Contents

<u>Tort & Contract Topics</u>

1. Introduction to Damages

The term 'damages', is used more broadly to describe all monetary remedies which are determined by the courts through a more or less principle-based process of assessment.

<u>There are five broad types of damages:</u>

- **Nominal** (where the plaintiff proves the wrong but fails to establish a claim for any other type of damages), available for common law wrongs actionable per se (trespass and breach of contract);
- **Compensatory** (reflecting the plaintiff's proved injury, and including 'aggravated' damages)
- **Restitutionary or gain-based** (reflecting defendant's gain)
- **Lord Cairns' Act damages** (or "equitable damages"), only available in lieu of, or in addition to, an injunction or specific performance;
- **Exemplary or punitive** (to punish the defendant and to deter others).

1. Nominal Damages

Nominal damages tend to vary between $1 and $25, although awards as high as $100 or thereabouts have occasionally been made. There are no principles governing the dollar amount that should be awarded, other than that it should be a <u>token amount</u>.

<u>Nominal damages are available</u> in <u>trespass actions in tort and actions for breach of contract</u> (which are actionable per se, without proof of damage), but <u>only where the plaintiff fails to establish an entitlement to other (eg compensatory) damages</u>.

<u>Nominal damages are NOT available</u> in any to<u>rt actions where proof damage is an element of the action</u>, namely (negligence and nuisance, where 'general' damage is sufficient) and <u>intentional economic torts</u>.

2. Compensatory Damages

The overarching goal is that damages should restore the plaintiff to the position he/she would have been in had the defendant's wrong not occurred (the 'compensation' or 'indemnity' principle).

In addition, a plaintiff may seek to recover 'aggravated' damages, for emotional harm or injured feelings falling short of a psychiatric illness (distress, disappointment, vexation, inconvenience and the like). Aggravated damages are available in some actions but not in others.

The Compensation principle

The principle has since been held to govern recoverable damages for personal injury.

The same principle is embodied in the **s 82(1) *Competition and Consumer Act 2010 (Cth)***: "A person who suffers loss or damage by conduct of another person that was done in contravention of [certain provisions] may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention".

In ***Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272**, the Court said, in relation to contract:

> 'the words 'the same situation as if the contract had been performed' do not mean "as good a financial position as if the contract had been performed". In some circumstances putting the innocent party into "the same situation will coincide with placing the party into the same financial situation.

Proof

To prove compensable or actionable harm, the plaintiff must prove that they are actually worse off as a result of the wrong; it is not enough to prove that they might be.

Australian courts have refused to strike out claims where a fear of developing an illness in the future, following a negligent exposure to a harmful substance like asbestos, has led to actual psychiatric illness: ***Maddalena v CSR Ltd* (2006)**.

Compensation and General Rules

In ***Butler v Egg and Egg Pulp Marketing Board* (1966)** the High Court made it clear that such general rules will not apply if they produce a result contrary to the compensation principle in a given case.

Aggravated Damages

Aggravated damages are awarded for injured feelings and cover vexation, disappointment, embarrassment and the like.

Aggravated damages focus on the effect of the wrong on the plaintiff: ***Gray v Motor Accident Commission* (1998)**.

Uncertainties and Contingencies

Where damage is the gist of the action, (negligence and intentional economic torts), the plaintiff must prove that they have, in fact, suffered damage. The effect of the 'once and for all rule' is that the plaintiff cannot return to court for more damages if the injury worsens, or if further consequential loss later occurs.

3. RESTITUTIONARY DAMAGES

Introduction

It is used to describe a monetary remedy in common law ("unjust enrichment") actions which do not depend on the commission of an actionable wrong (tort, contract or statutory) by the defendant.

Reasonable Licence Fee

Apart from equity, where the defendant wrongfully uses or exploits the plaintiff's property, the plaintiff may recover a reasonable licence fee for the use.

Accounts of profits

Account of profits is traditionally an equitable remedy, available for breach of trust and breach of fiduciary duty.

The award reflects the profit made by the defendant from committing the wrong. An allowance is made for the effort and expenditure invested by the defendant in generating the profit.

An account of profits is not available in statutory actions where damages are restricted to compensation for loss suffered: **ss 82 & 87 *Competition and Consumer Act 2010* (Cth); ss 138-141, 236 *Australian Consumer Law* (Cth)**.

4. EQUITABLE DAMAGES

Equitable damages (under Lord Cairns' Act) are a statutory remedy, available where court has 'power' to grant an injunction or specific performance. The court has 'power' where it has jurisdiction.

Equitable damages may be awarded where common law damages are also available ***Johnson v Agnew* (1980))**. Equitable damages may also be awarded where there is no entitlement to common law damages, where:

- The wrong or threatened wrong is purely equitable: ***Giller v Procopets* (2008)**;
- Damage is the gist of a common law action and no damage has yet been suffered: ***Leeds Industrial Co-operative Society Ltd v Slack* [1924]**; and
- A contract is unenforceable because not in writing but specific performance is available under doctrine of part performance.

NSW enacted **Lord Cairns' Act** as **s 68** of ***Supreme Court Act 1970 (NSW)*:**

The court has a two-fold discretion:

- Whether to award equitable damages at all: ***Wentworth v Woollahra Council* (1982**

Although the amount may be discretionary, one of the maxims of equity is that 'equity follows the law', so the starting point at will be a consideration of the common law damages that would be recoverable, having regard to matters such as remoteness.

- The equitable discretion may then lead to adjustments. For example as regards the date at which damages are assessed, having regard to matters such as the plaintiff's delay (***Malhotra v Choudhury* [1980]**) or that the ability to grant specific performance was lost at a later date than that at which common law damages would be assessed (***Johnson v Agnew* [1980]**).

5. SOME GENERAL ASPECTS OF DAMAGES

Future Economic Damages and Present Value

In cases of property damage and economic loss, there is no future consequences of the wrong to account for in damages. Usually when damages representing future losses are assessed, it is in the context or personal injury or death, but may arise is other cases.

The two general rules governing the assessment of future economic losses are that:

- All future losses are assessed in trial date values; and
- Because the plaintiff is getting damages now, for losses that will not accrue or be realised for some time, future economic loss damages are discounted to their 'present value'.

In ***Todorovic v Waller* (1981)**, the High Court noted that the ability of an award of damages to compensate for future losses is affected by:

- The ability of the plaintiff to invest the award and earn interest up until the time the loss being compensated is realised;
- The liability to pay tax on any interest earned from investing the award; and
- The diminution in the real value of the award due to inflation.

Non-economic damages

Non-economic damages (compensating for a loss or injury for which there is no market value, eg pain and suffering, distress, injury to reputation) are assessed at trial-date values covering both the pre-trial and any future period.

Taxation

Tax is ignored in assessing damages for personal injury. The damages award is not regarded as income: ***McLaurin v Federal Commissioner of Taxation* (1961).** Hence damages for loss of earnings are assessed in after-tax amounts: ***Cullen v Trappell* (1980)**, and are exempt from capital gains tax: **s 118.37(1)**) **Income Tax Assessment Act 1997 (Cth)**.

- Compensatory awards for loss of business profits, however, will generally be taxed as profits, so the award will be based on pre-tax earnings.

Awarded "Once and For All" Awarded "Once and For All"

"Damages for one cause of action must be recovered once and forever": ***Todorovic v Waller***.

A plaintiff cannot seek more damages from the defendant if their injury worsens after judgment; damages should be sought for the future in the original award: ***Fitter v Veal* (1701)**.

The "once and for all" rule applies to each cause of action, so that where multiple causes of action arise from the one circumstance, the finalisation of one does not necessarily affect the others. Thus:

Lump Sum Rule

"Damages for one cause of action (in the absence of any statutory exception) must be awarded as a lump sum; the court cannot order a defendant to make periodic payments to the plaintiff": ***Todorovic v Waller***.

There are three types of statutory exception to the lump sum rule:

- The parties agree that the lump sum award is payable as a tax-free annuity, but there is no power to adjust the award after judgment: **Part 2 Div 7, ss 22-26 *Civil Liability Act 2002 (NSW)*; s 87ZC *Competition and Consumer Act 2010 (Cth)***
- Once liability is admitted/established, the court may defer the final assessment and make an "interim" award: **Civil Procedure Act 2005 (NSW), ss 81-84**, **Dust Diseases Tribunal Act 1989 (NSW), s 11**