**A Theory of Contract Remedies**

**The Drama of Remedies**

**Mitigation of Damages** – even after the relationship has turned down the path (that could lead to litigation), the non-breaching party doesn’t have the right to “sit in the dark” or “party because it doesn’t matter.”  No reward for being less than you can be.  You should (reasonably and in good faith) find substitutes (obviously not ones different in kind or quality or that would cause you embarrassment, etc.).

**Limitation on holding another to their promise**:

**Specific Performance:** “You, you, you and only you” is not the norm (at least in US law).   It is the stuff of operas (including the soap variety).  You usually are not held to your promises when you don’t want to do so. When you are not unique nor is what you are exchanging then you can buy yourself out of a deal (by law) (application in action of this “law” needs studying). The threat of specific performance raises the cost for the part who wants to breach; **Consequential Damages**: You are not liable for consequences that you didn’t foresee.

**Agreeing in front to what are the consequences of a breach:**

**Disclaimers :**  Eliminating liability types (consequential damages, e.g.) – ok (despite consumer ignorance).**Liquidating Damages**: estimating harms (pre-nuptials, e.g.). –  One party will see as a pound of flesh, and the other as a reasonable estimate of difficult to anticipate or prove consequences of the breach.

**By contract, people can fund one’s expectations** – Normally, (outside the family), you can’t rely on people to help you.  Contract is a legal institution that promotes economic trust.  It allows parties to allocate rights, duties, claims, etc.  It adds security.  It is a partial insurance.  But the threat of the application of contract law is only one means to settle a dispute.  And its use is neither free nor without unwanted consequence.  **Expectations Damages**: According to contract law, if other party is the first to breach it, you have a legal right to be put where you expected to be.  **Reliance Damages:** You are protected by a remedy (not a guarantee) to be no worse off than you were prior to the contract.  There are various ways to measure expectations, courts sometimes much choose between them (Peevyhouse). Contractual remedies do not punish breaching party nor protect the winning party’s attorney’s fees, court costs, emotional, psychological harms, and other injuries to the non-breaching party’s dignity (at least in US law) (at least in contract law) (Chung is exceptional).

**Suits sounding in Restitution ( A v. C)**:

**C shouldn’t be allowed to keep that!** –

* It’s my property!
* It’s my chattel!
* It’s my money!
* It’s my services!
* Look at how much C is benefitting from it?  Given what happened, I also should benefit from it!

Can A maintain this action if A breached the contract? (Do we want to punish those who breach contracts?) (De Leon)

            A legal trick: “Constructive contract” – court saying that it knows that had a contract been made, then these would have been its terms. It is to remedy “unjust enrichment” in a world of inequality. From whose perspective (P or D) do we measure the injustice?

“Professionally proper professionals” don’t promise results that are uncertain to occur.  Courts will punish some professionals who do so by having them turn over sums to their patients as compensation for their injuries (Sullivan).  Justice Kaplan’s decision presents that courts do rough justice.  It is not all formulaic.

Patients and clients often hear promises in what their professional says to them.  Whether to protect patients’ expectations is focused on the very beginning of the relationship.  What was said? What was understood?  Was there a moment of obligation to the promise of results?  How do we understand the creation of obligation – in contracts? That is the next topic to which we turn.