

Remedies

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Introduction to Remedies

What is a Remedy?

- Definition in Law: Legal redress; the legal means of enforcing a right or redressing a wrong (Macquarie English Dictionary, 4th ed).
- Legal remedy = solution to a legal wrong.
- *Ubi ius ibi remedium* → Wherever there is a right, there is a remedy.
- Remedy is the thing that most interests your client.
- Perspectives from which we can consider remedies → Function, jurisdiction, theoretical.

Function

- Function: What do remedies achieve?
- Damages are 'compensation'.
- Remedies can achieve other purposes and take a variety of forms.
- Several policy objectives of remedies:
 - Compensation
 - Reversing loss or damage that has occurred or will occur.
 - Defendant must undo loss or damage done to the plaintiff.
 - Defendant may also compensate for anticipated future losses e.g. personal injury.
 - Usually refers to damages – money payment to reverse loss or damage.
 - Damages are the usual remedy for common law (legal) wrongs.
 - Equitable compensation may be awarded in equity for equitable wrongs.
 - Statute – damages a common remedy for statutory wrongs.
 - Compulsion
 - When a court orders a defendant to:
 - Perform an obligation – do what they were obligated to do.
 - Refrain from committing a wrong.
 - Repair loss or damage.
 - Useful when damages will not properly compensate a plaintiff.
 - Specific performance / injunctions
 - A court may order a defendant to fix loss/damage they caused rather than pay cost of repair.
 - Vindication
 - Public objection and affirmation of legal rights.

- Declaration – equitable remedy; by the court of a wrong committed or other state of affairs; usually sought with other remedies; declares rights of the plaintiff.
- Nominal damages – token amount awarded to the plaintiff to recognise legal wrong when no loss or damage caused.
- Vindictory damages – Substantial damages awarded for the infringement of the plaintiff's legal right; no loss required; generally not available in Australian private law (held by HCA, not for this subject).
- Punishment
 - The infliction or imposition of a penalty as retribution for certain wrongs.
 - Exemplary damages – When a court orders a D pays exemplary damages to the plaintiff, it orders the D to pay damages beyond that sufficient to merely compensate the plaintiff.
 - Paid to punish the defendant rather than compensate the plaintiff.
- Restitution
 - Overlap with compensation.
 - Some restitutionary remedies don't necessarily rely on the plaintiff having sustained any loss.
 - Look to the Defendant to see if they have unfairly gained anything at the expense of the plaintiff and demands D accounts to the plaintiff for that wrong.
 - Compensation: What loss or damage did the D cause P? VS. Restitution: What did the defendant wrongfully gain from P?
 - Restitutionary remedies exist both at common law and in equity.
 - Equity - Account of profits – requires D To account to P for any profit made by D when committed equitable wrong.
 - Common law restitution – based on principle of 'unjust enrichment' - asks if a plaintiff transfers value to the defendant, may the defendant retain the value? Or must it transfer if back to the plaintiff?

Jurisdiction

- Courts → Common Law & Equity (Judge-made law) → 'General Law'.
 - **Equity**
 - When common law conflicts with equity, equity prevails.
 - Subject to legislation.
 - **Remedy: Injunction, rescission, specific performance, rectification, account of profits.**
 - **Settled principles and remedies in exclusive and auxiliary jurisdictions.**
 - **Common law**
 - Default rules unless displaced by equity or legislation.
 - **Remedy: Compensatory Damages**
 - **Settled legal rules – Just outcome in most cases.**
- Parliaments → Legislation – Statutory remedies.
 - Legislation

- Parliament is sovereign.
- Overrides common law and equity.

Common law

- Developed and applied by the courts of common law
- Limited remedies: usually just damages.
- Consequence of remedy of damages developing at common law, is that damages are a *legal right*. Not subject to discretion of the court.
- Common law actions and remedies became too rigid.

Equity

- To seek relief from rigours of common law, plaintiffs would appeal to Lord Chancellor.
- Common law rules sometimes led to unfair outcomes. Dissatisfied litigants would ask the Lord Chancellor to provide alternative relief.
- Chancellor not bound by common law rules.
- Decision informed by religious authority and based on 'conscience'.
- Court of Chancery (Equity) evolved.
- Remedies were practical and flexible: specific performance, injunctions, account of profits, rescission on terms etc → more adequately meet justice of case.
- Equitable remedies are discretionary.
- Consequence: the conduct of the D scrutinised and remedies are not granted as of right. Plaintiff must persuade the Court to exercise discretion in his or her favour. The court will scrutinise the conduct of both parties, and all the circumstances of the case to evaluate whether good conscience requires an equitable remedy.
- Two jurisdictions:
 - Exclusive
 - Principles that developed separately from the common law.
 - These equitable rights are not recognised by the common law (e.g. trusts).
 - A plaintiff asserts an equitable right (cause of action recognised only in equity), such as a beneficiary under a trust), and only equitable remedies are available.
 - **Auxiliary – Focus in subject.**
 - Principles that developed as a supplement or alternative to the rigid rules of common law. Where common law remedy isn't sufficient to meet justice of case.
 - Main remedies – specific performance and injunctions.
- Equity as we know it today developed in the 19th Century.
- Until 19th Century – Equity and common law administered by separate courts (physical and conceptual).
- *Judicature Acts 1973-5 (UK)* – Streamlined administration of justice by merging Chancery and common law courts into a single High Court of Justice and Court of Appeal.

- Uniform system of pleading and procedure
- Rules of common law and principles of equity could be applied in a single proceeding.
- The Acts fused the administration of the principles in a single court.
- They did not fuse the rules of common law and equity into a single civil code.
- ‘... the two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters’ – W Ashburner.
- Stagnation of the general law
 - By the 19th Century, equity had settled into a formalised system of law bound by rules and precedent.
 - Chancery famously lampooned by Charles Dickens in *Bleak House*.
 - By the 20th Century, Parliaments more actively passed legislation to address the failures of the general law to adapt to modern life, and the modern standards of justice.
 - Began legislating new rights into existence, and new remedies.

Statute

- Flexible and better allow for individualised outcomes not possible at general law:
 - Damages
 - Equitable-like remedies
 - Orders not possible at general law.
- General law remedies guide the courts’ approach to statutory remedies.

Conclusion

- The source of the remedy will determine:
 - When it is available; and
 - How it will be applied.
- You must be aware of the differences between the jurisdictions and properly apply them.

Theoretical

- Monist theory (Monism) – holds that a remedy is inseparable from a cause of action.
 - Directs attention to individual causes of action.
 - Negligence – Damages – *Livingston v Raywards Coal Co*
 - Deceit – Damages – *Gould v Vaggellas*
 - Breach of contract – damages – *Robinson v Harmon*
 - Evidence of monism
 - No single code of rules that governs assessment of damages irrespective of cause of action.
 - Tendency to apply cases relevant to the cause of action.
 - Negligence, deceit and nuisance: proof of loss establishes both liability and assessment of damages → difficult to separate cause of action and remedy.

- Dualist theory (Dualism) – holds that causes of action and remedies are separable and separate.
 - o When liability is established, judge has a choice to select one or more of several remedies to meet the justice of the case.
 - o Evidence
 - In tort and contract, equitable remedies are available if court chooses to exercise its discretion to grant an equitable remedy – not limited to damaged.
 - Statute provides a ‘smorgasboard’ of choice – discretion of judge to make orders.
 - Litigation practice: hearings can be heard in two parts: liability, then remedy.
- The law is neither purely monist or purely dualist.

Alternative / Cumulative

1 Scenario = multiple causes of actions. Same legal interests may be protected by multiple remedies. Remedies may be:

- Alternative – one remedy chosen to the exclusion of an inconsistent other.
- Cumulative – several complimentary remedies granted at once.

Alati v Kruger (1955) 94 CLR 216

- Seller induced a purchaser to purchase a fruit and vegetable business by fraudulently misrepresenting the weekly takings of the business.
- The seller’s fraudulent statement was promissory – became a term of the contract of sale.
- Purchaser discovered the truth about the business’s takings, and the purchaser sought to rescind the sale.
- HCA recognised that the following remedies/cause of action were open to the purchaser:
 - o Breach of contract
 - Affirm contract and keep business.
 - Damages assessed on contractual basis.
 - o Deceit
 - Affirm contract and keep business.
 - Damages assessed on tortious basis.
 - o Rescission
 - Void contract for fraudulent misrepresentation.
 - Restored to precontractual position.
- Could not both rescind contract and enforce it – inconsistent outcomes.
- No legislation present at the time – *Australian Consumer Law*.
- Purchaser chose to rescind contract.

Plaintiffs commonly plead several causes of action and claim for alternative or cumulative remedies. If plaintiff is successful, and claims incompatible remedies, then he or she must choose one by the time of judgement.

- *Tang Man Sit v Capacious Investments Ltd* [1996] AC 514 – ‘He may claim both remedies, as alternatives. But he must make up his mind when judgment is being entered against the defendant.’ 521.

Common Law Damages

Introduction to damages

Damages in contract and tort

Purpose of damages

- Primary purpose of an award of damages is compensation for loss or damage caused by a D's wrong. Mostly awarded for this.
- Compensation – Generally, D must have caused P some legally recognised form of loss or damage to be eligible for damages. P worse off because of D's wrong.
- No loss or damage = no damages
- Notable exceptions:
 - o Exemplary damages
 - o Nominal damages.

Identifying the loss

- The position the P would have been in was it not for D's wrong (no wrong).
- And the position of P after D's wrong (post wrong).
- Loss = difference between pre- and post-wrong positions.
- Damaged = monetary value of that difference. Orders D to pay that amount. P restored to pre-wrong position.

Compensation

- Sufficient damages to reverse the loss or damage – Not punishing the D.
- Careful to award only sufficient to restore P to their pre-wrong position.

Process

- What was the relevant wrong (cause of action)?
- What loss or damage did the wrong cause?
- Should the defendant be liable for all the loss caused by their wrong?
- How much should D pay to reverse the loss or damage within the D's scope of liability?

Jurisdiction

- Can be awarded at common law, in equity or under statute.
- Mostly identified by common law – classic remedy for civil wrongs.
- Common law – torts and breach of contract.
- Common law
 - o Damages awarded by the common law are a legal remedy for infringement of legal rights.
 - o P has a right to damages if D's legal wrong has caused loss or damage.
 - o Not a discretionary remedy like equitable remedies.
 - o P proves cause of action – get damages.

Tort and contract

- Cause of action helps us identify the position P would have been in **but for** the wrong.
- Contract – enforcement of legally binding promises voluntarily made by consenting parties.
 - o *Robinson v Harmon* (1848) 154 ER 363, 365 (Parke B) – 'The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be **placed in the same situation, with respect to damages, as if the contract had been performed**'
 - o D also liable for any consequential damages.
 - o *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, 11-2 (Mason, Wilson and Dawson JJ) - 'In contract, damages are awarded with the object of placing the plaintiff in the position in which he would have been had the contract been performed – he is entitled to damages for loss of bargain (**expectation** loss) and damage suffered, including expenditure incurred, in reliance of the contract (reliance loss)...'
 - Expectation damages – focus is compensation for loss of expected promised benefits.
- Tort – involuntarily imposed legal obligations not to injure others.
 - o *Livingstone v Raywards Coal Co* (1880) 5 App Cas 25, 39 (Lord Blackburn) – 'where an injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that some of money which will **put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong** for which he is now getting his compensation'
 - o 'how much worse off'
 - o *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, 11-2 (Mason, Wilson and Dawson JJ) – 'In tort, on the other hand, damages are awarded with the object of placing the plaintiff in the position in which he would have been had the tort not been committed (similar to **reliance** loss).
- Contract vs Tort
 - o Despite the different approaches, the principles of assessment of damages in tort and contract often overlap:
 - Disappointed expectations can be compensated in tort.

- Consequential loss is compensable in contract.
- Common to see 'tort' cases cited in 'contract' cases and vice versa.
- There is not one unified code of rules that apply to damages in both tort and contract, so it's necessary to consider them separately.
 - *Commonwealth v Amann Aviation Pty Ltd* (1992) 174 CLR 64, 116 (Deane J) - 'While the general principle is the same in both contract and tort, the rules governing its application in the two areas may differ in some circumstances. Those differences are largely the result of historical considerations in that they reflect distinctions between causes of action rather than reasoned development or exegesis of the law... They are of diminishing significance for most purposes... Nonetheless, the stage has not been reached where they can be ignored...'
- Will frequently distinguish a claim in tort vs contract.

The counterfactual and burden of proof

The counterfactual

- A hypothetical scenario where D didn't commit the relevant wrong.
- Counter to actual facts – reality is that D did commit the relevant wrong.
- Counterfactual reasoning: Court infers from the evidence what would have happened D hadn't committed their wrong.
- Example – negligence
 - *Civil Liability Act 2002 (NSW) Section 5B* – General principles
 - (1) A person is not negligent in failing to take precautions against a risk of harm unless—
 - (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
 - *Section 5D* – Causation (but for test) → counterfactual reasoning.
 - (1) A determination that negligence caused particular harm comprises the following elements—
 - (a) That the negligence was a necessary condition of the occurrence of the harm (factual causation).
- May also be used to:
 - Identify whether P suffered loss or damage, and
 - Assess the value of that loss or damage.
- *Lewis v Australian Capital Territory* (2020) 271 CLR 192 [Counterfactual reasoning at assessment of damages stage]
 - Mr Lewis sentenced to 12 months periodic detention for intentionally/recklessly causing actual bodily harm.
 - Breached conditions of periodic detention by failing to report for detention on more than 2 occasions.
 - Legislation obligated the Sentence Administration Board to hold an inquiry and imprison him full time to the end of his term.
 - Mr Lewis committed to full time custody for 82 days.

- Mr Lewis alleged that he was falsely imprisoned because the Board did not accord him natural justice when it held its inquiry.
- Refshauge J
 - Agreed that Mr Lewis was falsely imprisoned due to not being accorded natural justice.
 - Awarded nominal damages for 'trespass to person' because Lewis couldn't prove any loss or damage resulting from the imprisonment.
 - Mr Lewis would have been lawfully imprisoned therefore had not suffered any loss or damage.
- Court of Appeal agreed with Refshauge J.
- Mr Lewis appealed to High Court arguing that he should have been awarded substantial damages for the bare fact of his false imprisonment → argued this was relevant loss or damage.
- HCA dismissed Mr Lewis's appeal.
- 'The general principle upon which compensatory damages are assessed is extremely well established... As it is usually stated, the principle is that the "injured party should receive compensation in a sum which, so far as money can do, will put that party in the same position as he or she would have been in if the contract had been performed, or the tort had not been committed". 239 [139] (Edelman J)
- Liability for a wrong and the measure of damages to compensate for any loss or damage are two separate things. 'Separate from apportionment or allocation of legal responsibility, it is necessary to identify loss in order to award compensatory damages. It is **that** inquiry which involves the use of a **counterfactual**. The counterfactual is the position the plaintiff would have been in **had the tort not been committed**' 218 [69] (Gordon J)
- 'The correct approach is to look to the position that Mr Lewis would have been in had the Board not in fact conducted the inquiry that it did and had the Board not in fact gone on to make the order on which the Chief Executive in fact acted. Notwithstanding the inherently hypothetical nature of that counterfactual inquiry, the inquiry necessarily proceeds by drawing inferences from known facts to find the counterfactual position on the balance of probabilities' 209 [35] (Gageler J)
- 'As was said by Kirby J in *Ruddock v Taylor*, "the principal function of the tort [of false imprisonment] is to provide a remedy for 'injury to liberty'... Damages are awarded to vindicate personal liberty". It is the interference with the right to liberty that is vindicated by the cause of action, and there must be a "reasonable proportion between the amount awarded and the loss sustained" as a result of the tort. An award of damages "must not exceed the amount appropriate to compensate the plaintiff for any relevant harm he or she has suffered" 203 [14] (Kiefel CJ and Keane J).
- All judges: If Mr Lewis had not been falsely imprisoned then he would have been lawfully imprisoned as mandated by the legislation.
- Therefore, he could not prove any substantial loss of liberty.
- Nominal damages awarded to recognise the State's liability.

Burden of proof

- Legal burden
 - The plaintiff must prove:
 - Defendant's liability, and
 - Value of their loss
 - **On the balance of probabilities** (civil standard)
 - What *has* happened (the facts)
 - (if necessary) what *would have happened* (the counterfactual)
 - Legal burden or 'legal onus'
 - Proving the facts and any relevant counterfactual should prove:
 - D's liability (including causation, scope of liability)
 - The loss or damage
 - (If necessary) That the defendant's wrong caused the loss or damage and is within their scope of liability.
 - Value of loss or damage.
 - In some cases:
 - What *will* happen
 - What *would have* happened
 - Into the future after the trial
 - Common in serious personal injury claims.
- Evidentiary burden
 - 'Under the common law accusatorial system, **the duty of a party to adduce evidence sufficient to raise something as a genuine issue**. To discharge the evidential burden the judge will have to be satisfied that the evidence, if accepted, could persuade a reasonable fact-finder on that issue to the requisite standard. Failure to discharge the evidential burden will cause the judge to decide against the party who bears it without the need to call upon the other side' (Lexis Nexis, 2020).
 - If a party asserts something, they have evidentiary burden to prove something.
 - Evidentiary burden may shift depending on:
 - Pleadings
 - Contested issues
 - Any legal inferences or presumptions
 - *Berry v CCL Secure Pty Ltd*
 - In the pre-trial and trial processes that lead up to a court ultimately having to determine whether a plaintiff has discharged the legal onus of proof by inferences drawn from the whole of the evidence, **the practical burden of introducing evidence can and often does shift'**
 - ...'Whether, and if so how and to what extent, an evidentiary onus might shift from a P during the conduct of an action depends in large measure on how the P **chooses to formulate the loss or damage claimed to have been suffered**, and on how the parties thereafter choose to **join issue on the questions of connection with the contravention and quantum** that arise in respect of the chosen formulation. Much, in other words, depends on the pleadings'

