud not grounded in the evidence; actions were motivated by their precarious economic position; senior management was aware of the actions of their lawyer

- lower court: judge condemned Pilot's lawyer; made more egregious by the knowledge of the client; jury agreed and awarded $1 million in punitive damages (on top of compensatory damages and solicitor/client costs)
- Court of Appeal: award was reduced to $100,000
- SCC: restored the original award based on the exceptional circumstances of the case
  - found Pilot's conduct exceedingly reprehensible and in breach of their obligation to deal with the Whitens in good faith
  - exacerbated by the fact that insurance contracts are "peace of mind" contracts
  - behaviour was planned & deliberate even when they knew the hardship it was causing
  - court was mindful of the controversial status of punitive damages (fears of "Americanization")
  - case represents an effort to limit awards of punitive damages (while upholding a large award)
- **doctrine** - two basic requirements (test) for an award of punitive damages in a breach of contract actions:
  - misconduct must be **highly reprehensible** - "high-handed, malicious, arbitrary… departs to a marked degree from ordinary standards of decent behaviour"
  - misconduct must be an **independent actionable wrong** (IAW) aside from the main cause of action
    - IAW may be founded in a breach of a term of the contract; doesn't need to be a tort
- **policy framework** - court laid out policies to guide future applications of the doctrine; key features are:
  - **exceptionality**: punitive damages are the exception to the general rule of compensatory damages in breach of contract
    - must be a rational response to the circumstances of the case; driven by the reprehensible conduct of the defendant

- **rationality**: punitive damages are intended to achieve three objectives: punishment, deterrence, denunciation
  - an imposition of punitive damages must be linked to one of these three goals
- **proportionality**: the sum should be proportionate to the degree of misconduct exhibited and no more
  - *proportionate to the blameworthiness of the defendant's conduct* - considers factors such as deliberateness, motive, length of time, knowledge of wrong-doing, profiting from conduct
  - *proportionate to the degree of vulnerability of the plaintiff* - considers the relative positions of the parties and whether the stronger party abused it's position/exploited the vulnerability of the weaker party
  - *proportionate to the harm or the potential harm directed at the plaintiff* - includes both actual harm and likely harm; defendant is punished for the nature of their conduct, not necessarily the outcome
  - *proportionate to the need for deterrence* - the sum should deter both the wrong-doer and future wrong-doers from contemplating similar misconduct
  - *proportionate even after considering penalties that have already been assessed for the same misconduct* - punitive damages should not be awarded if compensatory damages/criminal penalties are adequate to meet the policy objectives
  - *proportionate to the advantage wrongfully gained by the misconduct* - the amount of the award can't be such that the defendant can regard it as "the cost of doing business"

Mitigation

Principle
- plaintiff cannot recover for losses that they reasonably could have avoided
  - one of two doctrinal tools to limit recovery of damages/prevent ballooning damages (along with remoteness)
- "duty to mitigate" - "duty" to take reasonable steps after a breach of contract to minimize damages/avoid loss
  - not technically a "duty" (no legally enforceable duty to mitigate) - plaintiff is not liable for not mitigating
  - principle is that the plaintiff cannot recover losses that could reasonably have been avoided
- what is reasonable is a question of fact dependent on the circumstances
- exception: where the P. is entitled to specific performance; if claiming specific performance then you don't take steps to mitigate

Rationales

I. Avoidance of hardship & unfairness
- contract liability is absolute - plaintiff does not need to prove intention or negligence; innocent reasons for breach are not an excuse for contractual liability
- quantum - normal measure of damages - expectation damages - is quite high and can lead to overcompensation

- unfair surprise versus reasonable expectations - unfair to make the defendant liable for losses the plaintiff could have avoided

II. Fair allocation of risk

- rule promotes a fair allocation of risk; plaintiff may be in the best (or only) position to deal with consequences of breach; fair way to allocate post-breach risks
  - i.e. mitigation requires a vendor to take reasonable steps to resell a refused product (i.e. oranges) in the market place and then claim difference in prices + incidental costs
- rule promotes efficiency; plaintiff is expected to take reasonable measures to salvage the transaction and minimize the resulting damages (i.e. letting the oranges spoil)

III. Reasonable steps to avoid losses (avoid economic waste)

- generally - burden of proving that the plaintiff ought to have taken steps to mitigate is on the defendant
  - P. must take reasonable actions - not extraordinary
    - will depend on facts/context
    - what might a "reasonable business person" have done in the P.'s position?
    - standard tends to be relatively low - P. is responding to an unexpected event and may be facing difficulties
    - generally courts are reluctant to second guess efforts to avoid loss
- additional costs - P. may recover additional costs reasonably incurred in taking steps to avoid a loss
  - costs are recoverable even if the attempt is fruitless
  - costs are not recoverable is the actions taken are not reasonable

IV. What is reasonable?

- ***Payzu Limited v. Saunders*** (1919, Eng. CA) - contract of a sale of silk - discount & credit; vendor breaches by demanding cash on delivery
  - normal MOD - difference between market & contract price
  - but... P. should have mitigated by buying the silk for cash and without the discount (still the best price)
  - damages = loss of discount & cost of credit
  - P. argues it is unreasonable/unfair to expect them to deal with someone who just breached their contract
  - court responds that what is reasonable re: mitigation is a question of fact
    - in commercial circumstances it is reasonable to require continued dealings (to accept an offer from a party in default)
    - exception: it may be unreasonable to deal with a contract breaker in a personal services contract (i.e. housekeeper)

V. Impecuniosity

- is the P. required to mitigate where they don't have the financial resources to do so? - lack of resources generally does not justify not mitigating; particularly in commercial circumstances (unless related to financing - see below)

- P. may suffer additional losses because they lack sufficient funds to mitigate; D. may then argue the following:
  - P. has failed to mitigate and cannot claim losses that could have been avoided
  - the loss was not "caused by the D. but by the P.'s failure to mitigate (and their financial situation)
  - the loss is too remote to be recoverable
- bottom line - the issue is risk allocation; which party should bear the risk that the loss caused by the D. might be aggravated because of the P.'s lack of funds?
  - no universal rule - general presumption is the D. is not liable for losses caused by the P.'s impecuniosity
  - rule gives P. incentive to protect itself from damage - i.e. insurance (D. should not be saddled with risk that P. is uninsured)
- consumer transactions - impecuniosity is generally an acceptable excuse for failure to mitigate
  - ***Wroth v. Tyler*** (1973, UK) - breach of contract to sell a house; P. seeking specific performance (that the D. sell them the house) or damages
    - contract price 6000 pounds; market price at breach 7500 pounds
    - mitigation would be that P. purchase replacement house for 7500 pounds and claim damages of 1500 pounds
    - unable to mitigate (already financially stretched); court found there was a real & legitimate reason for P. not to mitigate - lack of resources; court ordered 5500 pounds in damages
- commercial transactions - there is a general requirement to mitigate; D. are not required to assume the risk of dealing with an impecunious P.; whether mitigation is required will depend on the facts
  - ***General Securities Ltd. v. Don Ingram Ltd.*** (1940, SCC) - D. (finance company) liable for loss of P's car dealership when they repudiated it's contract to provide financing for the operation
    - subject matter of the contract is finance; D. assumed the risk of the venture by agreeing to provide funds (therefore no mitigation required)
- may be addressed as an issue of remoteness - i.e. losses due to impecuniousity are not in the reasonable contemplation of the parties
  - ***Freedhoff v. Pomalift Industries Ltd.*** - P. lost ski operation due to D's breach of contract to install a lift and its own impecuniosity; denied claim for loss of its property - loss held as too remote
  - could be argued that all cases dealing with impecuniosity are simply an application of the principle of remoteness

VI. Mitigation & the doctrine of election

- The rule in McGregor's case - ***White & Carter (Councils) v. McGregor*** (1961, HL)
  - contract with municipalities to supply litter bins; White & Carter could attach ads
  - three year contract with McGregor to advertise; contract expired; renewed by McGregor's sales manager
  - renewal was done in error; McGregor calls next day to cancel the renewal
  - White & Carter ignore cancellation & proceed with contract

- McGregor argued they could not recover for avoidable losses; should have accepted the breach & sued for lost profits; should have made reasonable efforts to find new customers rather than incurring further expenses
- HL (Lord Reid) rejected argument on the basis of **doctrine of election**
  - background - three types of contracts:
    - executory - calls for future performance/exchange in the future
    - executed - performance of contractual obligations is complete (i.e. purchase of goods)
    - partially executed - there has been only partial performance under the contract
  - doctrine of election - where there is an executory contract and an anticipatory breach or anticipatory repudiation (breach takes place before the date of performance) the P. has two options:
    - P. may accept repudiation immediately and sue for damages; contract is terminated - obligations end and P. can only seek damages; or
    - P. can disregard the repudiation and treat the contract as still in effect
      - effectively (in the case of an anticipatory breach) the P. may continue to perform (without the need to avoid losses) where it can do so unilaterally - no assistance, consent, participation by the D. is required
- Comments on the rule - widely criticized by academics and judges - runs contrary to general rationales for mitigation; principle of election essentially "trumps" the principle of mitigation
  - Lord Reid qualifies the application of the rule - there must be a legitimate interest (financial or otherwise) in performing the contract
    - burden of proof seems to be on the D. to prove the P. did not have an interest in performing the contract
    - if D. can prove that the performance is "benefitless" then the P. cannot recover for losses that reasonably could have been avoided (CP, p. 40)
      - presumed benefit... that P.'s business depended on having a high profile through the use of ads; needed to demonstrate that the advertising was popular/successful
- Treatment of the rule in Canada - Canadian courts are reluctant to accept the decision on *McGregor's Case*
  - ***Finelli v. Dee*** (1968, OCA) - canceled contract to pave a driveway; paved anyway; claim for contract price (CP, p. 41)
    - "attracted by the reasons of the two dissenting members of the Court. Repudiation is not something that calls for acceptance when there is no question of rescission, but merely excuses the innocent party from performance and leaves him free to sue for damages."
    - regardless... in this case there was trespass on property - unable to unilaterally perform
    - note: Lord Keith presents same issue in *White and Carter* - questions whether company is entitled to display ads without the consent of the other party

VII. Mitigation, loss of profits & lost volume

- may be cases where as a result of mitigation the P. is able to completely avoid any loss
  - ***British Westinghouse Electric & Manufacturing Co. Ltd. v. Underground Electric Railways*** (1912, HL) - breach re: delivery of defective machinery; mitigation with more efficient machines
    - held that the increased profitability of the new machines was to be taken into account with the consequence that the P. recovered only nominal damages
    - "The subsequent transaction, if to be taken into account, must be one arising out of the consequences of the breach and in the ordinary course of business." - Viscount Haldane (CP, p. 42)
    - principle: the performance in mitigation and that provided for under the original contract must be a substitute for the other; as a result of the breach of the breach of contract there is released a capacity to work or to earn
    - *British Westinghouse* exemplifies the fundamental principle that contract damages are compensatory; no loss then no award (except nominal)
    - ability to mitigate will typically depend on conditions of supply and demand (see lost volume cases)
      - ***Apeco of Canada v. Windmill*** (1978, SCC) - breach for commercial space; landlord rented to another tenant; but supply outstripped demand so the landlord was not able to avoid a loss

VIII. Date of assessment of damages

- general rule - two aspects of doctrine of mitigation are the time at which damages are to be measured and how gains/losses subsequent to the breach are treated
  - assessment is made at the time of the breach
    - additional losses aren't the result of the breach but the failure to mitigate
    - justification is risk allocation - D. is generally powerless to reduce the P.'s losses; risk of further losses should be on the P.
    - promotes efficiency; gives the P. incentive to avoid loss/prevent waste
- interest & inflation - there is often a long delay between time of breach and the resolution of a dispute in court; P. is deprived of money (damages) in the interim
  - courts may award pre-judgement interest on the amount of the damages
  - court may also take into account the eroding effects of inflation
- exceptions to the general rule - "date of breach" rule is not literal - usual requirement is that P. mitigates within a reasonable time of breach
  - depends on nature of transaction/circumstances that influence what is considered a reasonable time
  - may be extended is the good contracted for is unusual/unique; P. is exposed to risk from mitigating; P. has inadequate funds; nature of goods means it can't be resold instantly
  - common alternative is to award damages calculated at the time of trial/ judgment (*Wroth v. Taylor*) or sometime in between breach and trial...
    - leading case is ***Asamera Oil Corp v. Sea Oil*** - contract to loan shares; failed to return on time; price of shares fluctuated

- SSC found that P. had a duty to mitigate by purchasing replacement shares
- damages not based on share price at time of breach (but at a higher price)
- considered unreasonable to expect the P. to purchase replacement shares at the time of breach
- factors included unstable nature of the shares and the relationship between P. & D.
- principle: courts have the discretion to take into account any special circumstances that indicate it is unreasonable to require the P. to mitigate immediately

Equitable Remedies

Historical Overview
- equity emerges in medieval times - counterbalance to the sometimes unjust remedies of early common law courts
- disappointed litigants petitioned King for relief; role eventually delegated to Chancellor & his Courts of Chancery --> courts of equity
- common law courts & equity counts developed separately - difference judges/bodies of law
- late 19th C. - equity was joined with common law; Canadian courts dispense justice using both common law & equitable traditions
- equity - seen as corrective (remedial) to the common law
- equity ruling will prevail over common law but used in rare circumstances
- in contracts equitable remedies may be orders where the common law fails to provide adequate relief: specific performance & injunctions
- specific performance: an order compelling the party in breach to perform the contract
- injunction: an order compelling a party not to do something

Specific Performance

The Values Debate in Specific Performance
- seems an ideal remedy - P. received exactly what was promised
- common law tradition there is a marked preference for damages; SP rarely granted - only available in limited number of circumstances where an award of damages would be inadequate
- historical reasons: English legal systems equity prevailed; used to supplement the common law; SP only used where damages were inadequate
- ideological reasons: classical contract law imbued with ideals of liberalism - autonomous individual; separation of law & morality - purpose of contract law is to enforce rights not compel people to be good/behave a certain way; court's role is not to enforce morality of keeping one's promises
- practical reasons: damages are often more convenient; may be preferred by the P. (i.e. may not want to deal with a hostile contractor)

- administrative reasons: SP is difficult for courts to administer/supervise; judges are reluctant to oversee/supervise compliance or leave the door open to further litigation (i.e. problems re: court supervision in child custody/access agreements)
- adverse impact on mitigation: if SP were presumptive remedy there would be no obligation to mitigate; undermines economic rationale (i.e. efficiency) of mitigation
- avoidance of hardship: general rule in favour of SP might be overly burdensome to the D.; would shift the burden of mitigation to the D. which might be costly/unfair

Co-operative Insurance Society v. Argyll Stores (1998, HL) - D. operates grocery store in P.'s shopping centre; closes store before contract expires; P. sues for SP
- court declines to grant SP; expresses these concerns:
  - SP as an exceptional remedy; appropriate only in particular circumstances
  - long-term, constant supervision by the courts is untenable; expense; resources; administrative efficiency
  - onerous on the D. - may lead to expensive on-going litigation for minor breaches
  - loss for the D. would be disproportionate; purpose of contract law is not to punish
  - contempt as a heavy-handed enforcement mechanism
  - economically wasteful; prolongs & may exacerbate hostility between the parties - not in the public interest

Doctrinal Requirements
- in order to get SP P. must establish damages would be inadequate in the circumstances
- unique goods: i.e. family heirlooms; rare works of art (i.e. Monet painting); reconditioned ship (*Behnke v. Bede Shipping Co. Ltd.* (1927)
- land: historically the uniqueness of lawn went unchallenged; source of wealth & power; SP consistently order in breaches involving sale of land
  - ***Semelhago v. Paramadevan*** (1996, SCC) - presumption overturned in case of sale of property in a subdivision; court allowed SP but in *obiter dicta* stated that it is no longer the general rule that all land is presumptively unique and that damages are presumptively inadequate; the land in question must be truly unique - substitute not readily available
  - ***Tanenbaum v. W.J. Bell Paper*** (1956) - SP granted where transfer of land is conditional on work being done (building of a road)
    - case highlights difficulty of assessing damages
- relational contracts: agreements for future, on-going relationship
  - in discrete transaction contracts courts look to uniqueness of subject - does not transfer readily to relational contracts where the benefits hinge on multiple/ fluctuating variables
  - SP may be a more apt resolution where monetary damages are too difficult to calculate do to the many factors influencing the expected outcome of the contract
  - involves looking beyond the "four corners" of the contract to the intricate relationships created/influenced by its terms

- ***Sky Petroleum Ltd. v. VIP Petroleum Ltd.*** - long-term supply contract where the P. may go out of business
  - 10 year supply of gas at set prices; 1972 OPEC oil embargo/skyrocketing prices; D. tries to get out of contract by accusing P. of breach; stops supplying gas
  - court ordered interim injunction (SP) until matter could be resolved at trial; court noted forcing the P. to pay market prices for gas could put P. out of business before trial even began

Exception to the Rule: Personal Service Contracts
- absolute rule: courts will not order SP of a personal services contract (including employment contracts & independent contractors) - akin to slavery

Injunctions

Doctrinal Requirements
- opposite of SP - court orders a party not to do something that would result in breach/ non-performance of contract
- typically sought in order to enforce a negative covenant - a promise not to do something - i.e. non-competition clause (most common); meant to protect employers in the form of exclusivity & non-disclosure agreements
- court may strike down a negative covenant that has the effect of unfairly preventing a person from earning a living; overreaches - viewed as a restraint of trade or unconscionable
- requirements for enforcing a negative covenant:
  - existence of a negative covenant (implied or expressed);
  - damages inadequate/difficult to calculate; and
  - must not amount to compulsion to perform a personal services contract (or be an undue restraint of trade)

Injunctions & Personal Service Contracts
- will a court issue an injunction that prevents an individual from breaching a personal services contract?
- ***Lumley v. Wagner*** (1852) - ruling kept an opera singer from singing at other venues
  - issue was whether the negative obligation was tantamount to enforcing a positive obligation - court said it was not
  - court held that it can issue an injunction to encourage or put pressure on one party to continue to work for an employer; order fell short of specifically ordering her to perform as per her contract
  - "*Lumley* injunction" arises when the court enforces a promise (normally made by the employee) *not* to work for another similar employer for the duration of the employment contract
  - employees subject to a *Lumley* order effectively have no choice but to continue working for their existing employer
  - wide application in English/NA jurisdictions - basis for much of sports & entertainment law (Waddums - xenophobia against German performers)

- ***Warner Bros. v. Nelson*** (1937) - seeking an injunction against Bette Davis
  - positive covenant - court will not order her to provide exclusive services to WB
  - negative covenant - enforcement would compel her to be "idle"
  - court strikes down the "any other occupation" part of the clause as being too broad
  - receive injunction - limited to three years & only to England
  - seen as the high water mark for the "singer/star" cases - takes a narrow view of what constitutes compulsion
  - has drawn criticism - little difference between the "compulsion" of an order of SP & the "mere inducement" provided by an injunction enforcing a negative covenant
    - broader view of compulsion (subsequent cases) - does the negative covenant effectively enforce the positive covenant if the person wants to work in their chosen profession?
- ***Page One Records v. Britton*** (1968) - re: exclusivity contract binding The Troggs to their then manager and forbidding then from engaging another manager/agent for five years
  - court found having a manager was an essential element of the music industry; needed one to continue
  - injunction enforcing the negative obligation would in effect either prevent them for working in their chosen field for the duration of the contract or force them to stay in the contract
  - distinguished from *Warner Bros.* on basis that the management-client relationship is a fiduciary one requiring good faith by all parties
  - outcome - courts are unwilling to force parties to work together when the relationship has broken down
- ***Warren v. Mendy*** (1989) - more pointed criticism of *Warner Bros.* - expectation that Bette Davis might find equally fulfilling employment in another line of work was flawed/ unrealistic
  - court held that negative covenants ought not to be enforced if the effect is to compel specific performance of the contract
  - "compulsion" to be determined on the facts of each case with regard to employee's psychological & physical reliance on the skill at issue
  - compulsion more likely to be found in contracts of lengthy duration involving relationships of mutual trust/confidence that have broken down
- **Vandervelde** - "Gendered Origins of the Lumley Doctrine"
  - patriarchal values influenced enforcement of covenants on women; all the performers receiving injunctions were women
  - context - actor/managers relationships where the women were seen as bound to men; subordinate relationships; social control of "loose women" - naughty/ dangerous women who needed "correcting"

Restitution

Restitution as an independent cause of action

- can have obligations arising specifically out of restitution; recently recognized; slowly gained acceptance in the common law
- focus on unjust enrichment; obligation to provide compensation for unjust enrichment
- *Deglman v. Guaranty Trust* (1954, SCC) - court awards money to nephew on basis of *quantum meruit* ("what one has earned")

Restitution of benefits conferred vs. disgorgement of profits

- ***Attorney General v. Blake*** (2000, HL) - D. was intelligence officer in UK during the Cold War; sold secrets to the USSR; escapes to USSR to avoid prosecution; publishes a book years later & makes deal to release book in UK; AG brings action against D. to claim profits
  - issue: can a P. - having suffered no financial damage as a result of the D.'s breach - sue for profits which have been derived from that breach?
  - ruling: D. was acting in context of a quasi-fiduciary relationship - immeasurable damage done to the public trust; standard remedies are insufficient to respond to his conduct; stripping him of his profits in the apt approach
  - principle: court has the discretion to require a D. to account to the P. for the benefits received from a breach of contract - only available in exceptional circumstances; discretionary - is it just & equitable?
    - Lord Nichols: useful guide is whether the P. has a legitimate interest in preventing the D.'s profit-making activity and therefore in depriving D. of profit
    - rule in equity allowing an innocent party to recoup D.'s profits arising from breach - "disgorgement of profits" - calculated via *quantum meruit*

Concern: effect on commerce - efficient breach

- A contracts with B for machine for $1,000
- C values machine at $2,000
- B can obtain a substitute for $1,200
- Efficient for A to breach, sell machine to C and pay B $200

Promises Legally Enforces

Bargains

Offer & Acceptance

Bargain Theory: Offer & Acceptance

- issue: determination of when communications give rise to legal obligations
- policy framework: balance the need to enforce promises (reasonable expectations) and the avoidance of surprising parties with unanticipated liabilities (unfair surprise)
- legal framework: the balancing takes place (in part) through the rules encompassed by the bargain theory of contract: those relating to offer, acceptance & consideration
  - contracts are based on bargains; they are deals
- test: in resolving the questions surrounding offer, acceptance & consideration courts will adopt an objective (reasonable person) standard
- consideration: the thing that is exchanged in the contract; may be nominal; a dollar to keep the contract open
- contract must have three P's:
  - parties (needs to be clear)
  - price (does not have to be a dollar value)
  - property (good or service; the thing being contracted has to be clear)

Offer

- general: task is to ascertain what communications (offers) will be elevated to the status of legal offers; must bear in mind that the consequences can be quite serious
  - recipient of the communication (offeree) has the power to bind the offeror to a contract; an offer creates the power of acceptance in the offeree) and this to claim expectation damages (***Denton v. Great Northern Railway***)
- specific rules:
  - there must be a manifestation of an intent to be bound
    - generally a mere advertisement, enticement, or invitation to treat (i.e. negotiate) is insufficient (***Johnston Bros.***; exception - ***Lefkowitz***)
    - ***Pharmaceutical Society v. Boots*** - display is like an advertisement; when the customer brings the goods to the cashier it's an offer; acceptance is the cashier taking the money
    - things need to be communicated - i.e. revoking an offer

  1. the offer must be sufficiently specific and comprehensive that the terms of agreement can be identified (the problem of uncertainty)
  2. an offer ceases to exist if it is rejected; offer expires after a reasonable time - length is determined by context (***Manchester Diocesan Council***)
  3. an offer can be revoked anytime before being accepted; unless the offer has expired (passage of a reasonable period of time) effective revocation may require notice of revocation (***Dickson v. Dodds***)
  4. an offer is binding one it is accepted (unequivocally) and thereafter cannot be revoked

Acceptance

- general: acceptance by word/return of promise produces a bilateral contract (most common); acceptance by performance/action results in a unilateral contract (i.e. reward contract for returning a lost dog; lots of reliance issues)
- specific rules:
  - must be a clear manifestation of an intent to be bound
  - must sufficiently correspond to the offer or will be viewed as a counter-offer (***Eliason v. Henshaw***)
  - generally must be communicated to the offeror and must be done before the offer has expired or been revoked (***Larkin v. Gardiner***)
    - method of communication may be stipulate by offeror
    - silence is not acceptance
    - postal acceptance rule... (later)

Cases Re: Offer & Acceptance Principles

Denton v. Great Northern Railway (1856) - P. plans trip around schedule of a train; train company doesn't own whole line but works with another company to get people to town of Hull; knowing they can no longer get people to Hull they continue to let people use their printed schedule

- Lord Campbell C.J.: holds that there was a contract; company's use of the old schedule was false representation; award damages for cost incurred by P.
  - other judge also finds they were liable on false representation but that does not mean there was a contract
- issue: whether the schedule is an offer of contract
  - acceptance in this case is the action in performance (he goes and buys the ticket)
  - what's the consideration? - judge makes an analogy with a reward situation (unilateral approach - you come to station and we will give you the ticket)

Johnson Bros v. Rodgers (1899) - D. provided a letter offering services to sell flowers to P.; P. accepts price but then price changes; P. claim D. must be held to the provious price; claiming damages

- issue: whether a quote is an offer
- trial: P. wins
- CA: overturned; court finds the letter was simply a quote and not an offer of contract
  - letter says "quote"; judge looks at definition of quote; also a request for quick response because prices change quickly; in the end it is considered an advertisement

Lefkowitz v. Great Minneapolis Surplus Store (1957) - ad in paper about coats & stoles for sale to first person who comes in; P. came to buy each item and was told the sale was for women only; D. argues it was only an advertisement not a contract

- "the test of whether a binding obligation may originate in advertisement addressed to the general public is 'whether the facts show that some performance was promised in positive terms in return for something requested'"

- “whether the... advertisement is an offer rather than an invitation to make an offer depends on the legal intention of the parties and the surrounding circumstances... we are of the view... that the offer... was clear, definite, and explicit, and left nothing open for negotiation.“
- D. cannot change the conditions after acceptance - so house rule of only women getting the sales does not apply
- result: P. entitled to performance

Pharmaceutical Society v. Boots (1953, Que. C.A.) - under Part I of the Pharmacy and Poisons Act poison could not be sold unless under the supervision of the pharmacist; acceptance when cashier takes your money

Manchester Diocesan Council v. Commercial & General Investments (1969)
- general rule: the offer has to be accepted within a reasonable time
- court can imply a term based on a reasonable time for such a transaction
- court may look at it from the offeree's perspective; it is assumed they have refused the offer if they have not accepted it within a reasonable period of time
- if they say they are still thinking about it then the offer is still open

Larkin v. Gardner (1895) - purchaser makes the offer; vendor signs contract but does not communicate it; purchaser revokes; then vendor communicates acceptance
- acceptance has to be communicated - could have been communicated by either the vendor or his agent but was not done by either

Dickenson and Dodds (1876)
- offeror can revoke an offer prior to acceptance even where there is a stated expiration date (goes to bargain theory)
- Dickenson knew the offer has been made but once there is no continuance of the offer it cannot be accepted

Battle of the Forms
- seller & buyer use standard form contracts; each relies on its standard form; overlapping terms
- approaches:
  - first shot rule - first set of terms govern
  - last shot/performance doctrine - last form wins
  - reconcile the terms - if contradictory they cancel each other out and the court implies reasonable term
- common law adopts the last shot rule
- ***Butler Machine Tool Co.*** (1971, Eng. CA)
  - May 23 - seller's offer to sell on stated terms & conditions to prevail over terms in buyer's order (includes price variation clause) - OFFER
  - May 27 - buyer places order on own terms with tear-off acknowledgement of terms - REJECTION OF OFFER/COUNTER-OFFER

- June 5 - sett completes acknowledgement and sends letter stating that order was being entered into on basis of quote in May 23 letter - ACCEPTANCE - letter referred to quote as price & identity
- trial: first shot; seller's offer with respect to price subject to material terms cannot be modified
- CA: last shot; last form governs; buyer prevails and is not subject to price variation clause

The Tendering Process

- owner/buyer makes a call for tenders/bids; call for tenders sets out the terms upon which the owner/buyer is interested in contracting
- tendering process is analyzed as a two-contract approach:
  - Contract A - the contract governing the tendering process; call for tenders is an offer; submission of the bid is acceptation; if bid is accepted the bidder must enter into Contract B; terms of Contract A depend on the call for tenders
  - Contract B - the contract for the provision of goods/services with the owner/buyer
- ***MJB Enterprises v. Defence Construction*** (1999, SCC)
  - Contract A does not arise in all circumstances; if it does then its terms depend on the call for tenders (CB, p. 214, note 6)
  - no term in Contract A that the owner had to accept the lowest bid
  - court interprets the privilege clause (which reserves to the owner certain rights including whether to accept/not accept tenders or whether to accept the lowest tender) as not including the right to accept non-compliant tenders
  - result: MJB awarded lost profits as a result of not obtaining Contract B
- ***Double N Earthmovers v. Edmonton*** (2007, SCC)
  - Contract A has two implied terms: to treat all bidders fairly & equally; to accept only compliant bids