Remedies classnotes, Spring 2006. Monique Lillard.

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Tuesday, January 10

Introduction

Hatahley (10th Cir. 1958) (p11)

- How were the Navajos hurt?
    - Lost horses
        - Use of the horses
            - The Navajos's livelihood
                - Farming
                    - Products to eat and sell and *trade*
            - Pets
            - Transportation
                - Going for medical care
                - Other travel
                - Religious ceremonies
                - Tribal meetings
                - Getting food and water
                    - Drinking
                    - Washing
                    - Religious purposes?
                - Getting wood
        - Sadness
- Who caused this hurt?
    - Greed? (by the landowners)
    - Columbus?
    - The U.S. government

  The legal question, though, is: who caused this that you can sue?
    - Itc. is a trespass action
    - Also, conversion/wrongful deprivation of property would be possible here
- What would Πs want to get? What would they want the court to do?
- What questions would you ask if Πs came into your office?
    1. What injury?
    2. What caused it?
    3. Which of these causes can be sued in court?
        - So, greed won't work
        - Also, keep in mind immunity, waiver, jurisdiction, and so on.
        - Solvency, too.
            - But you shouldn't stop if the potential Δ is insolvent—insolvent people can sometimes do stuff other than pay money. Courts don't do that a lot, but *you* can do it in a settlement.
    4. What do you want?

- And what are the legal limits on getting it?
  - Evidence rules
  - Remedies law

  Ask first what Πs want, then determine if the rules will let you get there (not vice versa).
    - N.b. how remedies is a final semester course—but it's where you start in practice.

- Course outline
  1. Compensatory damages
  2. Injunctions
  3. Restitution

- Back to *Hatahley*—what can a court do for the Navajos?
  - Restitution
    - How did the government *gain* by taking the horses?
      - Public opinion (of whites)
      - $$, from the glue factory
      - $$, from leases (from landowners, perhaps)
    - Restitution seeks to disgorge Δ of unjust enrichment. The goal is to restore the *Δ* to where it would have been but for the wrong.
  - Injunction
    - Could the government just be ordered to do anything?
      - Buy new horses for the Navajos
      - Allow the Navajos to graze horses on public land
      - Enforce the notice requirement
      - Extend a public apology
      - Give jeeps to the Navajos (for transportation)?
      - Give jobs to the Navajos (for livelihood)?
    - Reparative injunctions and orders seek to restore Π to where he would have been but the wrong.
    - Preventative injunctions are possible, too—preliminary injunctions, temporary restraining orders, permanent preventative injunctions.
  - Compensation
    - Is there anything that the government could give the Navajos? To restore them to their "rightful position"?
      - N.b. that there's a but-for causal link concept here.
      - Compensation can't perfectly restore the Π—so we try to get Π back as nearly as possible.
      - Usually, we use $$, our common currency.
        - And usually, $$ is *substitutionary*—the court won't inquire what Π does with it.

Itc., the court remanded for further factfinding on remedies.

- What was wrong with the first determination? It wasn't sufficiently specific—it was too general.
- On remand:
  - What should Πs argue?
  - What defense arguments should Π anticipate?
  - What should Δs argue?

Wednesday, January 11

- *Hatahley* on remand
  - How should the Πs prove up damages?
    - Law: (replacement cost of the taking) + (use value) + (emotional distress and other intangibles)
      - Limits:
        - Causation, which is further limited by the proximate cause doctrine.
        - Certainty
        - Avoidable consequences doctrine ("duty to mitigate")
        - Offset
      - Value of the horses
        - The best way to prove this would be if there was a local market value for the exact same breed, sex, color, etc.
        - In real life, we look at what's available in the area—we ask what Π would have done if the horses had dies of other causes.
        - What about the training of the horses, though?
          - Use the market value of a professional horse trainer?
          - Or the market value of Πs time (if Π does the training). But, how would we measure this?; especially if Π doesn't work for a wage?
        - And what if Π obtains the horses by barter?
          - Then you would work your way out to a money market.
        - Also, you can have either experts or the Πs themselves testify to the value (because here the Πs are really the experts)
        - What about pet value??
      - Use value of the horses
        - How do we prove that because the Navajos didn't have their horses they couldn't round up their cattle?
          - We could prove before and after numbers of cattle—but we'd still have to account for other possible causes of loss. I.e., we must prove that the Δ was the actual cause.

        - Also, the Navajos lost the horses offspring.
        - And, they lost their ability to transport water,and therefore their ability to garden, and therefore they had to purchase plants on the market, supposedly.
    - Emotional distress
        - A causal link is still required.
        - Note n5p14: here, the trial court awarded a "communal" pain and suffering award. The appeals court said that individualized pain and suffering determinations are required. This is a culture clash—we're in the individualized proof culture, but other cultures are relevant, especially for teaching the jury.
- What's good about the precision required itc. by the appeals court?
    - It combats arbitrariness. So, it shows that we're willing to sacrifice some efficiency for non-arbitrariness.

Thursday, January 12

Compensatory damages

Value and torts

- How do we value something?
    - The easiest way is to look for a market.
    - Also, we can look at:
        - The cost to repair
        - Streams of income
        - Use value
    - Δ is entitled to pay the lowest accepted value.
    - Also, certain methods of valuation are associated with certain causes of action.
- Usually, difficult valuation is the result of an odd market.
- *Fifty Acres of Land* (1984) (p19)
    - Here, FMV = $225K, but the cost of a new landfill is $723K.
        - Nobody argues that Δ should have to pay $723K. The city wants the $723K discounted for the longer useful life of a new landfill.
            - The court rejects this argument from the city, saying it's too uncertain and subjective.
        - What else could the city argue?
            - $$ to contract for garbage removal.
            - Perhaps, the cost of financing a new landfill less the income from selling garbage space.
    - Even though itc. is a takings case, the rule is broader—Π is entitled to be made whole, but Δ is entitled to make Π whole in the least expensive way.
        - And usually the least expensive way to value is to look at the market value at the time of the wrong.

        - What's unusual about this case is that the court is somewhat concerned about how Π is going to spend the money.
- When market value is too hard to find (or is a "manifest injustice," some courts say), then you can start looking at replacement cost.
    - Consider used goods:
        - The best is if there's a market in similar used goods (see the Kelly Blue Book, and eBay).
        - N.b. the lemon effect—buyers assume the worst, so sellers won't see high quality used goods, meaning buyers are justified, leaving only lemons on the used goods market.
            - Courts don't seem to care about this—they'll stick with used good market value if it exists.
    - Also, consider items that fluctuate rapidly in value:
        - Contracts: use the value at the time of breach.
        - Torts: use value at the time of wrong.
        - Others: see the casebook...
            - *Decatur County* (Ind. 1981) (p33)
                - Should the Π here have argued for lost use/rental value of the land? Lillard thinks maybe, but probably not.
                - Crops: valued at the time of harvest.
                    - But here Π held the beans until the price went up from 7x to 10x.
                    - Nevertheless, the court sticks to the time-of-harvest rule, saying that Δ shouldn't have to bear Π's speculation risk (n.b. though, that the price could have gone down).
                    - Also, note that the farmer could have covered at the time of harvest (but, the farmer is probably cash-poor).

Tuesday, January 17

- Recall: value—how to determine it?
    - Market (but when?)
    - Replacement cost (but when?)
    - Repair/restore cost
    - Stream of income
    - Use value
    - Rental value

  And the Δ is entitled to pay the lowest value. So, Δ should be creative in identifying ways to make Π whole...

- *The Helen B. Moran* (2d Cir. 1947) (n6p23)
    - The cost of raising the barge—$7K

        - This is recoverable, because the barge had to be raised to determine what needed to be done.
    - The cost of repairing the barge—$43K
        - This is what Π actually did—but this was attacked as unreasonable because the barge was only worth $16K.
            - But there's no market in barges at this time!!!
                - What if, though, a new barge market existed. If so, do we have to offset for depreciation?
                    - Yes. How do we determine the depreciation offset?
                        - Tax returns? No because depreciation there is fictitious.
                        - Other accounting records? Probably not, because those figures are also determined for other purposes.
                        - What we want to determine is *actual* depreciation.
                            - Here, the court got its figure from the original cost less actual depreciation from wear and tear.
                                - But why not *increase* for appreciation due to scarcity??
                                - In any case, we *do* want to adjust for inflation when looking at the original cost.
    - What about valuing based on the cost of building a new barge (labor and materials)??
    - What about capitalized earnings?
        - That is, how much money did the owner stand to make from this barge? And what were the costs of running it?
            - With these two figures, we can calculate the new profit per trip. Then, if we can determine how many trips were left in the barge, we can get a compensation amount.
            - But this is too speculative, especially because of the war. (Another way to figure this would be to look at the last several years, but this too won't work here because the last few years were the Great Depression.)
    - After everything, whatever it is, we want to discount to present value.
    - Thus, itc., Π isn't made whole—it's left bargeless and still must pay its lawyers.
- *Trinity Church* (Mass. 1987) (p26)
    - Despite the dissent, it seems clear that the church was damaged, Lillard says.
    - The question, though, is whether it is present or future damage.

        - Although courts don't look at what Π will do with damages $$ it gets, it can be helpful to ask what Π will actually do with it in order to determine whether there really is any present damage.
    - How to value this damage?
        - Replacement/restoration—how would we measure this?
            - And even if it's measurable, how could we determine how much damage Δ caused and how much was accelerated by the Δ. Here, this amounted to 39% of the total replacement cost.
            - Also, note the offset that Δ will want for Π's costs of maintaining the church—which Π will no longer have to do.
    - Π also gets interest from the date of the wrong (which the court says is the present) to the date of the judgment.
- Sentimental value
    - This can be part of market value:
        - Provable historic value
        - Provable aesthetic value
        - Antique value
    - But what about things like:
        - Home movies
        - Wedding photos

        There is some recognition of value here. But the proof is the owner's testimony. Also, though, a court can look at the industries surrounding these values (e.g., Super8 to DVD services).

- Note how all of these torts against property are *forced sales*—we would prefer if the parties could bargain between themselves.

Wednesday, January 18

Value and contracts

- What is Π's "rightful position" when we have a contract?
    - How is Π hurt by a contract breach?
        - Reliance
        - Expectancy (benefit of the bargain)
            - This is based on a right to performance that kicks in when the deal is made.
            - Is this a present or a future loss? The general rule is that it is a *present* loss (this is based on the idea that a contract is property).
        - Lost opportunities
        - Emotional hurt? Disappointment?
            - Courts generally won't hear this.
- The rules:

- The standard measure for contract damages is expectancy.
- Sometimes, though, reliance is used.
    - Keep this reliance, the damages measure, distinct from the reliance (i.e., promissory estoppel) theory of recovery.

These are not measures that are used with torts.

Also, Π gets to elect whether to go for expectancy or reliance. The "Δ gets to choose the lowest cost remedy" rule, which we saw with tort damages, doesn't apply here.

And, keep in mind that restitution could be a possibility.

- *Neri* (N.Y. 1972) (p37)
    - Why not let the buyer rescind here?
        - Because the standard measure is expectancy—and this seller is a volume seller.
            - Note that some scholars think that the lost volume theory is applied to easily—these scholars would require more proof before it could be used.
    - What damages to the seller here?
        - Lost profit
        - Incidental costs (e.g., preparing the boat for the buyer; marketing costs for that specific boat).
- What about excessive expectancies?
    - Is there such a thing?
        - N.b. the windfall profits tax (which was exacted in the 1970s).
    - *Chatlos* (3rd Cir. 1982) (p48): here, the buyer was promised a $207K machine (arguably) and got a $46K machine.
        - The blackletter rule: UCC § 2-714(2): damages measure is the difference, at the time and place of acceptance, between the value of the goods accepted and the value they would have had as warranted, *unless* special circumstances who proximate damages of a different amount. (n1p49).
            - What numbers to plug in here?
                - The value as warranted = ???
                    - Chatlos will use and expert to value what was warranted.
                    - NCR will argue that the best evidence of value is the contract price, and such a machine doesn't exist, so any value would be speculative.
                - The value as delivered = $46K
        - Note that Chatlos might argue for punitive damages, but the general rule is that there are no punitive damages for a contract breach.
    - Also, *Bolles* (1989) (p53) and *Texaco* (Tex. 1987) (n4p52)

Tuesday, January 24

Recall:

- Contract: the goal is to put the parties where they would have been had the deal gone through.
- Tort: the goal is to put the parties where they would have been but for the wrong.

- *Chatlos* and *Bolles* and *Texaco*
  - You could say that these are three stories of dashed expectancies, linked by the fact that the expectancies were excessive.
    - Should the Πs be allowed to recover for excessive expectancies?
      - In contract, the answer is yes—because of a deterrence goal. See fn1p49.
    - Should how the Πs pleaded the case (contract or tort) make a difference?
      - Well, it does. Isn't this form over substance??
      - *Bolles* (1889) (p53)
        - Reliance measure for damages with tort (fraud here).
          - But there are exceptions to this—see the casebook.

Consequential damages

- In contract, there's a prejudice against consequential damages.
- *Buck* (Tex. 1893) (p56)
  - N.b. that Lillard hates the "general"/"special" damages distinction, even though it's recited all the time.
    - See pp60-61x.
    - It's better just to detail everything you want to recover for, rather than ask for general and/or special damages.
- Recall *Hadley*.
- Why is there a hostility to consequentials?
  - Because some consequentials are avoidable.
  - Because there's no reasonable limit to them.
  - Because it's inefficient to prove all of them.
  - Because of risk allocation.

  But not that there are doctrines to limit them—e.g., the duty to mitigate and proximate cause.
- *Meinrath* (SDNY 1980) (p63)
  - Why isn't Π allowed to prove up consequentials? Because of efficiency, the court says, quoting Williston (this is a direct contradiction to *Hatahley*, n.b.).
    - Why else, could the court have saide?
      - Too speculative.

- Proximate cause.
- The costs of contracting and breaching are driven up.
- The cost of going to court is driven up.

Wednesday, January 25

- Why are consequential damages barred?
  - See *Meinhard* at ¶1p65: the court doesn't give much of a reason.
- Summary of the rules here:
  - With money, the measure of consequentials is interest.
    - Increasingly, Πs are allowed *actual* interest—the rate they had to pay to "cover" the money (as opposed to the old rule—the legal interest rate).
- Lessons for lawyers:
  - Transactional lawyers:
    - Spell out what you want (but this can spoil a deal or at least drive its price up).
  - Litigators and transactional lawyers both:
    - Advise the Π to get a loan—because you probably can't get the money back in court. If you have no credit, have the Π do what he can.
  - Litigators:
    - Plead actual knowledge by Δ of the consequentials.
    - And plead in tort, where there's not so much hostility to consequentials.
- *Pennzoil* (Tex. 1987) (p68)
  - What's the expectancy? The stock or the oil?
    - By pleading in tort, Πs gained the flexibility to say that this was really about the oil (and therefore weren't wedded to the nature of the contract).
  - N.b. that even the contract's existence is disputed here (see n4p52).

Avoidable consequences, offset, and collateral sources

- Offsetting benefits
  - Ask:
    - Did the Π save anything as a result of Δ's act?
    - Did the Π make any money due to Δ's act?
  - Also, keep causation in mind.
  - In matching offset to the interest harmed, there are some rules—see the casebook.
- Avoidable consequences
  - Ask: if Π didn't benefit, would a reasonable person have avoided certain costs (or even have gained from the harm)?
    - Is this putting the Π in his "rightful" position? Consider, e.g., reasons why a specific Π would *not* mitigate—e.g., wrongful termination Πs might not be able to find a close enough substitute for their old job.
  - N.b. that eggshell Πs will be taken into account (see the note in the case book

about the manic depressive Π).
- Avoidable consequences is an affirmative defense.
- Uncertainty is resolved against the wrongdoer.
- You can recover for your expenses in reasonably trying to mitigate.
- *Groves* (3d Cir. 1978) (p92)
    - N.b. the second rule here: Δ could have gone to another supplier, too.
    - Reasonableness is used to determine whether the consequences were avoidable. That is, this is done objectively, but with some subjective elements (e.g., eggshell Πs, special circumstances).

Thursday, January 26

- Why do we have the avoidable consequences doctrine?
    - Well, perhaps to limit Δ to paying for the harm he really caused.
- Collateral source doctrine
    - The traditional rule: *no offset* for money from a "collateral source."
        - Tort reform advocates, though, say this should be offset.
    - What actually happens?
        - Subrogation: in some areas, the insurance company will go after this money; in other areas, it won't.
            - See I.C. 41-2505 (Idaho subrogation statute).
    - Why have this doctrine?
        - Δ pays for what he caused.
        - Mutuality
        - Otherwise, we'd punish prudence and reward wrongdoing
        - "None of your business" where I'm getting money idea
        - Deterrence—make the Δ fully internalize the costs of his behavior
        - For non-insurance sources, encourage generosity
        - Encourage Π cultivating collateral sources
        - It makes up for non-recovery of fees, costs, and hassle costs.
    - Why abolish it?
        - Consider n9p109—a synagogue raises $20m to replace it's building. And we won't offset it??

Tuesday, January 31

Scope of liability

- *Pruitt* (E.D. Va. 1981) (p110)
    - Hypo: a shrimp wholesaler, with a processing plant in the bay, has "Chesapeake Shrimp—Local" on its sign. It loses profits for two season. Δ is going to move for dismissal arguing (1) no duty to prevent pure conomic harm and (2) in the alternative, no proximate cause. Π will respond that (1) yes there's a duty and (2) this harm was reasonably forseeable.
        - Here:

- Duty?
  - Source
  - Scope—pure economic harm?
  - Beneficiary
- Breach? Yes.
- Actual cause? At issue.
- Proximate cause? Also at issue.
- Damages? Los imaginable:
  - Lost profits
  - Possibly the entire business lost
  - Goodwill lost
  - Emotional distress

- Π arguments
  - Δ shouldn't get away with this
  - Δ triggered a long chain of events
  - Economic harm is the main harm here
  - Π is directly impacted
    - What does this mean? Just that there was physical contact?
  - The harm was forseeable: Π was right on the water's edge; Π is a seafood business.
- Δ arguments
  - The *amount* of harm wasn't forseeable
  - The impact was not "direct": Π was too far down the causal chain
  - The general rule—no compensation for pure economic harm

- Note how the *Pruitt* court admits that the rule is arbitrary—that is has to draw the line somewhere, and so will just pick a place.
- Risk allocation arguments
  - Δ
    - Π can expect problems like this, and so can either insure or cover.
    - Business is risky, and why should Π get to pass that risk off onto the Δ?
    - Π is more of an expert on its business
  - Π
    - Deterrence
    - Δ is more of an expert on this chemical
- The blackletter here:
  - Proximate cause: directness and forseeability
    - Note how "direct" isn't helpful, but it's common.
- Note how that if pure economic harm isn't recoverable, Δs might rationally decide to spill chemicals (that is, B is about equal to PL).
- Is it cheaper to have possible Πs insure individually than to have Δ insure generally against every possible harm?

- Lillard thinks this court is wrong about double counting here—because the concern here is *profit*.
- Is this result a subsidy to the chemical industry? I.e., itc. makes it cheaper to produce this chemical.

- *Evra* (7th Cir. 1982) (p119)
  - Is this result a subside to banks?
  - Rules itc.:
    - There's strict liability in contract, but usually lower damages.
    - In tort, Π must show fault, but damages and proximate cause scope are bigger.
    - Courts will look *through* the pleadings to determine if, e.g., a business tort is really a contract dispute, and, if so, apply *Hadley*.
    - Forseeability
    - Risk allocation—who's the most efficient loss-avoider?
      - Here, the duty to mitigate fits into proximate cause—who's the *best* person to mitigate?
      - Note the tension between this rule and the eggshell Π rule—here, unreasonable risk preference will be used *against* Π.

Wednesday, February 1

N.b., writing an exam for this course: start with the blackletter. E.g., what we did yesterday was blackletter—start there and move on to making factual arguments, noting what will sway the decisionmakers.

- (*Evra*) Would it matter if Π had told the teller about its urgency?
- Or, what if the teller told Π that it couldn't guarantee speedy delivery? What would Π have done?
  - Gone elsewhere?
  - Double checked?
  - Offered to pay more?

All of this goes to risk allocation.

- Tort versus contract in remedies: Lillard thinks that, in the end, torts are better for Πs. Otherwise, it depends.

Certainty

- Note that we've been studying limits on recovery
  - Proximate cause
  - Consequential damages
  - Avoidable consequences
- There's lots of speculation in remedies, and we allow it in many cases
  - In future damages, especially
  - But in past damages, too: consider "but for" causation—nobody knows what

would have happened if things hadn't gone how they did.

So, the system strives to guess as closely as possible, and only *complete* guesswork won't be allowed. Some uncertainty will be okay, especially if the wrongdoer has prevented a more precise computation.

- *Bigelow* (1946) (p129)
  - Blackletter:
    - The wrongdoer must bear the risk of uncertainty that his own wrong created, based on evidence. See ¶5p133.
    - Where Δ by his own wrong has prevented a more precise computation, the jury still may not render a verdict based on pure speculation or guesswork. But, the jury may make a just and reasonable determination, based on relevant evidence (direct, inferential, or circumstantial). See ¶4p133.
      - Why do we have this rule?
        - Prevent a windfall to Δs
        - Prevent inducement of worse wrongdoing—i.e., the worse the wrong, the more likely the there will be no recovery.

        Lillard says that this is the courts choosing what error to make.
  - Also here:
    - How do we measure the injury?
      - Sometimes, an injury is said to be *unmeasurable*—and so there's no recovery.
      - Sometimes, there's no injury--"negligence in the air".
      - Sometimes, there's an injury, but it's not legally recognized (e.g., pure economic harm in some situations).
    - The dissent, which seems to go to whether there really is a wrong here (or just a technicality).
    - Burdens of proof, after itc.?
      - Damages:
        - Yes or no—Δ's burden.
        - How much—Π's burden, but softened a little by the *Bigelow* rule about Δ bearing the risk of uncertainty.
          - See *Brink's* (n5p137).
- But, n7p138:
  - Lost profits: these are always speculative—Π must overcome this, and Δ must hammer on it.
    - There are causation problems.
    - It's hard to pinpoint what will be profitable, when (of course).
  - Lost profits on new businesses
    - The general rule is that there will be no lost profits awarded for new businesses.

        - Courts are starting to look at this on a case-by-case basis, though.
    - What is a "new business"?
        - New product lines?
        - New geographic areas?
        - Less than one year? Two years? Longer for some types of business? Less for others?
- How to prove lost profits
    - These are uncertain, generally.
    - Use experts—but certainty costs a lot.
    - Use statistical techniques and modeling.
    - Show a real-life track record.

Thursday, February 2

Intangible loss

- We translate these into $$
    - But what about certainty??
    - Generally, Πs aren't allowed to hurt Δs back, except in the wallet.
- Taxonomy
    - Physical pain and suffering
    - Mental pain and suffering
        - Note bystander liability
    - Wrongful death
        - This is a statutory exception, usually only for pecuniary losses (which are tangible, except that they can merge into intangibles (e.g., lost services)).
    - Fears (e.g., near misses, generalized fear)
    - Triggering events (e.g., of schizophrenia)
    - Sorrows
    - Lost dignity
    - Embarrassment
    - Lost reputation
        - Defamation
    - Lost companionship
    - Lost consortium
    - Lost enjoyment of life (hedonic damages)
    - Lost constitutional rights
- How much should we give for these?
    - As much as the jury will give, but with limits:
        - Evidence rules and argument rules
        - Remittitur
        - Tort reform
- Why do we give $$ for these?

- Justice??
- It would be offensive not to??
- Tradition?? (It's not a long one, for these intangibles.)
- The risk should be borne by the wrongdoer??
- To give Π money to use for freedom and power??
- **Deterrence
- **Compensation

Lillard says:

- Money talks
- It forces everyone to recognize the harm done
- It forces internalization
- It helps Π realize that people recognized their injury (vindication)
- Retribution
- Compensation
- Deterrence

- Note that attorney's fees will come out of awards for intangibles.
  - So, tort reform that would limit intangibles is disincentivizing attorneys to take cases.
- Note the possibility of getting an apology—but this is limited to settlement, mainly, since courts won't usually order it.

Tuesday, February 7

- *Debus* (Vt. 1993) (p146): the court says that per diem arguments can be made.
  - What can be said to the jury?
    - Anyhow, why have any rules at all? After all, it's an adversarial system?
- *Levka* (7th Cir. 1984) (p181)
  - Lawyering points itc.
    - Π's lawyer:
      - Why did they put the neighbor on the stand who recognized changes in the Π but didn't know much about the Π otherwise?
      - Why did they have the neighbor testify about Π going to work, not the employer?
      - Should you focus on conduct, or on subsequent changes?
        - Note how the court focuses on conduct (see p185).
        - Also see n3p189: in intangibles cases, Δ's motives and conduct are relevant, where usually they're only relevant to punitives.
    - Instruct your client to keep journals about how they're feeling—from as early on as possible.
      - Does this encourage malingering, or is it healthy?
    - And, send your client to physical and mental doctors—both to get them better and to build proof.

        - Judicial review: the stated standard on appeal is "shocking the conscience." Does this mean anything?
            - What's really done, though, is *verdict comparison*.
                - N.b. that this is saying that people are about the same.
                - E.g., one Louisiana court set a standard amount and determined an acceptable range of deviation.
- *Carey* (1978) (p193)
    - The only harm here is deprivation of a constitutional right.
        - Is this more like a battery or a conversion? Or a trespass? (What about breach of contract, I say?)
        - Note:
            - De minimis = no damages = no tort.
            - Nominal = low damages = yes tort (= yes attorney's fees).

Wednesday, February 8

Tort reform

- See the methods of tort reform listed on p170.
    - The current favorite is damage caps. This limits recovery in very few cases, because large damages are rare. But, often those cases are the ones where the Π is the most hurt (see n8p174).
        - So, how does this help the insurance companies?
            - It prevents large payouts, of course.
            - It reduces the incentive to bring lawsuits in the first place.
- N.b. trust in juries: why is it high when we're talking about the death penalty, but low in personal injury cases?
- Lillard recommends the book "Business on Trial."
- Is there a "torts and malpractice crisis," Lillard asks?
- Is tort reform constitutional?
    - Jury rights?
    - Separation of powers?
    - Equal protection?
    - Due process?
    - Open court provisions?

[Tort reform problem (h/o)]

Tuesday, February 14

Parties limiting recovery

- Usually, these limits are put in by prospective *Δ*s—the repeat players.
- Taxonomy
    - Warnings (on products)

- Disclaimers (with contracts)
- Arbitration agreements
    - N.b. that arbitrators who have awarded large amounts can end up blacklisted. So, arbitrators have a self-interest in limiting remedies.
- Contractual limitations
    - E.g., remedies limited to repair or replace.
    - These limits usually limit the *other* party.
- Liquidated damages
    - Specifying either a specific amount or a formula.
    - These limits usually expand the party's *own* opportunities.

Why do we have all of these?

- To settle the case before there is a case.
- The scare parties into performance.
- The help risk analysis.

- Liquidated damages provisions—they're valid
    - "Underliquidated" damages—where the estimate is too low
        - These will be scrutinized for:
            - The parties' intent
            - Unconscionability
    - "Overliquidated" damages—where the estimate is too high
        - These will be scrutinized for:
            - Whether they're a penalty (which is not allowed)
                - Ask:
                    - The "uncertainty" requirement: was the amount of damages difficult to ascertain at the time of contracting?
                    - The "ballparking" requirement: does the amount bear a reasonable relationship to the loss?
- *Kearney & Trecker* (NJ 1987) (p74)
    - UCC rules:
        - At least minimum remedies are available
        - Parties should get the value of their bargain
        - The code's principle is freedom of contract
        - Normally, consequentials are available (§ 2-714(3)), but they may be limited or excluded (§ 2-719(3)), if the limitation or exclusion is not unconscionable.
            - They are prima facie unconscionable in consumer contracts (but not in commercial ones).
    - Circumstances itc.:
        - Exclusion of consequentials.
        - A repair/replace warranty.
    - Issues itc.:
        - ¶1p77: if a limitation or exclusion of consequentials isn't unconscionable when the contract is made, must it be held

unenforceable if the limited remedies don't achieve their intended purpose?
        - More specifically, does failure of the repair/replace warranty invalidate exclusion of consequentials? Or are the two provisions independent?
            - The Court says yes, they are independent.
                - There is some conflict among jurisdictions on this issue, however.
- *Ashcraft & Gerel* (D.C. Cir. 2001) (p83): there are some planning lessons itc.
- *No. Ill. Gas* (Ill. 1984) (p88)
    - This is an underliquidated damages casze.
    - Lillard would just stick with § 2-718 (see n4p90).

Wednesday, February 15

[Problems, h/o]

Thursday, February 16

[Ship problem, h/o]

Equity

Preventive injunctions

- Requirements for equitable relief
    - Irreparable injury, or at least an otherwise inadequate remedy at law.
        - That is, $$ won't fix your problem.
        - You *must* at least make this argument to get equitable relief.
    - Real danger of real harm.
    - Balance of hardships (the wrong versus the hardship of an injunction on the Δ) tips in the Π's favor.
    - Other considerations—which we'll see as they come up.

Also, the *scope of the injunction* is a question that will run through all of this.

- *Humble Oil* (E.D. La. 1966) (p233)
    - Π seeks an injunction to prevent a certain Δ from destroying relevant documents.
        - So, the requirements:
            - Irreparable injury: can we put a $$ amount on the loss of these documents? It would be hard.
                - What about sanctions as a remedy?
            - Balance of hardships: is it hard for the Δ to keep these documents? Well, there's a reputational risk to the Δ, which would be especially hard on the Δ if its noncompliance was accidental.

Tuesday, February 21

- Recall: the requirements for a Π to get equitable relief:
  - Irreparable injury / no adequate remedy at law
  - Real, imminent danger / real harm / ripeness
  - Balance of hardships in Π's favor
  - Other considerations

  This isn't like a rigid prima facie case, but it's not as loose as just a list of factors. That is, there's something like a sliding scale, with this.

- Real danger / ripeness
  - *Humble Oil* (E.D. La. 1966) (p233)
  - Why do we have this requirement?
    - E.g., in *Humble Oil*, why not just order the documents preserved, rather than saying, as the court did, that there's no real danger of real harm?
    - If there's not this requirement, then you add more strategic games to litigation, what with Πs seeking injunctions to prevent document destruction as a way of making the Δ look bad.
    - An injunction has a lot of power—it's enforceable by contempt, and so it's an infringement on personal liberty.
    - The cost, though, of having the requirement is that more documents may be destroyed.
  - How can Π prove this?
    - Previous instances
    - Δ having lied before, especially if to a court
    - Acts showing contrary intent
    - (N.b. that in *Humble Oil*, the Π didn't do a good job proving imminence.)

    So, does all of this mean that you get "one free bite"?
      - Much of the time, yes.
      - But, it doesn't have to be that way—sometimes, you can get an injunction from just a *threat*; but that's hard.
  - In *Humble*, Π lost on the injunction, but did Π win in the long run?
    - Yes—Π gained a tactical from having forced Δ to defend this charge before the judge in the case.
    - But, Π may have lost some credibility as well, for moving for the injunction and losing the motion.
  - The point of *Humble*:
    - The court won't enjoin unless there's badness that's imminent.
    - And in any case, it will only enjoin *that* badness.
- *Marshall* (5th Cir. 1977) (p241)
  - Itc. is about the same thing as *Humble*, plus the *scope* of injunctions—i.e.,

how much injunction Π gets.

- Π here wants:
  - (Backpay.)
  - A *nationwide* injunction.
    - Π gets this at the trial court.
    - On review, though, the appeals court allows the injunction only against a single store, because:
      - no findings that there was a nationwide problem;
      - and no evidence of a companywide policy.
- One injunction-drafting lesson from itc. is that you should always state the findings of fact in your injunction.
- Why is there any injunction at all here?
  - Injunctions are standard in employment law cases.
  - Hardship—there's virtually no hardship to Δ at all, because the injunction just orders Δ to obey the law.
- Would it have made a difference if the store manager had promised never to discriminate again? Or what if the manager was fired for what he did??

- What should be prohibited? I.e., what should the scope of an injunction be?
  - Drafting points:
    - Get as much as you can.
    - Make sure your order will hold up on appeal.
    - Make sure your order will be valid on enforcement (i.e., in contempt proceedings).
      - That is, make sure it's an injunction that will stand on its own (e.g., in another court, long in the future).
    - Include language to make the order a teaching tool; e.g., order employee trainings (but keep these linked to findings of fact).
    - Rub Δ's nose in your victory??
  - What could a winning Π realistically get in *Marshall*?
    - An end to *all* prohibited discrimination? Maybe.
    - And end to all discrimination in violation of federal law?
    - To all age discrimination?
    - To all age discrimination against people over forty?
    - Forced revision of all employee manuals?
    - Striking of the entire existing manual?

    See n3p243.

    Can the court do a little bit more good than what it has before it?
      - I.e., would that:
        - Withstand appeal?
        - Be enforced?
      - Note the factual propensity question—what leaps are acceptable? See n8p245, on obey-the-law clauses, which often appear although not technically acceptable.

- What does the court have power to do?
  - What is its subject matter jurisdiction?
  - What's justiciable?
  - Etc.
- Drafting: start with a very broad umbrella clause, even if it would be too vague to be enforceable on its own.
- N.b. that the trial judge has lots of discretion with these things.

Wednesday, February 22

- *W.T. Grant* (1953) (p247)
  - Here, Δ did a bad act, but there's still no injunction.
  - Is there any harm in the Clayton Act violation itself?
    - Is there harm in the violation, alone?
    - Is there harm in not knowing whether there has been any "real" harm?
  - So, is this case jurisdictionally moot? No.
    - Because there's still a realistic fear that the company will go back to its old ways.
    - And the public may have a need for the case to reach a conclusion.
  - Should/may an injunction issue?
    - Well, if Π had proved something more than a mere possibility of future harm, them probably.
      - The government's facts, which weren't enough:
        - The guy didn't resign for five years.
        - And when he did resign, he only did it under pressure.
        - And his company had a policy to seek board representation.
  - There are four points to take away from itc.:
    1. Standard of review—it's abuse of discretion.
    2. Ripeness
    3. Burden of proof—it's heavy for Π with respect to jurisdictional mootness.
    4. What do you do when there's a real danger of harm and also voluntary cessation? Well, we know from itc. that voluntary cessation isn't always enough to prevent an injunction from issuing.
- *Nicholson* (Conn. 1966) (p252)
  - This is also a ripeness case, but it's very different from *W.T. Grant*.
  - Is there real danger of *real harm* in this case?
  - The court says that there will be no injunctions "merely" because of fears and apprehensions of the applying party. ¶4p252.
  - Note that we see an "other consideration" itc.: the court seems to be saying, "let's give this halfway house a chance."
    - Why did the dump case (*Brainard*, ¶2p253) come out the other way?
      - Maybe because we already know that dumps smell bad.
    - And what about the mortuary case (*Jack*, ¶2p253)?

        - Well, this one was not quite as strong for Δs as *Brainard* seems, Lillard says.
    - What better argument could Π have made?
        - Emotional depression, like in *Jack*?
        - Property value reduction??
- Terms to know:
    - Preventive injunctions: what we've been talking about so far—these are to stop a bad thing from happening and to keep Π in his rightful position.
    - Reparative injunctions: these are like compensation—they are to restore Π to a rightful position, when $$ won't do that adequately
    - Structural injunctions

    It's important to note, though, that these are analytical—not legal—terms.

- *Bell* (5th Cir. 1967) (p260)

Thursday, February 23

Reparative injunctions

- *Bell* (5th Cir. 1967) (p260)
    - Who was hurt here?
        - The voters
            - Were the black voters hurt more than the white voters? In terms of fear, perhaps yes.
        - Those served by the justice of the peace (the office elected)
        - The county and state governments
        - The U.S.
        - Mrs. Bell (whether she would have won or not)
            - Is she entitled to money damages for not winning? Well, we don't know who would have won—so, maybe yes.
            - Could we translate her other, general losses into $$? Maybe.
    - Injunctions
        - Should a preventive injunction issue now, regarding the next election?
            - Well, is there a real danger of real harm?
        - We we issue an injunction that would undo the harm that's already happened?
            - If so, should that injunction undo the acts already done by the pretender justice of the peace?
                - No—his rulings are valid, so long as he took office under color of law.
    - The holding itc.: a federal court can set aside a state election *and* require the calling of a special election when, in the course of the election, there has been gross and unconstitutional discrimination.
- Injunctions may, truly, be worded in positive or negative terms.

- The old rule that injunctions must be phrased in the negative ins't really true—you can word them positively.

- *Forster* (8th Cir. 1996) (p264)
  - This case can be used as a practice exam, Lillard says.
    - How to measure the money damages?
    - Should an injunction issue?
    - What should the scope of the injunction be?
  - Itc. is here to pose the question whether a Π can get damages *and* an injunction.
    - Π can't get money for the difference between the land and the dock *and* get an order giving Π the dock.
      - So, Π must elect a remedy.
      - Usually, the legal system prefers $$. But here, because there's land involved, the Π gets to choose.
    - When *can* you get $$ and an injunction?
      - Punitives
      - Multiple aspects, or phases, of harm.
- Types of injunctions
  - Preliminary: before trial on the merits
  - Permanent: after train on the merits
    - These can last any amount of time.
    - A *perpetual* injunction is an injunction that goes on forever.

Tuesday, February 28

- *Winston Research* (9th Cir. 1965) (p271)
  - What would be the measure of $$ damages here?
    - $$ for Mincom's lost "head start" in the market
      - This is the "reverse engineering period."
      - Is Mincom also, in this way, a lost volume seller?
    - Unjust enrichment
      - What did the Δs gain?
        - A head start
        - A shortened development process
        - Financing
        - Reduced development costs

        But, still—nothing was sold, here.
    - What about the delay in development that Mincom suffered from losing key people?
      - Well, hiring away key people is not illegal.

    So, it looks like there are significant certainty problems with $$ damages here.
      - But isn't there a market for this information—so, couldn't you

use experts to appraise the information's value? Lillard says maybe, but is skeptical.

- Injunctive relief
  - Elements
    - Irreparable injury? Yes.
    - Real danger of real harm? This isn't a big issue here, because we're talking about a reparative, not a preventive, injunction.
    - Balancing of hardships? This is more difficult.
  - Duration?
    - 0 years? Because the information is already in the public domain!?
      - If so, then there's no remedy for this particular tort.
    - Forever? See *Shellmar* (pp272-73c).
    - An exact time, based on testimony? This is what the court does itc.
      - Use the time it would take a non-insider to reverse engineer this?
  - Would Mincom rather have an injunction or $$?
    - Should Mincom get to choose? Well, in whatever case, that's not the law—Π must show that there's no adequate remedy at law before it can seek an injunction.
  - Itc. is an example of using an injunction to put the Π back in its rightful position.
    - In fact, if damages could be measured here, the court might still have ordered an injunction in order to prevent future harm.
    - And, the court might also order restitution to disgorge profits.
    - But, the court can't award damages for future profits *and* an injunction to prevent future harm—that would be double recovery.
  - The holding itc.: duration of the injunction is for the reverse engineering time *plus* a little bit more.
    - Why?
    - When do we measure *from*?
  - Itc. is also an example of precision in ordering an injunction.

- *Bailey* (1st Cir. 1947) (p276)
  - This case, with *Winston*, establishes a spectrum:
    - On the far left is *Winston*, which required a great deal of precision in ordering an injunction.
    - On the far right is *Bailey*, which is liberal in crafting an injunction, relying on general equity.
  - Is there actually a real danger of real harm here, considering that a new person is in charge?
  - Separation of powers: if congress grandfathered this venture, who is the court to do otherwise?? And, if the court is right itc., is there any limit to equitable discretion at all??

Wednesday, March 1

- Redux: both the *Winston* and the *Bailey* approaches are legally defensible, and both are still viable.
- It *is* possible to get:
    - An injunction plus compensatory damages
    - An injunction plus restitutionary damages
    - An injunction plus punitives (although this is somewhat rare)

  But—there will be *no double counting*.
- Goals of an injunction:
    - Repair harm. That is, compensate.
    - Deter and prevent harm
        - Hence the real danger of real harm requirement.
        - Note the risk of error, and where it falls—see n16p288.
    - Punish
- It is *very* common for courts to order extra things as part of an injunction—the "little bit more," Lillard calls it.
    - This is more common with violations of "public law" rights (such as the civil rights statutes), Lillard thinks. With those, the courts will take prophylactic and education approaches more often; sometimes, in fact, this will be written into the statute itself.

Structural injunctions

- The school desegregation cases are the archetypal example, here.
    - The first order in such cases was usually: "desegregate yourselves."
    - Next, the court will modify the order, but will still give substantial deference to the school districts.
    - Then, the court will begin getting more specific.
    - Some issues, though:
        - *Milliken I* said that a court can't order around people who have not been proved to have done wrong.
        - Funding: how do you pay for all of this stuff?
            - Modern solutions include magnet schools (which have "desegregative attractiveness"), but these require lots of money.
            - See *Jenkins III* (1995) (p295), which said that a court can order a tax.
- *Hutto* (1978) (p307)
    - The rule here: courts don't have to consider inadequacies in a vacuum—rather, they can put the violation and possible remedies in context.
    - Rehnquist: he gives an "other" consideration—the interest of locals in managing their own affairs.
        - But Lillard reminds that these particular locals have already blown it!!

- Or, is Rehnquist saying that itc. is *unripe*?
- Or, is this just an injunction drafting problem?
- Or, is this about federalism?

Thursday, March 2

- *Lewis* (1996) (p313)
  - Itc. is kind of like *Marshall* (the Goodyear case where an employment discrimination injunction was limited to an individual store).
  - When *would* a court micromanage an entire prison library system?
    - When the inadequacies were systemwide (and there were supporting facts proving so).
  - The rule itc.: the nature of the remedy is determined by the nature and scope of the constitutional violation (¶0p315).
    - The holding here: the constitutional violation here was not systemwide, thus a broad injunction is improper (¶4p315).
  - N.b. the concurrence itc.
  - Note, too, the deference to the prison system (¶0p316).
    - So, is *Bailey* dead? No—this case can be limited to deference to prisons, or perhaps government generally.
  - Is there a constitutional violation here at all? If so, what exactly is it?
  - N.b. PLRA (n3p317).
- *Microsoft* (np326)

The irreplaceable loss rule

- *Pardee* (W.Va. 1911) (p363)
  - It's not an accident that this is such an old case—there are very few modern cases that talk about irreparable injury with any seriousness. Courts today, rather, find more specific reasons for denying equitable remedies.
  - Why isn't $$ adequate here?
    - The property (timber) was unique
    - The property is hard to grow and takes a long time to grow
    - The property is part of real estate, which is unique per se
    - The property was of "inestimable value," the court said
  - Note ¶0p365: "if a man threatens to kill a horse, there is no injury." Lillard thinks that this might not be true anymore.
- General rules about irreparable injury:
  - It must be shown.
  - Irreparable injury = no adequate remedy at law
  - Laycock at ¶4p381: "a legal remedy is adequate only if it is as complete, practical, and efficient as the equitable remedy."
  - Uniqueness
    - We presume that land is unique

Why have this requirement? Why not just let Π choose?

- Which--$$ or an injunction—is more efficient in administration?

Friday, March 3

- See the notes on pp382-83.
- Recall:
  - "Irreparable injury" = inadequate remedy at law.
    - "Adequate" = as complete, practical, and efficient as any equitable remedy.
      - A remedy is *not* adequate if the subject matter is unique.
  - Why are legal remedies preferred?
    - It's more costly to administer injunctions (maybe).
    - It keeps the teeth in injunctions if we reserve them only for serious things.
    - Juries are available at law, but not in equity.
    - The history of law and equity
    - Law and economics
      - It's hard to tell if law and economics is for or against injunctions.
      - It is, though, concerned about keeping transaction costs lost.
      - It usually favors transactions between parties—it doesn't want juries (or others) to be setting prices.
- *Brook* (Okla. 1967) (p374)
  - Replevin: here, it's Π's choice whether to get the property or $$ in substitution. Why? Because replevin is a *legal* remedy.
- *Continental Airlines* (9th Cir. 1994) (p377)
  - This is a rare modern case about irreparable injury.

Specific performance

- Specific performance is a specialized kind of injunction.
- *Campbell Soup* (3d Cir. 1948) (p383)
  - Note how the underlying action (contract breach) is an action at law. But the only relief is in equity, here.
    - Often, the underlying "bill" will be in equity, too. See, e.g., *Bailey* (where the underlying bill was receivership).
  - A rule: the legal remedy is inadequate if it is *virtually impossible* to replace the subject matter on the open market (see nnp386-87).
    - Even so, specific performance is a disfavored remedy.
  - The economic/practical analysis of itc.:
    - (First, assume that:
      - there was no liquidated damages clause
      - there's no unconscionability
      - carrots don't spoil

        - there's no insolvency.)
    - If damages:
        - Amount = market price – contract price = 90 – 30 = 60
    - If specific performance
        - Profit = carrots – cost = 90 – 30 = 60

    So, this is the same result, to both parties.
        - Why would Wentz breach, then?
            - The possibility that Campbell's won't sue
            - The value of holding $60 until the end of the suit
            - The possibility of selling at "higher" than market price
        - Why would Campbell's want specific performance?
            - It saves the transaction and hassle costs of finding another seller.
            - It eliminates the risk of not getting consequential damages, at law.
            - It makes a point to small suppliers that Campbell's can get specific performance if it wants it.
- Do we (society) care which remedy is given?
    - What about the "highest use" idea?
        - With a damages remedy, Δ are, in effect, holding an auction to find the highest use (because Δ still has the property).
        - With specific performance, Πs are holding the auction.

        But note the transaction costs, which mean that the auction to find highest use will be imperfect.
- If there's not a true shortage, then the law prefers Campbell's to cover on the market. That is efficient breach.
    - Is efficient breach moral?
    - What about opportunistic breach? (See n8p392).
    - Is efficient breach efficient?

Tuesday, March 7

- *Van Wagner* (NY 1986) (p394)
    - How will the remedy granted ($$ vs. inj.) impact negotiations between the parties?
        - If specific performance is given itc., then the demolition could not start until the lease ends, unless Van Wagner was paid to not enforce the order.
            - What's the precedential value of itc., then? That little things can stop big things (??).
        - If just $$ is awarded, then Van Wagner could potentially pay S&M not to build the new building.
            - What's the precedential value? That, to some extent, property is

not unique (??).
- Holding: no specific performance—just $$.
  - Why is this the right result?
    - Because the remedy at law is not inadequate??
    - Because of the disproportionate hardship to Δ??

- Hardship
  - *Ariola* (Ill. 1959) (p401)
    - The cause of action here: trespass—an intentional tort.
    - What would $$ damages be here?
      - Gutter and drainage system: cost.
      - Water damage: value before – value after; or, repair/replace cost.
      - "Lost" property: appraisal, then prorated by the inch (here, $1.61); or, value before – value after.
      - What arguments can Δ make here?
        - Mitigation, especially with the water damage.
        - Avoidable consequences.
    - Injunction
      - Elements
        - Inadequate remedy at law? Yes, because real property is presumptively unique.
        - Real danger of real harm? Yes, because this is a continuing trespass.
        - Balance of hardships?
          - Δ's arguments:
            - Expensive
            - Difficult
            - Disproportionate
        - Other considerations?
          - Intentional tort
            - Disrespectful to the courts
            - Leads to private eminent domain
          - Δ on notice
          - Administrative efficiency
            - An injunction would steer more matters to private dispute resolution.

Wednesday, March 8

- (Hardship::*Ariola*) Rules on the removal of encroachments:
  - Generally, you can have encroachments ordered to be removed.
  - But, there's some concern about disproportionate cost.
- Note that undue hardship is a good place to argue law and economics, as well as efficient violation of law.
- Also, when courts talk about undue hardship, it's not always clear whether they're talking about the elements of Π's bill (which are Π's

burden to prove) or Δ's affirmative defense (which is Δ's burden to prove).
        - "Other considerations" itc.:
            - The relationship between the parties (e.g., whether both parties have notice of the problem)
            - Π's diligence or acquiescence
            - Δ's attention to the law
            - Public benefits
    - *Boomer* (NY 1970) (n2p405)
        - All available technology was used here.
        - There was no health issue brought up (!!).
        - The court finds a nuisance.
            - Are $$ damages adequate? This is unique, real property theat's being interfered with here, right??
            - Yet the court refuses to grant an injunction, because Δ had invested $45m and employed over 300 people.
    - Nuisance:
        - The hardest questions are those about competing uses of land.
            - (N.b., put latin equity maxims on the final for extra credit.)
            - Equitable maxims: including, "who was there first?"
            - Is common law not good enough to address thes? Do we need statutory regulation?
- *Willing* (Pa. 1978) (p421)
    - We're not moving, with itc., into a new area—we're still talking about when injunctions should be issued.
    - What would be the damage measure here if damages were proper? Lost profits; which would be hard to prove.
        - The rule: damages remedies are inadequate if there are no provable damages, yet there is obviously damage. See *Continental Airlines*.
        - Also: most courts say that insolvency renders an injury irreparable (but, not in Pennsylvania, which is where itc. is).
        - And: multiplicity of suits—if there is the imminence of too many, then a damage remedy begins to look inadequate.
        - Further: small damages can nevertheless have no adequate remedy at law, especially if they are part of a continuing wrong.

Thursday, March 9

    - (*Willing*) Here, the court refuses to enjoin, based on the balance of the hardships.
        - Π hardships: Δ insolvent, and will continue her protesting.
        - Δ hardships: prior restraint on freedom of speech.
    - *Mazzocone* (Pa. 1976) (p425) (lower court)
        - The lower court *was* willing to enjoin.
        - Note the difference in the breadth of the injunctions below (see

¶3p422).

Preliminary injunctions

- *Los Angeles Coliseum* (9th Cir. 1980) (p440)
  - The district court here enjoins, but the injunction was rejected on appeal. On appeal LA won, and the NFL had to pay damages to LA.
  - The underlying cause of action here is antitrust.
  - Irreparable harm?
    - Could these lost profits be proven?
    - Default on the bonds?
    - Loss of goodwill?
    - Will $$ be adequate?
  - What hardships?
    - To LA?
    - To the NFL?
    - To the city of Oakland?
      - Which is not a party!! Can the court consider these? Yes!

Tuesday, March 21

- Elements/factors for preliminary injunctions
  - *Serious* irreparable injury to Π
  - Real danger of real harm
  - Irreparable hardship to Δ
    - N.b. the role of the injunction bond, as well as the scope of the injunction.
  - Likelihood of success on the merits
  - Status quo ante litem: the last peaceable, unconstested status between the parties.
  - Other considerations: e.g., the First Amendment, and the public interest.
- *LA Coliseum* (9th Cir. 1980) (p440)
  - Lillard instructs that you should weigh preliminary injunctions in *both* directions: that is, how bad would it be to the Π if there was no injunction but Π was correct? *And*, how bad would it be to the Δ if there is an injunction and the Π was incorrect?
  - The element/factor checklist itc.:
    - Hardship to Δ? It's largely intangible—the loss of power.
    - Hardship to Oakland (a third party)?
      - It *is* okay for the court to consider this.
    - Likelihood of success on the merits?
      - Here, the court must balance the risks of error.
    - Real danger of real harm?
      - For a permanent injunction, the harm must be complete. But for a preliminary injunction, the harm must be more serious—in

other words, a preliminary injunction is harder to get than a permanent injunction (and that's as it should be, Lillard says).
    - Could the court deny the preliminary injunction and then grant a permanent injunction? Sure—there are different standards for these two. And, it could go vice versa, of course, as well.
- Note Posner's formula (n5pp445-46): P x Hp > (1 – P) x Hd (where P is the probability of Π winning, Hp the harm to Π, Hd the harm to Δ). Lillard doesn't like it.
- Status quo ante litem: see *Lakeshore Hills* (Ill. 1980) (p447)
- Bonds:
    - These are used to "soften" the possibility of a court's mistake in granting a preliminary injunction. I.e., they are compromises.
    - How it works: Π pays a bond company for surety. If the preliminary injunction turns out to be erroneously granted, Π is liable to the bond company.
        - Thus, there are access to justice issues here—the bond amount could be very high.

Wednesday, March 22

- Bonds, some more:
    - These can be waived, in the discretion of the trial court (even though the language of the rule doesn't appear to be discretionary).
    - The judge sets a bond amount after a hearing.
    - Note that in some jurisdictions, there's an exception, by statute to the rule that the bond amount caps the amount of recovery. But otherwise, that's the general rule.

Temporary restraining orders

- *Carroll* (1968) (p459)
    - Rule 65 and this order—it's no good, because there was no notice and no explanation.
        - *But*, is itc. about following the rules or is it about something else?
            - Lillard: maybe itc. constitutionalizes Rule65, since itc. seems to be really about free speech and due process.
                - So, does itc. govern non-free speech cases? Maybe, especially if they are due process cases.
- The treecutting hypo
    - What papers do you need to get a TRO?
        - A complaint
        - A notice of hearing and motion for TRO
        - A notice or hearing and motion for a preliminary injunction (probably)

      Are you okay—or comfortable—with writing a complaint quickly and without doing much factual investigation at all? (Well, you can allege on

information and belief.)
- How much notice do you want to give?
  - Is it ethical to delay giving notice?

Thursday, March 28

- [Treecutting hypo, continued]
- TRO duration:
  - A TRO without notice can last up to 10 days.
  - A TRO with notice isn't really treated in th rule, so it's unclear how long these can last.

TROs are not appealable—this, though, is a judge-made rule.

- *Sampson* (1974) (p464)
  - Cf. *Granny Goose* (1974) (n2p470)

Contempt

- Three kinds of contempt
  - Civil contempt
    - The goal here is to compensate Π, based on evidence of Π's actual loss (or, sometimes, evidence of Π's profits).
    - Form: $$ to Π.
      - Amount: this is set just like in a damage inquiry, except the courts will now be angry and maybe a little more lenient on certainty.
        - If there's a fixed (preset) amount, then the comtempt looks less like civil contempt.
    - Standard of proof
      - The fact of contempt must be proved by clear and convincing evidence.
      - The amount of contempt must be proved by the preponderance of the evidence only.
  - Coercive civil contempt
    - The goal here is to threaten Δ into compliance.
    - Form: $$ paid to the state; or jailtime.
      - Amount of $$: look at:
        - The character and magnitude of the harm.
        - The likelihood of the threat being effective.
    - Standard of proof:
      - The fact of contempt must be proved by clear and convincing evidence.
  - Criminal contempt
    - The goal here is punishment.

        - Form: a fine paid to the state; or jailtime.
            - Amount of fine:
                - Set at the contempt hearing.
                - The courts will consider a variety of factors.
        - Standard of proof:
            - The fact of contempt must be proved beyond a reasonable doubt.
                - Also, there is more due process required with criminal contempt.
- The process of contempt
    1. A lawsuit
    2. A violation of an order emanating from that lawsuit
    3. A motion for an order to show cause
    4. An order to show cause
        - With criminal contempt, the order must give constitutionally satisfactory notice of the crime.
    5. A hearing
        - With criminal contempt involving a potentially serious sentence, then the alleged contemnor is entitled to a jury trial.

Tuesday, March 28

[Guest speakers: Pat Costello and Tom Whitney on domestic violence protection orders]

Wednesday, March 29

[Redux on domestic violence and the legal system]

- *United Mine Workers* (1994) (p776)
- *Anyanwu* (NJ 2001) (p794): coercive civil contempt.
    - The law itc.:
        - The burden of proof is on the contemnor.
        - The contemnor is entitled to due process.
        - The standard of review is whether there's a substantial likelihood that continued incarceration will accomplish the purpose of causing the person confined to comply with the order on which confinement is based (¶1p797).
        - Imprisonment is not punitive, it's coercive. See *Catena* (NJ 1975) (p797c).
- N.b. the Chemerinsky handout, on prior restraints.

Thursday, March 30

- *Griffin* (4th Cir. 1966) (p802)
    - Timeline:

- July 9: the district court refuses to enjoin the grants (private school vouchers)
- July 17: appeal
- July 28: appeal accelerated
- August ?: request, from the court to the Δ, that it won't issue the grants for the time being
- August 4: the Δ county board meets
- August 4-5: the Δ issues the grants

So, technically, there was no violation of any order. The violation here was removal of the *res* of the action.

- This is strange, and probably wrong.
- Recall the treecutting hypo—does itc. change the analysis we had there?

- [Reargument of *Walker* (1967) (p812)]

Tuesday, April 4

- *Walker* (1967) (p812)
  - Why is the injunction no good?
    - Dubious procedure in issuing it.
    - It's based on an overbroad statute that granted overbroad discretion to the issuing court.
    - And so on.
  - So, should contempt be held?
    - No, because of the bias of the court?? How could you carve such an exception out in words?
- How *can* you attack a TRO, then?
  - At the time it's being considered.
  - By motion for immediate appeal, if possible.
  - Appeal to federal court, if the TRO was issued by a state court.
  - Move quickly to the preliminary injunction stage.
- Can you advise your client to disobey an injunction?
  - *Walker* suggets no. But ask: what does you client really want?
- What does *Walker* stand for? Lillard says it says that courts' power must be absolute or close to absolute so as to maintain order.
- [Discussion on civil disobedience and the law.]

Wednesday, April 5

- Injunction drafting assignment
  1. Statement of the court's jurisdiction
  2. Statements/findings of fact
     - Repeat the main facts of the case. Lillard would do this prima facie case format.

3. Statement of conclusions of law
   a. Law with respect to the merits of the case
   b. Law with respect to whether an injunction should issue
4. Order
   - There's no need to phrase in the negative.
   - Don't be too chatty.
   - Don't bee too vague.
   - Use broad, obey-the-law provisions—then get into detail.
5. Enforcement
   - You can remind of the possibility of contempt.
   - You can shortcut civil coercive contempt by wrapping daily penalties into the injunction itself.
6. Modification possibilities
7. Duration

Restitution

- *Olwell* (Wash. 1946) (p569)
  - What if this was a suit for conversion—how would we measure damages?
    - If it was for permanent conversion
      - Use FMV of the machine—look to the used egg-washing machine market (and measure at the time of conversion).
    - If it was for temporary conversion
      - Use fair rental value, plus some amount for wear and tear.
  - Is this an efficient tort?
    - Even if so, the remedy here may be justified from:
      - deterrence
      - fairness and justice

      So, when should disgorgement be required? When there's conscious wrongdoing.
  - How do we measure unjust enrichment, then?
    - We put Δ back in Δ's "rightful position."
      - Itc.:
        - No labor costs.
        - No hassle for purchasing a machine on the market.

        The court chooses to look to the first option—labor savings. How did it choose this?
        - Note that there's a punitive aspect due to the underlying wrongdoing. Compare *Edwards* and *Beck*.
- N.b. assumpsit / "waive the tort": this has to do with choice of remedy.

Thursday, April 6

- Measuring restitutionary recovery
    - Δ's culpability factors in.
    - But, it can't be pure speculation—there must be at least some evidence supporting the number.
- "Waiving the tort, suing in assumpsit": this isn't exactly accurate, as the tort is still there, as the underlying wrongdoing.
- Restitution is both a substantive and a remedial idea. The substantive part, that is, is a separate theory of recovery—separate from tort and contract.
    - Restitution is important, as sometimes the advantage of restitution to the Π is enormous.
    - When will restitution be attractive?
        1. When there's no other cause of action, but Δ has received a benefit at Π's expense.
        2. When Δ's gain exceeds Π's loss (these are the disgorgement cases).
        3. When Π wants to reverse a transaction rather than let it stand.
        4. When Δ is insolvent and Π can get a preference by seeking restitution of specific property that used to be Π's.
- *Maier Brewing* (9th Cir. 1968) (p579)
    - Measuring restitution here:
        - First, how would we measure Π's losses?
            - Lost sales
            - Lost reputation and goodwill
            - Lost value of the license to use the trademark—i.e., no the distiller can't branch of into beer (as successfully as it might have otherwise).
        - Then, what about Δ's gains?
            - No license fee.
            - Trademark may have helped beer sales.
    - The court says that Π can get all the profits from Δ's beer sales—even those not caused by consumer confusion.
        - Would the amount of profits from consumer confusion be provable, anyway?
        - If the Δ had been more innocent, could the court have measured differently?
            - Probably. Especially if the restitution here was not statutorily prescribed.
                - So, with this discretion that the court has, does this look like equity?
                    - Well, restitution remedies can be either legal and equitable—you have to trace them back to the particular remedy requested (e.g., quantum meruit is a legal remedy, but a constructive trust is an equitable remedy).

- Means of restitution:
  - In *Olwell*, assumpsit—legal.
  - In *Maier*, accounting—equitable, and the Lanham Act--equitable.
  - In *Snepp*, constructive trust—pure equity.
- *Snepp* (1980) (p585)
  - What's the wrong here?
    - Not asking permission—i.e., bypassing the process that Snepp had agreed to. In other words, the government isn't saying that Snepp actually gave away any secrets.
    - Note that, at least theoretically, Snepp was paid more by the government for signing the agreement—so, the government has arguably lost that added value.
  - How did Snepp gain?
    - Faster publication, which enable Snepp to publish his book just before a presidential election.
    - No possibility of disapproval.
    - Notoriety as a result of bypassing the process.

    How can we measure this benefit?
    - All of Snepp's profits?
    - Some arbitrary percentage of Snepp's profits?
    - Profits attributable to bypassing the process?
    - Profits from future books, speaking engagements, etc.?

Tuesday, April 11

- Read nn6-8pp594-95, which go through blackletter on restitution.
- *Snepp* (1980) (p585)
  - Compensatory damages
    - How is the government hurt?
      - Well, *is* the government hurt?
      - How can we measure this hurt?
        - Loss of the information itself?? Does the government own this information??
        - Are there any limits here??
  - Punitives?
  - Is this a crime? Treason?
  - Restitution
    - How did Snepp gain?
      - He bypassed the process.
      - He avoided the possibility of disapproval.
      - He gained notoriety—and consequential sales and speaking engagements.
    - How can we measure this gain?
      - All profits? Some profits? Profits attributable to Snepp's

benefits?

- Are there any limits on the amount here?
- How can the government actually get the amount?
    - There are several mechanisms.
        - Constructive trust
            - Is the Court overreaching here? Is this judicial activism? (See the dissent, which argues that it is.)
            - Is the *government* overreaching?

- First Amendment issues itc.
    1. Is this speech? Yes.
    2. How does it rank on the hierarchy of speech? Very high, because it's political speech.
    3. Is it protected speech? Yes.
        - It's not fighting words.
        - It's not defamatory.
        - It's not obscene.
    4. Was the speech restrained or abridged by the government?
        - Yes, because the CIA and the Court are telling Snepp he can't publish?
        - No, because the only thing Snepp has to do is go through the process, and with the constructive trust Snepp gets to speak anyway—he just doesn't get the profits.
        - Would an injunction issue against this speech? Probably not.

        So, it's a restraint, but not as bad of a restraint as an injunction.
    5. Is the restrain content-based? It looks like it is.
    6. What's the government interest in restraint? National security (plus some aspects of basic control).
    7. Balancing—the court must now balance the speaker's interests against the government's interests.

But, can this right be waived? Yes. See itc.

- Hypo: what if Leonardo intentionally steals paint and brushes and paints his first masterpiece. What should the hardware store-victim recover?

Wednesday, April 12

[Missed class]

Thursday, April 13

[Missed class]

Tuesday, April 18

Punitive damages

- These are *not* compensatory.
- Note the impact of tort reform.
- When are they imposed?
    - See, first, whatever statute authorizes them (if any).
        - And, in that statute, note:
            - The burden of proof
            - The maximum amount
            - The entities immune from punitives (the government, sometimes, and sometimes M.D.s)
            - Any prescribed jury instructions (see, e.g., the Texas punitives statute)
            - ** The standard of behavior. E.g.:
                - Malice
                - High recklessness of some kind
                - Sometimes "gross negligence"
    - *Grimshaw* (Cal. 1981) (p719)
    - See nnpp732-33.
- What are the goals of punitivies? (see h/o)
    - To make an example of someone
    - To punish
    - To deter...
        - This Δ and similarly situated Δs

          Why don't compensatory damages deter enough? And what about criminal and regulatory fines? See *Grimshaw* at p722c, where the court notes that those fines obviously were insufficient to deter.
    - Revenge?
    - Shaming?
    - Satisfaction to the victim
        - In order to preserve the peace (by preventing, e.g., duels).
    - Compensation (!!)
        - Punitives can be a place to compensate for Π's attorney's fees, spiting the American rule.
    - A reward (from bringing the meritorious suit).
    - Restitution
        - See *Grimshaw*, where the jury set the punitives at the amount that Ford saved on the safety measures it didn't implement.
    - Forced recognition of costs (internalization)
- Questions:
    - Do punitives induce settlement?
    - Do they open the courtroom doors?

- Should we use them to put bad entities out of business?

Wednesday, April 19

- Lillard: in punitives against corporations, are we adding certain societal values into the corporations' calculus? Values that aren't in the calculus until converted, by a court or jury, into $$ (which corporations are allowed to—and must—recognize)?
- Why don't punitives go to a special fund?
  - Because we want to encourage people to bring these lawsuits.
  - Because punitives can serve as compensation, to Π, for:
    - Fees
    - Costs
    - Hassle
  - And, punitives *are* taxed—so some of them do go to the government to spread around.
  - Also, administrative efficiency—managing a special fund would be costly, and political.
- Should punitives go to Π's heirs if Π doesn't survive the litigation? Yes—otherwise, the Δ is better off because the Π is dead.
- Should Δ's heirs have to pay the punitives if Δ doesn't survive the litigation? Usually, they are denied in this case, but this is not a legal rule.

So, what we're seeing is that the focus seems to be on the Δ, not the Π.

- On appeal, an appellate court will determine if the jury was properly instructed on punitives.
- But, after *State Farm* (h/o), state standards for punitive awards have been called into question.
  - But, isn't *State Farm* private litigation? Why are we talking about the state imposing anything?
    - Well, because punitives are awarded by the state's *court*—so it is state action.
- *State Farm* (2003) (h/o)
  - How much would itc. change if there were plenty of facts to prove that the jury was *not* biased against big business? (See ¶1p4)
  - The *BMW/State Farm* factors:
    1. Reprehensibility
       - Whether the conduct was repeated, not isolated, is important.
       - But, the Court was concerned about the use of nationwide evidence to demonstrate this factor (see ¶0p6).
       - The Court also wants to see a nexus between the reprehensibility evidence and Π's specific harm.

Thursday, April 20

- The amount of punitives
    - Letting in evidence of wealth is an anomaly here. Usually wealth evidence is considered prejudicial (and irrelevant).
        - There's also a constitutional dimension to this—that is, a constitutional dimension to the rules of evidence: they strive to meet the constitutional guarantee of fair trial.
        - So, why do we let it in for punitives? Because it helps us tailor damages to the specific Δ.
    - On appeal, the appellate court will check the amount to make sure its not excessive.
        - One thing it will look for is whether the award was based on "passion or prejudice."
        - Thus, the appellate court sits as a sort of superjuror, Lillard says.
            - What about *IT*'s due process rights, then?
        - The appellate court may also compare the award before it with other punitive awards.
            - *But*, each punitive award is specifically tailored to the Δ, right?!!!
    - Both the trial and appellate courts can consider whether other juries are considering punitives against the same Δ for the same behavior (to prevent double counting).
- *State Farm* (2003) (h/o)
    - The Court seems to be against the unpredictability of punitives. Itc. stands for a fairly rigid rule—single-digit ratios between punitives and compensatories.
        - And it seems like the Court is even a little upset with the size of compensatories (!!!), Lillard thinks.
    - What about states' rights here?
    - And, what about the obvious access to justice issues?
    - But, note the danger of overdeterrence.
- [Thought questions h/o, briefly]

<u>Tuesday, April 25</u>

Litigation expenses

- There are three aspects to these:
    - There's a systemic/policy point: who's litigation is going to get funded?
    - There's an ethics point: how do you get your $, as a lawyer?
    - And there's a remedial point: we're not actually making Π whole, when Π wins.
        - Also, what about the "winning" Δ? He's had a lot of hassle and fees—so did he really win?
        - And what about SLAPP suits?
- Outline of our coverage:
    1. Ways to get fees and costs

2. How to measure fees
3. Ethical aspects

- Costs: usually the winner gets them (see FRCP 54(d)(1)).
  - Costs include filing fees, process service, duplication of documents, interpreters, witness fees and travel, expert fees.
    - With expert fees, you must distinguish between lawyer-selected experts (the costs of which may not be shifted) and court-appointed experts (which will usually be shifted).
- Fees: these are usually left where they lie.
  - Usually, paralegal fees are lumped in here.
  - The American rule: each side bears its own fees.
    - SCOTUS is committed to this.
    - The biggest exception to it is *statutes*. But these provide only a limited number of exceptions, even if it sometimes seems otherwise.
    - Why do we have this rule?
      - Because we want free access to the courts. I.e., we don't want Πs to be afraid to bring suits.
- Ways to get fees:
  - (Note that fee-shifting can't be done as a matter of discretion—the court must have a basis for shifting.)
  - Common fund
    - See *In re Synthroid Marketing* (7th Cir. 2001) (p924).
    - This is really a restitutionary theory.
    - When a case creates a fund of $$ in which many, beyond just the Πs, will share, it's usually called a common fund and attorney's fees can be shifted into it.
      - E.g., union suits, trust suits, shareholder suits, etc.
  - Private attorney general
    - This theory is not alive in the federal system (see *Alyeska Pipeline* (1975) (n7p915).
    - But, it's still viable in many states.
    - Factors:
      - Societal importance
      - Need for private enforcement
      - Number of people benefiting from the decision
      - Π's pecuniary interest would not normally be enough to justify the suit otherwise

      Some say that these factors are too amorphous. Also, there's a fear that this theory promotes litigative bounty hunting.
  - Statutory exceptions to the American rule
    - Start with the substantive statute that your case is about.
    - Also, many states have *general* exceptions.
      - Alaska, for example, has a complete, general statutory exception to the American rule.

        - Idaho has many fee shifting statutes. See 38 Idaho L. Rev. 1 and 32 Idaho L. Rev. 29.
    - And, there are some shifting statutes for attorney and party misconduct.
        - FRCP 11, e.g., will allows sanctions to equal fees (although this is not express in the rule).
- Private shifting
    - Contracts: all good contracts will have dispute resolution mechanisms built in, and you can put in attorney fee provisions there.
    - Insurance settlements: usually, insurance companies settle for three times medical expenses:
        - one time for the expenses themselves;
        - one time for intangibles;
        - and one time for fees.
    - Injunction orders: these might include fee-shifting in the case of contempt proceedings.
- Collateral litigation
    - Malicious prosecution (a tort)
    - Malicious bringing of a civil action (another tort)
    - Abuse of process (also a tort)

Wednesday, April 26

        - Indemification (e.g., where a losing seller sues the manufacturer for attorney's fees in the underlying warranty breach action).
    - Punitives: these can be used to pay attorney's fees.
- Measuring fees
    - The "lodestar": # hrs. x hourly rate.
        - You must have records. And they must be specific.
            - There might even be some negotiation over certain line items.
        - The number of hours is limited to a reasonable amount, which may be determined in comparison to other lawyers (i.e., the market).
            - And a court might look at how much $$ was at stake in the lawsuit. See *City of Riverside* (1988) (p905). But that's a minority approach.
        - Contingency lawyers: the court will try to put them in the hourly market, anyway.
        - Government lawyers: a court may pro-rate their salary. But what about overhead costs? Thus, a court might look to the private sector market.
        - Pro bono projects: what to do with these?? Do we want to have Δ internalize despite that Π's lawyer took the case on for free?
        - Public interest lawyers: treat these like government lawyers—pro rate their salary, or compare them to the private sector market.
            - Or, what about comparing to the hourly rate for Δ's lawyers?
    - N.b. *In re Synthroid* at p926c.
    - In class actions, note that the attorneys' interests are not quite in line with the

class's interests.
        - More rules:
            - Can there be an enhancement to the lodestar?
                - See *Dague* (1992) (n1p932), which pretty much got rid of the possibility of a multiplier. It still, though, permits "a little bit more."
            - The non-lodestar approach is the contingency approach.
                - Here, the court can set the contingency percentage.
                - *Dague* definitely said no multiplier here.
            - There still could be a multiplier allowable in common fund cases.
            - The "prevailing party": who is it??
            - Settlement: attorney's fees can be part of the bargain.
                - Be careful, though, with the tax consequences to your client—make sure the settlement is clear about what money is going to who.
                - In large cases, especially class actions, there will be a consent decree required. See *Jeff D.*
- *Jeff D.* (1986) (p940)
    - (Note that Idaho still hasn't done what it promised to do itc.)
    - Some state bars says it's unethical for Δs to request a fee waiver.
    - See n1p950: Lillard thinks that repeat players *do* care how money is split up—i.e., how much goes to Π's lawyers.
    - Π attorneys can get a deal from their client not to waive fees—this should be gotten at the very beginning, as a condition of engagement.

<u>Thursday, April 27</u>

        - The dissent argues that the settlement itc. is contrary to public policy and should be voided.
        - N.b. *Buckhannon* (1989) (n2p921).
- Luban article (h/o)
    - Is there such a thing as "dirty law[yering]"?
    - Note that the push to defund legal services and public interest lawyering is a recent push. It started in about 1990.
- What about the middle class?
    - To take a case to trial costs over $100K (!!!).
        - So, only high-damages, likely-winners will be taken on as cases by for-fee attorneys.
            - Tort reform, too, wants to reduce the maximum damages, so to reduce the incentive to bring suits even more.
        - How could we reduce litigation expenses?
            - ADR
            - Limited discovery
            - More lawyers??