Remedies as cures:
- remedies are a response that relieves a person of some predicament.

Remedies as secondary rights:
- a remedy can also constitute a ‘right’ in the sense of imposing on the D a correlative ‘duty’ to the P (i.e. duty to pay damages, to perform a contract)
- such duties are referred to as secondary duties (and remedies as secondary rights) because they are brought into being for the protection of another, prior legal right that the plaintiff has, such as not to have property interfered with, or the right to performance of a contract.

Lectures on Jurisprudence (Primary & Secondary Rights) – John Austin
- Primary right: right to enjoy property
- Secondary right: duty to perform damages

Rights + duties are of two classes – primary rights (cause of action) + duties that exist in the eyes of the law; secondary rights + duties that exist to protect the other rights + duties recognised by law – i.e. primary rights don’t arise from violations of other rights + duties; secondary rights (remedies) arise from violating these duties. Primary rights + duties (e.g. contracts) are not separated from remedies (secondary rights) – so idea is that the legislature creates a declaration that an act or omission will amount to an injury + so they will end up with a remedy – e.g. ADJR Act. The law that confers the primary right + defines the nature of the injury also gives the remedy + punishment as implicated by law.

Primary right sometimes owes its existence to the injunction of certain acts + the remedy to be applied – e.g. injunction refraining a D from breaching the contract implies that there has been a breach of a primary right. Historically remedy came first + represented what the P wanted out of the action after they obtained a writ. Wesley Newcomb Hohfeld built on Austin’s model – on a Hohfeldian analysis, the responses that arise when wrongs are done probably include more than just new, secondary “rights” for P that result in a defendant being subjected to new duties to pay damages, or make restitution. P can also obtain “powers” (abilities to bring about changes in the defendant’s existing legal rights and duties), such as the power to terminate a contract for the defendant’s repudiatory breach (see [2.195] below); “privileges” (sometimes called “liberties”), such as the privilege to enter others’ land without their permission in order to abate a nuisance that they are committing, and “immunities” (impunities to any change in a plaintiff’s own legal rights and duties) such as the immunity a trespasser enjoys from a defendant’s suit for trespass when the plaintiff chooses to exercise his or her power of abatement in the nuisance example just given.

Types of remedies:
- injunction
- compensation
- constructive trusts
- damages
- specific performance
- restitution for unjust enrichment
- account of profits
- rescission
Remedies as responses to wrongs and other claims

Some remedies are granted where the D has apparently not breached a duty owed to P – e.g. A claims money from B as an overpayment; B has not breached any legal duty, but A claims unjust enrichment, + is thus given a remedy, restitution – there is no breach of a primary right/duty/obligation in this case. These are remedies that are independent of any proof that D has breached, or intends to breach any primary legal duty owed to the P – e.g. restitution for unjust enrichment.

Rights, Wrongs and Remedies – Birks

Argues that remedies available in cases of wrongdoing exceed those that are available to claims not based on wrongdoing, e.g. mistaken payment. The label “wrong” acts as a license to the law to mistreat the wrongdoer – so entitlements the law can give the victim of a wrong are large unless its been narrowed by case law or statute. Not-wrongs leave little room for choice because there is no general licence to mistreat the D – C who puts in an issue an unjust enrichment can’t show that D makes good his consequential loss. Birks defines ‘wrong’ as “all conduct, acts or omissions whose effect in creating legal consequences is attributable to its being characterised as a breach of duty.” - e.g. torts, contractual breaches, and breach of E duties. "No-wrong" is any event giving rise to a legal response that doesn’t consist of a breach of duty. Main types of remedial responses to wrongs are compensation, restitution, disgorgement + punishment but compensation is main response. Argument that restitution is a better response to compensation as “corrective justice”, provided P isn’t in a better position than when they started.

The control of remedies

Judicial and self-help remedies

Most remedies require a court order, but some are ‘self-help’, i.e. P can get them without a court order, e.g. power and liberty of an individual to enter another’s land to abate a nuisance that is taking place on that land (even though it could be trespass) – now going through Alternative Dispute Resolution (ADR). For contract – parties have scope to decide what the remedy will be, e.g. how much is payable in damages for a breach.

Case: Photo Production Ltd v Securicor Transport Ltd [1980] AC 827 (House of Lords)

Lord Diplock: parties to a contract are free to determine what primary obligations they will accept – express words in the contract itself, or inferred by law. Breaches of primary obligations give rise to secondary obligations on part of D + can entitle P to be relieved of primary obligations – but contract itself is source of secondary obligations as well + thus can be modified by agreement between parties, but not be completely excluded. Failure to perform a primary obligation is a breach of contract, so secondary obligation is to pay monetary compensation BUT two exceptions – primary obligations have not yet been fully performed by the parties.

Exception 1: event resulting from failure of one party to perform primary obligation effectively deprives P of substantially the whole benefit they would have obtained from the contract – P can then terminate the contract that remains unperformed.

Exception 2: contracting parties have agreed that failure to perform a particular condition shall entitle the other party to terminate the unperformed obligations. States that anticipatory breaches can be contracted out + excluded by express words. Only exception to exclusionary clauses is that you cannot impose on a D a requirement to pay compensation that would exceed the loss sustained by P.

Generally a failure to perform a primary obligation in a contract automatically gives rise to a secondary obligation to pay damages by operation of law but parties can limit or exclude this secondary obligation – but subject to ACL + CCA. No mention of the extent to which courts will enforce clauses specifying the amount of damages payable by D for a breach – has to be a genuine pre-estimate of the losses P likely to suffer. Generally, secondary parties can’t define the content of the obligation to pay damages – rule against penalties, even if they are two commercial parties contracting at arms’ length. Diplock doesn’t look at parties ordering specific performance, since that is dependent on the discretion of the court, but parties could potentially contractually exclude it, but not clear whether they can stipulate it as a remedy for
breach of contract. **Self-help remedies for termination of breach of contract** – have to stipulate clearly in their contract that a term a D breaches is a condition amounting to an essential term of the contract + so innocent party can end the contract on the day of the breach without a judicial order.

**Classifying remedies**
Can classify them according to the primary obligations they attain to – e.g. breach of contract, breach of torts, breach of equitable duties; can also classify them according to the underlying goals + effects of the remedies to look at the secondary rights, powers, liberties + immunities that arise to protect primary rights.

**The Law of Remedies as a Social Institution – Wright**
There is no law of remedies – ‘where there is a right, there is a remedy’ is not an accurate description of the law since there are rights where there is no remedy. 1) First step is to consider the purpose which remedies are intended to serve – main one is ‘compensation’ or ‘indemnity’ i.e. wrongdoer should compensate innocent party for losses inflicted + gains prevented by wrongful act – argues that this is only one of five principles from which the law of remedies might be constructed.

2) Alternative to indemnity is specific relief, e.g. injunction + specific performance – D must perform the exact act he wrongfully refused, or refrain from committing the wrong – good example is if sparks from a passing train start a fire + burn down P’s house, remedy would be to get the railway to build P a new house, rather than attempt to quantify the value of the house. In theory a P won’t be granted a specific remedy provided an adequate compensatory remedy exists.

3) Another theoretical arm is restitution; don’t attempt to make the P whole, but attempt to let the wrongdoer not benefit from his wrongdoing – problem is P would not recover anything in a tort case for personal injury since tortfeasor doesn’t get a benefit from inflicting the injury.

4) Could punish the wrongdoer to deter conduct that is undesirable – punitive damages that reflect the indignation at D’s wrong rather than a value set on a P’s loss – not a great idea since sometimes punitive damages can exceed the compensatory amount – if they should be awarded it should be where a deterrent is desirable.

5) Could also use Acts and a Schedule on the recovery possible for each kind of wrong – society generally rejects fixed remedies though, although in Copyright Act you can be charged for certain things; or compensation from car accidents.

**Restitution vs. “disgorgement”**
Wright refers to restitution, i.e. referring to all remedies, functions; effect of which is to require a D to pay the *value of a gain* he/she has made or *transfer the gain itself to P*, rather than to compensate loss P has suffered. They respond to “not-wrongs” e.g. unjust enrichment.

“Disgorgement” remedies are gain-based remedies that respond to wrongs (CL or statute), but disgorgement gain D makes doesn’t actually come from P’s pocket – idea is not to do corrective justice by restoring P to rightful position but to just strip D of his/her gains.

Scheduled relief common example is fixed bodily injury claims in workers’ compensation law or other statutory compensation schemes.

Is a declaration of the parties’ rights + duties a remedy? Arguably in the asylum cases in Admin law (Kirby J dissenting) if there are no practical legal effects flowing from the grant of a declaration as a “remedy”, then there are no recognised legal rights.

Now looking at another category – vindication of a P’s rights, i.e. P has suffered no loss + D has made no gain, but just shows court’s disapproval of the wrong, e.g. *Lumba v Secretary of State for the Home Department* [2011] UKSC 12 – false imprisonment case.

**The relationship between right and remedy**
**Traditional (“monist”) view:** remedy is a mirror of the P’s cause of action, set by the law as the appropriate response to the right in issue – so a primary right + secondary remedy are congruent – e.g. breach of
contract generates damages, designed to restore the rightful status quo + reverse effect of D’s wrong – “same thing looked at from the other end”.

**Dualist view:** once liability has been determined, courts grant a remedy after looking at what is appropriate in the circumstances, taking into account reasons underlying P’s cause of action + moral + practical considerations e.g. D may have to undergo an education programme if this was appropriate.

**Rethinking remedies: The Changing Nature of the Conception of the Relationship Between Legal and Equitable Remedies – Hammond**

“Monist” asserts that the existence of a “right” is meaningless – they are means by which interests are protected, NOT protected interests – so unless court declares P has been defamed + awards compensation, there is NO right – so the right is dependent on the availability of a particular remedy to recognise that right has been infringed.

“Dualists” assert that there is a valid distinction between the right in respect of which a remedy may be given – so basically rights have a meaning of their own independent of enforcement, and the law does allow some rights to be specifically enforced. Additional arguments:
1) CL + E evolved through specific modes of relief + then the rights came into existence – BUT note the developing of rights through statute – remedies are discrete from + no longer congruent with or growing out of “rights”.
2) Rights + remedies is influenced by American constitutional law.  
3) Private law – merits + remedies are separated + Cth limitation statutes recognise a distinction between barring the right + barring the remedy. Suggests that courts have to give clear reasons for their choice of remedy.

Have to also factor in the effect of a remedy on third parties, the conduct of the parties, the difficulty in calculating the loss of the P, the practicability of enforcing a remedy.

**Legal and equitable remedies**

Equitable remedies are only available where the legal right remedy is “inadequate” in the judgment of a court of equity.

So basically legal remedy is the “primary” remedy; E remedies are “secondary”.

**“Fusion fallacy”** – Heydon, Leeming + Turner – basically the administration of a remedy e.g. CL damages for breach of fiduciary duty, that was not previously available either at law or in E, or the modification of principles in one branch of the jurisdiction by concepts which are imported from the other + thus are foreign, e.g. holding the existence of a DOC in tort may be tested by asking whether the parties concerned are in fiduciary relations – so basically creates a new body of law containing elements of law + E but in character are quite distinct from its components.

1) First type of fallacy is the idea that a legal remedy can be used in support of an E right – “crossover of remedies”.

Idea is that the crossover of a remedy from law into E could significantly change the nature of the secondary rights available to Ps and interfere with the goals pursued by an E action, e.g. CL compensation (damages) for E loss.

BUT no “crossover” fallacy if a court makes an E remedy available in support of a CL right, since E historically provides remedies in support of CL rights where CL remedies were inadequate – e.g. specific performance developed by E.

2) Second type of fusion fallacy is idea that courts can import concepts or ideas (not remedies themselves) from law into E + vice versa – is this harmful? E.g. are punitive monetary awards available in E.
**Case: Harris v Digital Pulse Pty Ltd (2003) 56 NSWLR 298 IMPORTANT CASE**

**Facts:** D knowingly breached contractual + E fiduciary duties to employer by diverting business to himself + misusing information gained during employment. Trial judge included exemplary damages (CL remedy) to employer for D’s breach of fiduciary duty (E right).

**Issue:** Whether NSWSC had jurisdiction to make an award of exemplary damages (CL remedy) for breach of fiduciary duty (an E duty).

Spigelman CJ: Heart of the fusion fallacy is the proposition that the joint administration of two distinct bodies of law means that the doctrines of one are applicable to the other. Says that this is not true; they can influence but are conceptually distinct. E remedies include E compensation may have elements that are seen as more punitive or deterrent than CL remedies due to application of liability, causation, remoteness rules + tests – basically says that E shouldn’t adopt a CL remedy developed for a different conceptual foundation – so just because exemplary damages are awarded in tort is not a basis for asking “why not?” in E.

**Heydon JA:** NSW law does not have a fusion of E + CL – there was no fusion of two systems of principle but of the courts which administer the two systems. So basically argues that there is no fusion.

**Mason P (dissenting):** There is no fusion fallacy - Meagher, Gummow and Lehane’s example of a fusion fallacy based on novelty is “CL damages for breach of fiduciary duty”. CL damages is by definition a CL remedy and “breach of fiduciary duty” is by definition an E wrong. Putting to one side any reliance on the Judicature Acts, I suspect that, at bottom, criticism of Day v Mead rests on two unarticulated grounds. One is that the Court of Appeal was guilty of impiety in daring to pollute a traditional equitable concept with a new-fangled common law notion. The other is that it is not for the courts, under the guise of judicial development, to alter the substantive principles of law and equity on policy grounds. Neither objection can be supported. The traditional principles of E are not so invincibly superior to the concepts of the CL that E cannot occasionally profit from CL ideas. And, though the courts should look at policy arguments with due circumspection, it would be absurd to suggest that the courts cannot adjust or modify equitable principle on policy grounds where to do so is appropriate. Main argument appears to be that although CL + E remedies are designed to be distinct, due in part to the Judicature Acts + its history, there is scope for some borrowing of ideas + remedies between the two jurisdictions, due to the history – e.g. E’s history to supplement the CL.

**Outcome:** allowed the appeal against the punitive damages but didn’t do so on the basis that it is never permissible to award a CL remedy for an E wrong – fiduciary duties higher than contractual obligations – can seek an account of profits.
Parties attempting to settle disputes themselves – 1) bargaining power is often conducted in light of the relative legal positions of the parties; 2) the actions done in attempted settlement may have tortious or even criminal consequences; 3) law recognises the legitimacy of some self-help remedies that are themselves prima facie wrongful – e.g. trespassing.

Self-help remedies in contracts: 1) part may have right to rescind the contract (self-help right) exercisable on giving notice to the other party of the election to rescind; 2) parties can bring their own remedies that may/may not require judicial enforcement e.g. forfeit of a deposit if the purchaser defaults on buying land.

Rescission
Recognised by CL + E. Rescission is the right to set aside an otherwise effective transaction. Arises in CL where transaction has been brought about through fraud or duress. Arises in E in wider range of circumstances – misrepresentation, unilateral mistake, duress, undue influence, unconscionable dealing, breach of fiduciary duty – includes wrongdoing and unjust enrichment categories.

Conventional understanding – rescission is a self-help remedy exercised by right-holder giving notice of their election to rescind to the other party: Alati v Kruger (1955) 94 CLR 216. Rescission reverses or unwinds the transaction ab initio so parties are restored to their original positions.

The requirement of restitutio in integrum
Basically at CL + E transaction must be capable of being unwound + parties restored to their original position – D must make restitution + P counter-restitution of any benefits received in the transaction. Restitutio in integrum means that any brief use of a benefit or a change in the nature of the benefit precludes rescission, e.g. using P’s land briefly – at CL, but flexible at E (provided parties can be “substantially” returned to their positions”).

Case: Clarke v Dickson (1858) 120 ER 463 – common law
Facts: P wanted to rescind a contract at CL for purchase of shares brought about as a result of D vendor’s fraudulent misrepresentation.
Issue: whether P could rescind the contract.
Erle J: basically says that the P isn’t offering the shares back for the purchase price in the condition he bought them in; the company is being wound up, he has changed the shares from company shares to engaging in partnerships with others for the shares, + the company was being wound up + so there was no chance of profit.
Crompton J: a contract induced by fraud is voidable, not void, + the party defrauded has the option to rescind the contract, but party must be in a state to be able to do this, i.e. must be able to put the parties back to their original positions. P bought the shares in a partnership with others, so can’t return them + the shares are in a different form to now – P must rescind in toto or not at all.
Ratio: a party can never repudiate a contract after, by his own act, it has become out of his power to restore the parties to their original condition.

Case: Alati v Kruger (1955) 94 CLR 214 – equity
Facts: respondent wanted to rescind a contract for the sale of a business after appellant made fraudulent misrepresentations to him regarding the profit takings of the business. R issued a writ to A notifying him of his intention to bring court proceedings against A, acting promptly after finding out about the misrepresentation. R got a document under seal from the landlord where R would reassign the lease should he be successful for rescission; R continued to carry on the business even though it wasn’t making any money until he shut the place down + left the premises.
Issue: whether R could rescind the contract + satisfy the requirements of restitutio in integrum.
Dixon CJ, Webb, Kitto and Taylor JJ: basically said that if the case was decided at CL, R wouldn’t be able to show that he was entitled to rescind the purchase when he served the writ as he wouldn’t be able to put the A in specie back to the original position under the contract as he did when he received the business: 

Clarke v Dickson. In E, even though restitutio in integrum isn’t possible, provided that the court can do practical justice between the parties + restore them substantially back to the position they were in, then this is acceptable: Erlanger v New Sombrero Phosphate Co. “The function of a court in which proceedings for rescission are taken is to adjudicate upon the validity of a purported disaffirmance as an act avoiding the transaction ab initio, and, if it is valid, to give effect to it and make the appropriate consequential orders.”

Equitable title to such property where legal title doesn’t pass at CL revests upon the rescission.

Said that at CL the R taking possession of the property would preclude rescission: Blackburn v Smith. Also said that R was able to make a legal re-assignment of the lease with the landlord’s consent, so title would revest in E when he rescinded. The property of A’s business could be valued + that value paid to A, + even though the business had deteriorated, that wasn’t due to the fault of R – in CL this is recognised – CL qualifies the right to rescind + notes that this is subject to incidents for which the buyer was not responsible: Head v Tattersall.

The case was therefore typical of the class of cases in which a defrauded purchaser is regarded by a court exercising equitable jurisdiction as entitled to rescind the purchase and obtain a decree, on proper terms, declaring and giving effect to the rescission as an avoidance of the transaction from the beginning. Also said that R hadn’t lost his right to get rescission because he vacated the premises – main reason is because he served a writ to A, A saw that the findings of fact went against him, + didn’t do anything about his property, + so A had opportunity to protect his interests.Varied the judgment so that R had to return to A the chattels + A had to repay the balance of the purchase money.

Fullagar J: agrees with majority, but states that R must take reasonable care to preserve the property in goodwill – however stated that purchaser is not bound to remain in position but needs to give reasonable notice to the vendor offering to restore possession of the property + then it falls to the vendor to take action.

Ratio: in E, if a party takes reasonable steps to take care of the property under a contract + notify the other party of their intention to rescind, + are in a position where they are able to substantially return both parties to their previous position, then rescission is usually available – i.e. he who seeks E must do E. The principle of restitutio in integrum clearly requires that, as a condition of rescinding the transaction and thereby regaining any benefits conferred on the defendant, P must make counter-restitution to the defendant of any benefits received from the defendant pursuant to the rescinded transaction.

Notes and questions

Note: rescission is always the act of the rescinding parties; but there is an argument that D can counter-rescind the contract to prevent P’s unjust enrichment – Halpern v Halpern.

If the benefit has devalued, P must usually make good the amount in order to make full counter-restitution to the defendant – exception is for incidents where P was not responsible. P must also give back the “use value” of the benefit as a condition of rescission: in Alati v Kruger, a reasonable rent for the business and premises from the date the plaintiff took possession of the premises. Likewise, the D must return the purchase price plus the use-value of that benefit (interest).

Also an issue as to whether P can recover damages for a tort that has led to the decision to rescind the contract — Brown v Smitt (1924) 34 CLR 160: “But where the property has been improved or deteriorated by the act of the purchaser, and yet remains in substance what it was before the contract, equity adjusts the rights of the parties by awarding money compensation to one or the other, and so substantially putting each party in the position which he occupied before the contract was made.” However, putting the parties back in their original position only is in respect of the rights and obligations created by the rescinded contract – can’t ask for compensation for collateral losses sustained by reason of the fact he entered into the contract, e.g. losses incurred in carrying on a business.