

# Remedies Outline

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## I. Introduction to Damages

### A. Types of Relief

#### a. General Damages

- This is what an ordinary person would believe damages would be if K was breached
- The terms of the K will help to establish what general damages are

#### b. Special/Consequential Damages

- This is what the D knows to be the damages based upon the information that was given. Requires that the communication be made to someone who is in a position to bind the company to the losses.
- Tacit Agreement Test
  - ◆ In a minority of jdx, the D will not be liable for special damages even if aware based upon info given unless he tacitly consents to be liable.
    - ◇ Tacit consent is not express consent, but silence is not tacit consent.
    - ◇ Example - inform hardware store that need lights for tractor or will not be able to harvest crops and suffer losses, hardware store says we guarantee our product. Could argue this is tacit consent, but others argue that disproportionate value btwn bulb and losses mean no tacit consent.



#### ◆ Proportionality

- ◇ Look to the proportionality of the price paid versus loss suffered.
- ◆ UCC does not apply the tacit agreement test.
- ◆ Informal dealing (i.e. chit chat) can go to show that no tacitly consent.

#### c. No Double Recovery

- You can file both a tort and a breach of K claim, but you can only recover once for your damages.

### B. Major Limitations on Damages Recoveries

#### a. Foreseeability - only liable for what is foreseeable

##### (a) Tests

##### 1. Zone of Danger (Palsgraf)

- ◇ Liable if the D and the type of harm is within the zone of danger
- ◇ But just because within zone, you must still show causation and that a DUTY was owed

##### 2. Liable for all that Directly Result (Eggshell)

- ◇ This is greater source of liability than what we see in K law
- ◇ Liable for any harm that results from the act if find D negligent
- ◇ Requires find negligence: that a rpp/ssc would foresee act cause injury and do different
- ◇ P would prefer that this is the test because then it is more likely that the D will be liable for any damages
- ◇ Example: drop piece of wood, foreseeable that breakage occur. So when a fire erupts also liable for that too.

##### 3. Liable for all Probable Consequences

- ◇ Liable for harm that had a greater than 50% probability of occurring

##### 4. Liable when Easily Preventable

- ◇ Liable where the cost to prevent the harm is low, even where the probability that the harm would occur is also low (because usually harm should be probable)
- ◇ Example was the radio on board ships

##### 5. Liable where General Harm Probable, even if Harm Caused was Unlikely

- ◇ Example was Kinsman - water damage was a probable type of harm so

even though the way the water damage was caused was unlikely the D still liable.

- (b) Tort versus Contract
  - ◆ Tort typically easier to win because the foreseeability test here is easier (all direct harms or zone of danger versus what an ordinary person know/ what special info know)
  - ◆ Negligence in performing K (i.e. an attempt to make breaching a K into a tort claim) is NOT allowed.
    - ◇ You would need to allege Fraud or some other type of tort re the K.
    - ◇ Exception is that if the K breach causes personal injury then there could be tort and breach of K claims.
- b. Certainty - not liable for damages that did not occur/ unlikely to occur
  - (a) Analysis Hypos
    - ◆ New Businesses - old rule was that could not show expected profits because too uncertain, but modern rule allows you to
    - ◆ Future Earnings/Lost Earnings - requires expert testimony, will look at the individual's likelihood of obtaining
      - ◇ Rare and special talents - this is particularly hard because unlikely to be successful but if you are then you would have lots of money. So need to look at the individual's talent.
  - (b) Lost Chance Doctrine
    - ◆ Determine the percentage of likelihood that the D caused the harm and then make the D liable for that percentage of the harm caused
      - ◇ Example: death. There was already a chance that would die even with good care (40% chance survive), but bad care mean that he has 25% chance survive, and if find by prep of evid that doctor's actions were bad care then hold the doctor liable for 15% of loss earnings (40-25%).
  - (c) All or Nothing Approach
    - ◆ Alternative to lost chance. Here hold the D for everything but it requires that the jury find by prep of evid that the injury was caused by the act.
      - ◇ Example: pre-existing condition and crippled. The jury has to find that the D's poor care caused the crippled condition that make the P unable to work and if so then responsible for entire loss. If the jury finds that it was 80% likely to have been due to the poor care and 20% a result of his pre-existing condition then the P gets nothing.
- c. Avoidable Consequences - not liable for damages that could have been avoided/mediated
  - (a) Rule
    - ◆ Must take reasonable steps to mitigate losses (both in breach of K and tort - i.e. prevent injury)
      - ◇ Reasonable, not everything
    - ◆ If fail to mitigate then D will not be liable for that portion of the harm
- C. Agreed Remedies
  - a. K Provisions
    - Generally, the ct will uphold the provisions that you agree to (even if there is no actual harm that resulted)
    - But some jdx will not enforce the agreed upon remedy if there is no actual injury because they feel that implicit in the K is the premise that the sum will be in the fair range. Tunick no like this approach.
- D. Punitive and Nonpecuniary Damages
  - a. Punitive Damages Test
    - A puni damages award is grossly excessive and violates d.p. based upon considering the following factors:
      - 1) Degree of reprehensibility of nondisclosure - the greater the reprehensibility the greater the puni damages

- ◆ No bright line number or rule
  - ◆ Some wrongs are more blameworthy than others
  - ◆ Purely economic less reprehensible than performance/safety problems
    - ◇ But gigantic economic loss could be worse than just tearing off someone's hangnail
  - ◆ Can consider past conduct in determining whether reprehensible. But cannot base amount of punitive damages on past conduct (because double punishment is against d.p.)
- 2) Difference between the harm and punitive damages
- ★ ◆ Ratio of actual harm inflicted to the punitive damages award must bear a reasonable relationship
  - ◆ There could be a big difference in the ratio if the act was particularly egregious but resulted in small harm. But here, that was not the case.
- 3) Sanctions for Comparable Misconduct
- ◆ Compare what fines are in other states, and this state compared to the punitive damages award.
  - Should be future-oriented - there must be a sign that an award would go to discourage future misconduct of the D or in society
- b. Punitive Damages in Tort Actions versus Breach of K
- Purely economic losses are less likely to result in punitive because not as reprehensible as losses to life or safety
  - Bad faith concerning K typically does not justify punitive damages, must show that need the money immediately, and that were counting on its availability
    - ◆ In California this is limited to disability insurance
- c. Nonpecuniary Damages in K Actions
- E. Interest and Prejudgment Inflation
- The amount must be certain and definite for interest to be awarded.
  - It is done at the discretion of the court based upon justice.
- F. Attorney's Fees and Sanctions
- a. Entitlement and Measurement
- General rule is party bears own costs but legisl can decide to shift and give right to attorney fees. Reasonable requirement.
- II. Introduction to Equitable Remedies
- A. Influence of History
- B. Interests Justifying Equitable Remedy
- a. Property Rights / Personal Rights Dichotomy
- The nature of the rights at stake will determine whether courts will get involved
  - Typically property rights seen as more serious and necessitating court involvement
  - But where a major personal right is being infringed upon the court may feel that monetary damages are insufficient (e.g. refusing to allow entrance into a club based upon race)
- b. Instrumental Considerations
- Look to see if there is an alternative forum that is a better place for remedying the problem
- C. Inadequacy of Legal Remedies
- Sometimes legal remedy is inadequate (e.g. racist club, home purchase)
- D. Feasibility and Practicality of Equitable Remedies - Judicial Resources Limitations
- a. Feasibility and Practicality
- An argument against equitable remedy is that it takes up too much judicial resources (too much time, too difficult to do)
- b. Judicial Resource Limitations
- E. Balance of Equities and Hardship
- Courts will weigh equities (weigh the dirt)
  - Courts will consider the public interest at stake. More likely to award an injunction if in the

public's benefit.

- There may be other interests that are more impt than others (e.g. interests of the child trump unclean hands of the father)

#### F. Unclean Hands

- Cts will consider and weigh the unclean hands of P and D but it doesn't necessarily mean you will lose.
- The blemish must have something to do with the action before the ct.
- Inducing someone to violate rules can be an example of unclean hands.

#### G. Estoppel and Laches

##### a. Estoppel

###### (a) Equitable Estoppel Rule

- 1) Other party misrepresented or concealed material facts,
- 2) the other party knew at the time they made their representations that the rep were untrue;
  - ◆ Some states have different mental requirements on the party making the misrep (e.g. reckless indifference of the truth would suffice in some jdx, or misrep even if believe that true)
  - ★ ◆ Tunick points out that where no rep were made (i.e. a concealment.) this element may not be met.
- 3) the party claiming estoppel did not know that the rep were untrue when the rep were made and when they were acted upon;
- 4) the other party intended or reasonably expected the rep to be acted upon by the party claiming estoppel or by the public generally;
- 5) the party claiming estoppel reasonably relied upon the rep in good faith and to their detriment; and
- 6) the party claiming estoppel has been prejudiced by his reliance on the rep.

- (b) Result is that the party will not be able to make that argument, bring that defense.
- ◆ Example of the sexual abuse of the minor child by church priest.

###### (c) Tunick's Summary of Elements. The party claiming estoppel must show:

- 1) The other party misrepresented or concealed material facts;
- 2) The party claiming estoppel was unaware of the concealment or misrepresentation when acting upon, or refraining from acting upon, the misrepresentation or concealment;
- 3) The party claiming estoppel reasonably relied that the other party was not misrepresenting nor concealing material fact(s); and
- 4) The party claiming estoppel has, or may be, prejudiced because of such reliance.
  - ◇ Tunick inserted the "may be" requirement. Has been prejudiced takes care of the book's detriment element.
  - ◇ Detriment has not occurred until case is dismissed, whereas here he has not even filed the case so that's why he added in "may be" prejudiced.

##### b. Laches

- i. Laches - unreasonable delay in pursuing equity claim prejudices the adversary and thus prevents the claim

- ◆ Example - H was supposed to keep up life insurance for his W as part of his divorce settlement. The H let it slip and notified his W. W didn't complain until much later. By this time the ct felt that it was not right to force the H to pay for life insurance because rates were much higher due to his old age. Tunick points out that they could have lowered the amount of coverage that want the guy to get (i.e. make him pay the amount he would have been paying monthly and let the W have whatever that would get her in coverage)

#### H. Right to Jury Trial

#### I. Enforcement of Equitable Decrees - the Power of Contempt

##### a. Civil and Criminal Contempt

- Cts have the power to hold someone in contempt (but arbitrators don't)

- b. Limitations on Civil Contempt Sanctions
- c. Collateral Bar Rule
- d. Requirement of Specificity of Decree
  - i. Cts can only hold someone in contempt if they are aware (have notice) that this might occur. Need to know it applies to them and what they must do/ not do.
- e. Requirements of Wilfulness and Ability to Comply
- J. Injunctions as Provisional-Procedural Remedy - TRO and Prelim Injunctions
  - a. Due Process Requirements
  - b. TRO
  - c. Prelim Injunctions
- K. Equitable Considerations in Fashioning Injunctions
  - Must be very explicit. Need to know the outcome. Need to know who it applies to.
- L. Persons bound by Equitable Decrees
- M. Continuing Jdx of Equity - Power to Modify Decrees
- N. Declaratory Relief
- III. Introduction to Restitution
  - A. Development / Overview of Restitution
    - a. Restitution in General
      - i. Usually the measure of damages is the harm to the P, not the benefit to the D.
      - ii. But with restitution you can get the benefit that the D received.
        - ◆ Example steal your \$10 watch and then sell it for \$100. You can get the \$100.
    - b. Theories of Recovery
      1. Thief is your agent, so get the value of whatever the thief sells your stolen goods for.
      2. Can only recover the amount that item is worth (not what it sold for)
      3. Can recover the value to the P
    - c. Impact of Abandoned Property Analysis
      - If property is abandoned then not allowed to recover because P does not own it anymore (i.e. there is no theft)
      - If property is not abandoned then it is a theft - you have the right to take it back until the trash collector collects the item
    - d. Restitution as One Alternative Remedy for Existing Cause of Action
    - e. Restitution as Free-Standing Remedy
      - Unjust enrichment prevents someone who has gotten the value of services (e.g. someone who did the work with the expectation of payment for someone who did not have the authority to approve) without payment from collecting insurance proceeds on that damages
      - Insurance money will go to the person who did the work
  - B. Acceptance of Benefits
    - Acceptance of benefits alone does not require you to pay someone for their services.
    - Example of the attorneys who were able to get more money for the beneficiaries in a will contest. The beneficiaries refused to authorize the attorney so they were not required to pay them fees even though they got the benefit of the extra money.
    - But if you have the ability of stopping someone you know from performing work which they expect compensation, you have the duty to do so.
  - C. Requirement of Restoration by P
  - D. Unsolicited Benefits and Volunteers
    - a. General/ Overview
      - i. If performing noncontractual duty of another, even if perform without actor's knowledge or consent is entitled to restitution if acted unofficiously and with intent to charge thereof.
      - ii. Also entitled if supplied immediately necessary to prevent serious bodily harm or suffering of such person.
    - b. Restitution for Unsolicited Acts Preserving Property
    - c. Restitution for Unsolicited Medical Services or Preservation of Life

- d. Restitution for Payment of Another's Debt or Performance of Another's Obligation
  - i. General rule is that no restitution for payment of another's debt or perf oblig
  - ii. Equitable Subrogation is an Exception
    - ◆ Equitable subrogation - Payment of debt of another under a moral obligation will support equitable subrogation; and the remedy will be applied in all cases where demanded by the dictates of equity, good conscience, and public policy.
  - iii. Protection of Own Interests as Exception
    - ★ ◆ Motive of self interest: if you are protecting any interest you have or think you have or if you are discharging any duty you own or thought you own

#### E. Measures of Unjust Enrichment

- Quantum Meruit - you get the value of the work done, not the benefit obtained from the work
  - So absent an agreement you get paid a salary, not a portion of the company's worth
- Only get if had opportunity to refuse and the P was not a gratuitous volunteer (i.e. did not do with expectation of compensation)

#### F. Affirmative Defenses in Restitution

#### G. Asset-Based Remedies for Unjust Enrichment

##### a. Overview

- Ordinarily the first person prevails. Between two innocents, the first harmed is the one who prevails
  - ◆ Example of the two wives and the question over who gets the H's life insurance? The first wife prevailed.

##### b. Tracing

- a) FIFO
  - ◆ First money in is first money out.
- b) LIFO
  - ◆ Last money in is first money out (like the way you do dishes).
- c) Hallet
  - ◆ If money is coming out of the account and the D has money in the account then use his money first.
  - ◆ Basically the D-thief's money gets used up first.
- d) Learned Hand Percentage Base
  - ◆ Money comes out of the account in the same percentage as what was stolen from victims. So if \$4 was stolen from each victim and there is \$8 in the account, when the thief buys something for \$4...\$2 will come out of Victim A and \$2 from Victim B and each will own 1/2 of the item.
- e) Oatway
  - ◆ Lets the victims decide whether they want to have the money coming out of the account be from the D-thief or from their own. Would become relevant if the item is something valuable that they want to be traced to.
- f) Restoration / Lowest Intermediate Balance
  - ◆ Innocent P has priority to whatever the lowest intermediate balance on the account was.
  - ◆ There are several ways that it can be calculated
    - ◇ All deposits first, then withdrawals
    - ◇ All withdrawals first, then deposits
    - ◇ Events as they occur

##### c. Contribution and Indemnity

#### IV. Remedies for Harms to Person

##### A. Damages for Personal Injury Overview

##### B. Damages for Medical Expense and Loss of Earning Capacity

##### a. Measurement of Loss

- Experts will testify as to the amount. If no evidence then no get.
- Amount will be adjusted to present value (this is supposed to take account of interest)

and inflation)

- Tunick says we need to know
  - Whether the D would want the P to work a long time or short - SHORT
  - D would say interest rate will be high, and that's what will invest in
  - D will argue for a high minimum wage
  - P will argue that entered workplace and earned a lot

b. Inflation

c. Structured Settlements and Periodic Payment of Judgment

### C. Damages for Pain and Suffering

- Old rule was that person had to testify about pain and suffering (so babies could not receive. Modern Rule allows babies to recover.
  - Could testify by other people testifying about the child's crying, etc.
  - Tunick says this is more of an evidence issue. It is just that there is other ways to get into evidence that baby experienced pain (e.g. someone hear them crying, etc.)
- Pain and suffering is compensation for loss of enjoyment in life. If you are not aware that you are receiving money because you are comatose then you don't get it. Otherwise will be punitive damages.
- Standardized measurements
  - Most jdx say that amt is specific to the individual. But some jdx say that there are standardized measures for p&S.
    - Will have an expert talking about measurement of damages on average.

## V. Remedies for Interference with Property Interests

### A. Physical Damage to Property

a. Rules

a) Different Compensation Valuation

1) Cost to Repair

- i) The cost to repair the damaged property is the upper limit on what can recover

2) Diminution in Value

- i) Can recover the amount the damaged property has gone down in value

3) Economic Loss

- i) Only award damages if the damage to the property is worth repairing (likely that D will repair). When the cost of restoring to former condition is disproportionate to cost of more limited repair which would substantially restore property's utility then no award repair costs.
  - ◇ Example of the barge that got a dent that was still seaworthy. Thus, the economic loss was zero.

b) Exception: Items of Sentimental Value

- ◆ Generally, the damages are the actual value of the property.
- ◆ But where an item is property that purely sentimental the reasonable special value of such articles to their owner taking into consideration owner's feeling of the property is the way measure.
- ◆ You can K around being responsible for sentimental value of items.
- ◆ Acceptable valuation - heirlooms in family for years, wedding albums
- ◆ Unacceptable - eccentric old man that likes hanes tshirts
- ◆ Hypo
  - ◇ Gun that shot the President. Sentimental value versus historic value.
    - ◇ Ct said that the valuation was based upon the worth to the P in displaying the item as a showpiece. Likely could not get the \$10k paid, but probably could get more than the \$50 that the gun was originally purchased.

c) Damages when the Repairs Extend Life of Property

- ◆ Two options for how to award damages
  - 1. Percentage of Loss Caused

- ◇ Take the "# yrs remaining in old life/"# yrs in new life" = that percentage is the portion of the cost that the D should pay because his wrongdoing caused that damage.

2. Depreciation Method

- ◇ Tunick no like.
- ◇ Take the "# yrs remaining in old life/"# yrs in total old life" = that percentage is the portion of the cost to repair that the D should pay. Seen as what the P has not had the ability to use yet.
- ◇ In the hypo the D was arguing for this method because it made him pay less - his basis was that the P had depreciated these yrs so he should pay for them.

3. Entire Cost

- ◇ Perhaps this would make sense if the new regs require an extended life but it would have been ok if grandfathered

b. Hewlett

c. Freeport Sulphur

d. Bond v. AH Belo Corp

VI. Remedies for Fraud, Misrepresentation & Breach of Confidence

A. Choice to Affirm or Disaffirm

a. Manifestation of Choice

□ Rescission

- ◆ General rule is that must promptly notify intent to disaffirm when want to rescind.
- ◆ Settlement Negotiations
  - ◇ Stops the running of the clock. But must be g.f. negotiations (not to buy self time to decide)
- ◆ May not exercise dominion and control over the property
- ◆ Must return the property in its original state (status quo)
- ◆ Intersection with Duty to Mitigate
  - ◇ This may mean that can't return status quo.
  - ◇ Ct will allow so long as it is just enough to protect the Ds property
- ◆ Fraud
  - ◇ Fraud will mean that no need to manifest electing to disaffirm K, if the fraud is what causes you not to manifest immediately.
  - ◇ Fraud mean no need to return in original state if that what cause damage
- ◆ Incidental Damages
  - ◇ This is the costs that you incur prior to learning of the fraud for which makes you rescind.
  - ◇ You can recover these expenses that incurred in reliance on the K. BUT the longer you take to rescind (and the more expenses), the less likely it will be available.

b. Election of Remedies

B. Remedies upon Affirmance

a. Proximate Cause Limitation of Damages

b. Misrepresentation

a) Scienter

- ◆ Innocent - really believed it
- ◆ Negligent - believed but a reasonable person would not have made stmts
- ◆ Reckless - say but have not researched at all
- ◆ Intentional - knew false and intend the other person to rely

b) Measures of Damages for Intentional Misrep

- ◆ Some jdx say that bad scienter mean that get greater recovery

c) Remedies of Damages for Negligent or Innocent Misrep

- ◆ Some jdx will reward damages even if the misrepresentation is not intentional



- d) Elements
  - 1) Material Misrep
    - ◇ Requires that the misrep by a deal changer
  - 2) Reliance
    - ◇ P must have reasonably relied upon the misrep made
- e) Impact on K
  - ◆ Sometimes a misrep will mean that the K's terms may be modified/negated. That is because the P can say that the misrep was what caused them to enter into the K. (REFORMATION). Most jdx only allow if intentional or reckless, but some will allow even if innocent misrep.

C. Remedies upon Disaffirmance - Restitutionary Measures for Misrep

- Cannot get losses that incur after you learn of the misrepresentation
- Rescission
- Reformation
  - Most jdx only allow if reckless or intentional
  - Some jdx allow even if misrep is innocent

VII. Remedies for Mistake

A. Mistake in Performance

- Mistake which entails the substantial frustration of donor's purpose (here he wanted it to be gift, which was not) means that can rescind.
  - Fact that it was a gift. Concealed this from him. Could be seen as fraud.
  - Dissent felt that unreasonable to rescind because the misrepresentation was not the basis of his decision not to give gift.
  - Point is that if you lie it is not okay to say that it was unjustified for the person to rely.

B. Mistake of Fact in Formation of K

- General rule is that you can recover if it is a mistake of fact BUT NOT if it is a mistake of law. Tunick doesn't care if we can tell the difference btwn the two.
- a. Unilateral Mistake
  - A mistake on one side of the K can usually on rescind/reform if the other party knew or should have known that party was mistaken.
  - One party mistaken and the other party commit fraud = can reform.
- b. Mutual Mistake
  - General rule is that where both parties made a mutual mistake of law then can rescind/reform.
  - But parties can K around this rule (e.g. a House K that says buyer takes the property "as is.").
  - But if the mutual mistake only go to the value of the item and both parties are aware that don't have all information then cannot rescind.

C. Mistake in Integration - Reformation

- Reformation is an equitable remedy so evidence of inequitable conduct becomes relevant to show whether should be granted.
- a. Parol Evidence Rule and Statute of Frauds
  - Usually not allowed to bring in outside evidence but can be exception where the party is claiming fraud/ mutual mistake

VIII. Remedies for Breach of K

A. Land Contracts

- Seller's Remedies. Centex Homes
- Usually can get specific performance because see the house as unique

B. Construction Contracts

- Usually damages is the only remedy, cannot get specific performance. Rationale is that it is difficult to oversee/supervise performance.
- In cases where the defect is one that can be repaired or valued without undue expense the cost of perf is the proper measure of damages but where defect is one that can't be remedied with an **expenditure for reconstruction disproportionate to the end to be**

**attained** the value rule should be followed.

- Tunick says that disproportionate is key. 500 and 300 as example, versus 30k and 300. You could argue that the ct should have given up to the amount that feels is proportionate. Otherwise the D would try to increase the harm to make it more and more disproportionate. But if the ct feels like it was intentional you might not get away with things.

C. Employment & Service Contracts

- Employees Remedies. Parker v. Twentieth Century
- Any salary that you get is deducted from recovery.
- General rule is that not required to take just anything to mitigate damages, must be substantially similar before the ct will hold it against her.
  - ★ ▪ NOT THAT it must be substantially different before she can refuse.