

REMEDIES NOTES

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INTRODUCTION

- Distinction between primary obligations (the right) and secondary obligations (the remedy)
 - EG: primary obligation is breach of duty of care while secondary is obligation to pay damages
- General definition of remedy:
 - Something that cures or relieves or heals;
 - Something that corrects or removes an evil.
- Legal definition of remedy
 - Legal redress; the legal means of enforcing a right or redressing a wrong
- *ubi ius ibi remedium* → “wherever there is a right, there is a remedy”

THEORY ON REMEDIES

- NOTE: do not need to know these for exam – neither comprehensively fit with the practical reality as different remedies fit within each theory
 - EG: typical contractual remedy is damages although there may be a choice with other remedies such as an injunction or specific performance
- Monism
 - The remedy and the cause of action are inseparable
 - Promotes thinking of remedies in terms of causes of action
 - Examples: damages are assessed by cause of action; establishing the cause of action in negligence is bound up in the remedy
- Dualism
 - Causes of action and remedies are separable and two-staged
 - Once the cause of action is proved, then judge can choose a remedial response
 - Examples: both legal and equitable remedies are available for tort and contract; statutory remedies; litigation practice

CONTRACTUAL DAMAGES SCAFFOLD

AIM = place P in position had contract been performed (*Robinson v Harman*)

(1) CAUSE OF ACTION/BREACH

- Must be a breach of contract
- THEN CL right to damages for contractual breaches (*Photo Production v Securior*)
 - Except where there are liquidated damages or agreed damages clauses – will recover damages there specified (*Essanda Finance v Plessnig*)
- NOTE: normally YES if contract involved in the question

(2) IDENTIFY HEADS OF DAMAGE

- Damages can be awarded under multiple heads, provided there is no double recovery (*TC Industrial Plant v Robert's Queensland; Sharman v Evans*)
- NOTE: number each applicable head and specify the precise loss in exam qs
- Includes:
 - Past and future economic loss damages
 - Personal injury damages (covered by CLA)
 - Non-economic loss damages – includes (s 3 CLA; CSR v Eddy)
 - Pain and suffering
 - Loss of amenities of life
 - Loss of expectation of life
 - Disfigurement
 - Loss of chance/Opportunity damages
 - Property damage/Repair and rectification damages
 - Statutory damages (ACL or SoGA)

(3) DOES THE CLA APPLY?

- Part 1A (Negligence) applies to any damages claim for harm resulting from negligence brought in *tort, in contract, under statute* or otherwise (s 5A(1))
 - IE. applies to contractual negligence claims (s 5A(1) CLA)
 - BUT when applying s 5D(1)(b) must use the *Hadley* test NOT RF test
- BUT Pt 2 (like whole Act) does not apply to civil liability resulting from an intentional act causing injury/death or an act that is sexual assault/misconduct (s 3B(1)(a))

(4) CAUSATION

NOTE: usually no issue between different heads and causation – causal link to one head will establish link to others (do not spend a lot of time on this in exam)

PRELIMINARY POINTS

- Yes/no question decided on BoP (**s 5E CLA; *March v Stramare***)
- D's breach does not have to be the sole cause (***Simonius Vischer v Holt***)

COMMON LAW CAUSATION (NOTE: use statutory language if CLA applies)

- BUT FOR = whether P would have suffered the loss 'but for' D's breach (***Barnett v Chelsea & Kensington Hospital***)
 - Mainly applied where there is a single cause of loss
 - BUT inadequate and troublesome where multiple causes (***March v Stramare***)
- COMMON SENSE = whether as a matter of common sense, the relevant act/omission was a *material cause* of the loss (***Alexander v CCC; Chappel v Hart***)
- BUT apply both – use 'but for' first but if it leads to absurd results then use CS
 - "Rules relating to causation/remoteness are to be liberally construed and not applied so rigidly as to cause injustice ... ultimate question is always whether the breach "causally contributed" to the damage" (***Alexander*** per McHugh JA)
- EGs where 'but for' test (+ s 5D(1)(a)) likely satisfied include where D's wrong:
 - Was the only causative circumstance involved in producing the harm
 - One of several circumstances which combined to produce the harmful event BUT no harm would have occurred without D's wrong
 - NOT where there is 'multiple sufficient causes'
 - IE. Where D's wrong was sufficient to cause the harm, but not necessary because there was another factor present which was also sufficient to cause the harm
 - This is where s 5D(2) may be engaged
- NOTE: statutory causation moulds causation/remoteness whereas CL separates

TORTIOUS DAMAGES SCAFFOLD

AIM = restore P to pre-tort position (*Livingstone; Butler v Egg Corp*)

(1) CAUSE OF ACTION

- Many tortious causes of action giving rise to compensatory damages:
 - Assault
 - Abuse of process
 - Battery
 - Conspiracy
 - Conversion
 - Deceit
 - Defamation
 - Detinue
 - Duress
 - False imprisonment
 - Inducing a breach of contract
 - Injurious or malicious falsehood
 - Interference with contract
 - Malicious prosecution
 - Mifeasance in public office
 - **Negligence – biggest cause of action**
 - Negligent misstatement
 - Nuisance
 - Passing off
 - Trespass to land
 - Trespass to goods
 - Invasion of privacy – debatable
- NOTE: character/elements of each CoA determine how damages claims proceed
 - EG: in defamation and passing off damages are assessed at large and there is a presumption that the natural consequence of the tort is injury/damage so remoteness and causation non-contentious
 - Contrast to negligence where damage must be proven (*Cth v Cornwell*) and causation and remoteness are the 'gist of the action' (*Harriton v Stephens*)

(2) IDENTIFY HEADS OF DAMAGE

- Damages may be awarded under multiple heads provided there is no double recovery (*TC Industrial Plant v Robert's Qld*)
- NOTE: number each applicable head when doing exam question and specify the precise loss under each head

- Past economic loss
 - Including past loss of earnings
- Future economic loss
- Future loss of earning capacity
 - NOTE: can be lost capacity to provide domestic services
- Gratuitous attendant care
- Loss of expected financial support
 - Not in exam because covered in assignment
- Non-economic loss
 - Includes (**s 3 CLA; CSR v Eddy**):
 - Pain and suffering
 - Loss of amenities of life
 - Loss of expectation of life
 - Disfigurement
- Property damage/repair and rectification
- Exemplary damages (NOT under CLA per s 21)
- Aggravated damages (NOT under CLA per s 21)

(3) DOES THE CLA APPLY?

- Part 1A (Negligence) applies to any damages claim for harm resulting from negligence brought in *tort, in contract, under statute* or otherwise (**s 5A(1)**)
- Part 2 (Personal Injury Damages) applies to all *personal injury* damages claims (**s 11A(1)**) brought in *tort, contract, under statute* or otherwise (**s 11A(2)**)
 - PI damages are those that relate to death or injury to a person (**s 11**)
 - Injury includes pre-natal injury (**s 11(a)**), impairment of a person's physical (**s 11(b)**) or mental condition and disease (**s 11(c)**)
 - Cannot award damages or interest on damages, contrary to Pt 2 (**11A(3)**)
- BUT Pt 2 (like whole Act) does not apply to civil liability resulting from an intentional act causing injury/death or an act that is sexual assault/misconduct (**s 3B(1)(a)**)
 - See more below
- **NOTE:** test for application of whole Act under **s 3B** is different from the test for application of Part 2 in **s 11A**

EXCLUSIONS

- BUT the Act (and Part 2) does not apply to:
 - Civil liability resulting from an intentional act causing injury/death or an act that is sexual assault/misconduct [tort of assault] (**s 3B(1)(a)**)
 - Except (**s 3B(1)(a)**):
 - (i) ss 15B and 18(1) (in its application to damages for any loss of the kind referred to in s 18 (1)(c)), and
 - (ii) Part 7 (Self-defence and recovery by criminals) in respect of civil liability in respect of an intentional act that is done with intent to cause injury or death, and
 - (iii) Part 2A (Special provisions for offenders in custody)
 - Dust diseases and tobacco-related illnesses: **s 3B(1)(b)-(c)**
 - Actions against employers for work-related injury, or to awards of statutory compensation: **s 3B(1)(f), (g)**
 - **NOTE:** injury not defined in Act but should be given its broad, everyday meaning encompassing deprivation of liberty, humiliation, injury to reputation, emotional upset (*Houda v State of NSW*), anxiety and distress (*State of NSW v Ibbett*)

(6) ASSESSING DAMAGES

- AIM = restore P to pre-tort position (*Livingstone; Butler v Egg Corp*)
- Must itemise each head with amount of damages and reasons (*Sharman v Evans*)
- For PI generally calculated at date of judgment to prevent injustice (*Rentokil v Channon*)
- Damages for one cause of action must be recovered once and for all (*Todorovic*)
 - EXCEPTIONS:
 - Where appellate court overturns initial damages judgment (*Gamser v Nominal Defendant*)
 - Where different causes of action (*Burnsden v Humphrey*)
 - Where there is a continuing tort such as nuisance and further causes of action may arise in future (*Mann v Capital Territory Health*)
 - Statutory exceptions (eg. structured settlement between the parties under ss 22-26 CLA)

ECONOMIC LOSS (Past or Future)

- Actual financial loss incurred because of the injury/death (*CSR v Eddy*)
 - Only need to prove that loss claimed will be payable at some time – does not need to be incurred by time of trial (*CSR Limited v Eddy*)
 - Future losses MUST be based on P's reasonable needs, not necessarily on what is ideal (*Sharman v Evans*)
- EG: Ambulance charges; charges for medical, hospital and professional nursing services; travel and accommodation expenses incurred in obtaining those services; costs of rehabilitation, special clothing and special equipment; costs of modifying houses; costs of funds management; and costs of professionally supplied home maintenance services (*CSR Limited v Eddy*)
- NOTE: ADD interest ONLY for past (s 18)
- NOTE: 5% discount ONLY for future (s 14)

PAST LOST EARNINGS

- Amount awarded for past loss of earnings cannot exceed 3 times P's average weekly earnings at date of damages (s 12(1)(a); s 12(2))
 - See more below

EQUITABLE REMEDIES

RESCISSION

- Reversal of a transaction (normally contract set aside) whereby parties are returned to original positions (***Louth v Diprose; Cheese v Thomas***)
- BOTH equitable and CL remedy
 - Equity requires *substantial restitution* whereas CL requires precise
 - Equity extends to all transactions whereas CL only for contracts
- Differs from termination because no breach needed (***McDonald v Lascelles***)

1) MUST BE A VITATING FACTOR IN FORMATION OF CONTRACT

- Duress
 - Where one party uses threatened or actual unlawful conduct to force the other party to consent to a contract against their will (***ANZ Banking v Karam***)
 - Can be duress against a person (***Barton v Armstrong***), goods (***JS Holdings v NRMA***) or economic duress (***Crescendo v Westpac***)
- Misrepresentation
 - Must be a misrepresentation of fact which *induces* a party to enter the contract (***Gould v Vagellas***)
 - Can be express or implied from conduct
 - Must be a statement of fact and not mere puffery or a reasonably held belief/opinion
 - Either:
 - Fraudulent – where person had no honest belief in the truth of the statement (***Derry v Peek***)
 - Innocent – where misrepresentation was based on an innocently held belief (***Tanwar v Cauchi***)
 - Negligent – where party owed duty of care and breached it by making the representation/statement (***Shaddock v Parramatta Council***)
- Undue influence
 - Improper exercise of an ascendancy or dominion affecting another party's entry into a contract (***Goldsworthy; Johnson v Buttress***)
 - Two types:
 - Actual = where P must prove D exerted actual undue influence to induce the transaction (***Barclay; Goldsworthy***)

EQUITABLE INTERIM INJUNCTIONS

- Usually ordered on short notice to preserve the status quo pending final hearing

REQUIREMENTS

- 1) Serious question to be tried (***Beecham; Samsung v Apple; Seven v Warburton***)
 - Prove there is a prima facie case (***ABC v O'Neill***)
- 2) Balance of convenience favours granting the injunction
 - Weigh up damage/loss to P with prejudice to D (***Beecham***)
 - Consider strength of P's case – stronger case, more likely the balance favours the grant (***Warner-Lambert v Apotex***)
 - Irreparable harm will result (***Samsung v Apple***)
 - IE. Damages would be inadequate
- 3) Plaintiff gives usual undertaking as to damages (***Ansett v Halton***)
 - These cover damages arising because of the *imposition of the injunction*
 - Must be paid by P to D if injunction is lifted at final hearing
- 4) Must precisely specify what it requires parties to do (***Curro***)
 - EG: mandatory or prohibitory

DECLARATIONS

- Declaration of a party's rights
- Made pursuant to court's inherent jurisdiction (not particularly equitable – arises from **s 63 SC Act**)

REQUIREMENTS

- 1) Court has jurisdiction to grant a declaration (***Forster v Jododex; s 63 SC Act***)
- 2) P must establish sufficient interest in subject matter of the dispute (***ACF v Cth***)
- 3) There is a "contradictor" (usually a defendant)
- 4) There is no discretionary reason to refuse granting a declaration
 - Although not dispensing a remedy, so equitable defences not available

STATUTORY REMEDIES (ACL s 18)

Section 18(1) ACL: *A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.*

NOTE:

- Spend little time on steps 1-4 (unlikely to be in issue in exam)
- Jurisprudence relating to s 52 TPA is relevant (***Explanatory Mem***)
- Section 18 deals with the protection of the public interest and consumers (***World Series Cricket; Henjo v Collins***)

(1) STANDING

- Any person has standing to sue under s 18 (easily proven if person has direct interest in subject matter of proceedings) (***WS Cricket; Truth about Motorways***)

(2) LIMITATION

- Action must commenced within 6 years after date which cause of action accrues (**s 236(2) for damages; s 237(3) for compensation orders**)
 - NOTE: no limitation period for other forms of ACL relief
- COA accrues when the loss is suffered (***Wardley; Murphy***)
 - Question is determined by the evidence in each case (***Hawkins v Clayton; Magman v Westpac***)
 - Will not always be clear on the evidence – must interpret the evidence (***Karedis v Antoniou***)
 - NOT entry into a contract (***Murphy***) or lease (***Karedis***) *per se* because this only gives rise to a contingency that loss will be incurred – must wait till this loss actually occurs
- NOTE: also other limitations on damages that can be received for death and personal injury resulting from a breach of the ACL (see **s 137C**)
- NOTE: D may be estopped from relying on a limitation defence if they induce P into believing it will not be raised (***Cth v Verwayen***) OR where they fraudulently conceal the existence of the loss or damage (***Wardley v WA***)

(3) 'ENGAGING IN CONDUCT'

- Must first identify conduct suggested to be MD (*Campbell v Backoffice*)
- Usually reps (express or by conduct) BUT not limited to reps (*ACCC v TPG*)

DEFINITION

- Conduct is defined in **s 2(2)**
 - (a) reference to engaging in conduct is a reference to doing or refusing to do any act, including:
 - (i) making of, or giving effect to a provision of contract or arrangement
 - (ii) arriving at, or giving effect to a provision of, an understanding; or
 - (iii) the requiring of the giving of, or the giving of, a covenant; and
 - (b) a reference to conduct, when that expression is used as a noun otherwise than as mentioned in (a), is a reference to the doing of or the refusing to do any act, including:
 - (i) making of, or giving effect to a provision of contract or arrangement
 - (ii) arriving at, or giving effect to a provision of, an understanding; or
 - (iii) the requiring of the giving of, or the giving of, a covenant; and
 - (c) a reference to refusing to do an act includes a reference to:
 - (i) refraining (other than inadvertently) from doing that act; or
 - (ii) making it known that that act will not be done; and

SILENCE

- Definition of conduct in **s 2(2) ACL** is wide enough to encompass silence - reinforced by *Explanatory Mem* which specifies silence as conduct

MERE PUFF

- Not a rep – will often be a hyperbole or ridiculous rep, not a specific or accurate rep of a matter (*Unilever v Goodman Fielder; Samsung v LG Electronics*)

FUTURE REPRESENTATIONS, PREDICTIONS, PROMISES AND OPINIONS

- Like all other representations, fall within **s 2** (see above)
- NOTE: distinguish b/w opinions, estimates and representations of fact (*Forrest*)

IMPUTING CONDUCT

- Conduct engaged in by a person's (incl. corporation) employee or agent within their actual or apparent authority is deemed to be their conduct (**s 84(a) CCA**)

MDC CASES

MEANING OF 'in trade or commerce'

EMPLOYER/EE CASES

Concrete Constructions v Nelson

- FACTS
 - Nelson was CC's employee
 - N injured falling through screen mesh over a hole at work as he was relying on his employer's false statement that the bolts holding screen in place were secure
 - Argued CC engaged in MDC under s 52 because they communicated and employed N on the basis that there was a safe system of work
 - Question for HCA was whether CC was "in trade or commerce"
- HELD
 - CC was a commercial company BUT its conduct was as an employer directing an employee = not in "trade or commerce" because this was an employer/employee relationship NOT a commercial transaction
 - Emphasis of "trade and commerce" on conduct not the person because of the word "in"
 - However conduct may still be in trade and commerce if it is incidental to engaging in trade and commerce

REAL PROPERTY CASES

O'Brien v Smolonogov

- FACTS
 - Vendor subdivided and sold part of his land
 - V misrepresented the access to the land and purchaser bought it without seeing property
 - Accepted that V had engaged in misleading and deceptive conduct
 - BUT question as to whether this was in "trade and commerce" because he owned part of the land he lived on and was not a developer/subdivider
- HELD
 - Selling part of your own land is not "in trade or commerce"
 - If vendor was a developer, this may have been "in trade or commerce"

CONTRACT DAMAGES SCAFFOLD

- 1) Cause of action
 - a. Breach of contract
- 2) Identify heads of damage
 - a. Past and future economic loss damages
 - b. Personal injury damages (covered by CLA)
 - c. Non-economic loss damages – includes (s 3 CLA; CSR v Eddy)
 - i. Pain and suffering
 - ii. Loss of amenities of life
 - iii. Loss of expectation of life
 - iv. Disfigurement
 - d. Loss of chance/Opportunity damages
 - e. Property damage/Repair and rectification damages
 - f. Statutory damages (ACL or SoGA)
- 3) Does CLA apply?
- 4) Causation
- 5) Remoteness
- 6) Calculate damages
- 7) Adjustments (future discount, past interest, tax)
- 8) Contributory negligence
 - a. P breached their duty to take reasonable care for own interests
- 9) Mitigation
 - a. P failed to mitigate their loss after it began to occur
- 10) Calculate total damages
- 11) Apportionment between multiple wrongdoers
 - a. Only for economic loss and property damage
- 12) Equitable relief
 - a. Injunction or SP