# Terms vs Representations

---

**Pre-Contractual Statements**

- A pre-contractual statement can be a **term** or a **representation**.
- A *promise* of future performance is a **term**. Failure to fulfill a contractual **term** is a **breach** of contract.
- A *statement* of existing fact is a **representation**. If a pre-contractual representation is **not true**, it is a **misrepresentation**.
- The distinction is important because the remedies are different:
    - For a breach, the remedies are **damages** or **specific performance**.
    - For misrepresentation, **rescission** is the most common remedy.
        - Rescission is an equitable remedy, and it "undoes" the effect of misrepresentation by making the contract *void ab initio*. The goal is to return the parties to the position they were in prior to the misrepresentation.

**Enforceability of Terms**

There are two requirements for terms to be enforceable:

**1) Formation:** Have the requirements for contract formation been met with respect to that specific term?

- Something could fail to be a term because there was no intent to create legal relations, it was not offered, it was not accepted, or there was no consideration.

**2) Incorporation:** Was the term incorporated into the contract?

- Have the parties objectively taken reasonable steps to incorporate that term into their contractual relationship?
- Courts like to see "notice" of the term (ie. a sign stating liability is limited), "reasonable steps" to bring a term to the attention of the other party, or some evidence that the other party had a reasonable opportunity to be aware of the term.[1]
- If the term is a standard clause, it will be much easier to prove that it was incorporated, because the other party would have been reasonably aware of it.
- If a term is **harsh or unusual**, the drafter will have to do more to make the other party reasonably aware of it.

**General Types of Clauses**

- **Force Majeure Clause** → aims to protect the parties when part of the contract cannot be performed because of some event that it outside of their control

[1] Examples of evidence supporting incorporation: a signature, a pre-contract contract, a sign stating liability is limited

- **Confidentiality Clause** → requires parties to keep certain information private and not disclose it to third parties
- **Arbitration Clause** → requires parties to resolve disputes through arbitration instead of litigation in court
- **Jurisdiction Clause** → specifies which law will govern the contract and where disputes will be resolved
- **Entire Agreement Clause** → the written contract represents the complete agreement between the parties, superseding all prior discussions and agreements
- **Acceleration Clause** → allows a party to demand immediate payment or performance if certain conditions are not met
- **Liquidated Damages Clause** → aims to redetermine the amount of damages payable if a party breaches the contract
- **Severability Clause** → if one provision is found invalid, the rest of the contract remains enforceable
- **Termination Clause** → specifies conditions under which the contract may be terminated
- **Acceleration Clause** → seeks to allow a party to demand immediate payment or performance if certain conditions are not met
- **Time is of the Essence Clause** → states that deadlines are critical and any delay constitutes a material breach
- **Condition Precedent Clause** → there are one or more conditions that must be met *before* the contract or a specific term becomes effective
- **Condition Subsequent Clause** → provides that a contract *will end if* a certain event occurs or fails to occur after the contract has begun

## The Problem of the Parol Evidence Rule

---

The traditional **parol evidence rule** is that the written contract subsumes all external communications. Consequently, admissible evidence is limited to the "**four corners**" of the contract.

However, this rule poses problems in a modern age. Sometimes, the written contract does not capture the intentions of the parties (**ex:** where there has been a **typological error**, where the initial agreement is premised on a **mistake**, where one party makes a **false assurance** that is not incorporated into the written contract, or where a term is **vague**, such as "a reasonable price").

In ***Sattva***, this rule was overturned for good. The SCC held that surrounding circumstances not only *can* but *must* be used to interpret the written contract.

# Principles of Contractual Interpretation

---

**General Principles**

- ➔ The contract must be read as a **whole**: ***Sattva***
- ➔ Interpretation is based on the **words** used in the contract: ***Sattva***
- ➔ The contract must be interpreted in the context of the **surrounding circumstances** ("**the factual matrix**"): ***Sattva***
- ➔ However, for **standard form contracts**, factual matrix is usually not specific to the parties and is therefore less relevant: ***Ledcor***
    - ◆ Courts may be cautious enforcing standard form contracts, because they do not necessarily indicate the parties' objective intentions.
    - ◆ There can be **a spectrum**, from party-specific to "standard form." The **factual matrix will be more or less important** depending where the contract falls on this spectrum.
- ➔ Interpretation must be consistent with **commercial realities**.
- ➔ **Subsequent conduct** is relevant only to inferentially establishing the parties' intentions **at the time of contract formation**.
- ➔ ***Contra proferentem***: ambiguity will be construed against the drafter.

## *Sattva Capital Corp v Creston Moly Corp* 2014 SCC

**BLL**

- ➔ Contracts should be interpreted in the context of the **surrounding circumstances** (the **factual matrix**).
- ➔ Accordingly, contractual interpretation (CI) is generally a question of **mixed fact and law.**
- ➔ The **purpose** of CI is to ascertain the parties' **objective** intentions.
  - ◆ **Issue:** What would a reasonable person say the parties had intended to agree on?
- ➔ **Framework for CI:**

  **1)** Give words their **ordinary and grammatical meaning**
  - Read the text in a "practical, common-sense" way, "not dominated by technical rules of construction."

  **2)** Place the words **against the factual matrix**
  - ◆ Square interpretation with the **surrounding circumstances reasonably known** to the parties at the time of or prior to contract formation[2]
  - ◆ *Ex*: In *Sattva*, the Court's interpretation was informed by the sophistication of the parties and the fluctuation in share prices.

  **Caveat**: Surrounding circumstances are an interpretive aid. They cannot overwhelm the ordinary and grammatical meaning of the words.

**Facts:** Dispute arose over number of shares D owed to P under a "finder's fee" contract.[3] Case turned on interpretation of "maximum amount" provision.

**Issues:**
**1) Procedural Issue:** Is contractual interpretation a question of law (appealable), or a mixed question of fact and law (not appealable)?[4]

**2) Substantive Issue:** How should the Court interpret the contract?

**Holding:** Leave Court erred in granting appeal (CI is a mixed question).

**Reasons:**

[2] This is an ***objective*** standard – what should the parties reasonably have known? Includes "anything which would have affected the way in which the language of the document would have been understood by a reasonable man."
[3] Finder's fee: a commission paid to someone who helps facilitate a business transaction
[4] Important for determining standard of review as well as whether requirements for leave to appeal are met.

- Historically, CI was a pure question of law, confined to the literal meaning of the words. This approach is outdated. Now, courts must consider the surrounding circumstances, meaning CI is a mixed question of fact and law.
    - Therefore, CI is not appealable under the *Arbitration Act*.[5]
- Interpreting a contract in light of surrounding circumstances is consistent with the **parol evidence rule**.[6]
    - Rationale for rule is to achieve finality and certainty in CI + eliminate unreliability
    - Modern approach is consistent with these objectives because surrounding circumstances are used as an interpretive aid for determining meaning of written words, not for overruling them
- Difference between question of law (historical approach) and mixed question of law and fact (modern approach) is degree of generality: generality confers precedential value

### *Ledcor Construction v Northbridge Indemnity Insurance* 2016 SCC

**BLL**

- ➔ ***Sattva* exception**: for **standard form contracts**, factual matrix is usually not specific to the parties and is therefore less relevant.
- ➔ Interpretation of standard form contracts is a **question of law**.
    - ◆ Therefore, we interpret the contract through prior jurisprudence. The factual matrix is still part of the equation, but a lesser part.
- ➔ Where there is **no meaningful factual matrix specific to the parties** and contractual interpretation is of **precedential value**, it may be a question of law.[7]
    - ◆ Appellate courts can review interpretations of standard form contracts without as much deference to lower courts.
    - ◆ **Purpose:** consistency
- ➔ In this case, the Court interpreted the standard form contract in a manner consistent with the parties' reasonable expectations, with commercial realities, and with prior jurisprudence.

[5] In **Ontario**, the Arbitration Act allows parties to agree that issues of mixed fact and law decided by arbitrators are appealable.

[6] "Parol" = "outside." In its strongest form, this rule states that **when parties have entered into a written contract, it alone should decide parties' rights and obligations** – no outside evidence such as discussions, negotiations, even at time of contract formation should be admissible.

[7] **Question of law:** appealable, subject to the **correctness** standard of review. **Question of mixed fact and law**: not appealable, subject to "**overriding and palpable error**" standard – *unless pure question of law can be extracted*.

**Facts:** Contractor hired to clean windows. Accidentally scratched them, and they needed to be replaced. Building's insurers refuse to cover the cost on the basis of a standard builders' risk policy – the "cost of making good faulty workmanship" exclusion clause.

**Issue:** Does the exclusion clause exclude the damage caused by the contractor from coverage?

**Held:** Clause only excludes cost of redoing faulty work – replacement cost covered under insurance policy.

**Reasons:**

- Parties are not actually negotiating standard form contracts. Thus, the factual matrix is not party-specific, meaning there is precedential value.
- Courts want more consistency in interpretation of standard form contracts.
- Treating contracts as mini-legislation.
- Distinguished from *Sattva*: there, parties were sophisticated entities who negotiated terms; thus factual matrix was highly specific and relevant.
- Signs of standard form provision:
    - Unilaterally drafted by one party
    - No negotiation
    - Presented on "take it or leave it" basis
    - Applied repeatedly across various transactions (cut-and-paste template)

### *Humphries v Lufkin Industries Canada* 2011 ABCA

**BLL**

- ➔ Courts should interpret contracts as a **whole**, in a "**positive and purposive**" manner to reach a commercially reasonable interpretation
    - ◆ **a)** Read the contract holistically to **extract the overall scheme**
    - ◆ **b)** Interpret the contested provision in a manner that **makes the scheme work**
- ➔ If there are competing readings, the Court should choose the one that allows the scheme to **function** best
- ➔ **Presumption of commercial efficacy**: we presume that parties intended to create a "workable commercial deal"
    - ◆ Reasonableness is assessed **from the perspective** of an objective, third party
    - ◆ Reasonableness is assessed **at the time** of contract formation
- ➔ The wording in the contract **constrains** interpretation. Commercial efficacy is not an invitation to ***undervalue*** the language of the contract.

**Facts:** H, the only surviving shareholder of Black Widow, sold the business and all its assets to L. H continued working for L, and L fired him. H sued for return of chattels – some binders he claims are his personal property.

**Issue:** Were the binders part of the sale?

**Held:** The binders were part of the sale and belong to L.

**Reasons:**
*Words as Starting Point*
- Began with **First Recital**, "Entirety of Assets": "the purchased assets constitute all or substantially all of the property…reasonably regarded as necessary for carrying on the business"
- Other clauses state **a)** the written contract constitutes the entire agreement, **b)** supersedes any other agreements or representations or implied terms, and **c)** can be amended only in writing

*Placed Against Background Setting*
- H swore that the written contract accurately reflected the asset sale, and he testified that the binders were essential to the business
- H had invoiced the company for maintenance of the binders

## ***Shewchuk v Blackman Capital Inc*** **2016 ONCA**

**BLL**

- ➔ Usually, the factual matrix is circumscribed to facts reasonably known by the parties **at the time** of contract formation.
- ➔ Subsequent conduct can be used **to resolve ambiguity**, but only where the primary sources of contractual interpretation (wording + factual matrix) do not yield a decisive answer.
- ➔ There is **ambiguity** when two or more interpretations seem equally possible.
- ➔ Courts should weigh subsequent conduct with **caution**, given the risks inherent in relying on it (changes over time, potential ambiguity in actions, and self-serving behaviour)
- ➔ Subsequent conduct cannot overwhelm the primary sources of CI, but it can be used to **tip the scales** in favor of one interpretation where multiple are equally likely.
- ➔ When **weighing** subsequent conduct, courts may consider:
  - ◆ Whether it includes acts of both parties (more likely to confirm a meeting of the minds)
  - ◆ Whether acts are intentional (more probative than unintentional acts)
  - ◆ Whether acts are consistent over time
  - ◆ Whether acts are those of individuals or agents of a corporation (acts of corporate agents could be less probative)
  - ◆ Whether the conduct is unequivocal (will be given greater weight if consistent with only one of two interpretations)
  - ◆ Temporal proximity to execution of contract (closer in time = greater weight)

**Facts:** P was a commissions-based investment advisor. He negotiated a "letter agreement" which stated he would receive higher commissions than stipulated in his original contract. A dispute arose over whether the "Letter Agreement" applied only to retail transactions or also to capital market transactions.

**Issue:** When is subsequent conduct admissible, and how should courts assess its weight?

**Held:** The "Letter Agreement" **included capital transactions**.

**Reasons:**
*Ambiguity*
- Compensation for capital market transactions was always discretionary (amount not fixed in initial contract).
- Therefore, the language "over and above that which is payable…under [the original] compensation plan" is ambiguous. It is not clear whether it should apply to a purely discretionary amount.

*Subsequent Conduct*
- P argued that the **D had subsequently asserted that the Letter Agreement applied to Capital Markets transactions.**
- Since the primary sources of CI left it unclear which interpretation the parties had reasonably agreed on, subsequent conduct was admissible as evidence to tip the scales.

### ***DirectCash ATM Management Partnership v Maurice's Gas & Convenience*** **2015 NBCA**

**BLL**

➔ ***Contra proferentem*** means interpretation against the drafter. The *contra proferentem* principle should only be used in cases of **ambiguity** and as an interpretive tool of **last resort**.

➔ This tool is a "tie-breaker," so it should be used after subsequent conduct.

**Facts:** D provided an ATM system to M's gas station. The service term expired and M found a new ATM provider. The contract obliged M to alert D if they received an offer from a new provider when the initial term expired, provide D a copy of the competitor's written offer, and give D a right of first refusal.

M informed D they had already found a new service provider without giving D the opportunity to bid on the contract.

**Issue:** Can we apply the *contra proferentem* principle to interpret the contract against D?

**Held:** Not in this case, as there was no real ambiguity. The TJ erred in not focusing on the overall language of the agreement.

**Reasons:**

- The agreement was clear: M was to provide D a copy of the "specific terms" of the competitor's offer.
- Thus, the parties clearly intended DirectCash to have the opportunity to meet the terms and conditions of any competing offer.

**Note:** *Esjudem generis*

- If things described by particular words have a common characteristic which makes them a genus, the words which follow ought to be limited to that genus (*Lambourn v McLellan*)
- Applied in *St. Anne-Nackawic Pulp and Paper Co*

## Exclusion Clauses

---

### General Principles

➔ Exclusion clauses are risk allocation tools.
➔ They are generally enforceable in Canada.
➔ Courts interpret exclusion clauses strictly, especially in situations of unequal bargaining power or ambiguity.[8]
➔ An exclusion clause should not exclude the very benefit the contract was intended to provide.

### *Tercon* 2010 SCC

**BLL**

➔ **Modern Rule:** 3-step test (***Tercon***)

**1)** Does the clause apply to the circumstances?

- Here, we interpret the clause to discern the parties' objective intentions (***Sattva***).
  - Defendants or drafters will want a broad interpretation, so their liability is limited as much as possible. Plaintiffs will want a narrower interpretation, so they can recover damages.
  - **Note**: when interpreting an exclusion clause, pay attention to nexus phrases[9]

[8] Because exclusion clauses limit liability, courts may be suspicious of them. This may raise the threshold for the degree of "notice" required for the term to have been effectively incorporated. In addition, courts may "read down" an overbroad exclusion clause.

[9] "Related to" "caused by" "solely result from" "to the extent of" "arising from"

**2)** If so, was the clause unconscionable ***at the time*** of contract formation?
- Test for unconscionability: **a)** inequality of bargaining power and **b)** an improvident bargain (***Uber***).
- Unconscionability will invalidate a clause.

**3)** If the clause is applicable and valid, is there an overriding public policy reason the Court should not enforce it?
- Overriding policy must outweigh public interest in enforcement of contracts.

➔ **Traditional Rule**: "Fundamental breach" doctrine (***Hunter Engineering***)
- ◆ A party whose breach is "fundamental" or "colossal" is said to have deprived themselves of the exclusion clause's protection
- ◆ "Laid to rest" in *Tercon*, as it hinges on games of characterization and produces legal uncertainty
- ◆ **Note:** Overall, the shift from the doctrine of fundamental breach to Tercon is a movement in favour of freedom of contract.[10]

➔ **Note:** While an exclusion clause has some uniformity across industries and thus arguably resembles a standard-form contract, courts tend to approach exclusion clauses with suspicion. They will typically consider the factual matrix, as they require a higher degree of certainty that the parties intended to limit liability.

**Facts:** Province accepted a bid from an ineligible bidder, then took steps to ensure this was not disclosed. There was an exclusion clause in its "request for proposals":

"*No Proponent shall have any kind of claim for compensation of any kind whatsoever, as a result of participating in this RFP*, and by submitting a Proposal each Proponent is deemed to have agreed that it has no claim"

**Issue:** Does the clause exclude Tercon's claim for damages?

**Held:** No. It is ambiguous and should be construed *contra proferentem*

**Reasons:**
*Majority's Application of Test* (Cromwell J + 4)
**1) Does the clause apply to the circumstances?**
A) *Narrow Interpretation*
- Started with the text of the clause: no proponent will have a claim for compensation "***as a result*** of participating in ***this RFP***."
  - Tercon's complaint is not "a result of participating in ***this RFP***," because the

[10] The Hunter Engineering "fundamental breach" approach looked at the effect of the breach; was very consequence-based. Tercon moves the test up to the TIME of contract formation and links it to contractual interpretation. Thus, they are closer to ascertaining

process contemplated by the contract does not include ineligible bidders.
    - The province argues that "participating in this RFP" = "submitting a proposal." However, this reading is not consistent with the rest of the clause, which uses the words "submitting a proposal" to express that idea.
- Other provisions of the contract:
    - S.2.9 reserved the Province's right to unilaterally cancel the RFP and propose a new one allowing additional bidders.
    - If "this RFP" were open to ineligible bidders, there would be no need to reserve the right to widen the circle.
- Commercial context:
    - The process was premised on a closed list of bidders: submitting an ineligible bid was expressly precluded in the bidding instructions (no Contract A could arise therefrom). Thus, the participants did not intend to compete with ineligible bidders.
    - In addition, the Minister had approved a closed list of participants.
- **Conclusion**: The clause does not exclude liability for accepting ineligible bidders.

B) *Ambiguity*
- Alternatively, the clause is ambiguous and the *contra proferentem* principle applies
    - If, as the province contends, "participating in this RFP" could reasonably mean "submitting a proposal," it can also mean "competing against other eligible participants"
    - Ambiguity means the clause should be interpreted against the drafters (the province)
    - Thus, it does not exclude liability for allowing an ineligible bidder to participate

**Note:** The majority resolves the issue at stage 1, so it does not not proceed to stages 2 or 3.

*Dissent's Application of Test* (Binnie J + 3)
**1)** Does the clause apply to the circumstances?
- "Participating in RFP" = submitting a proposal for consideration, and Tercon's bid was considered.
- Limiting "participating in RFP" to participating with eligible bidders = a "strained and artificial interpretation" to avoid impact of what seems unfair post-contract formation.
- Therefore, the exclusion clause applies to Tercon's conduct.

**2)** Was the clause unconscionable ***at the time*** of contract formation?
- No. As a sophisticated commercial entity, Tercon was "well able to look after itself in a commercial context." There was no inequality of bargaining power.

**3)** If the clause is applicable and valid, is there an overriding public policy reason the Court should not enforce it?

- The province did breach Contract A, but the breach was not so aberrant as to justify the Court depriving them of freely agreed-upon contractual protection.
- It did not engage an overriding and paramount public interest.
    - Tercon points to the public interest in "transparency and integrity of government tendering processes," but that is not sufficient.

### *Earthco Soil v Pine Valley* 2024 SCC

**BLL**

➔ The general principles of CI extend to exclusion clauses governed by statute (ie. contracts for sale of goods).

➔ To contract out of liability, the parties must make their ***intentions*** **express**.

- This does not mean parties must use "magic words" or terms of art.
- Exclusion clauses drafted by lay people may require less precise language than those drafted by counsel.

➔ Shift away from strict and technical interpretation: purpose of CI is to extract parties' objective intentions.

**Facts:**

- City of Toronto hired Pine Valley to remediate a flooded area. Pine Valley subcontracted with Earthco to deliver topsoil with a specific composition.
- EarthCo gave Pine Valley some initial test results. They wanted to test the soil more thoroughly but Pine Valley was in a rush, as it had already missed several deadlines.
- Therefore, EarthCo added an exclusion clause: Pine Valley had the right to test and approve the soil, and if it waived those rights EarthCo would not be responsible for variations in soil **quality**.[11]
- On the site, the soil created water ponding due to excess clay.
- Toronto sued Pine Valley, who sued EarthCo for damages, alleging the soil they received was not consistent with the initial test results.
    - S 14 of the *Sale of Goods Act* implies a term into sale contracts → where there is a contract for sale of goods by description, there is an implied condition that the **identity** of the goods will correspond.
    - Per s 53, the parties can contract out of this with an "express agreement."

**Issue:** Was the exclusion clause an "express agreement" capable of ousting the implied term under s.14 of the SOG act, even though the contractual term referred to variations in soil "quality" while the statute referred to the "identity" of the goods described?

[11] 6) [Pine Valley] has the right to test and approve the material at its own expense at our facility before it is shipped and placed. Please contact [Earthco's sales manager] to arrange.

7) If [Pine Valley] waives its right to test and approve the material before it is shipped, Earthco Soils Inc. will not be responsible for the **quality** of the material once it leaves our facility.

**Held:** Yes.

**Reasons:**

- What has to be "express" is the parties' *intention* to contract out
    - This means they parties must have used language expressly and unambiguously signalling their *intent* to do so
    - However, they do not have to use "magic words" corresponding to the language of the statute
- Exclusion clauses drafted by laypeople may require less precise language than those drafted by counsel
- This case overturned a line of case law stating that contracting parties cannot be taken to have intended to exclude liability arising from breach of a "condition" by using words such as "warranty"

## Implied Terms

---

Where there are gaps in a contract, courts may "read in" certain terms. Where those terms flow from an assessment of the parties' presumed **intentions**, they are **implied by fact**. Where those terms attach as a **legal incident** of this class of contractual relationship, they are **implied by law**.

### *Machtinger Taxonomy*

### I. Terms Implied in Fact

➔ Terms implied **in fact** are based on the presumed **intentions** of the parties at the time of contract formation.

- **The question is:** what would ***the parties have stipulated*** if their attention had been drawn to the matter at issue?

➔ **Tests**:

- **1) The Officious Bystander Test**
    - Is the term so **obvious** that **express inclusion was unnecessary**?
        - An implied term is something "so obvious… that if, while the parties were making their bargain, an officious bystander were to suggest some express provision for the inclusion in their agreement, they would testily suppress him with a common 'Oh, of course!'" (*Shirlaw v Southern Foundries Ltd*, 1939)
- 2) **The Business Efficacy Test**
    - Is the term necessary to **make the contract work**?
        - "*What the law desires to effect by the implication is to give **such business efficacy** to the transaction **as much have been intended** at all events by both parties who are businessmen*" (*The Moorcock*, 1889)

➔ **Note**: There is no hard rule for when to use each test. You have to persuade the court to use the one that is most advantageous to your client.

## II. Terms Implied in Law

➔ Terms implied **by law** are legal incidents of a particular kind of contractual relationship.
  - ◆ **The question is:** does the ***nature of the contract*** require that this term attach to contracts of its kind or class?
  - ◆ Intention is not relevant to **terms implied as a matter of law**.

➔ The test is whether the term is ***necessary*** for the fair functioning of the agreement.

➔ Terms implied by law may flow from statute or precedent, but they do not need to. You can persuade the court that the law *should* imply a term.
  - ◆ Take a **wider view** of the relationship – not looking at these specific parties, but at relationships between employers and employees or landlords and tenants in general

➔ **Notes**:
  - ◆ Sometimes, terms implied by law are **default**, meaning the parties can agree to something more (ie. minimum wage, notice of termination.)
  - ◆ Sometimes, they are **mandatory**, meaning the parties cannot change them.

## III. Terms Implied Based on Custom and Usage

➔ A term may be implied as a **widely accepted standard**, given the nature of the contract.
  - ◆ The usage must "be reasonably certain and **so notorious and so generally acquiesced** in that it may be **presumed to form an ingredient** of the contract" (*Georgia Construction v Pacific Great Railway Co*, 1929)

### *Machtinger v Hoj Industries* (McLachlin J's concurrence) 1992 SCC

**Facts:**
- M worked for H. Contrary to the *Employment Standards Act*, which stipulated that employees are entitled to at least four weeks' notice, M signed a contract with a termination clause permitting H to terminate employment at any time.
- The lower courts agreed that the **termination clause was null and void** for attempting to "contract out" of the ESA.
- However, the lower courts were **divided as to what should fill this gap** in the contract – the statutory minimum notice period or reasonable notice at common law?

**Issue:** "The law says that where the contract is silent as to the term of notice upon dismissal, the court will imply a term of notice. But what term should be implied?"

**Held:** The common law term of reasonable notice is the default.

**Reasons:**
Iacobucci J (Majority):

- For policy reasons, absent an enforceable termination clause, common-law reasonable notice should be a **default presumption** – not the 4-week statutory minimum.
    - Replacing provisions contrary to the ESA with the longer common-law notice period will incentivize employers to adhere to statutory minimums.

McLachlin J (Concurring):

- Agrees with Iacobucci J re: presumption of common law reasonable notice.
- However, she arrives at this conclusion not for policy reasons, but because common-law reasonable notice is ***a term implied in law*** – "a necessary condition of this kind of contract."
- The common-law reasonable notice period is set by the Court, with reference to the *Bardal* factors[12], which have nothing to do with the parties' intentions.
    - Thus, the reasonable notice period is a "legal incident" of this kind of contractual relationship.

## Good Faith in Contracting

---

***Bhasin*** (2014)
Recognized **good faith** as an **organizing principle** and established the **duty of honest performance**.

**Significance:**

- **Organizing principle** → not a freestanding rule or a basis for an action, but a standard that "underpins and is manifested in more specific legal doctrines and may be given different weight in different situations."
    - You can't sue for breach of an organizing principle.
- **Duty of honest performance** → follows from the good faith principle, and requires a party to perform the contract honestly.
    - You *can* sue for breach of the duty of honest performance.
- **Notes**:
    - To sue on this ground, the dishonesty must be attached to a contractual term
    - This case left the door open for other duties and doctrines to follow from the organizing principle of good faith

[12] "the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, the experience, training and qualifications of the servant"

***Callow*** (2020)
Expanded scope of dishonest performance to **include misleading conduct**.

**Facts:** C had a two-year contract to remove snow from a bunch of condos. There was a clause saying the condo owners could terminate with 10 days' notice. Early in the second year, the condo owners had already decided not to renew the contract. However, instead of telling C, they sat back and watched him do extra free work in an effort to secure future business.

**Issues:**
**1)** Does the duty of honest performance include a duty not to mislead the other contracting party (respecting performance of contractual terms)?
**2)** Did the condo owners breach this duty?

**Held:** Yes and yes

**Reasons:**
- Building on *Bhasin*, the Court clarified that the duty of honest performance is breached not only by outright lies but also by misleading the other party respecting performance of a term.
- The duty of honest performance was triggered the moment the condo owners knew they would terminate but continued to let C work under a false impression.
- **Note:** C may also have a claim for restitutionary damages in unjust enrichment, as he provided extra services believing they would help secure renewal.

***Wastech*** (2021)
Held that **where a contract gives one party discretionary power**, that discretion must be **exercised in good faith**

**Facts:**
- Wastech had a contract with Metro Vancouver. The contract gave Metro Vancouver discretion to allocate waste to different disposal sites.
- Wastech's profitability depended on the volume of waste directed to a high-paying site.
- Metro Vancouver exercised its discretion by shifting waste allocation to a lower-paying site. This reduced Wastech's expected profits.
- Wastech argued this discretion was exercised in bad faith and sought compensation

**Issues:**
**1)** Is there a duty to exercise contractual discretion in good faith?
**2)** If so, did Wastech breach that duty?

**Held:**
**1)** Yes
**2)** No dice

**Reasons:**
- The organizing principle of good faith does elicit a duty to exercise discretion without bad faith (ie. malice, dishonesty, etc).
- However, the duty to exercise discretion in good faith does not rise to the level of a fiduciary duty (it does not require a party to place the other's interests above their own).
- Thus, Metro Vancouver did not breach their duty by exercising discretion in their own best interests, even if this exercise had adverse effects for Wastech.

## Discharge of Contract

A **discharge** is when the contract is terminated and the parties are relieved of their obligations under it.

**Ways of Discharge**
- Performance
- Parties' agreement (e.g., option, condition precedent or subsequent, rescission[13], variation)
- Operation of law (e.g., frustration of contract, bankruptcy)
- Breach (warranty vs condition)

| Type of Contractual Term | Type of Breach | Effect |
|---|---|---|
| **1)** Warranty | Little | Allows non-breaching party to sue for damages |
| **2)** Condition | Big (repudiatory, goes to the heart of the contract) | Brings contract to an end + allows non-breaching party sue for damages |
| **3)** Wait and See What the Consequences Are (innominate terms) | | |

[13] Rescission is when the parties agree to rescind the contract. An agreement to rescind can be consideration in support of a subsequent contract.

**Note:** It is not clear which terms are warranties and which are conditions. For instance, we do not know whether the duty of honest performance is a warranty or a condition. You have to argue based on which outcome you want for your client.

## Damages

---

The default remedy in contracts is damages. However, you can also get specific performance as an equitable remedy by showing the court why money can't fully compensate for the loss.

**Types of Contractual Damages**

| | |
|---|---|
| **Expectation Damages** | → Forward-looking<br>→ Aim to put the plaintiff in the position they ***would have been in*** had the contract been performed<br>→ Note: To ground a claim for expectation damages, you have to show it was a reasonable expectation. |
| **Reliance Damages** | → Backward-looking<br>→ Put the plaintiff in the position they would have been in without the contract (compensates ***actual losses*** already incurred in preparation for the contract) |
| **Restitutionary Damages** (Quasi-contractual) | → Aim to deprive the defaulting party of the value they have received<br>→ May be awarded for unjust enrichment[14]<br>→ Primarily grounded in equity |

### Expectation Damages

★ "It is the general intention of the law that, in giving damages for breach of contract, the party complaining should, **so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed**" (***Chicoutimi***).

**Calculating Expectation Damages**

**Step 1:** Expected Benefits

➔ If the contract had been fulfilled, X still would have gained [expected benefits].

**Step 2:** Expected Costs

➔ At the moment of the breach, X still had [expected costs] left to pay on her end.

**Step 3:** Math

➔ Expected Benefits — Expected Costs = Expectation Damages!!

[14] Where someone received money for no juridical reason, such as in reliance on a void contract

### Example 1 – Expectation Losses With Shifting Market Value

*Baker Bob agrees to buy 12 dozen eggs from Farmer Fanny for $60 to be delivered in 2 months. Farmer Fanny fails to deliver. What are Baker Bob's expectation damages:*

**a)** *If the market value of 12 dozen eggs on the expected date of delivery is $100?*

- $100 – $60 = 40

**b)** *If the market value of 12 dozen eggs on the expected date of delivery is $60?*

- $60 – $60 = 0

**c)** *If the market value of 12 dozen eggs on the expected date of delivery has dropped to $40?*

- $40 – $60 = -20 (Damages = $0)

### Example 2 – Expectation Losses With Partial Performance

*Charlie agreed to sell a car to Maria for $10,000. Maria made a downpayment of $5,000. Charlie later discovered that the car was actually worth $15,000. Charlie refused to deliver the car. What are Maria's expectation damages?*

- If the contract had been performed, Maria **would have gained a car worth $15,000. Thus, her expected benefits are $15,000.**
- Maria still had **$5,000 left to pay** under the contract. Thus, her expected costs are $5,000.
- So, we subtract $15,000 (expected benefits) from $5,000 (expected costs). **Maria's expectation damages are $10,000**.
- Because **expected costs do not include partial performance**, Maria gets the benefit of her $5,000 down payment.

### Example 3 – Maria's Bad Choice

*Charlie agreed to sell a car to Maria for $10,000. Maria made a downpayment of $5,000. Charlie refused to deliver the car, despite the fact that the car was only worth $2,000. Can Maria recover*?

**Issue One: Can Maria Get Expectation Damages?**

- **Step 1:** Counterfactual Gains = $2,000.
  - If the contract had been performed, Maria would have gained **a car worth $2,000.**
- **Step 2:** Counterfactual Losses = $5,000.
  - *At the moment of the breach*, Maria still had $5,000 to pay.
- **Step 3:** $2,000 – $5,000 = **–3,000$!!!**
  - If the contract had been performed, Maria would be $3,000 in the hole.
  - But we aren't going to take money away from her (she may have had some things going on in her life). So, her expectation damages are $0.

**Issue Two: Can Maria Get Reliance Damages?**

- Maria paid $5,000 in reliance on Charlie's promise.
- However, if we gave her back that $5,000, she would be in a better position than she would have been in if the contract had been performed.
- So, we aren't going to give her anything (***Bowlay***).

**Issue Three: Can Maria Get Restitutionary Damages?**

- However, Charlie was unjustly enriched. He got $5,000 because he was supposed to give Maria a car, and he never fulfilled his end of the deal. So, a court may require him to pay that money back to Maria.

### Example 4 – Diminution in Value or The Cost of the Cure

*P rented land to D for $100,000. D was entitled to use the land to operate a sand and gravel mine as long as D levelled the ground at the end of the lease. D removed a large amount of sand and gravel but left behind huge craters on the property. D did so because it would have cost $60,000 to level the land, but even if the land had been levelled it would have been worth only $12,000.*[15]
*What are P's expectation damages?* ***Should they be based on the cost of the cure or the loss of value?***

- The court will probably give P $12K, the lost value of levelled land, rather than $60K, the cost of the cure. This is because the $60k would be economically wasteful, as the land would only be worth 12k after leveling.

[15] *Groves v John Wunder*, 1939 Minn CA

- Also, courts generally compensate the lost value of performance rather than paying to make performance happen (as seen with Baker Bob, where expectation damages would mean giving him the cost of the eggs rather than making Farmer Fanny give him the actual eggs).

## Reliance Damages

***Anglia Television v Reed*** (1972 QB): A court may award reliance damages where expectation losses are unquantifiable.

**Facts:** P entered into a movie contract with D, who was supposed to play the leading role. P had accumulated expenses relying on D's performance. However, D repudiated the contract, as his agent double-booked him. The movie was cancelled. P could not establish expectation losses.

**Issue:** What happens when expectation losses are unquantifiable?

**Held:** P was awarded reliance damages (the sum of the costs they incurred relying on D's performance).

***McRae v Commonwealth Disposals Commission*** (1951 HCA)

**BLL**

- ➔ Reliance damages may be awarded where expectation damages are purely speculative or cannot be proven
- ➔ "Wasted expenditure" doctrine – if a party spends money relying on a promise that turns out to be false, they should be compensated for the wasted expenditure
  - ◆ To be recoverable, expenses must be **reasonably foreseeable** as a result of reliance on the contract
  - ◆ Capital expenditures are not reliance losses

**Facts:**

- Commission empowered to sell off stranded vessels following WWII
- Salvagers like McRae purchased rights to vessels, hoping to make a profit
- McRae purchased an oil tanker on Jourmand Reef
- McRae incurred expenses for the expedition (refitting one of its own vessels, purchased equipment, hired a crew, and made two trips from Sydney to Jourmand Reef) only to discover that there was no sunken vessel in that location

**Issue:** Should McRae get expectation damages (unrealized profits) or reliance damages (wasted expenditures)?

**Held:** McRae was entitled to reliance damages (could recover $ wasted in reliance on the

commission's false promise)

**Reasons:**

- **Expectation damages** (position M would have been in if contract had been fulfilled: – $ spent in preparation but + profits from salvaged "tanker")
    - Could not be awarded, impossible to determine tanker's value as there was no tanker (wholly speculative)
- **Reliance damages:** all reasonable expenses spent trying to salvage the nonexistent tanker, because the commission's false representation directly caused those losses
    - "They can say: (1) **this expense was incurred**; (2) it was incurred because you promised us that there was a tanker; (3) the fact that there was no tanker made it certain that this expense would be wasted."
- Commission argued that M's efforts would have been wasted even if a tanker had existed (it may have been unsalvageable)
    - Court rejected this argument – the commission promised a tanker existed and this directly led to M's wasted expenditures

***Bowlay Logging Ltd v Domtar Ltd*** (1992 BCCA)

**BLL**

- ➔ A court will only compensate a plaintiff for losses flowing from the defendant's breach. In general, a court will not compensate a plaintiff for losses flowing from entering into the contract itself.
- ➔ In other words, courts will not give reliance damages that would put a plaintiff in a better position than he would have been if the contract had been fully performed.
    - ◆ "The law of contract compensates a plaintiff for **damages resulting from the defendant's breach**; it does not compensate a plaintiff for damages resulting from his making a bad bargain."
    - ◆ "Where it can be seen that the plaintiff would have incurred a loss on the contract as a whole, the expenses he has incurred are **losses flowing from entering into the contract**, not losses flowing from the defendant's breach."
    - ◆ "In these circumstances, the **true consequences of the defendant's breach is that the plaintiff** is released from his obligation to complete the contract or, in other words, he **is saved from incurring further losses**."

**Facts:**

- BL was hired by Domtar to provide logging services.
- D failed to provide a sufficient number of trucks in order to perform the work (= breach of contract).
- BL had incurred expenses of $230,000 by the time of the breach and had been paid $108,000 (of total contract price of $150,000).

- BL sought reliance damages for the breach, claiming the difference between its expenses and the amount received up to the date of breach.
- TJ awarded nominal damages ($250): **P's losses did not flow from the breach but rather from an improvident contract**.

**Issue:** Can D claim reliance damages based on wasted expenditures? **Were the losses caused by D's breach or by B's own bad business decision in entering into an improvident contract**?

**Held:** No. Upheld $250 in nominal damages

**Reasons:**

- The logging contract was structured in a way that virtually guaranteed losses
  - P agreed to cut 10,000 logs for $15 each, meaning even if the contract had fully been performed they **only would have made $150,000** from the project – and they had **already put $232,905 towards the cutting**.
  - If P had continued logging, it would have kept spending money at the same rate.
- The contract was unprofitable from the start, so **B's expenditures would have been wasted regardless of the breach**.
- "In the end, **if there had been no breach, the loss would have been even greater.**"

***Chaplin v Hicks*** (1911 Eng CA)

**BLL**

- ➔ Courts are not relieved from awarding expectation damages just because there is an element of guesswork in the assessment.
- ➔ Loss of chance is a head of expectation damages in contract law.
  - ◆ Where the chance of being selected turns on many contingencies, the court has to make their best estimate.
- ➔ A plaintiff can sue regardless of how big their chance of obtaining a certain favorable outcome was.
- ➔ For loss of chance, expected benefits generally equal the value of the prize multiplied by the plaintiff's probability of selection.

**Facts:**

- The plaintiff entered a theatre director's beauty contest. The agreement was that entrants would submit their photos in a newspaper, and people would vote on the most beautiful. The director would come visit the shortlisted candidates and then make his selection.
- The plaintiff was shortlisted, and the director sent her a letter asking when he could come see her. However, she was not home to receive the letter, so he selected another candidate, breaching the contract.
- The plaintiff sues, arguing she can recover for her lost chance of selection.

**Issue:** Can a plaintiff sue for loss of chance?

**Held:** Yes.

**Reasons:**

- The director argued that expectation damages were unquantifiable, because the plaintiff's chance of selection turned on so many contingencies that it was impossible to determine her precise pecuniary loss.
- The court agreed with the director's assessment of the many contingencies, but held that uncertainty does not preclude a plaintiff from recovering.
    - **"In such a case the jury must do the best they can, and it may be that the amount of their verdict will really be a matter of guesswork**," but uncertainty "does not relieve the wrongdoer of the necessity of paying damages"

**Non-Pecuniary Expectation Losses**

Recovery for Distress or Disappointment

➔ **Traditional Rule:** Contracts are purely economic instruments. Thus, courts should only award damages for pecuniary losses (***Addis v Gramophone***, 1909 HoL[16]).

### ***Jarvis v Swans Tours*** (1972 EWCA)

**BLL:** Where providing pleasure, enjoyment, or peace of mind was the object of the contract and the breach prevented this from happening, damages can be awarded for distress or disappointment.

**Facts:** J purchased a holiday package. The brochure promised many perks (skiing, alpine scenery, a houseparty, an English-speaking host) and assured he would "no doubt…be in for a great time." He was not in for a great time. None of those promises materialized.

**Issue:** Can Mr. Jarvis recover damages for his loss of enjoyment?

**Held:**

➔ The lower court gave Jarvis half the value of his vacation, reasoning that the vacation he received was half as valuable as the one he was supposed to receive.

➔ However, Lord Denning overturned this award and gave $125 for loss of enjoyment. It's not clear how he arrived at this figure.

**Reasons:**

➔ The purpose of the contract was to give J a "great time." He literally only paid for enjoyment. The breach deprived him of this benefit. Thus, he should be compensated for his losses.

◆ "**In a proper case damages for mental distress can be recovered in contract**…I know that it is difficult to assess in terms of money, but it is no more difficult than the assessment which the courts have to make every day in personal injury cases for loss of amenities."

### ***Fidler v Sun Life*** (2006 SCC)

**BLL:**

➔ **1)** A loss is compensable to the extent that it is reasonably foreseeable. We just use the *Hadley v Baxendale* proximity analysis to address mental distress damages.

◆ "The basic principles of contract damages do not cease to operate merely because what is promised is an intangible, like mental security."

[16] A was fired in a "humiliating" fashion, and the House of Lords refused to make an award for damages on the basis of mental distress. They held that damages were limited to his lost wages and any loss of commission.

- Where psychological security is the very purpose (or *a* purpose) of the contract, it is reasonably foreseeable that a breach will result in mental distress rising to the level of legally cognizable damage.[17]

➔ **2)** We also have to ensure the degree of mental suffering is "sufficient to warrant compensation." This just means the damage must be provable as a loss.

**Facts:**

- F had a disability insurance contract with Sun Life. They breached the contract by terminating her benefits.
- They argued there was no breach, as F was only entitled to continued benefits after 2 years if she was "totally disabled."
- They had taken video footage of her walking, shopping, and driving, but they had no medical evidence that she was unable to work.
- F started a trial. Once Sun Life learned of this, they reinstated her benefits and paid all her lost benefits back. Thus, the only issue at trial was F's entitlement to mental distress damages.

**Issue:** Is F entitled to mental distress damages flowing from breach of contract?

**Held:** Yes. Sun Life had to pay $20,000 in damages for mental distress flowing from breach of disability insurance contract.[18]

**Reasons:**

➔ ***Hadley v Baxendale*** is the "single and controlling test" for compensatory damages.
- Damages must be ''such as may fairly and reasonably be considered either arising naturally…from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties."

➔ If a loss was **the very thing contracted for**, it is reasonably foreseeable and thus compensable under Hadley.
- However, the loss doesn't *have* to be the very benefit the contract was intended to provide in order to be reasonably foreseeable.

➔ We do not award damages for **normal distress** flowing from breach of contract.
- "It is not unusual that a breach of contract will leave the wronged party feeling frustrated or angry. The law does not award damages for such incidental frustration."

➔ Application:

[17] However, it is not necessary that psychological security be the very purpose of the contract. The test is reasonable foreseeability.

[18] The ONCA held that Sun Life had breached its duty of good faith, but the SCC held that whether conduct constitutes a duty of good faith is a question of fact. Thus, the SCC did not disagree with the ONCA's finding, but rather held that this issue is for the trier of fact.

- The **purpose** of an insurance contract is peace of mind.
  - This is clear because that is **effectively the consideration** F was receiving in exchange for payment.
- Therefore, it was reasonably foreseeable at the time of contract formation that a breach would result in mental distress rising to the level of legally cognizable damage.

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

**Facts:** V was dismissed without cause. His employer found him "conscientious to a fault" and began interrogating him frequently, causing V to become very stressed and start taking sedatives. His employer offered him 8 months' salary if he would sign a release stating that there was just cause. He refused and now sues for **1)** wrongful dismissal damages, **2)** aggravated mental distress damages, and **3)** punitive damages based on employer's conduct.

**Issue:** Can V recover aggravated damages? Punitive damages?

**Held:** No. He could only recover wrongful dismissal damages.

**Analysis:**
McIntyre J

- ➔ Mental distress damages are aggravated. Aggravated damages are compensatory. They take full account of the "intangible injuries, such as distress and humiliation, that may have been caused by the defendant's insulting behaviour."
- ➔ **Aggravated damages require**:
  - Independent actionable wrong = a tort[19]
  - Aggravating conduct (causing additional losses, on top of the breach)
  - Resulting mental distress
- ➔ **Punitive damages require**:
  - Independent actionable wrong = a tort (***Whiten***)
  - Conduct that is high-handed, vindictive, reprehensible, and malicious

Wilson J

- ➔ Damages for mental distress simply based on ***Hadley v Baxendale*** (recall ***Fidler*** and see ***Honda v Keays***)
  - Facts in favor of RF mental distress: age, second career, humiliating treatment meted out to him.
  - Facts against RF mental distress: not employed by ICBC for long, job market in his area is reasonably buoyant, no special trust and reliance in employment relationship.

[19] It is not entirely clear whether the IAW has to cause the mental distress. However, the more elements align, the stronger the claim.

- Overall, would not allow recovery.

➔ Punitive damages only require conduct that is high-handed, vindictive, reprehensible, and malicious.
- Would have allowed $5,000 in punitive damages.

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

**BLL**

➔ For punitive damages, **an independent actionable wrong is necessary, but this does not have to be a tort or breach of fiduciary duty. This can be the breach of a separate contractual obligation.**

➔ A duty of good faith and fair dealing attaches to insurance contracts, as a term implied at law.

**Facts:** Pilot Insurance denied W's insurance claim after a fire burned their house down (**breach**). Pilot alleged that W had committed arson, but there was no air of reality to this claim (**aggravating conduct**). Pilot deliberately entered into protracted litigation (> 2 years) on this issue with Whiten, in order to force her to settle for less than she was entitled to. This conduct was planned and deliberate.

**Issue:** Should Whiten receive punitive damages?

**Held:** Yes: upheld $1mil damage award.

**Reasons:**

➔ "The jury decided a **powerful message of denunciation, retribution and deterrence had to be sent** to the respondent and they sent it. The obligation of good faith dealing means that the appellant's peace of mind should have been the respondent's objective, and her vulnerability ought not to have been aggravated as a negotiating tactic. It is this **relationship of reliance and vulnerability** that was outrageously exploited by the respondent in this case."

➔ "Independent actionable wrong" remains a necessary condition for allocation of punitive damages. Otherwise, judges could simply punish conduct they disapprove of.

➔ Thus, the issue is whether a breach of an insurer's duty to act in good faith is an independent actionable wrong.
- Pilot argued that the duty of good faith is a contractual duty, and *Vorvis* requires a tort.
- The Court responded that this is not a correct reading of *Vorvis*. *Vorvis* said the circumstances where an independent actionable wrong rising to a punitive level is not a tort would be rare, but such cases exist.

**Three Categories of Independent Actionable Wrongs**

- ➔ Tort (McIntyre J in ***Vorvis***)
- ➔ Breach of another term (***Whiten***)
- ➔ Breach of legislation governing the contract (ie. ESA: ***Machtinger***; Sale of Goods Act: ***EarthCo***).

  **Note:** There is some ambiguity re: the word "actionable."
  - ➔ Where the IAW is a tort or breach of statute, the Court does not have jurisdiction to determine whether the wrong at law actually occurred. Thus, the plaintiff most likely just has to show that there is just a case.
  - ➔ However, where the IAW is a breach of a separate contractual term, it is arguable that the plaintiff actually has to show a breach.

### *Wallace v United Grain Growers*

Iacobucci J created a new head of damages – "*Wallace* damages." For high-handed, callous, bad faith conduct in dismissal, we extend the period of reasonable notice.

### ***Honda v Keays*** (2008 SCC)

**BLL**

- ➔ We no longer use *Wallace* damages for mental distress or bad faith in the manner of dismissal.
- ➔ For **aggravated damages**, we determine whether the loss *would have been* reasonably foreseeable as a result of the breach at the time of contract formation (***Hadley***).
  - ◆ No IAW is necessary (***Fidler***).
- ➔ For **punitive damages**, there must be:
  - ◆ An independent actionable wrong:
    - Tort (***Vorvis***)
      - No tort of discrimination: ***Bedoria***
    - Breach of separate term, such as insurer's duty of good faith (***Whiten***)
    - Statutory breach (not of human rights legislation: ***Honda***)
  - ◆ Extraordinary misconduct (***Whiten***): behaviour so "high-handed, vindictive, reprehensible, and malicious" as to warrant punishment rather than mere compensation.

**Facts:** K worked for H. K was diagnosed with chronic fatigue, and was in a disability program allowing absences with a doctor's note. H believed K was exaggerating his disability. H threatened K: K had to meet one of the company's doctors or be fired. The trial judge found that this doctor was biased in favour of the company. K refused and was indeed fired. Now K sues H for wrongful dismissal.

**Issue:** Is K entitled to either aggravated or punitive damages?

**Held:** No.[20] K was entitled only to reasonable notice damages.

**Reasons:**

**1)** Aggravated Damages

- ➔ Since we no longer need an independent actionable wrong to award aggravated damages (McLachlin J in ***Fidler***), we can just use ***Hadley v Baxendale***:
  - ◆ What was in the reasonable contemplation of the parties at the time of contract formation? (Or "what did the contract promise?")
  - ◆ It is not reasonably foreseeable that legally cognizable mental damage would arise from the "normal distress and hurt feelings resulting from dismissal." Thus, these are not compensable.
- ➔ It's probably only reasonably foreseeable that legally cognizable damage would flow from "bad faith" or "unfair dealing" in the manner of dismissal.
  - ◆ Here, there was no bad faith or unfair dealing.[21] Thus, Keays could not recover aggravated damages.

**2)** Punitive Damages

**A.** Independent Actionable Wrong (***Vorvis***)

**i)** "Breach of a distinct contractual provision or other duty such as a fiduciary obligation" (***Whiten***)

**ii)** Statutory breach

- ➔ However, a breach of human rights legislation does not qualify, because courts have no jurisdiction to appeal them. Only human rights tribunals do.
- ➔ Courts have refused to develop a tort of discrimination (***Bedoria***). Thus, discrimination is not an independent actionable wrong.

**iii)** Tort

**B.** Extraordinary Misconduct (***Whiten***): HVRM

- ➔ The conduct must be "high-handed, vindictive, reprehensible, and malicious." In other words, it must be extreme enough to warrant punishment rather than mere compensation.
- ➔ All Honda did was create a disability program with standards of review. According to the Court, this did not satisfy the high threshold of extraordinary misconduct.

[20] The trial judge awarded $500,000 in damages (reasonable notice + aggravated and punitive damages). The ONCA reduced the punitive damages award to $100,000.

[21] That is, once the SCC overturned the trial judge's palpable and overriding errors of fact.

***RBC Dominion Securities v Merrill Lynch Canada*** (2008 SCC)

**BLL**

➔ The ***Hadley*** test is not whether the **breach** was reasonably foreseeable.

➔ The test is whether the harm would have been reasonably foreseeable **if the parties *had* contemplated the breach**.

**Facts:**

- RBC & ML were big competitors in the investment brokerage business. In November 2000, all but two of the investment advisors at RBC left and went to ML.
- Among them was the branch manager Delamont, who had coordinated the mass exit. RBC was "hollowed out."
- The trial judge found that they had indeed breached the implied term to give reasonable notice of departure, and the notice period would have been 2.5 weeks. The employees therefore owed RBC lost profits over the 2.5 week period.
- He found that Delamont owed an extended period (5 years).
    - The CA overturned this finding. Held that the lost profit damages for 5 years were not "proximate," because **the parties would not ever have foreseen a mass exodus**.

**Issue:** What damages did Delamont owe RBC? Was an extended period of lost profits (5 years) reasonably foreseeable under *Hadley*?

**Held:** Delamont owed 5 years' lost profits. The trial judge applied the *Hadley* test incorrectly.

**Reasons:**

➔ The test is not whether the breach was reasonably foreseeable. The test is whether the damages would have been reasonably foreseeable if the parties had contemplated the breach.

➔ Here, if the parties *had* considered the possibility of Delamont intentionally causing a staff exodus, the resulting business collapse and lost profits were within the parties' reasonable contemplation.

**Note:**

- Both Delamont and the employees also owed punitive damages, based on the tort of conversion (secretly transferring insider documents to RBC's competitor). However, the punitive damages awarded at trial were not appealed.

## Remoteness and Mitigation

---

There are two main limitations on recovery for expectation damages:

**1) Remoteness**: damages are limited to those which were reasonably foreseeable at the time the contract was formed (***Hadley v Baxendale***)

**2) Mitigation**: a non-breaching party has a duty to take reasonable steps to minimize their losses after a breach of contract. Failure to do so may result in reduction of damages (***Evans v Teamsters***, confirming ***AsameraOil Corp v Sea Oil & General Corp***).

➔ To the extent that they take reasonable steps, they have reduced the defendant's liability – so any earnings they make will be subtracted from the damages.

### *Hadley v Baxendale*

**BLL**

➔ D is responsible for damage that was RF at the time of contract formation.
➔ Two limbed-test:
- ◆ Losses arising naturally from the breach → presumed RF
- ◆ Losses arising from "special circumstances" → only RF if the breaching party was aware of those circumstances. Otherwise, losses are too remote.

**Facts:**
- P owned a corn mill, which ran using a steam engine. The crank shaft broke.
- P paid D (shipping company) to ship the broken piece to the manufacturer, so they could make a replica. D promised to deliver the part by the next day.
- D negligently delayed shipping. Consequently, P had to close down until the late arrival of the new piece.
- P sues for lost profits from the delay.

**Issue:** Were the lost profits too remote?

**Held:** Yes. D was not liable for the lost profits.

**Reasons:**
- D had no way of knowing P would lose profits if shipment was delayed.
- P asked D to ship the piece as soon as possible, but did not say the mill would have to close down until its arrival
  - Customers often ask shippers to expedite shipments, so this statement alone could not alert D to the possibility of lost profits.
- Thus, although D **caused** the damage, it had no reason to **know** it was doing so.

### *Victoria Laundry v Newman Industries*

**BLL**

- ➔ Reasonable foreseeability depends on the knowledge, actual or imputed, possessed by the breaching party at the time of contract formation.
- ➔ **Imputed knowledge**: everyone is presumed to know what losses are liable to result from a breach of contract in the ordinary course of things
- ➔ **Actual knowledge**: where a loss arises from special circumstances outside the "ordinary course of things," the breaching party must have actually known about those special circumstances for the loss to be reasonably foreseeable.
- ➔ The *Hadley* test is counterfactual:
  - ◆ It is not necessary that the parties actually considered what losses would flow from a breach. Contracting parties tend to contemplate performance, not breach.
  - ◆ The question is whether the losses *would have been* reasonably foreseeable if the parties *had* contemplated the breach.
  - ◆ Broadens the scope of liability: The defendant need not foresee that the breach would *necessarily* result in the loss; it is enough if the loss was "likely," "liable," or "**on the cards**"

**Facts:** P, launderer, bought a large boiler from D. D, knowing P was required the boiler for commercial use, agreed to deliver by a certain date. Boiler was damaged in transport and D had to make repairs. Thus, D delayed delivery. P sued for breach of contract, seeking damages for general loss of profits and for special government dyeing contracts.

**Issue:**
**1)** Were general lost profits recoverable?
**2)** Were lost profits from the government dyeing contracts recoverable?

**Held:**
**1)** Yes.
**2)** No.

**Reasons:**

- ➔ **First branch of *Hadley*:** This was a contract for the sale of a boiler to a laundry. A laundry **would naturally use a boiler for** "**maintenance or increase of profit, or reduction of loss**." Thus, we can impute to D knowledge that lost profits would likely flow from delayed delivery.
- ➔ **Second branch of *Hadley*:** However, P's intention to use the laundry to enter into **especially lucrative government dyeing contracts** was a "special circumstance," which D did not actually know about. Thus, profits from those contracts were not RF, meaning too remote and not recoverable.

### *Scyrup v Economy Tractor Parts*

**BLL**

- ➔ **Majority**: What must be RF is "**the form of**" damages (ie. lost profits). Therefore, a fairly general level of knowledge will suffice.
- ➔ **Dissent**: What must be RF is "**the scope of**" damages (ie. the magnitude of lost profits). Therefore, a more specific level of knowledge is necessary.

**Facts:** P purchases a tractor attachment from D. P informs D they need the attachment urgently, in order to fulfill a pre-existing contract with another company. D provides a defective attachment. Consequently, P loses their contract with the other company.

**Issue:** Can P claim lost profits flowing from their inability to fulfill the contract with the other company?

**Held:** D is liable for lost profits flowing from P's inability to fulfill its other contract.

**Reasons:**

Freedman J.A. (maj)

- ➔ The lost profits would have been recoverable under either the first or second limb of Hadley:
  - ◆ **First limb** → Selling defective equipment would "in the ordinary course of events result in damages ***in the form of*** loss of profits"
  - ◆ **Second limb** → P clearly communicated the urgency and specific need for the equipment to fulfill the other contract. D had actual knowledge of the "special circumstances," which made the losses arising from the breach RF.

Miller CJM (angry dissent)

- ➔ Economy did not know enough details about the Supercrete contract. **Simply knowing that "another contract" was at stake did not make significant loss of profits reasonably foreseeable**.
  - ◆ **First limb** → "I do not think that damages for loss of profit naturally flow from the defective character of the equipment"
  - ◆ **Second limb** (actual knowledge) → "defendant was not given sufficient information regarding the actual contract in which the plaintiff was interested to determine ***the scope of*** its liability if the machine did not work"
    - To foresee the scope of losses, D would have to have known what kind of contract was at stake for P, the type of work to be done, and the magnitude of operation.

## *Koufos v Czarnikow* (The Heron II)

**BLL**

➔ What must be foreseeable: the general type of loss, if not the extent.
➔ How foreseeable must the loss be: the loss must be reasonably foreseeable as a "serious possibility" or a "real danger."[22]

**Facts:**

- P chartered the ship Heron II from D, to transport 3,000 tons of sugar to Basrah.
- P intended to sell the sugar promptly upon arrival at Basrah, but had not informed D of this. However, **D knew there was a market for sugar in Basrah**.
- D delivered the sugar too late. Another shipment arrived in Basrah before P's sugar could get there. The **price of sugar accordingly fell** from 32 euros per ton to 31.

**Issue:** Is the market-value loss too remote?

**Held:** The market-value loss was recoverable. It was within the contemplation of the parties ***as a serious possibility*** at the time of contract formation.

**Reasons:**
Lord Reid

- Hadley wasn't intended to produce two branches.
- "The crucial question is whether, **on the information available to the defendant when the contract was made**, he should, or the reasonable man in his position would, have realised that such loss was **sufficiently likely** to result from the breach of contract to make it proper to hold that the loss **flowed naturally** from the breach or **that loss of that kind should have been within his contemplation**."
- "Sufficiently likely" = "**not unlikely**" = more than mere possibility but not necessarily an even chance.
- Application:
    - Koufos knew there was a market for sugar at Basrah.
    - Thus, market fluctuations were **a serious possibility.** Losses resulting therefrom were a **real danger** which Koufos should reasonably have contemplated as flowing from a delay.
    - It was not necessary that Koufos have actual knowledge of Czarnikow's specific plans – knowledge of the general market context made the losses sufficiently likely to be reasonably foreseeable.

[22] This is unlike tort, where even a slight possibility will bring a loss within the scope of "reasonable foreseeability."