Course: Remedies
Date: Fall 2002
Professor: Berryman
Textbook: Remedies, 4th Ed. (Berryman, Cassels, Cromwell, Mullan, Sadinsky, Waddams)

Although great care has been taken to prepare these notes there may be errors and omissions. These notes are no substitute for attending lectures and scrutinizing the suggested and required readings. Enjoy.

Table of Contents

INTRODUCTION **1**

INJUNCTIONS **2**

INJUNCTIONS IN GENERAL 2
1. Inadequacy Of Damages *2*
2. The Protection of Rights *3*
3. Benefit versus Burden *4*
4. Supervision *4*
QUIA TIMET INJUNCTIONS 5
Fletcher v. Bealey (1885) Ch. D. *5*
Palmer v. Nova Scotia Forest Industries (1984) NS TD *5*
Hooper v. Rogers (1975) CA *6*
MANDATORY INJUNCTIONS 6
Redland Bricks v. Morris (1970) Eng HL *6*

INJUNCTIONS TO PROTECT PROPERTY INTERESTS **7**

TRESPASS 7
Goodson v. Richardson (1874) Ch. App. *7*
Woollerton and Wilson Ltd. v. Richard Costian (1970) WLR *7*
John Trenberth v. National Westminster Bank Ltd (1979) Ch. *8*
NUISANCE 8
Factors Favoring an Injunction *8*
Factors Favoring Damages *8*
Miller v. Jackson (1977) Eng CA *8*
Petty v. Hiscock (1977) Nfld *8*
Kennaway v. Thompson (1981) Eng CA *9*
Sharpe's Analysis to Injunctions *9*
Boomer v. Altantic Cement Co. (1970) NY CA *9*
Compensatory Injunction *10*

INJUNCTIONS TO ENFORCE PUBLIC RIGHTS **11**

PUBLIC NUISANCE 11
Standing of the Attorney General *11*
Standing of the Private Citizen *11*
ENJOINING CRIMINAL ACTS 12
Standing of the Attorney General *12*
Standing of the Private Individual *12*

INTERLOCUTORY INJUNCTIONS **14**

JURISDICTION 14
Brotherhood of Maintenance of Way Employees v. CP Ltd. (1996) SCC *14*
DIFFERENT MODELS 14
Classic Approach *14*
Modern Approach – American Cyanamid *15*
Alternative Approaches *15*
IRREPARABLE HARM 16
Mott-Trille v. Steed (1996) ON Gen. Div. *16*
David Hunt Farms Ltd. v. Canada (1994) FCA *16*
BALANCE OF CONVENIENCE 16

EX PARTE APPLICATIONS 17
UNDERTAKINGS 17

VARIOUS APPLICATIONS OF THE INTERLOCUTORY INJUNCTION 18

INTERLOCUTORY INJUNCTIONS IN CONSTITUTIONAL LITIGATION 18
RJR MacDonald v. AG Canada (1994) SCC 18
INTERLOCUTORY MANDATORY INJUNCTIONS 19
Films Rover International v. Cannon Film Sales 19
RESTRICTIVE COVENANTS – RESTRAINT OF TRADE 19
Jiffy Foods Ltd. v. Chomski (1973) ON CA 19
Towers, Perrin, Forster & Crosby v. Cantin (1999) ON SC 19
INJUNCTIONS AND INTELLECTUAL PROPERTY 20
Patent Law 20
Trade-Mark Law 20
Copyright Law 20
Confidential Information 20
INJUNCTIONS IN LABOUR DISPUTES 21
INJUNCTIONS AND DEFAMATION 22
Canadian Metal Co. Ltd. v. CBC (1974) ON HC 22
Canadian Tire v. Desmond (1972) ON Gen Div 22
Gagging Writ 22
JOHN AND JANE DOE ORDERS 22
INTERLOCUTORY INJUNCTIONS AGAINST NON-NAMED PARTIES 23

MAREVA INJUNCTIONS 24

IN GENERAL 24
Mareva Compania Naviera v. Internation Bulkcarriers SA (1975) Eng CA 24
Aetna Financial Services v. Feigelman (1985) SCC 24
JURISDICTION 25
Brotherhood of Maintenance of Way Employees v. CP Rail (1996) SCC 25
ACCESSIBILITY THRESHOLDS 26
DISSIPATION OF ASSETS 26
R. v. Consolidated Fastfrate Transport (1995) ON CA 26
IMPACT ON THIRD PARTIES 27
Z Ltd. v. A-Z and AA-LL Ltd. (1982) Eng QB 27
Extra-Territoriality 27

ANTON PILLER INJUNCTIONS 28

GENERALLY 28
CRITERIA FOR GRANTING THE ORDER/BASIC REQUIREMENTS 28
Rolex v. 28
Three Basic Requirements 28
Considering Safeguards 29
INTERROGATORIES AND SELF-INCRIMINATION 29
EXTRA-TERRITORIALITY 30
Cook Industries (Eng) 30
CHARTER APPLICATIONS 30
Ontario Realty Corp. v. Gabriele & Sons Ltd. (2002) ON CA 30

ANTI-SUIT INJUNCTIONS 31

IN GENERAL 31

Amchem v. BC W.C.B. (1993) SCC *31*
Hudon v. Geos Language Corp. (1997) ON CA *32*
Forum Conveniens *32*

SPECIFIC PERFORMANCE OF PERSONAL SERVICE CONTRACTS 33

TRADITIONAL APPROACH 33
MODERN APPROACH 33
Hill v. CA Parsons & Co (1972) Eng CA *33*
National Ballet v. Glasco (2000) ON SCJ *33*
SPECIAL CIRCUMSTANCES TEST 34
Shepherd v. Colchester Regional Hospital (1991) NS SC *34*
Knight v. Indian Head School Division (1990) SCC *34*
Kopij v. Metro Toronto (1996)) ON CA *34*
Lumley v. Wagner *34*
Warner Bros. v. Nelson (1937) KB *35*
Detroit Football v. Dublinski (1955) ON HC *35*

SPECIFIC PERFORMANCE IN LAND CONTRACTS 36

Semelhago v. Paramadevan (1996) SCC *36*
John Dodge Holdings v. 805062 Ontario (2001) ON Gen Div *36*
TYPES OF INADEQUACY OF DAMAGES IN LAND CONTRACTS 37
Domowicz v. Orsa Investments (1993) ON Gen Div *37*
The Interest in Land *37*
Hoover v. Mark Miner Homes (1998) ON Gen Div *38*
Landmark of Thornhill v. Jacobson (1995) ON CA *38*
BUILDING CONTRACTS 38
Wolverhampton Corp. v. Emmons (1901) Eng CA *38*
MUTUALITY 38
Price v. Strange (1978) Eng CA *39*
DISCRETIONARY DEFENCES 39
Laches or Delay *39*
Doctrine of Clean Hands *40*
Hardship *40*
CERTIFICATE OF PENDING LITIGATION (LIS PENDENS) 41
SPECIFIC PERFORMANCE ELECTION 41
KEEP OPEN CLAUSES 42
Co-operative Insurance v. Argyl Stores (1996) HL *42*

PERSONAL INJURY DAMAGES 43

NON-PECUNIARY DAMAGES 43
Assessing Loss *43*
PECUNIARY LOSSES – LOST WORKING CAPACITY 44
Toneguzzo (SCC) *44*
Fenn (SCC) *45*
Fobel v. Dean (19) Sask CA *45*
Contingencies *45*
Discount Rate *45*
Watkin v. Olafson (1989) SCC *46*
Tax Gross Up *46*
STRUCTURED SETTLEMENTS 46
PERIODIC PAYMENTS 47

FATAL INJURIES AND THIRD-PARTY CLAIMS 47
T.O. v. Toronto Board of Education (2001) ON CA *47*
CERTAINTY AND CAUSATION 48
Schrump v. Koot *48*
Farell v. Snell (19??) SCC *49*
McGhee *49*
Laperierre v. Lawson *49*
Sunrise v. Lake Winnipeg *50*
DATE OF DAMAGE ASSESSMENT 50
Asamera Oil v. See Oil (1979) SCC *50*
Wroth v. Tyler *51*
Johnson v. Agnew HL *51*
Semelhago v. Paramdevan SCC *52*
COST OF RE-INSTATEMENT OR DIMINUTION IN VALUE 52
Tito v. Waddell *53*
C.B. Tyler *54*
Evans v. Balog (1976) NS CA *54*
Deweis v. Morrow *54*
O'Grady *54*
Warren *54*
BETTERMENT 54
Harbutt's Plastercine *55*
James Street Hardware ON CA *55*
Bacon v. Cooper Metals (1982) Eng QB *55*
Upper Lakes Shipping v. St. Lawrence Cement (1992) ON CA *56*
MITIGATION 56
Hypothetical *56*
BASIC CONCEPTS – THREE PRINCIPLES OF MITIGATION 56

PROVOCATION AND INTENTIONAL TORTS 59

PROVOCATION 59
ANTICIPATORY BREACH 59
White v. Carter Counsels *59*
Finelli v. Dee ON CA *59*
AVOIDED LOSS 59
Erie County Gas v. Carroll (1911) ON PC *60*
Cockburn v. Trust Guaranty Co *60*
Jamal v. Moulla Dawood (1916) Burma *60*
Campbell *60*
Slater (69) *61*
Volume Selling *61*
DOUBLE RECOVERY 61
McLean v. Canadian Vickers *61*
RELIANCE INTEREST 62
Bowley v. Domtar *62*
INDEMNITY INTEREST 63
Molling c. Dean (1901) KB *63*

AWARDS MEASURED BY THE BENEFIT TO THE DEFENDANT 64

RESTITUTION 64
NON-PECUNIARY LOSSES 64

Farley v. Skinner (2001) HL *65*
WRONGFUL DISMISSAL 65
Vorvis v. Insurance Co. of B.C. (1989) SCC *65*
Ribeiro v. CIBC (1992) ON CA *66*
Wallace v. United Grain Growers (1997) SCC *66*
Frinzo v. Baycrest (2002) ON CA *66*

PUNITIVE DAMAGES 67

JURISTIC UNDERPINNINGS 67
Arguments For and Against *67*
REQUIREMENTS 67
Whitman v. Pilot Insurance (2002) SCC *68*
JUDICIAL TREATMENT OF PUNITIVE DAMAGES 69
Rookes v. Barnard UK *69*
AGGRAVATED DAMAGES 69
PRE AND POST-JUDGMENT INTEREST 69
Pre-Judgment *69*
Post-Judgment *70*

Introduction

There are four essential approaches to remedies as a subject:

1. *Monistic Approach* – what we are looking at is the relationship between rights and remedies (there is no right without a remedy nor a remedy without a right). This approach would say that the sole goal of remedies is simply to maximize the substantive right that is being raised. The entire focus is on identifying the substantive area of law and remedies poses as an afterthought. The goal of remedies is to maximize the right that is being determined. The notion of completeness is important. A number of factors ought to be looked as, such as remoteness, causation, mitigation, specific performance, injunctions, collateral benefits, punitive damages, and restitution;

2. *Distinct Subject Approach* – remedies as a subject has a distinct area from the area of law. This approach identifies the differences between right and remedies. There are distinct structures between the analysis of rights and of remedies. Under the title of right we should first look at the ideal and ask what ought the law to be whereas the remedy approach is what is realistic. Should you look at the right and make a determination based upon what the law ought to be or look at the situation and make a realistic assessment? Also, the right looks at the principles while remedies takes a pragmatic approach and considers what the fair solution would be to the problem. Rights assert that there is a clear winner over the other while the remedies approach is much more interest balancing trying to make an accommodation between the parties. Rights are supposedly certain and known clearly in advance while remedies are generally discretionary; it is dependent upon a judicial appraisal of the fact. Finally, rights tend to be drawn in the abstract (aspiration) whereas remedies are highly particularized and the focus is on the facts between the parties;

3. *Integration Approach* – there are distinctive structures between rights and remedies, but there is much more integration between the two. A judge goes between right and remedy using each one against each other – each get shaped by the other;

4. *Structural Functionalist Approach* – this approach does not purport to make any link between the right and the remedy.

Injunctions

Injunctions in General

There are a number of different injunctions. An interlocutory injunction is any injunction given prior to the commencement of any substantive trial of the merits. *Ex Parte* means without notice to the other side while o*n notice* is simply an expedited process. An *Interim* injunction is an injunction that is granted for a defined period of time. Normally, an interlocutory injunction granted is ordered on an interim basis so that the ex parte party may return to the Court and defend him or herself.

Interlocutory injunctions can be both prohibitive and mandatory. A prohibitive injunction prohibits the continuation of a particular course of action. A mandatory injunction orders the Defendant to do something positively to prevent the further incursion of an injury. Both prohibitive and mandatory injunctions may, once the trial of the merits is complete, become a permanent injunction. Finally, a *quia timet* injunction may be given as a permanent remedy in advance of any actual injury being experienced by the plaintiff.

When we talk about interlocutory injunctions one should note that the main reason is to put the parties into a sort of holding pen until the trial of merits can take place. The mechanism is used to control the period of time so that no further rights are infringed before trial. At trial, the issue turns to whether the injunction ought to be ordered as a permanent remedy.

There are three basic requirements needed to support an injunction along with issues of supervision:

1. *Rights* – The plaintiff needs a cause of action;
2. *Damages* – The granting of an equitable remedy requires that the damages are an inadequate remedy; and,
3. *Balance of Convenience* – There can be no impediment to the court's discretion to grant an injunction.
4. *Issues of Supervision*

1. Inadequacy Of Damages

The more important thing in terms of the granting of injunction is showing that damages are an inadequate remedy. The concept of irreparable harm and damages are often used synonymously. There are a number of possible meanings:

1. Damage to person or property that is impossible to repair;
2. Damage to an interest not susceptible to economic quantification;
3. A legal wrong that causes no financial or economic harm;
4. Damages are ascertainable but are not likely to be recovered;
5. Damages are a threat to an interest that is so important that a substitutionary remedy (damages) is inappropriate; and,
6. An injury has not yet occurred or the wrong is continuing.

The notion of irreparable harm is multi-faceted. The Courts never define irreparable harm in one particular way to the exclusion of all others.

There are a number of criteria used to evaluate perpetual (permanent) injunctions. The notion of inadequacy of damages is important in terms of determining whether to grant a permanent injunction. There are two distinct advantages that damages has over an injunction as a permanent remedy:

1. With an injunction it can be said that it is binary in effect (granted or denied) whereas damages vibrate flexibility. A damages remedy may be adjusted to meet the needs of a particular case. A concept of mitigation can be applied to damages; and,
2. Damages are a passive response to right a Plaintiff's wrong whereas an injunction is a direct order by the Court to the Defendant to do something. Any failure to comply exposes the Defendant to be in contempt of the Court's power.

Equitable remedies, therefore, appear to be a more coercive way to ensure compliance. Being cited for contempt of Court a Defendant may be imprisoned. The contempt powers may follow very quickly whereas the enforcement of damages may flow very slowly. The weakness of a damages remedy implies that all rights may be bargained away for a monetary equivalent. Damages works on the premise that all rights can be substituted for money. The notion of inadequacy of damages at the stage of a permanent or mandatory injunction was initially seen as a threshold test – it had to be proven before access to the remedy. The more modern concept is to give heed to the inadequacy of damages, but it is put in a mix with a number of other criteria. In other words, it is no longer a threshold test, but rather an important factor. In this light, an injunction may be coupled with damages or damages may be granted in lieu of an injunction. Also, another form of injunction has been developed – the compensatory injunction where the plaintiff compensates the defendant for the loss of the right to do a certain thing.

2. The Protection of Rights

There are no limits on what causes of action can get equitable remedies – any cause of action will support an injunction so long as the other criteria can be met. At the interlocutory stage, so long as there is a reasonable probability that the cause of action will satisfy the court then the first requirement has been met. For instance, in a case where a husband sought an injunction stopping his wife from having an abortion, the court held that the husband could not base the claim on a cause of action, but rather as some fanciful right and the application failed.

Calabresi and Melamed identified a number of rights and linked a number of remedies for those rights:

Inalienable rights Constitutional	→	Inalienable	→	Criminal Sanctions
Protection of Property	→	Property Rules	→	Injunctions
Other Rights Contractual Bodily Integrity	→	Liability Rules	→	Damages

There is a degree of flexibility between the right and the remedy. It cannot simply be said that a particular right involves a particular subject and therefore the remedy that would flow corresponds as above. It is much more dynamic and subjective – who is asserting the right and what is the interest being pursued?

We often say that when there is a compelling state interest to land, we do not apply a property rule. Instead, the land is expropriated, without any right of the individual to seek an injunction, and the individual landowner is compensated monetarily. It is not always correct to say that one has a property right and therefore is entitled to injunctive relief. There is significant malleability between the right and remedy, which depends largely on contextual factors and party interest. What are the factors that ought to be looked at in concluding the most applicable and effective remedy?

The full context in which a right is being asserted is going to be factored into any consideration of the appropriate remedy that ought to be applied.

Hypothetical – Ross Pediatrics

Both companies are breaking the voluntary World Health Organization Code, but there appears to be no legal requirement to follow the Code. The plaintiff may put fourth three causes of action:

1. Unfair and misleading misreprentation;
2. Numerous falsehoods and trade libel; and,
3. Unlawful interference with economic relations.

Mead Johnson's immediate concern is that if Ross Pediatrics is able to put forward the statement, it will have an adverse effect on their sales. Mead Johnson would likely apply for an interlocutory injunction. Mead Johnson will have to show proof of irreparable harm. While Mead Johnson may attempt to quantify their damages based on projections of loss of market share we will still run into some causation issues. In the granting of equitable remedies there are some issues that surface all the time:

1. Proof that the common law remedy is inadequate – the Plaintiff is suffering some irreparable harm; and,
2. The equitable remedies are always regarded as being discretionary – one has a right to damages if they can show and action and proof of loss.

Should non-compliance with the WHO Code be applied to grant an injunction? In this case an interlocutory injunction was granted. The Defendant was stopped from producing the inaccurate or misleading advertising. It is important to identify the scope of the particular injury that is being alleged.

3. Benefit versus Burden

Where the cost of compliance with an injunction would significantly exceed the damages a court would award in compensation it is unlikely that an injunction will be granted. On the other hand, difficult with quantifying the plaintiff's loss coupled with reasonableness in pursuing an injunction will result in the injunction being granted, unless the burden on the defendant is so overwhelming.

The benefit that a plaintiff gets from a particular judgment should correspond with the effect of the granting of the remedy. This is particularly useful when the plaintiff acts on irrational motives. The Court undertakes to ascertain the benefit that will be gained by the plaintiff and if that benefit far outweighs the cost to the defendant, then the injunction may be denied.

4. Supervision

There are a number of problems associated with the granting of and enforceability of injunctions:

(a) Problems associated with the possibility of repeated applications to ensure compliance – we know that courts are busy places and the fact that litigants might make repeated applications for compliance would waste precious time;
(b) Problems associated with the engagement of supervisors by the court – the courts do not have personnel to go out and ensure that injunctions are complied with and check on performance;
(c) Problems associated with the impact of the court's order beyond the litigants – the courts are concerned with whether it is going to overlap into the powers of other government machinery. Ought courts to be concerned with this potential overlap;

(d) Problems associated with the cost of compliance placed upon the defendant – can the court give sufficient specificity of the order such that the defendant knows what it has to do so that a proper cost/benefit analysis can be completed?

An issue with supervision is the distinction between prohibitive and mandatory injunctions. Courts have concluded that it is easier to grant a prohibitive injunction than a mandatory injunction – the feeling was that there was more cost involved in a mandatory than a prohibitive injunction. The tendency now is not to get bogged down with the form, but to make the assessment of whether it will involve costs or not and an also of what the litigants want the remedy to do.

Quia Timet Injunctions

What we are contemplating here is that there is no evidence of actual loss to the plainiff at the time that they are seeking a permanent remedy. This type of injunction is a remedy in advance of any actual loss to the plaintiff. Note, the common law remedy requires the cause of action and evidence of loss. This is a question of saying that there is a real risk or some risk that this is going to happen and should the court give an injunction now to ensure that it will not happen.

There are a number of specific requirements for this permanent injunction:

1. A legal cause of action;
2. Proof of irreparable harm;
3. Proof of imminent harm (temporal sense – looks at timeliness) or that the action is not pre-mature (probability of harm – factors supporting action have crystallized);
4. Proof that the apprehended damage, when it comes, will be substantial.

Fletcher v. Bealey (1885) Ch. D.

Facts	Holding	Ratio
○ The plaintiff is a paper manufacturer drawing water from the river ○ The defendant is up river who stores vat wastes that could potentially ooze out and into the river, which would cause problems relating to the quality of the plaintiff's paper ○ Plaintiff is seeking a remedy ensuring that the vat wasted does not leech into the river ○ Defendant is leasing the land and will come to expiration	○ The plaintiff must prove (1) a legal cause of action; and (2) have proof of irreparable harm – if and when this harm comes it will be of such a magnitude that it will be impossible for the plaintiff to protect him or herself ○ The court realizes that there is an absence of current harm so it adds an opportunity to show proof of imminent harm and proof that the apprehended damage would be substantial when it comes	○ In order to grant a *quia timet* injunction, the court must be satisfied that: 1. A legal cause of action exists; 2. There is a threat if imminent harm; 3. The apprehended damage will be substantial; 4. The harm will be irreparable

Palmer v. Nova Scotia Forest Industries (1984) NS TD

Facts	Holding	Ratio
○ Herbicides have the potential of affecting the ground water, which would eventually have an impact on the drinking water ○ The plaintiff brings an action to	○ Plaintiff is not able to provide sufficient proof that health is going to be at risk ○ There is a concern that the granting of a *quia timet* injunction	○ A *quia timet* injunction ought not to be used to stifle innovation and/or development

prevent the spraying of these herbicides o The plaintiff alleges that if the water is contaminated then there is a health risk to the community	may curb innovation and development – the injunction should not have this effect	

Hooper v. Rogers (1975) CA

Facts	Holding	Ratio
o There was a fear that the defendant's, who altered the grade of their land, exposed the plaintiff's building to erosion exposure and potential collapse o The plaintiff was awarded a damages in lieu of a mandatory injunction o The defendant appealed arguing that damages could not be awarded until actual damage was sustained and that damage to the building was not imminent	o *Issue*: Can damages be granted without actual loss? o There has to be a high probability of the coming about of irreparable harm – the plaintiff has shown a high probability that damage to the property is an inevitable result of the plaintiff's actions o Imminent harm does not simply refer to a quantification of time, it is also related to the probability that a particular event might happen and there is nothing that either party can do to prevent it	o Imminent harm relates to both a quantification of time and the probability that a particular event might occur o The event referred to must be such that neither party can do anything to prevent it

Mandatory Injunctions

A mandatory injunction is also *quia timet* in its effect as the plaintiff is trying to stop an event.

Redland Bricks v. Morris (1970) Eng HL

Facts	Holding
o Defendant is mining for its brick-works land below the plaintiff's property o The mining threatens to bring down his property o The plaintiff seeks an injunction ordering the defendant to do restoration work o Defendant argues that such an order would cost 35,000 pounds while the market value of the building is 12,000 o The cost of compliance far exceeds the benefit being obtained	o There comes a point in time where the court will not order an injunction, the court will consider the following factors: 1. The plaintiff must show a very strong probability that grave damage will accrue in the future; 2. Damages would be an inadequate remedy; 3. Whereas the cost to the defendant is not a consideration when deciding to grant a prohibitive injunction it is important when granting a mandatory injunction (where the defendant has acted wantonly, the cost of repairs goes against the defendant and where the defendant has acted reasonable, the costs will be considered where (1) no legal wrong has yet been committed; and, (2) the plaintiff still has a remedy for damages at common law o This is a case where some expenditure would be justified, but an injunction in absolute terms would not be reasonable

Concern: you should always remember what it is that you are seeking. The Plaintiff has the responsibility to show the court what an appropriate remedy would be. Interestingly, if you ask too much you may end up with nothing even though it is in the discretion of the Court to vary.

Injunctions to Protect Property Interests

Trespass

The difficulty in this area is that the courts have traditionally accorded their greatest rights to the protection of property. Where we have a growing industrial economy, however, the need to utilize land effectively needs to be accommodated. What then do we do with the trespasser? Courts have been reluctant to accord a trespasser a private power of expropriation. If the courts were to use the damages remedy frequently it would begin to undermine the sanctity of property – any trespasser would have a private power of expropriation for money. There are three approaches to granting a damages remedy:

1. *Damage* – Compensate the plaintiff for damage caused by the trespass and add punitive damages where the defendant's actions involve malice and deliberateness;
2. *Opportunity Cost* – Compensate for the lost opportunity to bargain for the use of the property; or,
3. *Restitution* – Compensate plaintiff with expenditure saved by the defendant

The court will consider a number of factors when determining whether to grant an injunction or order damages in lieu of an injunction under the *Courts of Justice Act*. Another option for the court is to grant the injunction but suspend its operation. The court will look to the following general factors:

1. It is difficult to deny an injunction where there is a direct infringement of plaintiff's property;
2. Deliberateness supports an injunction while inadvertence may justify suspension;
3. The plaintiff's motive for wanting the injunction is irrelevant;
4. The social importance of the defendant's work is not relevant except to tip the scale towards the idea of suspension;
5. The suspension of an injunction may be justified by the temporary and inadvertent nature of the trespass, but there ought to be some sort of compensation for the suspension; and,
6. Where the trespass is continuing and permanent the courts have put into balance the costs of compliance against the value of the encroachment to the plaintiff.

Goodson v. Richardson (1874) Ch. App.

Facts	Holding	Ratio
○ The defendant wants to lay water pipes across the plaintiff's land to supply water to another town ○ The fact that the defendant has to go under the plaintiff's property gives the plaintiff a fair amount of power	○ An injunction should be granted on the basis that the plaintiff is entitled to protect the exploitative value of his property – it is the ability to exclude that gives the plaintiff's real property its value ○ It does not matter how viciously or irrationally motivated that the plaintiff is	○ A plaintiff is entitled to exploit his own property and exclude others, this is what gives real property its value

Woollerton and Wilson Ltd. v. Richard Costian (1970) WLR

Facts	Holding	Ratio
○ Defendant is building an office building using a crane that swings across the plaintiff's land, the crane is the best method ○ The defendant tried to negotiate a right to trespass with the plaintiff ○ Plaintiff has suffered no harm	○ The fact that the plaintiff has not suffered any harm is not a reason to deny an injunctive order, but rather a reason for granting an injunction ○ Court grants an injunction, but suspends it ○ The suspension was motivated by the following factors: (1) The defendant's actions were not deliberate – but rather inadvertent; (2) This is a temporary trespass; (3) There is no injury to the plaintiff – only a risk; (4) The defendant's work is important; and, (5) There was no alternative to the defendant but to proceed in this way	○ A court may order and suspend an injunction from trespass if: 1. The defendant's conduct has social utility; 2. If the defendant does not act deliberately to trespass; and, 3. If the trespass is temporary

John Trenberth v. National Westminster Bank Ltd (1979) Ch.

Facts	Holding	Ratio
○ Defendant received a municipal order requiring it to undertake restoration work to its building, but must trespass in order to do it ○ Defendant asked for permission and was denied – he went ahead anyway	○ The defendant's actions were deliberate ○ The injury to the plaintiff is nominal ○ The notion in Woollerton is inappropriate – an injunction should be granted as of right in a trespass case	○ An injunction should be granted as of right in a trespass case

Note: The *Municipal Act* provides the municipality with the authority to pass by-laws granting a power of temporary trespass when it orders restoration on a building.

Nuisance

The notion of a nuisance is much more fluent than a trespass. A nuisance is some indirect or continuing interference with one's enjoyment of the land. There has to be some unreasonable usage and some substantial interference with the use and enjoyment of the land. Nuisance is indirect while trespass is a direct interference. Both parties, however, have the right to exploit their land to the fullest opportunities. Nuisance, because it is normally dealing with air, water, and noise, is much harder to measure or control. As such, we accept higher policy standards allowing for nuisances when the social utility is considered.

Factors Favoring an Injunction

There are several factors we can point to that favor an injunction to protect property in nuisance cases:

1. The courts will be seen as sanctioning private expropriation when damages are routinely given;
2. It is unlikely that the defendant will be able to compensate all those suffering harm; and,
3. Injunction may be a more long-term solution

Factors Favoring Damages

There are two general factors to consider that favor damages:

1. Where the interest protected by the injunction is disproportionate to the social cost involved; and,
2. If a compromise can be found that involves some payment

Miller v. Jackson (1977) Eng CA

Facts	Holding
○ During a cricket match balls would often be sent into the plaintiff's property ○ The plaintiff alleges that the activities of the club is causing a nuisance – interference	○ **Denning**: This does not constitute a nuisance as the community interest in cricket far outweighs the possibility of the plaintiff being hit ○ **2nd Judge** – nuisance does here exist, but the public interest tips the favor away from plaintiff ○ **3rd Judge** – the public interest is sufficient to postpone – grant the injunction but suspend its operation

Petty v. Hiscock (1977) Nfld

Facts	Holding
○ A soccer team kept kicking soccer balls into the plaintiff's property	○ An injunction should be granted ○ The injury to the property was likely greater than the interest obtained

Kennaway v. Thompson (1981) Eng CA

Facts	Holding
○ Noise generated on a lake by boats is affecting the enjoyment of an adjoining property owner on his land	○ Court orders a series of performance standards – speed boat racing can be performed on certain days, but on other days the decibels cannot exceed a certain level ○ The court is sensitive to competing interests and implements performance standards ○ **Ratio**: The court may order an injunction outlining specific performance standards in a nuisance case when there are equally competing interests

Ward v. Magna International (1994) ON Gen Div.

Facts	Holding
○ Magna had purchased a park reserve for their employees ○ The employees would use it for recreational purposes, which annoyed some of the neighbors ○ The neighbors brought an action for the noise nuisance	○ Court grants performance standards ○ Restrictions were placed on the amount of noise that could be generated and the intensity of the use that could be made of the land ○ Performance standards were imposed to provide half-way points between the litigants

Sharpe's Analysis to Injunctions

Sharpe wants to identify how complex the policy choices are in nuisance cases and how to develop an effective remedial regime in this context. There are three levels of protection, which the law can accord (taken from Malamed and Calabresi):

1. Property rules – person must buy the right from the holder in a voluntary transaction
2. Liability rules – commodity is exchanged at an objective judicially determined value (damages)
3. Inalienable rules – the law does not allow the transfer of the right at all – most constitutional rights are of this type i.e. the right to vote, anti-discrimination provisions.

Boomer v. Altantic Cement Co. (1970) NY CA

Facts	Holding
○ Plaintiff's land adjoins cement factory ○ Plaintiff wants an injunction stopping the operation of the cement farm, which causes noise, pollution, etc.,	○ Injunction is denied based on the consequences that would follow economically if the plant was ordered to shut down as against the benefit being obtained ○ The majority, as an alternative, suggest damages might be a good remedial option ○ A lump sum of $180,000 might be tendered to the plaintiff in exchange for the prevention of any subsequent suit against the defendant – a servitude ○ *Dissent* – it is not the function of the court to license these types of uses. The court is there to protect individuals and should not be swayed by utilitarian arguments

It is doubtful that any court in Canada can create servitude on the property and make it binding on subsequent purchasers.

A problem with damages as a remedy is that if you have a widespread nuisance, are you going to have all the litigants there who are suffering from the particular nuisance? Are you going to make a proper calculation for damages against the defendant? Equally, where a multitude of defendants are creating a nuisance you might have a number of causation problems – freeloader effect may exist as only some of the parties are being burdened with the remedy. Thus, there are always difficulties with the quantification of damages and who ought to be liable. Consider also that the more widespread the nuisance becomes, it crosses into the field of a public nuisance as opposed to a private nuisance. The Attorney General then brings the action forward. At this level, there is a far greater likelihood that the Attorney General will get the injunction and not be limited to the damages remedy.

Compensatory Injunction

Spur Industries Inc. v. Del E. Webb (1972) Ariz.

Facts	Holding
○ A developer has been able to purchase land outside Sun City in Phoenix – the land has been taken and transformed into a residential community from a feed lot ○ The surrounding existing uses as feed lots is not delighting the new residences	○ A compensatory injunction is granted ○ The plaintiff developer has to provide compensation to the displaced ranchers

Is this result just? Consider that the developer has been able to purchase the land at a very cheap price and develop the area. Should the defendants be able to share in some of the value? If there were multiple potential plaintiffs it would seem unfair that some get levied with the damages and some do not.

Freeloader Effect – is it not a disincentive for a plaintiff to bring an action? If you want the injunction you have to pay the compensation … if you bring into the matrix the fact that a nuisance might have to be stopped, but you may be compensated, why should an individual be persuaded to stop if s/he knows s/he may be compensated in exchange for the injunction?

Injunctions to Enforce Public Rights

A lot of the issues raise the question of standing – does the party have the right to pursue a particular action? A number of cases deal with the simple question of whether or not the individual has the right to bring the particular injunction action.

What constitutes a public nuisance and when can the AG seek an injunction to enjoin the public nuisance? When can a private citizen seek an injunction to enjoin a public nuisance? When can the AG seek an injunction to enjoin a criminal act? When can a private citizen seek an injunction to enjoin a criminal act? When can a private citizen challenge the exercise of the AG's discretion to refuse to allow his/her name to be joined in an *ex relator* action (stand in the shoes of the AG)?

Public Nuisance

Standing of the Attorney General

A public nuisance is one that is so widespread in its range, or so indiscriminate in its effect, that it would be unreasonable to expect one person to take proceedings on his or her own responsibility, but that it should be the responsibility of the community at large to put a stop to the nuisance. We now have a public officer before the court whose responsibility it is to say what the public interest is. This does not necessarily mean that the court follows precisely that opinion, but it does not have to enter into conjecture as to what the public interest arguments are. The AG does not have to show that the common law remedies are inadequate. The court will assume, because the AG is bringing the action, that there is justification for the remedy sought.

AG of BC v. Couillard (1985) BC

Facts	Holding
○ There is a soliciting of people in downtown Vancouver, which is decided as bad for the reputation of Vancouver and is annoying the residents and tourists in that area	○ The injunction is granted ○ Although the underlying action is criminal only the civil burden must be met ○ There is a lower standard here than in the criminal courts – it is only on the balance of probabilities and not beyond a reasonable doubt

AG of Nova Scotia v. Beaver (1985) NS CA

Facts	Holding
○ Similar facts as above, just in Halifax	○ Injunction was denied ○ The AG has not done enough in terms of utilizing the criminal law ○ The court is concerned with issues over the lower standard or burden of proof ○ The court is declining the grant, not refusing to exercise discretion

Once the AG has shown a public nuisance exists the court has the discretion to grant or deny an injunction. Large crowds, pollution of beaches, solicitation on streets, etc., can give rise to public nuisance litigation. Rarely will the court give damages. The AG does not have to show actual or potential damage. The harm to the public in breaching the law is sufficient to justify the injunction.

Standing of the Private Citizen

When can a private citizen get an injunction to prevent a public nuisance? A private citizen has no right to an injunction to prevent a public nuisance unless s/he can show that s/he has standing to bring such an

action. To have standing, the individual must demonstrate a 'special interest' that is beyond the general interest of the community at large.

A special interest must be something that is 'direct and substantial', and is of the type that is a 'difference in kind and not merely of degree'. For instance, in a prostitution case it can be said that all the residents are being inconvenienced as they walk down the street, but one might say that if it occurs outside of a hotel and deters people from staying there, then the hotel may have suffered a special interest of a different kind: residential inconvenience versus hotel pecuniary interest. A special interest is not proven if the plaintiff can only show that s/he will suffer a loss through incurring the cost of the litigation, or simply right a wrong, or win a matter of principle.

Enjoining Criminal Acts

Standing of the Attorney General

Where the law has been flouted by repeated breaches or where the penalty is inadequate, the AG may gain standing to enjoin a criminal act. There comes a point in time where the AG cannot tolerate a continued flouting of the law – the civil law injunction may be relied upon. The benefit for the AG is that now if the individual continues violation, s/he has committed a contempt of court, which can lead to imprisonment and other remedies and fines that may far exceed the potential penalties imposed by the original legislation. Once the courts contempt power is raised, the individual loses his or her power to raise any constitutional issues – the only issue of the court is the individual's observance of the court order. There is no ability to question the granting of the injunction at that stage. Where an injunction is sought to enforce a criminal code provision there is normally a higher standard.

Standing of the Private Individual

It is always open for an individual to bring a right of private prosecution. However, the AG has an absolute right to stay or take control of those proceedings at any time. The individual may take an interest as part of an *ex relator* action. The individual would bring the action in the name of the AG. In this situation the individual will be responsible for the full cost of carriage. Still, however, the AG has a right to step in or stay the proceedings at any time. This raises the issue of whether and when can the individual get the *ex relator* action or challenge the AG's discretion not to allow such an action.

Gouriet v. Union of Post Office Workers (1978) HL

Facts	Holding
○ The union of post office workers is declining to process mail that is being sent to S. Africa from the United Kingdom ○ Gouriet is a concerned citizen who requests standing of the AG who declines the *ex relator* action ○ *Issue*: Can the individual challenge the AG's decision not to grant standing?	○ There is an acceptance that such a politically charged issue should be dealt with by the AG ○ The court is concerned about allowing any individual to come to the court to challenge politically charge issues

Is *Gouriet* good law in Canada? Is there a way to challenge the AG's discretion whether to grant the *ex relator* application?

There was a trilogy of cases that arose that said, when an individual is going to be given standing to challenge a constitutional issue of government. The trilogy gives criteria on how to give an individual

standing. This was seen as liberating standing in Canada, but was a response to the fact that we had a new constitutional order. The individual had to satisfy the court of the following:

1. The individual had to have something appropriate for judicial determination;
2. The citizen had to have a genuine interest; and,
3. There was no other reasonable or effective manner to bring the issue before the court.

Findlay v. *Min. of Finance* – an individual was allowed standing, not only to challenge constitutionality, but also to challenge administrative action. This, in effect, lowered the standard of judicial review. The question to ask is, when the AG exercises its discretion, does the individual now have standing under the Findlay case to bring an action?

League for Life v. Morgantaler (1985) Man QB

Facts	Holding	Ratio
o Plaintiff was trying to get an injunction to stop an abortion clinic o AG declined to prosecute and refused to give an *ex relator*	o Kroft declines to grant any remedy, basically saying that there is no reason why 'busy-bodies' should be granted standing for such an action	o Where the citizen group has no interest different from the general public, the group is not likely to be granted standing

There are some acknowledged exceptions to the *Gouriet* principle:

1. If the individual can show interference to a public right, which also constitutes some interference with the plaintiff's own private property rights (*MacMillan Bloedel*);
2. If the individual suffers an interference with a public right and experiences a special loss as a result (*Whistler Cable*); and,
3. Suits brought by a competitor

MacMillan Bloedel v. Simpson (1996) SCC

Facts	Holding
o Protestors are having a demonstration on the road, which block Bloedel's entrance to property o Bloedel came to the court and sought an injunction to prevent the obstruction to the access-way	o Bloedel can get an injunction because his own private property rights are being infringed o Part of the order required police to supervise compliance with the injunction – those not in compliance could be charged with contempt and face criminal charges

Whistler Cable Television v. IPEC Canada (1993) BC SC

Facts	Holding
o The plaintiff brought the action against a competitor who was unlawfully operating a cable television system without a license	o There may be a tort of statutory breach upon which the action may be framed o There are six relevant criteria: 1. For whose benefit was the Act passed; 2. Was it passed in the interest of the public at large, for a particular class of persons, or for both; 3. Is the plaintiff within the classes of persons the Act was designed to benefit; 4. Were the damages suffered by the plaintiff the kind of damage the statute was intended to prevent; 5. Are the penalties prescribed in the Act adequate; and, 6. Does the Act set up a scheme designed to exclusively carry out the objects of the Act?

Interlocutory Injunctions

Jurisdiction

The power to grant an injunction comes from two sources:

1. Section 101 of the *Courts of Justice Act* – the court is empowered to grant an injunction where it appears to be just and convenient to do so; and,
2. The court's inherent jurisdiction – every court that is a superior court of record has an inherent jurisdiction

The granting of an injunction is an ancillary function of equity. Equity's greatest contribution to the common law is the creation of the trust and a fiduciary duty. The interlocutory injunction is a supportive jurisdiction of a substantive common law claim. In other words, equity assists the common law right.

Brotherhood of Maintenance of Way Employees v. CP Ltd. (1996) SCC

Facts	Holding	Ratio
o CP Rail was changing its staffing arrangements pursuant to the Canadian Labor Code o The Union was seeking an interlocutory injunction stopping CP Rail from putting in the system o The substantive issue is litigable within a federal board, yet the party come to the provincial superior court o The action would never come to that court	o There is jurisdiction to grant the interlocutory injunction o A court has jurisdiction to grant an injunction where there is a justiciable right, wherever that right may fall to be determined	o A court has the jurisdiction to grant an injunction where there is a justiciable right, wherever that right may fall to be determined

The original justification for granting an interlocutory injunction was the maintenance of the status quo between the parties. The question became, how do you determine the status quo? The contemporary justification for the interlocutory injunction is to favor an order that is going to preserve rights, but more importantly minimize the irreparable harm that will be experienced by the parties. When you focus upon the notion of irreparable harm it means that you should see great efforts and attention spent on the concept.

Different Models

Classic Approach

Under the classic model, the plaintiff must establish a strong *prima facie* case – this is described as a threshold test. The plaintiff must establish that a substantive right is being infringed by leading evidence in support. There are two components to this:

1. Bring the substantive claim; and,
2. Lead evidence to show a breach of the substantive right

Once the accessibility threshold is crossed, the plaintiff would then move to show irreparable harm would occur without the injunction. Finally, the plaintiff would move to the balance of convenience – you would weigh up the detriment to the plaintiff if not granted as against the detriment to the defendant if given the injunction.

This classical model existed for some time, but it has a number of problems:

1. The remedy was abused – parties used it as a preliminary trial of the merits;
2. Courts were ill equipped to handle increasing volume of litigation;
3. New situations demanded new solution which were more than maintenance of the status quo; and,

4. Changing relationship between law and equity where equity asserted more substantive rights.

As a result of these problems with the classical model a more modern approach has been developed.

Modern Approach – American Cyanamid

American Cyanamid v. Ethicon (1975) HL

Facts	Holding	Ratio
○ The appellants produced an absorbable suture ○ Ethicon was in the business of producing a new suture ○ AC sought an injunction to enjoin Ehticon from producing the suture claiming patent breach ○ At trial, the judge found that AC had proved a *prima facie* case and the balance of convenience lay with them ○ On appeal, the court did not find it necessary to go into questions as to the validity of the patent – based on the affidavits there was no infringement	○ The granting of an injunction should not be based on a *prima facie* case, but instead that there is a serious issue to be tried or a good arguable case, one which is not frivolous or vexatious – it should not be assumed that there is a decision on the merits ○ If the plaintiff can show that they will suffer irreparable harm and the defendant cannot show a competing claim, then the injunction will be granted ○ If the defendant has a competing claim, then you move to the balance of convenience (strict approach)	○ The judge is enjoined upon an application for an interlocutory injunction to direct his attention to the balance of convenience as soon as he has satisfied himself that there is a serious question to be tried ○ The judge ought to consider: 1. Serious issue to be tried; 2. Irreparable harm; and, 3. Balance of Convenience

NWL v. Woods (1979) HL

Facts	Holding
○ A trade union was refusing to unload the applicant's ship ○ The union was asserting that the ship was flying a flag of convenience ○ The injunction application was based on the Trade Union Act ○ It was unlikely that the ship would ever be back	○ When the case is despositive of the dispute, it is justifiable to enter into merit adjudication ○ The injunction was declined because it was 'almost certain' that the trade union would have a defence, establishing its right to black the ship pursuant to the legislation

Alternative Approaches

Yule v. Atlantic Pizza Delight (1977) ON HC

Facts	Holding
○ Yule is selling Atlantic Pizza franchises in Ontario ○ The defendants were the exclusive agents to put the franchises in Ontario ○ The plaintiff argues that within the contract you can find a stipulation saying that while the defendant cannot be forced to supply, the plaintiff can prevent the defendant from engaging those services with anybody else	○ There are three different tests in deciding whether to grant an interlocutory injunction: (1) Multi-requisite test; (2) American Cyanamid test; and, (3) Multi-factor test ○ The multi-factor test weighs a number of elements against each other: 1. If plaintiff's action does not succeed at trial, can s/he pay damages? 2. Is the order necessary to maintain the status quo? 3. Is there a strong prima facie case? 4. Will the plaintiff suffer irreparable harm? 5. Balance of convenience 6. Defendant's interest merits equal consideration ○ The court applied the American Cyanamid test because of the closeness of the harm between the parties

Irreparable Harm

How does a court conceptualize the notions of irreparable harm? The requirement of irreparable harm has a number of possible meanings and may be stated as follows:

1. Damage to person or property that is impossible to repair;
2. Damage to an interest that is not easily susceptible to economic measurement;
3. A legal wrong that causes no financial or economic harm;
4. Damages are ascertainable but unlikely to be recovered;
5. A threat to an interest that is so important that a substitutionary remedy (damages) is inappropriate;

Mott-Trille v. Steed (1996) ON Gen. Div.

Facts	Holding
○ The applicant is facing discipline proceedings before the LSUC, he is also a Jehovah's Witness who is facing proceedings in the church ○ The applicant wants to appeal before the LSUC, which will require him to have his witnesses there ○ The church of the JW has its own process that can lead to dispelling (other members of the church are not to have contact) ○ Applicant seeks an interlocutory injunction application stopping the JW disciplinary proceeding	○ What is the irreparable harm? ○ The disability to defend oneself before the Law Society of Upper Canada may be considered an irreparable harm

David Hunt Farms Ltd. v. Canada (1994) FCA

Facts	Holding
○ A farmer in Alberta had cows imported from the UK on his farm ○ The Ministry decided that it wanted to have UK imported cattle destroyed ○ The applicant wants an interlocutory injunction against the government stopping the cattle from being destroyed ○ There was a provision to allow compensation for the destroyed cattle - $2000 per cow instead of the real $7500 value ○ The government argued that a private group was promising money – but the applicant argues that it is not guaranteed	○ The Court grants a tentative interlocutory injunction based a judicial review application in Nova Scotia ○ The Court makes as part of the order the notion that the judicial review application has to be expedited

Balance of Convenience

There are a couple of factors that come into play when looking at the balance of convenience:

1. The delay in the plaintiff pursuing the interlocutory injunction application – the delay by the plaintiff can almost constitute evidence as saying that the irreparable harm cannot be too great because such a long time has been waited. Also, if you delay as an applicant it means that the defendant may have changed their position to a far greater extent than they would have done if the interlocutory injunction application had been brought earlier;
2. The undertaking – an applicant is required to give an undertaking in damages. An undertaking is simply a promise by one individual to say that s/he will bear the loss for the wrongful granting of the interlocutory injunction application. In this context, the courts are prepared to look at the strength or weight of the undertaking. It is great for a person to promise undertaking, but does the individual have the resources to honour the promise?

Ex Parte Applications

An *ex parte* application is one that is given without notice to the other side. The jurisdiction for the prescription of an *ex parte* injunction is contained in the Ontario Rules 40.01 and 40.02. An *ex parte* interlocutory injunction is good for only 10 days, the idea being that the plaintiff will have to return to the court for a motion for continuation, at which point the defendant should have been given fair notice and an opportunity to defend. Such an injunction is only given in the most extraordinary of circumstances. The key problem for the court is that there is only one party and a coercive order may be made with the information provided by that one party.

The plaintiff has an obligation to provide *full and frank* disclosure of all the information. A full and frank disclosure includes:

1. Disclosure of material facts;
2. The applicant must make proper inquiries before the application is made;
3. The extent of these inquiries must depend on all the circumstances of the case;
4. If material non-disclosure is proven then the court should ensure that the applicant is deprived of any advantage he or she may have derived from the wrongfully obtained injunction; and,
5. Not every omission to disclose will automatically result in the discharge of the injunction

It is important to recall that as a court officer, the lawyer has a duty to make full and frank disclosure to the court – this is not only a duty of the client, but also of the lawyer.

Undertakings

The court may request the plaintiff to provide the court with an undertaking at the end of the motion. The purpose of the undertaking is to provide the court with an assessment of the extent of damages suffered. The undertaking does not create any contractual rights as between the plaintiff and the defendant. The undertaking should be meaningful – supportable by the idea that the plaintiff does have the means to pay. In terms of actions brought by the Crown or the municipality, it is not normal to require an undertaking unless the Crown is pursuing its own proprietary rights. It is also possible to ask the plaintiff with a fortification undertaking, such as a bond that would be good for damages. Note also, it is possible that the court will ask the defendant to give an undertaking in lieu of granting the plaintiff an interlocutory injunction.

There can be special circumstances such that the defendant will not get damages even though the interlocutory injunction was wrongly granted. Such circumstances include where a public agency is trying to enforce a public interest or a municipality enforcing a by-law or where the defendant succeeds on a technicality.

Various Applications of the Interlocutory Injunction

Interlocutory Injunctions in Constitutional Litigation

RJR MacDonald v. AG Canada (1994) SCC

Facts	Holding
○ The federal government had enacted legislation which allowed regulations to be passed restricting the advertising of tobacco products ○ The constitutionality of the legislation was challenged ○ *Trial* – this was a violation of freedom of expression ○ *Appeal* – legislation was constitutionally valid	○ *Issue*: Having got success in the CA, the AG is wanting to enforce the regulations – RJR MacDonald wants a stay in the enforcement of the legislation ○ Do the tobacco companies have to comply with regulations pending a decision? ○ The test for granting a stay of an injunction pending an action: **1. Serious constitutional issue to be determined** • Don't want to determine complex factual and legal questions on limited evidence • Impractical to take a section 1 analysis at this stage • Risk that tentative determination on merits would be made without AG's being notified • Two exceptions to low threshold test: (1) where the interlocutory injunction was going to be determinative of the issue between the parties; and, (2) where the issue raises a simple question of law alone **2. Compliance with statute will cause irreparable harm** • Only look at irreparable harm to the applicant. Must consider the nature of the harm and not its magnitude. In Charter litigation because there is not a developed jurisprudence on section 24 remedies, it is appropriate to assume that the financial damage which will be suffered by the applicant following refusal of relief, even though capable of quantification, constituted irreparable harm **3. Balance of convenience, taking into account the public interest** • *Latent Public Interest* – the public interest in having laws enforced and balanced against having the Charter enforced • *Specific Public Interest* – the policy behind the specifically impugned legislation, what is the public policy behind it? • *Specific Individual Applicant's Public Interest* – consider why the particular applicant should/should not be subject to enforcement over others • *Public Interest as to Remedy* – there is a choice for the court: it can order a suspension of the legislation or it can give an exemption, which is peculiar only to the applicant before the court • Public interest is a special factor that must be considered. However, an applicant can also raise public interest in upholding constitutional protections, but must show that harm is to public interest and not merely self-interest. The public interest on the enforcing authority is easier than the private applicant. If public authority is charged with enforcement obligations, and impugned legislation is for promotion or protection of public, that is sufficient to prove irreparable harm ○ The applicant can show that there is a serious issue to be tried ○ The applicant can show irreparable harm – they would have to change their production method and incur costs in making the transition. However, this harm would not involve economic hardship to the applicant – they could absorb those costs ○ The applicant conceded that there was a public interest claim in health, but it could not come up with a public interest claim that it would be burdened ○ The stay was not granted and the regulations enforced

Note: On the substantive issue, RJR won and the government did have to go back and comply.

Interlocutory Mandatory Injunctions

A mandatory injunction requires the individual to take affirmative steps.

Films Rover International v. Cannon Film Sales

Facts	Holding
○ Films are required to be deposited to the plaintiff by the defendant and he stops doing so	○ A number of criteria that ought to be applied when considering whether to grant the interlocutory mandatory injunction: 1. Will the order entail of the defendant a greater waste of resources, either time or money, than merely being delayed in commencing some thing he or she would otherwise be entitled to do? 2. Will the granting of the relief make it unlikely that the plaintiff will return to bring the matter on for trial? Is the interlocutory proceeding going to give total relief? 3. Can the order be expressed with sufficient clarity so that the defendant and any subsequent court, knows what is expected of the defendant to be in compliance? 4. Are there other due process concerns about the use of coercive and intrusive power to achieve the particular end without the protection of a full trial? 5. Has the defendant increased the impugned activities after being informed of the plaintiff's request for judicial assistance?

Restrictive Covenants – Restraint of Trade

What we are looking at is covenants in agreements where the party agrees to forego undertaking a particular activity. The common law basically says that a restraint of trade clause has to be valid on the grounds of public policy, which is concerned with the reasonableness of the clause.

Jiffy Foods Ltd. v. Chomski (1973) ON CA

Facts	Holding	Ratio
○ Former employee goes into competition with employer and begins to solicit business based on customer contacts etc., ○ The employment contract contained a non-disclosure clause	○ *Issue*: Is the restrictive covenant is enforceable? ○ A valid covenant must meet three considerations: 1. It must be reasonable; 2. It must be founded on good consideration; and, 3. It must not be too vague	○ The party supporting a covenant in restraint of trade must show that it goes no further than is reasonably necessary to protect the interest of the covenantee ○ The onus is on the employer to remain vigilant

Where there is a restraint of trade clause there is a high likelihood that the plaintiff will be able to show irreparable harm. However, realizing that the legal issue is going to be based on the reasonableness of the restraint of trade clause, there is a propensity for courts to undertake a determination of the merits. How much more information is the court going to need in order to determine whether or not the clause is reasonable?

Towers, Perrin, Forster & Crosby v. Cantin (1999) ON SC

Facts	Holding	Ratio
○ A particular member of the Towers Group built up a Property and Casualty Insurance practice and	○ There are three accessibility thresholds: 1. A good arguable case; 2. A strong prima facie case; and,	○ Where you have a restraint clause you act at your peril in not seeking immediately

was recruited by KPMG o Towers wants to enforce a restraint of trade clause o Towers also alleges that KPMG are interfering with economic interests and that there has been a breach of fiduciary duty	3. A clear breach of the covenant o Any one of these standards may be applied o Turning to irreparable harm, the court refers to *RJR MacDonald* and concludes loss of flow of business and goodwill is irreparable harm o Turning to the balance of convenience, if the injunction is going to deprive the defendant from earning a livelihood, the court will apply a greater scrutiny when determining whether to order it	an interlocutory injunction to enforce it

Lansing Linde v. Kerr (1991) Eng CA

Facts	Holding
o Not Done	o The court will be reluctant to give an interlocutory injunction during the period of restraint where a large part of it had run its course

Injunctions and Intellectual Property

Patent Law

Once the patent is registered there is a presumption of the validity of that patent right. There is a high success rate amongst defendants who challenge the registration. The presumption of the validity of the patent may not be worth as much as one would presume. This has meant that the majority of the court's approach with regards to the patent will first apply the *American Cyanamid* test. The court will then say that where the court has previously upheld the patent, it is likely that the injunction will be granted. Where the defendant has provided no evidence to dispute validity, the presumption in the Act might be put aside and the injunction granted. However, where the plaintiff brings an action and shows evidence of the infringement, but the defendant challenges the patent and provides some evidence of invalidity, the court will be reluctant to grant the injunction.

Trade-Mark Law

The dominant model is the *American Cyanamid* model, but many of the trade-mark infringements for the common law action of passing off will start as Anton Pillar orders (where the threshold level is higher). The question is whether the motion is brought *ex parte* or not.

Copyright Law

The standard is *American Cyanamid*, but many of the copyright matters may start off as Anton Pillar orders. The *Copyright Act* was amended to include a 'wide injunction', which allows a plaintiff greater rights to seize infringing copyright or to make claims for infringing copyright than what was initially sought after.

Confidential Information

There are two general categories:

1. Information of an essentially private character and where privacy interest of individual is permanent over public interest in expression, court will grant injunction preventing public disclosure; and,

2. Included is information involving commercial and trade secrets – injunction usually granted (*American Cyanamid* applied).

The right to confidentiality has been described as a *sui generis* right. This has meant that information that would have been caught under the privacy right (if there were such a thing), would be caught under these other areas. Communications communicated in confidence will be protected and an injunction granted to prevent further dissemination. The courts favor the *American Cyanamid* approach in both of the above-noted situations.

Injunctions in Labour Disputes

Where the court grants an injunction you can sense that this is a heavily politically charged area. One of the problems is that the court is dealing with a secondary issue between the parties – it is not in any way connected to the collapsing bargaining process between the parties. The injunction merely prevents picketing or a strike action, which are all secondary effects of the bargaining process. The grant of the injunction typically has a demoralizing effect on the employees and trade unions and conversely tends to strengthen the employer. There is a concern about the public perception of courts being anti-labour. There are few judges that have labor law experience and it is partly because of this fact that provinces have set up labour tribunals. The injunction will never be expositive of the labour issue.

It has been common for legislatures to restrict the ability of courts to grant labour injunctions. Consider *Courts of Justice Act* section 102. Subsection 102(1) provides:

> (1) In this section, "labour dispute" means a dispute or difference concerning terms, tenure or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee

The injunction is typically granted where the police are not able to control the picketing (i.e., breach of peace, destruction of property etc.,) The important thing to note is that the provision does not cover secondary picketing. Thus, where the employer seeks to bring pressure by picketing outside of related businesses (suppliers etc.,) the exception does not apply. Section 102 appears to have an expedited process:

1. A change in the times of affidavits – they cannot have hearsay evidence;
2. There is an ability to have the deponents examined and cross-examined in the interlocutory process; and,
3. There is a right to appeal against the granting of the interlocutory injunction

The Labour Board has the power to grant an injunction. However, once you get up to the potential for violence etc., you can go to the court. With regards to secondary picketing one can seek the court's powers.

A key provision is found at subsection 3:

> (3) In a motion or proceeding for an injunction to restrain a person from an act in connection with a labor dispute, the court must be satisfied that reasonable efforts to obtain police assistance, protection and action to prevent or remove any alleged danger of damage to property, injury to persons, obstruction of or interference with lawful entry or exit from the premises in question or breach of the peace have been unsuccessful

CP Ltd. v. Brotherhood of Maintenance Way Employees (1996) SCC

Facts	Holding
○ See Above	○ There is an inherent jurisdiction in the court to grant interlocutory relief

Injunctions and Defamation

The plaintiff's right has to be balanced against the competing right of freedom of expression. In general, freedom of expression is going to be deemed the paramount right. Thus, it is very difficult to get an interlocutory injunction to prevent the publication of material. The court is aware that the issuing of an injunction in these cases involves a violation of press freedom. Some courts have suggested that a much higher accessibility threshold is required

Canadian Metal Co. Ltd. v. CBC (1974) ON HC

Facts	Holding
○ The radio program has yet to air ○ The program will air a story about alleged air pollution by the plaintiff	○ There are three classic defenses: 1. Justification – showing truth; 2. Fair Comment – opinion; and, 3. Qualified Privilege – areas where defendant can assert entitlement ○ Note that there is also an absolute privilege – the House can defame whoever they like ○ The injunction will not be granted where the defendant is seeking fair comment ○ The plaintiff will only generally get damages if it is fair comment

Canadian Tire v. Desmond (1972) ON Gen Div

Facts	Holding
○ Desmond buys a radio from Canadian Tire, it does not work and he wants his money back ○ Manager refused and Desmond sat outside the store with a sign "Canadian Tire Cheated Me, Will They Cheat You?"	○ The court granted the injunction ○ The customer had no grounds to say that he had been cheated, cheated means to defraud, which requires particular intent

Gagging Writ

The proceedings have commenced and the notion is the publication of the proceedings will be detrimental to a fair trial of the action. Courts have been more inclined to give a gagging writ than an injunction.

Dagemais v. CBC (1994) SCC

Facts	Holding
○ Claim that the airing of the *Boys of St. Vincent* would be detrimental to their trial	○ A publication ban should only be ordered when: Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measure will not prevent the risk

John and Jane Doe Orders

These orders can be used against a defendant who one knows exists, but whose exact identity is unknown. For instance, you may know that there is a street vendor operating on Yonge Street, but you do not know what to call them. Consider also a situation where the tort of negligence has happened, but you do not know who the right person to sue is. An injunction can be enforced against a party even unnamed.

Once a John or Jane Doe order is granted, the individual must serve the document on the offending party and then return to the court and amend the style of cause to include that individual in the action.

Interlocutory Injunctions against Non-Named Parties

The SCC has said that all citizens are required to observe a court order for an injunction once their attention has been brought to it. In this sense, the SCC has said that the style of cause is really irrelevant as even persons unnamed are bound to observe the injunction. However, their attention must clearly be brought to the injunction. The important difference is that the action is only for the contempt of court – it does not bring the unnamed party into the action itself. As such, the offending individual does not have any right to challenge the injunction. The only real defence is to argue that there was no real notice of the injunction. This is a significant departure from normal civil procedure and is particular to Canada – it is not found elsewhere in the commonwealth or the United States.

MacMillan Bloedel held that the administration of justice is brought into disrepute if a party who has notice of the order does not obey the court order – this is an open-defiance of the court on which contempt charges will be laid.

Mareva Injunctions

In General

This is an order directing the defendant to be amenable to the court process. The order can restrain the defendant from dealing with assets outside the court's jurisdiction.

Lister v. Stubbs (1890) Eng CA

Facts	Holding	Ratio
○ The agent has been employed by the plaintiff principal to buy commodities ○ The buyer takes a bribe by the agent who takes the bribe money and buys chattels ○ The action is to recover the bribe monies from the agent	○ If a trust relationship can be established between principal and agent, the principal may be said to have an equitable interest and, therefore, an interest can be traced to the property in question ○ The agent argues that the relationship is nothing more than a simple debtor-creditor and, until judgment, there is no way to attach or arrest the assets ○ Until there is judgment there is no right to execution	○ Execution cannot be obtained prior to judgment and judgment cannot be obtained before trial

AG for Hong Kong v. Reid (1994) PC

Facts	Holding
○ A New Zealander was attracted to Hong Kong to bribe ○ The money was sent back to N.Z. to purchase vast real estate	○ A bribe taken is subject to a constructive trust at the time the bribe is payable and so the principal has the right to trace into the money

The Mareva Injunction undermines these two principles, as the court deemed the injunction appropriate under certain circumstances

Mareva Compania Naviera v. Internation Bulkcarriers SA (1975) Eng CA

Facts	Holding
○ Plaintiff enters into an offshore ship charter ○ IB enters into a sub-charter with India – the president of India deposits funds into an English bank and the defendant defaults ○ The plaintiff wants to keep the assets in England because it is afraid that once it gets judgment it will not have anybody to execute	○ Under the circumstances it is appropriate to grant this type of injunction ○ There must be a justiciable issue

Aetna Financial Services v. Feigelman (1985) SCC

Facts	Holding
○ Aetna is in the business of being a factor – a company with accounts receivable sells those to Aetna at a discount and then seeks to recover ○ Aetna has also given a debenture to Pre-Vue and pursuant to it has appointed a receiver over Pre-Vue ○ Pre-Vue claims that Aetna have been too aggressive in appointing a receiver ○ Aetna has consolidated its operations and pulled out of Manitoba and back to Toronto	○ Trial Judge gives a Mareva injunction for $997,000 ○ **Appeal**: Amount reduced to $250,000 ○ What is meant by jurisdiction in terms of removal of assets from a court's jurisdiction? ○ A number of points to consider: 1. *Lister* v. *Stubbs* should be regarded as governing principles in Canada; 2. There are some recognizable exceptions to *Lister* in Canada, such as interim relief for the preservation of assets, the prevention of fraud, the protection of court process

Following this case most common law jurisdictions in Canada have adopted a mareva injunction jurisdiction. The judgment in *Aetna* tends to provide some restraint on the mareva injunction – the Ontario decision in Shattel.

Jurisdiction

Jurisdiction has three connotations:

1. The jurisdiction of a court to award this type of injunction – 'just and convenient to do so';
2. Whether the plaintiff has to have a substantive claim within the court's jurisdiction – is the mareva injunction purely ancillary to a substantive claim?
3. Jurisdiction as it applies to the defendant's removal of assets away from the court's jurisdiction – it will make it hard to execute if nothing is left in the jurisdiction

Brotherhood of Maintenance of Way Employees v. CP Rail (1996) SCC

Facts	Holding
o The substantive action is a labor dispute heard in the Canada Labor Relations Board o Court granted injunction outside of relevant forum	o There may be a break up of substantive claim and injunctive relief o Court looked to *Channel Tunnel* and not to *Mercedez-Benz*

The Siskina (1979) HL

Facts	Holding
o Not Done	o A mareva injunction could only be given as an ancillary proceeding in relation to the main action in an English Court

Channel Tunnel v. Balfour Beatty (1993) HL

Facts	Holding
o Not Done	o As long as the right is one that would be recognized in an English court, it is appropriate to grant a mareva injunction

Mercedez-Benz v. Leidick (1995) PC

Facts	Holding
o Action brought in Monaco with Mercedez looking to freeze assets in Hong Kong	o HL rejected *Channel* and went back to *The Siskina* o The substantive claim must be brought in the same court as the mareva injunction is sought

There are English cases that talk about the dissipation of assets within a jurisdiction and will nevertheless grant a mareva injunction. If the plaintiff was giving money away or spending it in contracts that were not true exchanges in value, one might argue this is a dissipation of assets in jurisdiction.

Gateway Village Investments v. Sybra Foods (1987) BC SC

Facts	Holding
o Assets were going to be moved from BC to Alberta o The amount was small	o Injunction was granted to restrain movement on the basis that the plaintiff would be put to an unduly additional expense chasing the plaintiff in Alberta o Unless there is a great deal of money at stake, the cost of chasing a corporate defendant across Canada is, if not prohibitory, certainly inhibitory

Allan v. Jambo Holdings Ltd. (1982) Eng CA

Facts	Holding
○ The defendant operated a small aircraft that had flown into English airports ○ The plaintiff walked into the propellers of the plane and the estate brings an action ○ The only asset is the aircraft in England	○ An injunction was granted to restrain the removal of the aircraft ○ The mareva injunction is applicable in all matters, not just commercial cases

Accessibility Thresholds

The UK requires a good arguable case and serious question to be tried. In Ontario the plaintiff must show a strong *prima facie* case (R. v. Consolidated Fastfrate Transport Inc. (1995) ON CA). In *Consolidated Fastrate*, the court indicates that the Crown has to show that there is a strong prima facie case that there will be a conviction and that the fine imposed would be in excess of the assets that the Crown is seeking to remove. This is less than a criminal law burden. The BC courts have tended to lean towards the UK adoption of the *American Cyanamid* approach. In the US, there is no Mareva Injunction.

Dissipation of Assets

The English Courts have accepted that the risk of dissipation is shown where there is a real risk that has the effect of dissipating assets without reasonable excuse. This tends to indicate some level of intent – imposes an obligation on the defendant to show that there is a reason to move the assets around.

R. v. Consolidated Fastfrate Transport (1995) ON CA

Facts	Holding
○ An action was brought by the Crown to prevent the moving of assets from Ontario to the US ○ The Crown was prosecuting the company under the Criminal Code for environmental offenses with an extensive potential fine	○ *Majority*: There was a requirement to show an intent that the removal of assets was to keep the money away from the creditors ○ The plaintiff must show evidence of intent to defeat creditors and the handling of the assets was outside the normal course of business ○ *Minority*: if the effect of the removal of assets is to leave the plaintiff exposed, then that is a reason to grant the mareva injunction. The following criteria might be useful: 1. Size of judgment to be obtained; 2. Effect on the financial position of the defendant; 3. Timing of the removal of assets; 4. Whether payment to meet legitimate business debt; 5. Ability to trace through business reorganization; and, 6. Possibility of reciprocal enforcement

The BC Courts are more guided by looking at the effect as opposed to requiring some improper motive or intent. Normal course of business – is the expenditure so out of character from what has normally been done?

Mooney v. Orr (1994) BC SC

Facts	Holding
○ The plaintiff argues that he entered into an agreement with the defendant, who was known to work off-shore and move assets around the	○ *Issue*: How can you argue that you are entitled to a mareva injunction when you knew what you were getting into? ○ The plaintiff here cannot show a sudden change in business

globe for the reason of defeating its creditors ○ Plaintiff argues this is the defendant's *modus operandi*	operation, but 'normal course of business' is to be understand in general abstraction and not necessarily to the particular business

Impact on Third Parties

Once the mareva injunction is obtained, notice ought to be given to all relevant parties, such as the individual's bank. Once the bank has notice of the order, although not specifically addressed to it, it must observe the injunctive order. The bank cannot be an aider or abbeter to the order.

Z Ltd. v. A-Z and AA-LL Ltd. (1982) Eng QB

Facts	Holding
○ Bank was used in a massive fraud of $2 million ○ What did the bank have to do to comply – if they incurred costs, could they be recovered? ○ Personnel would be required to undertake the search	○ The mareva injunction operates *in rem* – operates on all the world regardless of notice (some argue he overstepped his mark on this) ○ Any cost borne out by the third party ought to be borne by the plaintiff ○ The order should specify the particular assets that are subject to the injunction

Assets that are deposited in the bank after the bank has received notice of the order are not normally covered by the mareva injunction unless the order specifically states it. *Note*: The mareva injunction does not work to affect or advance the plaintiff as a creditor against other creditors.

Extra-Territoriality

There is a notion that courts cannot make excessive claims over the jurisdiction of courts in another jurisdiction. The basis is a security by mutual destruction – the more active an Ontario court becomes in dealing with things in another jurisdiction, they expose Ontario people to the same excessive claims by another jurisdiction in Ontario. The Mareva injunction is not a claim in another jurisdiction because the order applies to the defendant. However, this may cause much more problems as against third-parties.

Derby v. Weldon (1990) Eng CA

Facts	Holding
○ Not Done	○ A third party does not have to comply with the order unless the third party, in the courts jurisdiction, is in the position to control directly the movement of the assets in the external jurisdiction

This rule becomes more complex when you are dealing with types of jurisdiction and levels of control.

Anton Piller Injunctions

Generally

Anton Piller injunctions have no power to force entry – the premise is that it instructs the defendant to permit entry. The failure to consent to entry builds a liability for contempt of court. Unlike the police executing a search warrant, the plaintiff serving the order must go away if denied entry. Ostensibly, the order is designed to say that there is a need to preserve evidence for a later subsequent trial – the evidence is likely to be destroyed without this *ex parte* order. Also, there are cases where there is a need to preserve evidence, such as documentary records, to prove the substantive cause of action. The order has become common in the protection of restraint of trade clauses – such as where client lists have been taken. The order has also been used as a supplement to the mareva injunction and is used to seize documents that may show the location of the assets.

There are a number of issues associated with the Anton Piller order:

1. Jurisdiction to grant – for some reason the courts in the UK and Canada tend to list Anton piller injunctions under rules 32.01 and 45.01 of the Rules of civil procedure. Anton piller orders are an ill fit under those rules;
2. The alternative to the courts jurisdiction is the power to do what is 'just and convenient'
3. Finally, as a function of the court's inherent jurisdiction to control its own civil procedure

Criteria for Granting the Order/Basic Requirements

The Courts have consistently upheld the view that there should be a strong prima facie case. Secondly, the damage, actual or potential, must be very serious for the applicant. Also, there must be clear and convincing evidence that the defendant has in his or her possession incriminating documents and that there is a real possibility that they may destroy such material before an *inter parte* application could be granted. The plaintiff can take this order and serve it on anybody in Canada. Those people are then added to the cause of action.

Rolex v.

Facts	Holding
o Plaintiff had got an order protecting the Rolex watch brand o The order had been served on a number of individuals o The plaintiff, in proving that particular people had violated the mark, was seeking an order against *anybody* else that they catch violating the trade-mark	o The giving of such an order would not allow a defendant to ever challenge the trade-mark o The court would grant an order against defendants who could have been included at the time the interlocutory injunction was first launched o A number of criteria should be looked at when granting an Anton Pillar order: 1. The order should not be given where there is a reasonable opportunity for the plaintiff to identify the putative defendant; 2. The order should only be granted where there is a prospect that the defendant will be added to the proceedings; 3. There is a concern for due process that contempt proceedings do not become another means of obtaining enforcement of judgments;

Three Basic Requirements

There are three basic criteria that must be met before an anton piller injunction will be ordered:

1. The plaintiff must show an extremely strong prima facie case;
2. The damage, either actual or potential, must be very serious for the applicant; and,

3. There must be clear and convincing evidence that the defendant has in his or her possession incriminating documents or property and a real possibility that they may destroy such material before an application *inter parte* could be made

Three types of evidence:
1. Focus on the ease of removal or destruction;
2. The transient nature of the defendant's business; and,
3. Prior experience

In general, the vendors in the intellectual property infringement cases are well organized. Although these may seem to be rather impressive orders it is a well-organized infringement on the other side. On the other hand, there have been examples where the orders were carried out excessively, such as where a trade-mark has not, in fact, been infringed.

There is also a requirement that the plaintiff give an undertaking in damages. The order should describe exactly what can be taken – there ought to be some specificity. You cannot have a rolling order on a residential premises – you must get a site-specific order in a residential place.

Considering Safeguards

One of the big differences with anton piller orders is the attention paid to service requirements as a safeguard. The courts on these have taken a great deal of effort:
1. The order must be executed by a lawyer who must explain it;
2. The defendant must be given the opportunity to consult a solicitor and seek to have the order discharged; and
3. The plaintiff cannot use force to gain entry.

What do you do if you are the defendant's lawyer? The client should observe the order and the lawyer should take the opportunity to seek to have the order discharged. Most challenges are based on the notion that the plaintiff has not provided full and frank disclosure. Note: The court is willing to make an adverse inference upon the defendant that there must have been something there where entry is refused.

Interrogatories and Self-Incrimination

The issue of interrogatories is to find out the location of the infringing material. Once you obtain this information you might go to the retailer in order to find out who the wholesaler is so that you may add that party to the order. The UK experience was that as soon as some of these interrogatories came out in answering these questions they might have exposed themselves to criminal prosecution and the right against self-incrimination has been violated. Based on *Rank Film* the UK courts held that the defendant cannot be ordered to answer interrogatories that would incriminate. As a result, the legislature abrogated the cours case with respect to intellectual property and passing-off disputes.

In New Zealand, the court said that they could force the individual to answer the interrogatories, but seal the responses from the criminal courts.

In Canada, the provincial and federal evidence acts create a statutory privilege that compels the witness to answer interrogatories, but it provides a privilege against any subsequent use of the answers in criminal proceedings brought against the defendant. The difficulty with these provisions is that they likely do not apply to an anton piller order or mareva injunctions, but instead a witness in a proceedings. The legislation was drafted with the witness in the witness box in mind. If the evidence act provisions do not prevail, where does that leave Canada?

Extra-Territoriality

Cook Industries (Eng)

Facts	Holding
o English courts looking to enforce against a person in Paris	o As long as the court is exercising its *in personem* jurisdiction against a person it can execute against that individual

Charter Applications

There have been some issues in terms of charter applications in relation to search and seizure rights.

Ontario Realty Corp. v. Gabriele & Sons Ltd. (2002) ON CA

Facts	Holding
o There was an allegation that there was an excess of authority to grant a civil search warrant pursuant to the Courts of Justice Act	o Seen to be exercise of inherent jurisdiction and also between private actors not subject to charter scrutiny, nor a search warrant o If Charter applies, the alleged violation of a section 8 unreasonable search in *Hunter v. Southam Inc. (1984) SCC* – so long as the order is granted by a prior judicial authorization from an impartial adjudicator acting judicially by reference to objective standards o There appear to be no successful charter challenge to an anton piller order

There is, in terms of getting access or requiring access to a buyer's customers, an old equitable bill called a 'bill of discovery'. This is a process by which the plaintiff can get discovery of third parties to a proceeding. The criteria is:

1. There has to be a bona fide claim by the plaintiff;
2. The order cannot be given against a mere witness or disinterested by-stander; and,
3. This is the only practical means by which the plaintiff can gain access to that information.

Anti-Suit Injunctions

In General

Suppose a plaintiff has suffered an injury in Michigan, but has incurred all of his or her medical treatment recuperation in Ontario. All of the evidence is in Ontario. In that situation the plaintiff might say that s/he wants to bring the action in Michigan. The plaintiff must show that there is a real and substantial connection to the jurisdiction and apply a *forum non conveniens* rule and show that the desired jurisdiction is the *most appropriate* one for the action. The real and substantial connection test looks at the wider and more general issues – the courts want to be wary of excessive reach.

The anti-suit injunction deals with the situation where a plaintiff has commenced an action in another jurisdiction and the defendant wants to prevent it from being pursued again in another jurisdiction. A court to prevent a litigant from pursuing litigation in another jurisdiction issues it. If an anti-suit injunction is given it is given as a permanent remedy in an interlocutory environment.

The anti-suit injunction is linked to the conflicts of laws doctrine of *forum non conveniens*. Under the latter, a court will issue a stay of the proceedings before it if there is a better and more convenient forum in which the plaintiff's litigation should be brought.

Amchem v. BC W.C.B. (1993) SCC

Facts	Holding
○ The plaintiffs have all been injured by asbestos ○ The manufacturers are a number of American companies with head offices in various parts of the US ○ The plaintiffs decide that they want to go into the Texas courts seeking compensation against the US companies – launched there because big damages awards are usually granted there ○ Amchem, one of the defendants in the substantive causes of actions, seek an anti-suit injunction arguing that the plaintiffs are from B.C. and the injuries occurred in B.C. ○ The issue of *forum non conveniens* is for the domestic court to decide – the Texas court is not concerned with *forum non conveniens*	○ *Lower Courts* – prepared to grant the injunction ○ **SCC** – action allowed to proceed in Texas ○ Where a foreign court does not recognize basic requirements for *forum non conveniens*, and serious injustice will be occasioned as a result of failure of a foreign court to decline jurisdiction, the domestic court must consider the granting of an anti-suit injunction ○ Criteria for determining when an anti-suit injunction may be granted: 1. Domestic court should not entertain application if no foreign proceeding is pending; 2. If a foreign court fails to stay proceedings, then the domestic court can consider anti-suit injunction, but only if it is alleged that it is the more appropriate forum. If this is alleged, domestic court must apply its own *forum non conveniens* doctrine: i. Is the domestic court the natural forum (real and substantial connection to the dispute [see *Muscutt v. Courcelles (2002) ON CA]);* ii. Did the foreign court apply notions of *forum non conveniens* applicable in Canada when it refused the stay of proceedings? ○ If the answer is yes to (i) and no to (ii), the domestic court must then ask: would it be an injustice to the defendant if the plaintiff is allowed to pursue a foreign action and would it be an injustice to the plaintiff is s/he will be deprived of some advantage in the foreign court which it would be unfair to deprive the plaintiff of?

Generally, the court has two instruments in the selection process of an appropriate form for the litigation: the say of proceedings or the anti-suit injunction. The choice of the appropriate forum is left to the domestic court to decide in the former. In the latter, the domestic court is making a determination as to the appropriateness of the foreign court to hear the action. This is an issue of comity between nations.

Comity: In the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which the nation allows within is territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws (Per LaForest J. *Morguard Investments*)

The lower courts have made an error in their understanding of what the Texas courts did. Although, at the time, Texas did not operate a *forum non conveniens* rule, it did have rules to look at as to whether it should pursue jurisdiction. Texas was entitled to have those rules respected. The lower courts also erred in saying that BC was the most appropriate forum for the dispute – there were a number of appropriate forums where the dispute could be heard.

Hudon v. Geos Language Corp. (1997) ON CA

Facts	Holding
○ The plaintiff in the substantive action is a person who entered into a contract to teach ESL in Japan ○ Under the contract the Geos Language services were to get insurance coverage for injury – if matters were in dispute the law of Japan would apply ○ The plaintiff goes to Japan and decides to take a trip to China and is injured in an accident ○ The plaintiff comes back to Ontario to recuperate and incurs expenditures in Ontario ○ The plaintiff commences the action for a number of things ○ Geos argues that Ontario is not the appropriate forum – it should be heard in Japan, or the very least an interpretation of the contract in Japanese court ○ Hudon seeks an anti-suit injunction preventing Geos from going to the Japanese courts	○ It would be inconvenient and, therefore, unfair for the plaintiff to have to submit to Japan given the particular circumstances ○ On the other hand, Geos has a valid claim that says that the Ontario court will be required to construct the contract as per Japanese laws ○ As an issue of comity, the Ontario court should defer until the plaintiff had argued that the Japanese court ought not to give the declaration ○ The trial court 'jumped the gun' and should have let the Japanese court at least have its say

Forum Conveniens

The following are some criteria that govern the court's discretion:

- Location where the contract in dispute was signed or where the wrong was committed
- Applicable law of the contract
- Location in which the majority of witnesses reside
- Location of key witnesses
- Location where the bulk of the evidence will come from
- Jurisdiction in which the factual matters arose
- Residence or place of business of the parties

Specific Performance of Personal Service Contracts

Traditional Approach

Under the traditional approach to personal service contracts there are four general issues of concern:

1. Lack of mutuality – one party cannot compel the other to actually perform the service promised;
2. Difficulty with court supervision;
3. Perception that enforcement of contract was tantamount to involuntary servitude; and,
4. Resistance to forcing parties back into a relationship where trust and confidence had been lost.

If you have a situation where there has to be confidence between the parties, but their actions demonstrate that they cannot work together, is the best thing to do force them into a position where they have to work together? What the court does not do through the front door, it might do through the back door. For instance, by granting an injunction the court might order the individual to stop performing for anyone else in the event that specific performance cannot be obtained.

Modern Approach

The start of the modern approach comes in recent cases:

Hill v. CA Parsons & Co (1972) Eng CA

Facts	Holding	Ratio
○ The employee is seeking a specific performance on the employment contract ○ The employer has dismissed the employee because the employer has a 'closed-union shop' ○ This employee does not belong to that union ○ Employee starts action for specific performance of the contract	○ The court looks at the underlying basis of the contract ○ Legislation was coming in 6 months that would take away the closed-shop provision ○ The court granted an injunction to continue the employment knowing that in six months time the employee can engage in a legislative dispute	○ The court is prepared to look at the context of the dispute

The court talks about a sufficiency of confidence test in *Hill* v. *CA Parsons*. The court is saying that if the relationship is one where there is a high level of confidence, and then this would be a major reason to decline specific performance. The court would look at the nature of the work to be done and the likely effect on the employer and his or her operations by granting the remedy.

While we are saying that the more modern approach is accommodating or granting specific performance, none of this undermines the right of the employer to terminate the employment with reasonable notice. The right to give reasonable notice is always the right of the employer. Some things have changed. For instance, the SCC has recognized that work has an integral part in maintaining a person's dignity. Where a person is being terminated from employment, it is probably easier to secure work if you are employed and looking, although about to be terminated, than unemployed.

National Ballet v. Glasco (2000) ON SCJ

Facts	Holding	Ratio
○ Glasco is employed by the national ballet, but a new artistic director is	○ The standard of review is one of reasonableness – the arbitrator	○ The professionalism of the parties may be held as enough to get over

employed, Kudelka, who would not put Glasco in any starring role o Glasco claims that her treatment is a violation of their agreement o The parties went to arbitration o The arbitrator held that specific performance would be available o National Ballet argued that specific performance could not be available in this type of setting o Case taken to judicial review	must make a correct decisions/assessment of the law o National Ballet argued that this was a relationship requiring confidence between the artistic director and the dancer o Justice held that specific performance can still be granted although confidence is an issue – professionalism of the parties would see to it that they would carry through with the order	any insufficiency of confidence o Specific performance is available for the contract of personal service

Special Circumstances Test

The context in which the action arises is very important to consider. As against the sufficiency of confidence test, which came down in *Hill* and *Glasco*, some courts have come down with the special circumstances test. A characteristic of these types of contracts is that the employer has failed to adhere to some specific procedural rights in terms of the termination of the contract. This occurs most often in the context of an individual in office and re-instatement.

McCaw v. United Church of Canada (1991) ON CA – An ordained priest seeks re-instatement because the United Church had failed to adhere to its processes by which it terminates the priest's employment

Shepherd v. Colchester Regional Hospital (1991) NS SC

Facts	Holding
o A doctor has had his hospital privileges withdrawn because he did not take a competency test that the hospital insisted upon, but had no right to demand the particular test	o The hospital must have the right to demand a particular requirement before terminating based on the failure to adhere to the requirement

Knight v. Indian Head School Division (1990) SCC

Facts	Holding
o Not Done	o Even appointments of pleasure require some procedural due process in the termination of the contract

Kopij v. Metro Toronto (1996)) ON CA

Facts	Holding
o Metro Toronto has failed to give appropriate process to a person o This is a situation where the court could order re-instatement if the person requested it	o The process of due process and re-instatement has been extended to an office holder of pleasure

More recently there has been a willingness of courts to grant re-instatement relief.

Lumley v. Wagner

Facts	Holding
o The defendant undertook to sing for the plaintiff for a period of three months two nights per week	o The court prevents the performer from performing the same services for anybody else

○ There was a provision in the contract that the singer would not perform for anybody else ○ It is uncovered that the singer might undertake to sing for others ○ Plaintiff tries to stop this from happening	○ The court will enforce a negative stipulations, but will not force specific performance in an indirect way ○ The defendant must have alternative means of support other than being forced back into the plaintiff's employment

Warner Bros. v. Nelson (1937) KB

Facts	Holding	Ratio
○ Betty Davis is contracted to Warner to perform films for them ○ Davis was a junior star and now wants to be able to get more film opportunities and command a higher rate ○ Davis goes to the UK – Warner seeks an injunction preventing her from working for anybody else	○ If there cannot be specific performance through the front door, the effect of the order cannot be to render the defendant idle	○ What alternatives are at the defendant's disposal to earn a living other than being effectively compelled into performing for the plaintiff?

The *Warner Bros.* threshold appears to be very low. For instance, if Betty Davis can pick up a job as a waitress then that is a satisfactory alternative – she just cannot do work as an actress.

Detroit Football v. Dublinski (1955) ON HC

Facts	Holding	Ratio
○ Dublinski does not want to play for Detroit – instead he wants to leave the NFL and play for the CFL Argos ○ Detroit seeks an injunction to prevent	○ In order to get this injunction the plaintiff must show some interest in restraint other than the mere enforcement of its own contract ○ Must show that the departure will be adverse to some other interest as well	○ The plaintiff must be able to show an interest in restraining the defendant other than merely seeking to coerce the defendant to honor the contract. Such an interest could be enjoining a competitor organization in direct competition with the plaintiff

Specific Performance in Land Contracts

Up until approximately two years you would have seen in texts that specific performance was given as routine, in preference over damages, in instances of the sale of land. The basis of this is that land was considered unique – land could not be duplicated or replicated by another. This notion may have some basis in the United Kingdom, which is land-locked and has a high population. However, this does not have any particular persuasion in North America. Historically, when these rules were being set there is an argument to say that accompanying the land there were other types of entitlements, such as voting rights etc., and those rights/entitlements were being protected by the specific performance decree.

Semelhago v. Paramadevan (1996) SCC

Facts	Holding	Ratio
○ Not Done	○ Real estate is not as unique as it used to be – it appears to be mass produced and divided	○ There must be some fair, real and substantial justification for specific performance

The important thing to note is that it does away with the requirement that the plaintiff has to mitigate his/her loss. Under specific performance one must be ready, willing, and able to perform. However, you cannot be ready, willing, and able and be expected to mitigate at the same time. By diminishing the obligation to mitigate, you are shifting all the risk of the marketplace on the breaching party. If we are talking about months or years before we get a resolution, a lot can happen in terms of real property value. Under this 'fair, real and substantial' justification test you must show that this property is necessary and that you cannot find any real viable alternative.

John Dodge Holdings v. 805062 Ontario (2001) ON Gen Div

Facts	Holding	Ratio
○ Plaintiff is seeking specific performance of land held by the defendant, who is a subsidiary of Magna International ○ The plaintiff wants the land to build a hotel on – the land was attractive because it was close to their existing hotel, it was close to Canada's Wonderland, and it was opposite a retail development that was to take place ○ The original Magna plan was to subdivide – Magna learned that it could satisfy its requirements without the sale	○ What does the plaintiff have to show? ○ Uniqueness is not to be equated with singularity – the property has a quality that makes it especially suitable for the proposed use that cannot be reasonably duplicated ○ Uniqueness has both a subjective and objective aspect – the subjective aspect is less pronounced in commercial transactions and more significant in residential transactions. The subjective aspect should be examined from the plaintiff's point of view at the time of contracting ○ The onus of proof is on the plaintiff seeking the remedy, yet the plaintiff does not have to prove and negative and demonstrate the complete absence of comparable properties	○ Uniqueness is not to be equated with singularity ○ Uniqueness has both a subjective and objective aspect ○ Uniqueness is to be determined at the time of breach ○ The onus is on the plaintiff

Types of Inadequacy of Damages in Land Contracts

Domowicz v. Orsa Investments (1993) ON Gen Div

Facts	Holding
○ The plaintiff is the purchaser of the premises – a lawyer in the business of purchasing apartment buildings in Toronto, doing renovations, increasing the rent, and then selling off the complex ○ The plaintiff initially gets summary judgment for specific performance – this is litigated	○ A right to specific performance removes the obligation to mitigate – this has an impact on the damage assessment ○ There was no right to specific performance in this case and the damage assessment should be right back to the date of breach ○ The argument is that there was a fair, real and substantial justification for arguing for specific performance ○ There are a number of criteria to determine at what point damages are going to be quantified 1. Particular physical characteristics of the property – classical uniqueness criteria; 2. Particular transactional characteristics of the property – commercial uniqueness; 3. Personal or subjective attributes of the plaintiff in wishing to purchase the particular property – consumer surplus arguments

This case begins to provide some criteria to determine what constitutes inadequacy of damages to support specific performance. There had been prior to this decision a number of decisions holding that where property is being held for investment purposes only, damages should be had as an adequate remedy.

The Interest in Land

In all the cases there has been an outright sale to the purchaser and the purchaser is seeking relief. Note: It does not have to be a freehold interest

Verrall v. Great Yarmouth Borough (1981) Eng CA

Facts	Holding
○ There was a license of a community hall ○ Verrall was a member of the National Front, who organized a general meeting ○ Politically motivated, the National Front was going to be denied the operation of their license of the community hall	○ Court affirmed the granting of specific performance over a short-term leasehold entrance ○ This case was loaded with transactional problems because of the nature of the political party – they could not find any place else on such short notice

The court can give a specific performance decree for land that is held in a foreign jurisdiction – there is no way that the court can enforce the decree, other than the contempt of court powers. The arguments for uniqueness flow from the purchaser. Should a vendor ever get specific performance? A vendor can never make a claim that damages are an inadequate remedy – in the event of failure or breach, the vendor simply sells and proceeds based on the difference in purchase price.

Mutuality – if the remedy could be granted to the purchaser, then mutuality requires that it be granted to the vendor. If a purchaser can get specific performance, then a vendor ought to as well.

Hoover v. Mark Miner Homes (1998) ON Gen Div

Facts	Holding
○ The vendor was selling a two acre block of land to the purchaser ○ Prior to the completion of the purchase, the purchaser became aware that abattoir was on the land and blood there existed ○ The purchaser wanted the blood cleaned up ○ Vendor agreed to fill the blood pit with sand – but they filled the pit with clay ○ Purchaser would not go ahead with the deal	○ Court grants the vendor specific performance based on the fact of evidence the plaintiff had shown ○ Location etc., made this property difficult to sell ○ The vendor who shows some real and substantial need for specific performance may get it

Landmark of Thornhill v. Jacobson (1995) ON CA

Facts	Holding
○ Purchaser was buying a condo through a mortgage back scheme through the builder ○ The purchaser wants to get out of that financing and complete using other financing ○ There is nothing unique about this particular condo	○ Court of appeal grants specific performance decree

The purchaser's action for specific performance and abatement of purchase price. There is often a situation where the purchaser, when they perform the search of title, may find that there are some encumbrances that were not initially revealed to them. Nevertheless, the purchaser wishes to complete the sale, but does not want to pay the full contract price to reflect that everything that was promised to be conveyed has not been conveyed. An annulment clause givens the vendor a right to pull back of the contract, which is designed to avoid giving the purchaser a right to abatement. An annulment clause does not excuse the vendor from making genuine efforts to convey the title that was promised.

Building Contracts

Can you get specific performance of a contract to build property? Historically, there was some reluctance for the court to give specific performance of a building contract – how do you ensure that performance is good? The court has given specific performance over building contracts – although it may entail problems over supervision. The courts have laid down the following criteria in *Wolverhampton*.

Wolverhampton Corp. v. Emmons (1901) Eng CA

Facts	Holding
○ Not Done	○ The work must be able to be described in the order with sufficient clarity and certainty; ○ The plaintiff has a substantial interest in performance and can no be compensated adequately by damages; and, ○ The defendant has, by the contract, obtained possession of the land on which the work is to be done

Mutuality

Mutuality has both a negative and positive quality.

Negative – The plaintiff, even though otherwise entitled to specific performance, will be denied specific performance if the defendant could not have obtained a similar decree.

Price v. Strange (1978) Eng CA

Facts	Holding	Ratio
○ Plaintiff is seeking specific performance of a leasehold interest	○ You do not make a determination on the issue of mutuality at the time the contract was entered into, but instead at the time the court is asked to give specific performance	○ The concept of mutuality applies the date you seek the decree, not the date of the contract

Affirmative – The plaintiff, even though otherwise not entitled to specific performance will be granted specific performance if the defendant could have obtained it.

Mutuality is trying to balance coercive remedies – if one side will be granted a coercive remedy, the court wants to ensure that the other parties executory obligations are protected. The current rationales is to ensure that if specific performance is given to A, the B will still have effective remedies to pursue against A to ensure contract compliance should A then breach reciprocal contractual obligations still owed to B. For instance, has the plaintiff's obligations been performed? Could the plaintiff post a bond or security or give some undertaking? The issue is to ensure that the defendant is protected from any outstanding obligations.

Discretionary Defences

Laches or Delay

Equity will not assist a volunteer. Equity will not perfect an imperfect gift – the donee is a mere volunteer and equity will not assist a volunteer. Equity requires actual 'consideration' to have been provided, but the court will not look at the adequacy of consideration. However, inadequate consideration may be evidence of an improvident bargain, such that specific performance will be denied based upon hardship or unconscionable dealing.

Another defence is the doctrine of *laches*. Delay defeats equity! You cannot sleep on your equitable rights if you want to enforce them. Where you are looking at a purely equitable substantive right, it would appear that the *Limitation* Acts are not going to apply, but instead equity's notion of delay should be applied – *laches*. However, if equity is acting in an ancillary capacity, then the defence against equity will be found in the *Limitation Act*.

Two conditions must be fulfilled:

1. There has been an unreasonable delay in the commencement of the proceedings; and,
2. In all the circumstances, the consequences of the delay would render the grant of the equitable relief unreasonable or unjust
    a. Acquiesance on the plaintiff's behalf – plaintiff's assent to the violation of his/her rights after s/he has gained knowledge of the violation. The plaintiff must have capacity, knowledge, and freedom to make informed decisions about acquiescence; and
    b. Change in position by the defendant, which may make the imposition of the remedy unreasonably

Where the vendor has entered into a sale, the deal does not close the vendor knows he is in breach, months go on and the vendor starts to make renovations. In that case, the vendor's position is changed

such that it would be unreasonable for the plaintiff to gain specific performance – it is vital for the plaintiff to bring forward the action as soon as possible.

Doctrine of Clean Hands

He who comes to equity must come with clean hands. The depravity, the dirt in question on the hand, has an immediate and necessary relation to the equity sued for. *Note*: it is rare that this defence operates. Where a party is seeking to get specific performance, but in doing so they have been guilty or perpetuating some type of illegality, they are not likely to get it.

Hardship

This is a defense that is applicable to specific performance as a defence. Need to distinguish between unfairness, which goes to the formation of the contract, but with specific reference to the particular circumstances of the defendant (Unconscionability). The hardship, which focuses upon the actual impact on the defendant if the specific performance order is made. This hardship defense has been used relatively frequently – it is not rare by any means:

1. Hardship to both parties considered;
2. Hardship at time of contracting and not subsequent hardship; and,
3. Must be severe hardship – extraordinary and persuasive circumstances

Stewart

Facts	Holding
○ By the time the decree is going to be made, the plaintiff is a widow and the husband committed suicide while caring for six children dependent on government assistance ○ The vendor did not want to let the widow in and argued hardship	○ This was not sufficient hardship ○ This was hardship subsequent to the creation of the contract – hardship should be looked at the time of creation ○ The hardship to the defendant must be balanced to the hardship of the plaintiff

Patel v.Ali (1984) Eng CA

Facts	Holding
○ Vendor has been diagnosed with bone cancer and has had leg amputated – husband in prison – she is pregnant with third child	○ This was enough hardship to decline the specific performance decree ○ In denying the order of specific performance, she had to post a 10,000 pound bond to secure damages

111049 Ontario v. Exclusive Diamonds (1995) ON CA

Facts	Holding
○ At the time of the sale the defendant vendor's wife had been brutally murdered – they had both operated the jewelry store together ○ The vendor later decides that he does not want to sell the store ○ The plaintiff seeks a decree	○ The court confines the plaintiff to damages ○ Specific performance would cause too much hardship to the vendor ○ The level of hardship does not seem to be very high

This case appears to have lowered the bar – it is not required that hardship is present at the time the contract is created.

Certificate of Pending Litigation (Lis Pendens)

In a land transaction an individual would file a certificate of pending litigation on title to provide notice to potential subsequent purchasers that some right exists on title. In the sale of land contract this certificate is tantamount to interlocutory proceedings. These certificates are available on an *ex parte* basis. To obtain such a certificate the plaintiff has to show a triable issue in respect of whether the plaintiff has a reasonable claim to an interest in the land. When challenged, the plaintiff must prove a reasonable claim to an interest in the land. This onus is distinct from eventual substantive trial of the merits of plaintiff's claim.

There are a number of criteria to use in determining whether to grant the certificate:

1. Whether land is unique;
2. Intent of the parites in acquiring land;
3. Whether there is an alternative claim for damages;
4. Ease or difficulty to quantify damages;
5. Presence of another purchaser;
6. Whether damages are a satisfactory remedy;
7. Whether plaintiff is a 'shelf' company; and,
8. Harm to each party of the certificate is granted.

You may have in some agreements that there is a clause indicating that the plaintiff is not entitled to bring a certificate of pending litigation. Once the certificate is registered it gives notice to any subsequent purchaser. There is the power for the court to appoint somebody to stand in the shoes and sign the documentation to give over the property to the purchaser.

Specific Performance Election

Upon a breach the plaintiff may:

1. Accept repudiation and sue for damages;
2. Seek specific performance (the above can be pleaded in the alternative, but plaintiff must watch that any actions do not amount to a waiver of initial breach or constitute an irrevocable election);
3. Seek recovery of deposit and return of any benefits

The concept of election requires the plaintiff to choose a remedy. You want to keep an option open for specific performance, but if you indicate that you elect common law remedies, then you might lose your right to pursue specific performance. The fear is that between the time of the breach and the trial date one might undertake an act that shows an election. Be careful in your communications to the defendant that you do not make a communication tantamount to waiving a right to proceed with specific performance or to keep the contract open. This caution as to what statements flow from the plaintiff, and particularly the return of a deposit can cause problems – some argue that we should only consider these actions as actions of election where the defendant has taken a reliance on them. Recall, promissory estoppel requires some act of reliance by the defendant.

Keep Open Clauses

Co-operative Insurance v. Argyl Stores (1996) HL

Facts	Holding
○ Not Done	○ Specific performance of a 'result' as against an ongoing activity ○ Possibility of repeated actions before court to ensure performance – creates an inimical climate in which to operate a business (contemporary barrier in mind)

Canada has traditionally followed Co-Operative Insturance v. Argyl Approach

Nickel Developments v. Canada Safeway (2001) Man CA

Facts	Holding
○ Small town had two grocery stores operated by the defendant – one was being closed down to consolidate in the other ○ The grocer wanted to keep the lease in the old store to prevent a competitor from coming in	○ Court granted a declaration to the effect that a keep open clause on another tenant which was described as conferring 'significant and intended advantages' and 'central theme' of commercial lease ○ The monetary worth was not an issue – the landlord wanted to ensure the overall value of the plaza (also to other stores) through a specific performance decree to the effect of 'keeping open'

Al Scott v. Vancouver Savings Credit Union (2000) BC CA

Facts	Holding
○ The bank had shut down its bank in one mall because it had another in the opposite side of the street that it wanted to maintain	○ Suggests a revision of long standing rule against specific enforcement

Betal Properties v. Canada Safeway (1988) BC SC

Facts	Holding
○ The mall, having a number of tenants, wanted to renegotiate rental payments when an anchor tenant pulled out	○ Court grants interlocutory injunction for a keep open

The court appears to consider the other interests at stake.

Personal Injury Damages

In personal injury cases most losses are accounted for *future* losses. The individual must undertake to assess what his/her needs are and what his/her income would have been etc., How do we compensate for personal loss?

There are three big areas that are compensable:
1. Workplace – Worker's Compensation;
2. Automobiles – Insurance Schemes; and,
3. Everything else – Tort Law

In essence, when you look at worker's compensation and no fault insurance schemes they tend to provide more compensation on a total amount to a larger amount of people. In a court run tort scheme compensation is dependent upon fault whereas the other two systems are not. We pay a higher price of administration to establish issues of fault. Where there is a fault-based scheme, where there is no fault there is no compensation. The evidence is overwhelming, no matter the jurisdiction, that no-fault schemes will deliver more to victims than fault based schemes.

The argument is that industries that create problems should have to internalize those costs by bearing the responsibility – tort law is a method of communicating such a tariff. The liability of the one individual is communicated over a larger pool of people. Worker's compensation shifts the burden on all employees, employers, and taxpayers.

There has been a standardization of factors designed to keep economists out of the courtroom – the battle of the experts.

What is the role of the appellate courts in the damage assessment process. The role of the appellate court was described in the SCC's decision in *Toneguzzo-Novell* – a court of appeal is only justified in substituting its own finding of fact for that of the trial judge where the trial judge has made a manifest error.

Non-Pecuniary Damages

These damages are expected to cover three things:
1. *Loss of Expectation of Life* – compensation for shortened life span experienced by a person who has been severely injured;
2. *Paid and Suffering*; and,
3. *Loss of Amenities* – compensation for the loss of ability to experience feelings and emotions

Assessing Loss

These areas are very difficult to quantify. The SCC made a dramatic change in the ways that these are to be determined. There are three ways that these non-pecuniary losses can be assessed:
1. *Conceptual Approach* – treats each individual faculty as a proprietary asset with an objective value. This approach tends to be adopted in no-fault schemes;
2. *Personal Approach* – measures loss in terms of individual happiness of the particular individual; or,
3. *Functional Approach* – compensation to provide some substitute enjoyment and solace. Must serve a useful purpose by providing an alternative source of satisfaction

Of the three approaches, the SCC has chosen the functional approach of being the way that non-pecuniary damages ought to be assessed in Canada.

Where you have the plaintiff who is completely comatose or has little brain function those people should receive nothing under non-pecuniary damages because there is nothing that you can do to provide a substitute. It is hard to reconcile this notion with the fact that those victims are the ones who have lost the most. The result in Canada seems to be to look at what other comparable plaintiff's have received and adjust accordingly. The SCC also said in the trilogy of cases in 1978 that non-pecuniary damages should rarely exceed $100,000 (this figure currently stands at $270,000).

Pecuniary Losses – Lost Working Capacity

There are two general areas to consider:
1. Lost working capacity; and,
2. Future health care costs

In terms of lost working capacity there are three ways to assess loss:
1. Extrapolate from the existing income stream
    a. There are some difficulties where there is no income stream: children and home-makers;
2. Loss of 'working capacity' – reflect how particular plaintiff chose to live his or her life (Ken Cooper-Stephenson)
    a. Should reflect the particular choices that the plaintiff has made (for instance, an architect who decides to become a potter should be compensated in the context of losing the capacity to be a potter);
3. Loss of 'earning capacity' – measure abstract capacity – treat as a capital earning asset – work potential – 'lost opportunity cost' (Stephen Waddams)

There is no dominant view in these cases – Berryman thinks number two is the most logical approach.

There are essentially two groups of individuals that make it difficult to assess these losses:
1. Compensation for young children – you cannot make any determination of what the child would have done in the workplace. The SCC has chosen to apply a modest and conservative figure; and,
2. Compensation for home-makers – include provisions for future living expenses as part of pecuniary loss for future care (Fenn)

Toneguzzo (SCC)

Facts	Holding
o A child suffered oxygen deprivation at birth and as a result became blind and suffered other complications o Plaintiff's podiatrists argue a life span of 5-30 years while the defendant's podiatrists argue a span of 70 years	o The court used income tables for a woman's income with post-secondary training in Canada o The trial judge added a positive contingency to reflect the fact that there is a tendency for the woman's tables to begin to equalize to male income tables in comparable groups o The SCC did not deal with issues of systemic discrimination – it was an appropriate thing to do to note the contingency

Fenn (SCC)

Facts	Holding
o Not Done	o There are two ways that loss can be assessed: 1. Determine loss as if homemaker had been part of the work force (replacement of earning capacity or lost opportunity cost approach) 2. Include provision for future living expenses as part of pecuniary loss for future care

Fobel v. Dean (19) Sask CA

Facts	Holding
o Not Done	o Measure value of particular services provided by homemaker (substitute homemaker or catalogue of services approach)

Earning capacity is calculated based on the pre-accident lifespan of the victim. This is in contrast to future health care costs, which are conducted based on a post-accident lifespan.

Loss of shared family income – if a person cannot experience the benefit associated with the sharing of duties, then that is a real loss of compensation.

There is a requirement to bring a claim for health care costs and OHIP will have a subrogated right to those damages for those things that OHIP provides.

Contingencies

Contingencies can be both positive and negative – the threshold is generally between 15-20%. It really comes down to the amount evidence that you can call on these sorts of things. The amount of the discount rate will have a dramatic effect on the amount of money the plaintiff will receive up front.

Discount Rate

In severe injuries cases, a large portion of the damages award is called 'future losses'. Because calculations are made for costs years in the future payable by a lump sum today, the courts consider that the lump sum can be invested today to be worth more in the future. Another factor, however, is the effect of inflation. In the long-term interest rates generally outstretch inflation. The trilogy of injury cases concluded that, as a general rule, interest would outstretch inflation by a factor of 7%.

The Rules of Civil Procedure set the formula for determining the discount rate to be applied. Originally, the discount rate was set at 2.5%. One of the criticisms of the discount rate was that it did not take into account that our income levels rise as the years go on as a result of inflation. Today, an adjustment has been made in Ontario through Rule 53.09(1)(a) and (b):

- The discount rate for the first fifteen years may vary from 2.25 to 3% (builds in the notion of real productivity gains
- After fifteen years you choose 2.5%

When you are calculating discount rates you envisage that interest will build on the lump sum. The one thing that has been ignored is the impact on taxation. The lump sum award itself will not be subject to taxation. However, as soon as the lump sum is invested, then any of the income off the investment is subject to taxation. This has led courts to a third level of calculation called a tax gross up.

When you work out a person's lost working capacity, the income considered is the person's gross income. The issue has been before a number of courts:

R. v. Jennings (19) SCC

Facts	Holding
o	o You look at the gross income – the pre-tax earning capacity of the party

The incidence of taxation is something we face after we earn the income. Thus, in terms of lost earning capacity the person is entitled to say, I've earned the income and am entitled to look at the incidence of taxation after. What do we do about the notion of the offset (pretax income versus tax) for a person who does not have any present income? The tax gross up is applied. We have three pools of money: (1) lost working capacity, (2) future losses, and (3) tax gross up.

The tax gross up has been endorsed by the SCC

Watkin v. Olafson (1989) SCC

Facts	Holding	Ratio
o Not Done	o lump sum given to cover consequences of taxation o tax gross-up can be as high as 30%	o SCC endorsement of tax gross up

When you have such a large lump sum of money, the court says the person will likely need a person to manage those large pools of money. The courts have allowed another fee called a 'management fee' as either a lump sum or through a change in the discount rate – giving more money to the plaintiff and the extra money represents compensation for the management fee.

Tax Gross Up

Whenever a tax gross up is requested by a plaintiff it will trigger section 116 of the *Courts of Justice Act*, which allows the defendant to argue that the plaintiff should be required to take a structured settlement and then places an obligation for the plaintiff to show that taking a lump sum would be in the best interest of the plaintiff.

There is also provision for if the claim under automobile insurance scheme (catastrophic loss), then section 267.10 mandate periodic payments scheme if criteria is met.

One of the big problems with adjudication is that the court only gets one chance to make an assessment. There are some large problems with the award of the lump sum – it does not encourage rehabilitation. The lump sum provides no opportunity to revisit the assessment – whether the condition becomes worse or better.

Stevens v. Fitzsimmons – Parties agreed to allowing a reassessment when the plaintiff turned 70 years of age

Structured Settlements

The structured settlement does not give an opportunity for re-assessment. All it does is have the plaintiff receive a monthly or periodic sum opposed to a lump sum. The insurance company pays the periodic payments directly. The plaintiff bears the risk of insolvency of the insurance company. A second way is

for the insurance company to create a trust fund for the plaintiff – problems with this are taxation for the plaintiff. The insurance company can purchase a life annuity from a life assurance company for the plaintiff – most common form of structured settlement. The big advantage in the annuity is that the plaintiff receives the payments tax-free. The cost to the defendant is much lower in this case as well.

Periodic Payments

Section 116 of the *Courts of Justice Act* provides that the court can order periodic payment where the parties consent or where the plaintiff seeks a tax gross-up for an award. In which case, the court can order a structured settlement if it is in the best interests of the plaintiff.

Onus to prove lump sum in the bests interests is on the plaintiff. In considering factors in section 116(3), the court does not have to rule conclusively on all the factors. The court maintains discretion.

Section 267.10 of the *Insurance Act*.

Fatal Injuries and Third-Party Claims

We might have a claim by a third party either because a person has died or the person has been injured and the injury to the other person has an impact on his or her own life. There are two distinct claims for a third party where a person has died:

1. **Estate's Claim** – Survival Action. Section 38(1) of the *Trustee Act* confers upon a deceased's estate the ability to bring an action for any action that the deceased could have brought if alive. However, the act excludes certain recovery for pecuniary damages for the death or for loss of expectation of life.
2. **Family Law Act Claim** – section 61 of the act provides the dependants' claim. This depends on the ability of the claimant to come within the numerated class of claimants and to prove a particular dependency.

There is a requirement to avoid double recovery:

1. Prevent estate from bringing any claim for loss of income earnings during the lost years – the period the person would have been expected to have lived but for the accident;
2. Allow estate claim but reduce it by the amount that would be paid by the deceased to his/her dependant;
3. Allow Family Law Act claim but reduce amount of claim but the amount that the dependent has gained from the estate

Under the *Family Law Act* claim we are also talking about a victim who has his/her own personal injury claim and another party who claims that s/he has some type of dependency upon that victim.

The first thing that has to be done is to quantify the degree of dependency. Work out what the plaintiff has been getting in the past from that person and what they can expect in the future. This dependency will also be subject to contingencies – one of the most contentious issues is the prospect of remarriage or entering into another relationship where you might see a new dependency developed.

T.O. v. Toronto Board of Education (2001) ON CA

Facts	Holding
○ Chinese Canadian family was bringing an action for the loss of a son	○ Before the appeal court will upset a jury's award te damages must be so inordinately high or low as to constitute a wholly erroneous estimate of the guidance care and companionship loss

o Parents awarded $100,000 by trial judge o Sister award $50,000 by trial judge o Court of appear reduced the sister's award to $25,000	o The assessment must be made in an objective and unemotional way; o Each case must be considered in light of the particular family relationship involved

Certainty and Causation

There are two main areas of uncertainty:

1. Imperfect knowledge and facts that could directly be known; and,
2. Uncertainty in trying to estimate the position the plaintiff would have been in had the tort or breach not occurred

The court is making a prediction as to what the future would have been and calculates the difference between those two in order to come to some accounting of losses. With respect to facts that could have been known we are dealing with causation, the test for which is the 'but for' test – but for the actions of the defendant.

On the first point, the plaintiff carries the burden and onus of proof to establish on the balance reasonable of probabilities. Once that is shown the plaintiff is assumed to have suffered the injury alleged.

There may be evidential problems in establishing that 'but for' test. The onus of proof always lies on the plaintiff to establish the causation – the civil burden is on a balance of probabilities. Once the cause has been proven on a balance of probabilities, the defendant is assumed to have caused the damage. Next the plaintiff must establish what the defendant is liable for.

Schrump v. Koot

Facts	Holding	Ratio
o Plaintiff has suffered a back injury as a result of an auto accident o Evidence was that there was a 90% probability of back problems o There was a 25-50% chance that the condition would deteriorate requiring back fusion o The defendant was responsible for the accident o Defendant's medical evidence refutes the requirement for fusion	o **Trial**: Jury compensates for the possibility of the future back fusion o Defendant argued that the plaintiff never proved need for a fusion on a balance of probabilities and should be dismissed o **Appeal**: Once you prove causation you assume the defendant is liable for 100% of the plaintiff's losses o Losses do not have to be shown on a balance of probabilities, but instead a reasonable chance or probability that the injury is not remote o This possibility must be factored into the damage calculation	o Causation must be proven on a balance of probabilities o Once causation is proved, liability will follow o Injury must be proven on a scale of reasonableness and/or probability o There is a distinction between liability and the damage assessment process

There is a real loss to the plaintiff in this case and a future possibility that will not be known until time passes. This is being factored into damages by looking at the proportion of that particular exposure. In some situations, proof of the causal chain can be very difficult.

Probabilistic Causation – a defendant should be liable for the proportion of risk that can be attributed to a particular defendant and factor the total damage by the percentage share

Farell v. Snell (19??) SCC

Facts	Holding	Ratio
○ The plaintiff is bringing a malpractice suit against the defendant who had performed an operation on the plaintiff's cataract ○ When applying the anesthetic, it was noticed that there was some bleeding in the eye ○ Where the prudent course would have been to stop, the doctor tried to work quickly ○ The bleeding continued and the defendant suffered a hemorrhage ○ The defendant lost sight in the eye ○ Evidence was led to show that the hemorrhage is a common symptom of high blood pressure, diabetes and cardiovascular problems – defendant had all three	○ Issue: Did the doctor's operation cause the hemorrhage, which led to the defendant's loss of sight? ○ If there is a grave injustice or problem in the ability of a plaintiff to establish liability, then a notion of probabilistic causation might be accepted (elevated risk and a shift in burden) ○ The trial judge is entitled to make a pragmatic and robust interpretation of the causation requirement and onus of proof ○ The plaintiff may be entitled to certain inferences – an ability to presume that a point has been proven ○ The inference is entitled where there has been an absence of contradictory evidence by the defendant	○ The amount of evidence the plaintiff has to show is likely related to the amount of evidence led by the defendant ○ The court is not accepting probabilistic causation – elevated risk and a shifted burden ○ The burden of proof always lies on the plaintiff

This case examined whether we should change the causation requirement and shift the burden of proof onto the defendant.

McGhee

Facts	Holding	Ratio
○ The plaintiff had suffered from a dermatitis caused by dust working in the defendant's brick industry ○ It was alleged that the lack of showers to rinse off the dust caused the dermatitis	○ It could not be proved on a balance of probabilities that the lack of showers caused the skin condition ○ They can show that the failure to provide showers has *added* to the risk that dermatitis has been caused	○ If the plaintiff can show an elevated risk as being attributed to the defendant's negligence, then the burden passed on to the defendant to show that his/her action was not the cause

The judgment in McGhee was turned over in *Wilshire* – a trial judge is entitled to make a robust and pragmatic determination of facts, but the burden of proof should always stay with the plaintiff to establish the chain

Laperierre v. Lawson

Facts	Holding
○ Doctor failed to inform plaintiff that he had removed a cancerous breast ○ Plaintiff argued that had she known of the option, she would have done things differently	○ You do have to make a link between the alleged negligence and the injury suffered ○ The negligence was the failure to inform the plaintiff of the options/requirement of particular procedures

Sunrise v. Lake Winnipeg

Facts	Holding
o A ship, which through the negligence of the defendant, hits another ship o Repairs will require 27 days in the dry dock o On the way to the dry dock, the ship is hit again o Second accident will require 14 days to fix o Plaintiff calls for loss of profits o Defendant argues there should be an apportionment of lost profits	o The shipped damaged the second time is not a profit-making ship and, therefore, there can be no apportionment

It is important to differentiate between the unknown events that could directly be known.

Date of Damage Assessment

The normal starting point for any tort or contract assessment is to determine the date of breach – when the breach of contract occurred or when the tortuous activity arose. The date of assessment is important in terms of the extent to which a person has been kept away from certain monies from the date of assessment until the date of the order. The plaintiff could have done something else with the money and, therefore, loses in that respect as well. This is compensated through pre-judgment interest.

If a market does not exist there are problems. If the plaintiff does not have the financial resources to take mitigating steps there are problems. To what extent can we shift the date of damage assessment and where do we move it to? The other extreme is likely to be the date of judgment. To the extent that not having the use of money at a particular period of time is being compensated with pre-judgment interest, it does weaken the notion that we need to shift the date of damage assessment. There are difficulties with pre-judgment interest – it does not always reflect the particular market conditions that the plaintiff has experienced.

When is a court willing to change the date of damage assessment and what is the impact of a claim of equitable damages in lieu of specific performance? Any time before the 1950s you would see the date of damage assessment as the date of breach. Since that period there have been some moves away.

Asamera Oil v. See Oil (1979) SCC

Facts	Holding
o Plaintiff had loaned shares to the respondent o Under the loan contract, the defendant agreed to return the shares in 1960, but failed to so do o The defendant pledged the shares as security to a stock broker for his own trading o In 1960, the plaintiff sought an injunction ordering the defendant to retain the value of the shares o The shares were sold by the stockbroker to realize upon the security in 1958 o The plaintiff became aware of this in 1967	o There is some jurisprudence to support that the plaintiff is entitled to the highest intermediate value of those shares – this is inequitable o There is a paramount obligation to mitigate your loss o Once the plaintiff becomes aware of the breach, they have to be given a reasonable time to determine a course of conduct – what constitutes a reasonable period of time? o If the plaintiff is in a position of being impecunious or in a situation where s/he does not have the money to make a litigating step, then this may justify delaying the reasonable period as long as the plaintiff has acted *expeditiously* in litigating the action o Where the plaintiff is making a case for specific performance it is appropriate to delay the obligation to mitigate up until the time of judgment o You have to have a fair, real and substantial reason for specific performance o Expeditious litigation becomes the mitigating step

If we pursue equitable damages can we get to a different result?

Section 99 of the *Courts of Justice Act* may award damages in addition to *or* in substitution of an injunction or specific performance decree. If the plaintiff can show a fair, real and substantial reason for specific performance, but has delayed, the court may substitute damages.

Wroth v. Tyler

Facts	Holding	Ratio
○ Plaintiff purchased house from vendor ○ The contract price was 6050, the date of completion worth was 7500, and by January 1972 the property was worth 11500 ○ The plaintiff's action for specific performance is denied ○ The escalation in price was due to the market inflation that occurred in the United Kingdom	○ How should damages be assessed in lieu of a specific performance decree? ○ Damages in common law occur at the date of breach – but at this stage there would not be the opportunity to purchase a similar property ○ Damages in equity – a true substitute would be the different in intermediate value and contract price ○ It was argued the inflation was not reasonable forseeable	○ If the rule in common law was seen as being fixed in the date of breach, then damages could be given in lieu of specific performance ○ The assessment date could be moved to the date of judgment

The rule in *Bain* v. *Fothergill* – when you have imperfections of title, all the plaintiff is entitled to is the cost of investigating the title and any other incidental expenditures. This rule has been abrogated in Canada – we do not have this rule that limits damages (*AVG Management* v. *Barwell*).

Reasonable foreseeability goes to the *type* of damage that may occur and not the extent of it. For instance, in *Wroth v. Tyler* it is reasonably foreseeable that there will be some inflation that would increase the price of the house, it does not have to be reasonably foreseeable that the inflation would be so large. The remoteness test is as to the type and not remoteness of damage.

Johnson v. Agnew HL

Facts	Holding	Ratio
○ Action brought by the vendor ○ Purchaser declines to complete the deal, the vendor commences the action for specific performance ○ Judgment was gotten in November 1974 – in trying to complete the specific performance decree ○ Prior to any compliance, the mortgagee exercised a power of sale over the property and it is sold ○ The vendor is not in a position to give conveyance of the property	○ Can you plead in the alternative what happens when you have lost a right – can specific performance be reverted back to common law damages ○ The plaintiff never loses their right to the common law remedy to damages – the failure to comply with the specific performance decree is a continuing breach of the contract such that there is a right to assess the common law damages ○ Refer to page 145 – 5 points	○ The assessment process for common law and equitable damages is the same

In this case, having gone down the path of specific performance the trial judge held that once elected specific performance could not revert back to damages. Also, because specific performance was not here

available, the trial judge was not prepared to give damages in lieu of specific performance. The assessment point should be when the mortgagee exercised the power of sale because it was at that point the specific performance could not be carried through. Once the plaintiff has elected to pursue specific performance, they could have brought an action for contempt of the order at that stage.

Johnson has been followed in Canada in the Ontario Court of Appeal.

Semelhago v. Paramdevan SCC

Facts	Holding
○ The plaintiff was the purchaser and the defendant vendor ○ The vendor refused to convey property on the date of conveyance ○ The purchaser was taking the existing mortgage and laying down a cash deposit totally $205,000 ○ The contract price was $205,000 and when the damage was assessed the house was worth $325,000 ○ Defendant argues that	○ To give the plaintiff the equivalent of the value of the house at date of trial, ignore the fact that to get to that position the plaintiff would have incurred mortgage carrying costs on $130,000 mortgage, which has been saved, as well, plaintiff would not have $75,000 cash deposit to invest. These two deductions must be made from the damages, giving $80,810

Sopinka was not altogether convinced that this is how the assessment should be conducted. How the person would finance the acquisition should not have a bearing on the damages to which s/he is entitled.

We have moved away from a strict application of the date of breach as the common law assessment date.

1. Start from a default position – date of breach
2. What are the rights of the party – is there a right to specific performance, and then you can delay mitigation. If the party must re-enter the marketplace, when is it reasonable for them to do so? When is it reasonable for the person to re-assume the risks of the marketplace

Cost of Re-Instatement or Diminution in Value

Case Name?

Facts	Holding
○ The plaintiff has sold a piece of property to the defendant and part of the contractual obligations was for the defendant to erect a brick wall between the two properties ○ There is not brick wall and the plaintiff brings suit for the breach of that obligation ○ At the date of contracting the cost of erection is 1200 while at the date of trial it is put at 3400 ○ Plaintiff argues that performance will require 3400 pounds (cost of re-instatement) ○ Defendant argues that erecting the brick wall will not increase property value and, thus, the property value cannot have decreased (diminution in value)	○ The court is reluctant to give cost of reinstatement because: 1. Attitude that giving money, damages to carry out a task in which the objective value is less than its actual cost is economically wasteful; 2. Idea that you may be giving the plaintiff a windfall if s/he does not use the damages award to do what was promised under the contract or to remedy the tort ○ Courts are also reluctant to deny a plaintiff his or her contractual performance purely because it is based on eccentric or aesthetic values. But, how do you quantify the value the plaintiff put on these ephemeral qualities? ○ To hold the party to a diminution of value seems to ignore the fact that the plaintiff probably lowered the purchase price to represent the cost of erecting the wall

Tito v. Waddell

Facts	Holding
○ A consortium of governments would take the bird droppings from a particular island in the South Pacific and make phosphate fertilizer ○ An action is sought against the three governments – the land taken was to be restored by the governments ○ The cost of reinstatement in this case are enormous	○ Issue: If the plaintiff is confined to diminution of value, what value do you put on the diminution of a phosphate island in the South Pacific? ○ The determination will depend on the fixity of intention – the plaintiff has the obligation to establish that the money will be taken and they will carry through with what has been asserted in the contract – restoring the land ○ To show fixity of intention, the plaintiff can: 1. Complete work him/herself by time of trial; 2. Pursue specific performance; 3. Give an undertaking to spend the damages on restoration (enforcement issues) ○ The judge turned to rough justice – from an actual restoration requirement of $73,000 per/acre to $75 per/acre

Megarry V.C.:

1. Fundamental question in damages is to compensate the plaintiff by putting him in th eposition as if the defendant had not breached;
2. Plaintiff is entitled to any monetary loss in value of property, but not necessarily the same as the expenditure saved by the defendant;
3. It is for the plaintiff to establish loss which may include cost of doing the work;
4. For the plaintiff to establish point three, it dpenedn on the *fixity of intention* to use th emoney to complete the actual performance
5. There can be no certainty about doing the work which has not yet been done

Harris: Islanders would have had considerable consumer surplus in the replanted lands. An attempt to compensate for this could have been made by using an analogy with tort law where a value is put on intangible losses like pain and suffering. In *Ruxley* court awards for loss of amenity. Alternatively, the windfall could be shared between the parties. The value could be determined by considering what the defendant would have paid to be released from the obligation to restore the land – use specific performance decree to determine value.

Ruxley (327)

Facts	Holding
○ A swimming pool was to be build at 7'6" and was built at 7' ○ The pool would have to be destroyed to build at 7'6" ○ There is a loss of amenity here	○ The ultimate question is one of reasonableness of plaintiff's desire to seek cost of reinstatement. The court is prepared to give compensation for loss of amenity value but not reinstatement (proportionality argument) ○ Even if you do the work yourself, there must be some element of reasonableness – is it a reasonable thing to do?

What could the court order in substitution of a specific performance? In terms of compensation, we do not make a calculation between the plaintiff's losses and the defendant's gain – this is only done in a restitution sense and not a common law damages sense.

Are the same argument pursued in a pure torts action?

C.B. Tyler

Facts	Holding	Ratio
o Plaintiff's billiard hall is destroyed by fire with a cost of restoration of 28000 pounds o The value of the property is 42000 pounds, the value without is 40000 o The plaintiff held a reinstatement insurance policy on the property	o The court holds to a diminution of value order (2000) o To award costs of reinstatement you would have to contemplate the probability that the plaintiffs were reasonably minded to rebuild the billiard hall	o Would a party reasonable restore the property back to its state if the costs of re-instatement are ordered?

Evans v. Balog (1976) NS CA

Facts	Holding
o Defendant is building next door to the plaintiff's property o The building operation causes large amounts of vibration, such that it damages the plaintiff's property o The costs of restoring the property far exceeds the diminution of value of the premises o The plaintiff's intention is to spend the money on the cost of reinstatement	o The court gives the cost of reinstatement o The plaintiff had sought and successfully gained an interlocutory injunction to prevent the nuisance (vibration) o The application for the injunction shows the *fixity of intention* as does the fact that this is the family home o The court alludes to the notion of proportionality between the cost of restoration and diminution in value

When we look at chattels do we have the same kinds of issues involved?

Deweis v. Morrow

Facts	Holding
o The cost to restore a car is $1458 and the pre-accident market value is $900	o The court awarded the plaintiff the market value of the car

O'Grady

Facts	Holding
o Cost of repairs on a car 253 pounds with a market value of 175 o Plaintiff has gone ahead and repaired the car	o The court awarded the cost of restoration because this plaintiff had an affinity for the car

Warren

Facts	Holding
o Plaintiff goes ahead and incurs the expenditure of repairs	o Court grants only the diminution of value

Betterment

Where a person has had his/her property partially destroyed and the court orders reinstatement and the person puts in new materials, you can say that the person is being benefited by the injury that has

occurred to them. In Ontario there is a betterment deduction given, which appears to be changing the law across Canada. The traditional approach:

Harbutt's Plastercine

Facts	Holding
○ There was a fundamental breach ○ The plaintiff's factory was partially burnt down because of the faulty installation of pipes and wires ○ The cost of restoration is higher than the diminution of value ○ Defendant argues the plaintiff is better off after restoration	○ Betterment does not lie in the mouth of the tortfeasors to argue for a reduction where the other party has been put to the expense of restoration

James Street Hardware ON CA

Facts	Holding
○ The negligent performance of a building modification resulted in fire ○ As part of the restoration new materials were used and the building was brought up to code	○ The plaintiff has received a better building than s/he had beforehand ○ There was insufficient evidence to identify the betterment ○ When you take a building, which is slowly diminishing in market value with a finite expected life span, if the building is damaged as a result of the defendant's negligence, an outlay of money tends to be made as if the building is at year zero (suppose a life span of 20 years and damage occurring at 10) – when the building has been damages and new is put in for old 10 years into the life span, a commitment is being made that was anticipated at the end of the 20 year span ○ It is correct that a betterment deduction should be taken account of, however, it must be realized that in making a straight deduction you are saying that the plaintiff has had to make a deduction earlier than anticipated ○ Because the plaintiff has been required to make the capital expenditure earlier than necessary, the carrying charges of that capital commitment should also be ordered – interest charges for financing over the next 10 ○ **Ratio**: If you are going to give a betterment deduction, you also must give a carrying charge addition

Bacon v. Cooper Metals (1982) Eng QB

Facts	Holding
○ Defendant contracted to supply scrap metal ○ The defendant includes hardened steel, damaging the plaintiff's fragmentizer blade ○ The blade costs 47,000 pounds with a 7 year life span ○ The original blade was 3-years old	○ *Issue*: Can all the damages be shifted onto the defendant's shoulders? ○ The plaintiff did not anticipate making a 47,000 pound expenditure at this juncture and argues for the cost of investing the money (lost opportunity cost) ○ Court refuses to give any betterment reduction

Damages = Cost of Repairs – Betterment + Carrying Charges. Betterment requires:

1. The court to determine that the plaintiff is entitled to cost of repairs or reinstatement;
2. The court to make a determination of the life span over which a person could expect the property to last so that the period for which the carrying charges and/or betterment is incurred;
3. The burden is on the plaintiff to establish the costs of restoration (it may be desirable for the plaintiff to argue for betterment if that is going to give costs of restoration because at the very

least s/he will get carrying charges whereas in a diminution of value s/he will only get market value);
4. The burden is on the defendant to show the betterment;
5. The burden is on the plaintiff to show what the carrying charges are

In BC the temptation has been to make a betterment reduction without providing any carrying charges.

Upper Lakes Shipping v. St. Lawrence Cement (1992) ON CA

Facts	Holding
○ Plaintiff owned a bulk ore carrier ○ Defendant provided a shipment of coal and coke containing a steel plate damaging the ship's central conveyor belt ○ Plaintiff replaced belt for $231,460 ○ The original belt had 12 years remaining on its 15-year life span	○ The court quantified betterment as amounting to 20% of the value

Mitigation

Hypothetical

The Bank of Portugal purchases notes at a cost of $36,000 from Waterloo. The Bank puts those notes out into circulation, but a rogue passed itself off as a representative of the Bank of Portugal and started using the notes in Portugal to buy shares in the Bank of Portugal – the rogue acquire 15% of the Bank's stock. The notes put into the economy by the Bank are legitimate, but those put out by the Rogue are not. The Bank removes those notes from circulation by paying off the holders. The Bank of Portugal demands damages from Waterloo based on an equivalent via the exchange rate between the two economies. What are the obligations? What has been lost?

One argument is to say that all that has been lost is the paper printing of the particular notes, which can be redesigned and re-circulated. Another argument is to say that at the time the notes were being withdrawn it could be determined which are legitimate and which are illegitimate via the serial number.

The court held that the exchange value in sterling ought to be awarded in damages. The Bank of Portugal undertook reasonable acts of mitigation without having to jeopardize its goodwill and relationship with customers. You do not have to jeopardize relationships or reputation in order to mitigate.

However, this incident did not devaluate the currency in any way – the Bank of Portugal suffered no real loss with the illegitimate currency in circulation. The Bank was still within its limits of the amount of currency it could circulate.

Basic Concepts – Three Principles of Mitigation

1. *Reasonable Duty to mitigate* – Plaintiff must take reasonable steps to mitigate the loss. There is no duty owed to the defendant, but the defendant does not have to compensate for those losses that the plaintiff could have reasonably avoided through reasonable mitigation;
2. *Recovery of Loss* – Where the plaintiff mitigates reasonable s/he can recover increased losses. Where the plaintiff takes reasonable steps to mitigate, the plaintiff can recover the costs even where those costs are more than what the costs would have been if no steps to mitigate were taken; and,

3. *Mitigated Loss* – Defendant is free of mitigated loss. If the reasonable steps have been successful, the defendant is entitled to that benefit through a reduction in damages

The plaintiff need not risk his money too far to reduce the losses. The plaintiff need not risk his or her person too far in the hands of a surgeon. The plaintiff also need not risk to start litigation with a third party.

Jonack v. Ippolito (19) SCC

Facts	Holding
○ Plaintiff suffers back injury because of defendant's negligence ○ Since the accident the plaintiff has been unable to return to work ○ Surgery had a 70% success rate ○ Plaintiff has an unusual fear of surgery unless there is a 100% assurance and refuses the surgery	○ *Issue*: Does the plaintiff have to take the surgery as a reasonable step of mitigation? ○ A reasonable person would consent to the surgery ○ If the fear of the surgery arose after the accident, the court will look to the reasonable person ○ If the fear of surgery had a direct cause attributable to the accident or is a pre-existing condition the court will apply the principle, you take your victim as you find him/her ○ Where a plaintiff has conflicting medical opinion relating to the likelihood of success, the plaintiff may act in accordance with any arm of the opinion ○ If the plaintiff is awarded damages, but later consents to the surgery, there will be no recourse so long as there has been no fraud on the court

The plaintiff does not have to commence a legal suit against other defendant in order to mitigate damages against a particular defendant. The plaintiff does not have to identify all potential defendants as a way of mitigating against damages. The plaintiff need not destroy or sacrifice any property rights. For instance, in a breach of contract rights brought by a tenant against the landlord, the tenant does not have to volunteer to terminate the tenancy. Also, you do not have to injure an innocent party in order to mitigate your damages as against a particular party.

The plaintiff will not be penalized for the financial inability to pay.

Dodds Properties

Facts	Holding	Ratio
○ The plaintiff owned a service station adjoining a piece of land where the defendant was building a car park ○ The defendant's actions cause damage to the plaintiff's property ○ The defendant admits liability ○ When the injury was actually caused in 1968, the cost of repair was put at 11,000 pounds ○ By the time of the hearing, the cost was 30,000 pounds ○ Plaintiff is seeking to have judgment date as the date of assessment ○ Defendant argues that plaintiff should be limited to a reasonable period after the injury to mitigate the loss	○ **Trial Judge** – at the time the injury occurred, the damage was of a cosmetic injury and did not affect the profitability of the service. However, the plaintiff was still in a situation of financial uncertainty and it would be regarded as a prudent business decision not to incur the cost of repairs while there was no assurance the plaintiff would recover in pending litigation ○ Because the defendant denied liability at the beginning	○ The denial of liability may have an impact on what the court will consider as reasonable for mitigation ○ The court is more willing to review the actual conditions confronting the plaintiff – you do take your victim as you find him/her with respect to impecuniosity

Liesbosch Dredger

Facts	Holding
○ Not Done	○ A defendant will not be liable for any losses which flow from the plaintiff's failure to mitigate owing to the plaintiff's impecuniosity. ○ Impecuniosity is a new act causing the loss not attributable to the defendant

Alcoa Minerals of Jamaica v. Broderick (2000) PC

Facts	Holding
○ Defendant runs a smelting operation ○ Plaintiff had a small house within the vicinity of the defendant's operation ○ The defendant's operation emit fumes which destroys the plaintiff's roof ○ At the time, the cost of repairing the roof would have been $210,000 Jamaican ○ At the date of judgment, this had risen to $938,000 Jamaican ○ In the intermediate, there had been a devaluation of Jamaican currency and rampant inflation	○ It is appropriate for the plaintiff to delay mitigation in the face of defendant's denial of liability and the quantum of damages ○ There is no universal rule that damages in tort ought to be assessed at the date of breach ○ The escalation in the cost of repairs attributed to inflation and devaluation were reasonable foreseeable

This case treats an individual's impecuniosity as an egg-shell/thin skull. Impecuniosity might exacerbate the damages and the defendant takes an impecunious victim as s/he finds him or her.

In Class Hypothetical

The plaintiff is the owner of a ship who has a contract with the defendant who is to manage the ship. The plaintiff is tardy in reimbursing the defendant the various costs and expenses of running the ship. Unbeknown to the plaintiff, the defendant decides to bring the ship within South African waters and arranges to have the ship arrested to use as leverage against the amounts outstanding on the contract. This itself constitutes a breach in the terms of the management contract. In order to secure a release of the ship, the plaintiff has to post a bond. The plaintiff arranges the bond and the ship continues its journey. The plaintiff ran a very tight business. The only way the bank would secure a bond for the plaintiff was to increase the plaintiff's overdraft – this resulted in the interest on the principle being very high. As a result, the plaintiff pays out a large amount of interest whereas a normal person would pay the cost of securing a bond. In the action against the defendant, the plaintiff argues that he is entitled to the extra costs incurred in posting the bond as part of the damages. *Refer to handout of November 18, 2002*

1. A defendant will not have to pay increased damages if those damages are attributable to the plaintiff's impecuniosity;
2. There is a softening to this approach. The courts are increasingly prepared to look at the actual conditions which confronted the plaintiff and the individual circumstances of the plaintiff when determining what was reasonable for the plaintiff to do when mitigating (a more subjective approach)

Provocation and Intentional Torts

Where the plaintiff has provoked an action, this may have the effect of lowering the damages payable by the defendant. Provocation will go to reduce or eliminate punitive damages and aggravated damages. There are three types of damages:

1. Compensatory – Actual loss
2. Aggravated – Damages to a person's dignity
3. Punitive – Designed the punish the defendant for grievous conduct

Provocation

Consider someone assaulted witnessed by close friends and/or family. The individual might be compensated for the damages. Also, because of the loss of dignity, s/he might receive aggravated damages. The Ontario courts have held that provocation will not reduce compensatory damages. The Newfoundland court of Appeal and the BC Court of Appeal have held that provocation may reduce compensatory damages.

Anticipatory Breach

When there is an act of anticipatory breach, the innocent party has an option – they can accept the breach and bring the contract to an end subject to the obligation to mitigate. The plaintiff has the alternative not to accept the breach and continue with the performance of the contract.

White v. Carter Counsels

Facts	Holding
○ The plaintiff has agreed to place the defendant's advertisements on their garbage cans around town for a period of two years ○ The defendant signs the contract and just a few weeks after decides he doesn't want the ads ○ Plaintiff did not accept the breach, went ahead with the performance, and then sued the full contract price ○ Defendant argued that when he announced the breach, the plaintiff ought to have mitigated	○ The plaintiff had the right to accept the breach or not ○ The defendant ought to pay the contract price ○ Dissent: in the case of an anticipatory breach the plaintiff should be required to accept the breach and mitigate the loss

Finelli v. Dee ON CA

Facts	Holding
○ The plaintiff is contracting to lay an asphalt driveway – the defendant announces that he does not want it	○ A plaintiff should be required to accept the breach and mitigate the loss ○ When you come to the point of having to perform the contract and performance would require some offense, such as trespass,

Avoided Loss

When the plaintiff has taken an act of mitigation, should we attribute all of the actions of the plaintiff has being mitigating steps that would not have been taken but for the breach, or new initiatives that the plaintiff has undertaken and should not be taken into account against damages?

Erie County Gas v. Carroll (1911) ON PC

Facts	Holding
○ Defendant has an obligation to provide gas to the plaintiff – the defendant breaches obligation ○ Plaintiff, rather than securing an alternative supplier, builds its own gas refinery and provides its own gas at a cost of $60,000, which it sells for $115,000 years later ○ Defendant argues that but for its breach it would not have generated its own gas and sold it at a profit ○ Defendant argues that the loss has been mitigated so successfully that the losses are negative – no loss ○ Plaintiff argues that this was a new venture – why should the skill in so doing benefit the defendant in reducing the damages of initial breach	○ If you can make the link, but for the breach, then if they have done something and been so successful in mitigation, to the extent that losses are caused only nominal damages ought to be given ○ **Waddams**: could the plaintiff, even in the absence of the wrong, have made the disputed profits, if so, treat as collateral ○ **Harris**: Distinguish between reasonable and extraordinary means of mitigation

Cockburn v. Trust Guaranty Co

Facts	Holding
○ Employer goes into liquidation ○ Plaintiff buys and sells assets – makes profit on them and then sues defendant for wrongful dismissal ○ Defendant argues that the purchase and sale of the assets should be brought into account for mitigated damages	○ But for the breach (wrongful dismissal), the plaintiff would not have had the time or known of the state of the assets and his ability to sell them – all triggered by the wrongful dismissal

Jamal v. Moulla Dawood (1916) Burma

Facts	Holding
○ Plaintiff is the seller of shares to the defendant buyer ○ At the time of delivery the shares had decreased in market value – the buyer did not want to complete the deal ○ The plaintiff held on to the shares and sold them months later at an increase in price ○ Plaintiff sues for the damages (difference between contract price and share price at date of breach)	○ The court allows the plaintiff to keep the profits and not reduce the damages ○ The plaintiff, by holding on to the shares, re-assume the risk of the marketplace

If the plaintiff has taken mitigated steps that can be considered as 'new initiatives' the question becomes whether the mitigation that results will be applied against the damage caused by the defendant. The question to ask is whether 'but for' the breach would the plaintiff had taken the particular steps?

Campbell

Facts	Holding	Ratio
○ Plaintiff is selling cans of ham ○ Market price at time of refusal is below contract price ○ Subsequently the plaintiff sells above the contract price	○ *Issue*: Was there a market trading at the time of the breach? Was the vendor in a position to be able to sell ○ If you would not have found a market, then because the vendor is required to hold on to them that is a reasonable act of mitigation	○ If you cannot find an operating market, to the extent that holding on to the goods is a reasonable act of mitigation, the fact that the goods are later sold as a result will reduce the damages entitled to relative to the price of the goods as sold

Slater (69)

Facts	Holding
o The defendant has entered into a contract for 3000 pieces of unbleached cloth o Defendant rejects further performance of the contract claiming the cloth is defective o The plaintiff is bringing an action for failure of the buyer to take complete delivery o The buyer claims for damages for the non-delivery of the outstanding goods as well as the difference in value of the goods that were delivered o The buyer has been able to take the defective cloth and sell it in satisfaction of another contract – the other contract had called for bleached cloth	o The trial judge would only award damages for the defective cloth o The defendant does not have to bring the second series of contracts in as mitigating steps

Harris' approach is in some ways preferable in trying to identify what are reasonable acts of mitigation versus what are extraordinary means of mitigation.

1. Is there an available market to sell or buy on?
2. To the extent that the seller has done something, is the action a new initiative (an initiative that is extraordinary – Harris – or, an initiative that would not have been made 'but for' the breach – Waddams)?

Volume Selling

When you thing about a seller and the purchaser is in breach, then the automatic response is that to the extent that the seller has the goods still to sell, the next sale that comes along should be taken as an act of mitigation and, therefore, the damages ought to be nominal. However, what happens in the situation where the seller claims to be able to satisfy every purchaser that comes along? The seller has lost only a particular sale – should the sale to a subsequent buyer be brought in to mitigate?

Double Recovery

The issue of double recovery means that a person is not entitled to receive twice on a single item – you are entitled to you losses and no more. Double recovery typically arises in cases of businesses where you have an asset that is used to generate profits. The normal expectation is that that all of a companies gross receipts are used to cover the costs of the assets purchased. The other way to ask for the losses is to argue the seller is entitled to his/her net profits, but to the extent that the asset is defective and the seller has suffered a decline of value in the asset, the seller is entitled to that as well.

What does the plaintiff mean by profits? Loss of capital value plus gross profits? This would appear to provide double recovery. Double recovery is simply confusion over how the person calculates profits. This is likely to occur where a person is claiming profits.

McLean v. Canadian Vickers

Facts	Holding
o The plaintiff has purchased a printing press to print in four colors o The machinery is defective – does not reproduce as warranted o In 10 months the plaintiff tries to	o **Trial**: Damages were assessed under three heads: (1) dismissed seller's claim for outstanding purchase price; (2) awarded $50,000 special damages on list of costs in attempts to fix; and (3) awarded $50,000 as lost business profits o **Appeal**: (1) The plaintiff is required to pay remainder of purchase price; (2) Allows special damages subject to possible overlap with lost business

get the machine to work – has made expenditures to try o The seller agrees to take the machine back – without prejudice to bring an action for breach o Plaintiff had made first installment on capital cost of machine – 2/3 was left to still be paid o 2 years had lapsed and the machine still does not work properly	profits; and (3) does not allow the lost business profits figure to stand o The assessment of lost business profits is on the assumption that there is business to be conducted o The concern is whether the plaintiff had available contracts that would have made a profit – master specifically requested to assure him/herself that work existed on which a profit would be made o There was also a concern with overlap with losses specified as special damages which are lost profits incurred prior to the offer to buy bank the machine by the defendant

Reliance Interest

In contract three main interests are protected:

1. *Expectation interest* – be put in the condition you would be in if the contract had been performed according to its terms. Expectancy is always a measure of the lost profit that the plaintiff is going to make;
2. *Reliance expenditures* – expenditures the plaintiff has made in reliance upon of performance of the defendant. The reliance interest will most always be encompassed in the expectation interest; and,
3. *dd*

Fuller and Purdue argue that the law favor compensation of a plaintiff's reliance interest. However, they give an expansive definition of the reliance interest. The reliance interest encompasses the lost opportunities experience by the plaintiff that the plaintiff has foregone by contracting with the defendant. The difficulty in assessing these foregone opportunities may be the main reason to compensate the plaintiff for his/her expectancy as the best equivalence of this loss. The expectation interest will always encompass the reliance interest.

Reliance damages in contracts in most cases is used at a much more prosaic level: where the plaintiff experiences difficulties in assessing the expectation interest, as in where the whole venture is speculative, and therefore only wishes to rely upon the actual evidence of wasted expenditures.

The reliance damage will invariably be smaller than the expectation damages – if the expenditures are not recovered the plaintiff would incur a loss. This may be a reason why the plaintiff would seek the reliance interest in an improvidence bargain.

The choice of reliance damages has a technical advantage for the plaintiff where there is an improvident bargain – it shifts the burden on the defendant to show that there was a losing bargain.

Bowley v. Domtar

Facts	Holding	Ratio
o Plaintiff has a contract to cut timber o Domtar is to provide trucks for the timber o Domtar refuses to deliver trucks o Bowley has to stop cutting and claim expenditures up until the time they had to stop	o The expenditures Bowley would have incurred would have far exceeded the expected profit o This is a very improvident bargain for the plaintiff o The improvidence is not attributed to the defendant's breach of the contract	o Any claim for damages must be diminished by the amount which the defendant can demonstrate the plaintiff would have lost on the performance of the contract

o They had expended $232,000		

There have been occasions where a plaintiff has argued for a reliance expenditure, but then make the claim that they knew the contract was a losing contract saying that they were wanting to create a relationship with the defendant and then profit from subsequent contracts. The courts have been receptive to that idea where the plaintiff can prove that this is some type of industry practice and where there is a high level of probability that the plaintiff's contract will result in subsequent contracts with the defendant.

Indemnity Interest

This is an interest that indemnifies the plaintiff for actual expenditures made as a result of the defendant's breach. The indemnity interest allows for compensation of actual expenditures, which the plaintiff has been required to incur as a direct result of the defendant's breach. They are distinct from being merely causally linked to the breach. Any compensation of the indemnity interest must be within the remoteness contemplation test.

Often some of the expenditures may be incurred as an act of mitigation.

Molling c. Dean (1901) KB

Facts	Holding
o The plaintiffs have purchased books to be sent to a third party to the United States o The books were purchased from the defendant – but they are rejected in the U.S. because of the poor quality	o Plaintiff expected to get profit, they would incur the expenditures of shipping (reliance interest), and having been rejected the plaintiff ships them back to the U.K. and sells them there (indemnity interest are expenditures caused by the breach)

Awards Measured by the Benefit to the Defendant

Restitution

There are situations where we do look at the defendant's gains as an indicator of the plaintiff's entitlement. This immediately crosses into the area of restitution. The restitution claim requires three factors:

1. A receipt by the defendant of a benefit;
2. At the plaintiff's express; and
3. Circumstances where it would be unjust to allow the defendant to accrue the benefit

There are two areas where it is more common to find restitution claims:

1. *Account Profits* – it is very common that you will have an order for an account in intellectual property cases. There are a lot of different ways of calculating the accounting of profits and a great deal depends on the amount of costs the defendant will be allowed to deduct against the accounting of profits. For instance, where there are punitive damages there may be very little reduction of costs, but where there is an innocent infringement there may be a large reduction of costs and, in fact, overhead etc.,; and,
2. *Waiver of Tort* – waiver of tort competes with the intentional torts of trespass and nuisance. The waiver of tort is the idea that the person is basically saying that the tort will be allowed, but the compensation will be equal to what the defendant has gained by being allowed to undertake the particular activity.
    (i) The plaintiff should be entitled to recover the expenditures saved by waiving;
    (ii) What has the plaintiff actually lost; or,
    (iii) Loss of opportunity to negotiate the trespass

The other way that courts have compensated is through compensatory damage for trespass plus punitive damages as a measure to top the plaintiff up. Punitive damages are dependent upon finding deliberate and malicious conduct. The cases that have awarded punitive damages in these cases tend to under-compensate the plaintiff so that they still leave profits in the defendant's hands.

There are three alternatives:

1. Compensatory damages – likely to be zero if there is no actual physical damage, plus punitive damages;
2. Compensation for lost opportunity to negotiate the right to trespass; and
3. Restitutionary application

Non-Pecuniary Losses

There are three basic areas:

1. Non-pecuniary losses from a physical inconvenience or real discovery – it is easier to identify some type of objective measure;
2. Non-pecuniary losses due to the anxiety, distress, pain and suffering that is occasioned by the breach – losses experienced that have arisen from the breach of contract; and,
3. Non-pecuniary losses due to frustration, anxiety, and mental distress occasioned by the sheer fact of the breach alone. The courts have not been generous towards compensating for these types of non-pecuniary losses.

You must distinguish between where the damages flow. Within the first two heads, there have been two means of controlling the awards:

1. An interpretation of the rules of remoteness – the incursion of mental distress resulting from the breach may be too remote (not within reasonable contemplation) to have occurred at the time of the contract in the mind of the defendant; or,
2. An explicit policy for pragmatics – these types of losses should not be recovered. Because they are more subjective in assessment, for practical reasons we would want to deny their recoverability.

In a contract between commercial entities, the breach of contract is simply a circumstance and the thought of non-pecuniary damages is absurd. Commercial entities should take breaches with a degree of stiff mental fortitude – this happens in business.

The courts have been more generous in allowing recoverability subject to the remoteness clause. When the term physical inconvenience is used it means reference to some sensory experience.

Farley v. Skinner (2001) HL

Facts	Holding	Ratio
○ Plaintiff entered into a contract with a surveyor ○ Plaintiff asked surveyor to comment on a house he was proposing to buy – whether it was going to be affected by air traffic ○ Defendant reported negligible effect from air traffic noise ○ Plaintiff notices that on certain days aircraft fly over top – just miles away is a navigation beacon ○ Plaintiff wants to sue surveyor ○ Plaintiff argues loss of enjoyment and amenity value	○ There are two aspects: (1) discomfort experienced by aircraft coming over – sensory discomfort; and/or (2) damages for the mental distress occasioned by the negligent performance of the contract ○ Plaintiff wanted assurance relating to the aircraft noise – this was of value to the plaintiff ○ The plaintiff is entitled to some compensation due to the lost value to the plaintiff	○ A plaintiff is entitled to loss of value causally linked to a contractual breach ○ If one of the objects of the contract is breached, compensation should follow from any loss causally flowing from that breach

The court is trying to allow a window of recovery when the plaintiff has communicated the type of protection he wishes to seek in the contract – a report on the noise. The lost value appears to be flowing causally from the breach. The traditional approach in the UK has been if the object of the contract has been enjoyment or freedom of anxiety, then the plaintiff can be compensated for that loss. *Farley* revises this to say if one of the objects of the contract is breached, compensation should follow from any loss causally flowing from that breach.

Wrongful Dismissal

Vorvis v. Insurance Co. of B.C. (1989) SCC

Facts	Holding	Ratio
○ A solicitor is performing legal services for the Insurance Co. ○ The solicitor is backed up, but performs very well ○ The solicitor is ordered to pick it up at the expense of quality ○ Solicitor is let go – he sues for the anxiety of being dismissed and also for punitive damages	○ Damages for mental distress were available in Canada ○ The court characterizes the employment contract as a simple provision of labor in return for money ○ The only issue is what reasonable notice period should have been given	○ You could not get in terms of a breach of an employment contract damages of mental distress ○ If you can find an independent cause of action, then the damages may flow from the independent cause of action

	○ The court gives no value to the importance of carrying a job	

Ribeiro v. CIBC (1992) ON CA

Facts	Holding
○ Not Done	○ Some other action arising from a clause of the contract, such as notions of good faith performance or the obligation to provide counseling out may be used to support the distress action

Wallace v. United Grain Growers (1997) SCC

Facts	Holding	Ratio
○ Not Done	○ There is implicit within the contract of employment a notion of fair dealing or good faith discharge a requirement that the employer treats the dismissed employee with dignity without submitting to harassment or humiliation ○ If the employee experienced such factors during dismissal, the court is willing to extend the reasonable notice period	○ You cannot get compensation for the simple loss of employment – it is the way the loss is administered that triggers the *Wallace* factors

By extending the notice period the court gives some acknowledgement that self-worth is tied to the employment and it can be loss due to the dismissal and can be compensated.

All of these losses are subject to the obligation to mitigate. To the extent that another job is secured, the amount of compensation may be reduced.

Frinzo v. Baycrest (2002) ON CA

Facts	Holding
○ Individual was employed for 17 years running a hair salon in a geriatric care unit ○ The employment is terminated because the company is in a restructuring phase – employee accuses her of belaboring purposely ○ Plaintiff brings an action for the tort of intentional infliction of mental suffering	○ The tort is an independent cause of action that may justify compensation ○ The plaintiff may pursue the *Wallace* factors or the tort action, but not both ○ The *Wallace* factors will be cut down by an act of mitigation whereas the tort considers different activities of mitigation

Punitive Damages

Juristic Underpinnings

The largest punitive damages award has grown from $50,000 to $1,000,000 in less than one year. In increasing frequency the awards appear to be going up. The juristic underpinnings for punitive damages are essentially five:

1. *Compensation* – overlap with aggravated damages – compensatory damages for loss of dignity and pride. The plaintiff will need to show some exceptional conduct by the defendant;
2. *Deterrence* – prevent re-offence
   (i) Specific Deterrence – prevent the defendant from re-offending by making the defendant pay the true cost of his/her actions
   (ii) General Deterrence – use the defendant to signal to other would be tortfeasors about the cost of the breach;

   It is under the rubric of deterrence that you get the American notion of high punitive damages award – the defendant is going to be used as the vehicle for the court to send out a message
3. *Punishment* – is the particular thing the defendant has done worthy of being punished and what is the level of punishment that should be imposed on the defendant. Unlike deterrence, this prong is backward looking. Is it legitimate to ask what the worth of the defendant is so the defendant gets the message?
4. *Tort for Profit* – overlap with restitution action (particularly) waiver of tort, which is available in the property torts (trespass, conversion, nuisance, defamation). The advantage is that there is no need to show that the defendant was motivated by malice. The plaintiff's loss is measured by the defendant's gain. Also, the common law action of loss of opportunity to bargain is taken into consideration;
5. *Denunciation* – an open expression of society on the egregiousness of the defendant's contract

Arguments For and Against

In Canada, the goals are punishment, denunciation, and deterrence. There are a number of arguments in support of and/or against the award of punitive damages:

For	Against
o Symbolic function of enhancing the criminal law o Supplemental to the criminal law in prescribing other forms of normative behaviour o Privatized criminal law	o Overlap with criminal law – double jeopardy o Lack of principles to assist quantification o Civil burden of proof o Windfall to plaintiff o Constitutional objections

Requirements

In order to get punitive damages the following elements must exist:

1. The defendant's conduct must be deliberate or advertant (clearly intentional);
2. The defendatnt's conduct or motive must be exceptional, malicious, high-handed, outrageous, contemptuous, evil, callous, brutal, wanton, malevolent, and/or cruel;
3. The plaintiff must be the victim of the behaviour, which is the object of the punishment (this separates use from the United States)

Norberg v. Wynrib (SCC)

Facts	Holding
o Doctor traded sexual favors for prescription drugs o Patient had supposedly consented	o What constitutes consent? o There was a breach of the fiduciary duty o The defendant's conduct was reprehensible and offended the ordinary standards of the community

Whitman v. Pilot Insurance (2002) SCC

Facts	Holding
o The Whitmans had insurance on house, it burns down, they make a claim and the insurance company refuses to pay out	o Jury – punitive award of $1,000,000 o Appeal – punitive damages cut down to $340,000 o **SCC** – restored $1,000,000 o The general objectives of punitive damages are punishment, deterrence and denunciation – the primary vehicle for those objectives is the criminal law but it does not preclude them in civil law. o Governing approach to quantum should be proportionality – there has to be a rational connection between the objective for which they are awarded and, if granted, and only if, they have such connection o Juries should receive guidance on the function of punitive damages, the factors which govern their award and the assessment of a proper amount o There is a legitimate role for appellate courts to intervene where the award exceeds the boundaries of a rational and measured response to the facts of the particular case; o The plaintiff must specifically plead the claim for punitive damages (Ontario rule 25.06(9)). The facts which lead to the request for punitive damages should be identified and, in particular, what conduct meets the adjectives vindicate, reprehensible, and malicious

Rational Test for Proportionality (from Whiten)

The key to the award is the rational connection test between the need for the punishment and the defendant's conduct. There are a number of types of proportionality:

1. Proportionate to the blameworthiness of the defendant's conduct:
   (i) The more reprehensible the misconduct the higher the rational limits to the potential award:
      i. Is the conduct over a long period of time?
      ii. Is it inflicting hardship on the plaintiff?
      iii. Whether the misconduct was planned and deliberate
      iv. What is the intent or motive of the defendant?
      v. Was the defendant aware that what he was doing is wrong?
2. Proportionate to the degree of vulnerability of the plaintiff
   (i) Is there a power imbalance and vulnerability of the plaintiff leading to an abuse of power?
3. Proportionate to the Harm or Potential Harm Directed Specifically at the Plaintiff
   (i) What has been occasioned by the plaintiff as compensatory loss?
4. Proportionate to the need for deterrence
   (i) Issue of financial power of the defendant and ability to pay. This factor is of limited importance unless:
      i. Defendant chooses to argue financial hardship;
      ii. It is directly relevant to the defendant's misconduct; or,

iii. Other circumstances where it may rationally be concluded that a lesser award against a moneyed defendant would fail to achieve deterrence

5. Proportionate, even after taking into account the other penalties, both civil and criminal, which have been or are likely to be inflicted on the defendant for the same misconduct;
6. Proportionate to the advantage wrongfully gained by a defendant from the misconduct
   (i) That the punitive damages do not simply become a license to breach the plaintiff's rights

Judicial Treatment of Punitive Damages

Rookes v. Barnard UK

Facts	Holding
○ Not Done	○ A number of categories to consider for the ordering of punitive damages: (i) Where government servants or agents have acted in an oppressive, arbitrary, or unconstitutional manner, including police wrong-doing (ii) Where damages are sanctioned by statute; (iii) Where defendant's conduct was calculated to make a profit or advantage which the defendant believed would exceed any damages paid to the plaintiff in compensation ○ Three further conditions: (i) The plaintiff cannot recover unless he or she is the victim (ii) Restraint needs to be exercised when awarding damages so that they do not inflict greater punishment than would be exacted in criminal law (iii) Whereas means of the defendant are unimportant in calculating compensatory damages, it must be considered when awarding punitive damages

Canada never adopted these categories, but the three conditions are common.

Aggravated Damages

Aggravated damages are intended to be compensatory damages to compensate the plaintiff for humiliation and anxiety. However, before being awarded the CSS has held in *Hill* v. *Church of Scientology* that there must be a finding that the defendant was motivated by actual malice. Aggracated damages express the "natural indignation of right-thinking people arising from the malicious conduct of the defenant".

Non-Pecuniary Damages – do they fall within a remoteness test?
Aggravated – additional damages because of the humiliation or loss of dignity experienced and, therefore, require contemptuousness, callousness, or high-handedness
Punitive – to pursue punishment, deterrence, and denunciation

Pre and Post-Judgment Interest

Pre-Judgment

There are two relevant sections in the *Courts of Justice Act* – 127-129.

Section 127 – how the interest is to be determined
Section 128 – from what point in time it runs

To determine the interest rate you look to the preceding quarter from when the action was filed. The interest runs from the date in which the cause of action arose.

Post-Judgment

Similar to pre-judgment assessment determined in section 127 except that where the bank rate has a fraction, it is rounded up to the next whole number and then 1% is added

Section 130 – the court has the discretion to increase or lower both awards (either pre or post-judgment interest). This has been used against those parties that have failed to expedite the court process.