

# **REMEDIES (5105)**

# Table of Contents

<b>INTRODUCTION.....</b>	<b>5</b>
Nature of remedies .....	6
(1) Identify global loss .....	8
(2) Causation .....	9
(3) Scope of liability .....	9
NOT compensation .....	10
<b>COMPENSATORY DAMAGES – BREACH OF CONTRACT.....</b>	<b>12</b>
Basic approach .....	12
Expectation / performance damages.....	13
Reliance damages.....	14
Consequential loss .....	16
Remoteness - limitations on Df liab.....	17
Mitigation requirements - limitations on Df liab.....	20
<b>COMPENSATORY DAMAGES – TORTS .....</b>	<b>25</b>
Torts principles .....	25
Loss / rectification damages .....	26
Torts involving land.....	26
Torts involving chattels .....	29
Tort of deceit .....	30
Consequential damages .....	31
Scope of liability: remoteness.....	32
Scope of liability: contributory negligence .....	34
Scope of liability: Mitigation .....	34
<b>ACL DAMAGES.....</b>	<b>35</b>
Introduction to the ACL.....	35
Not Just Damages: ‘Remedial Smorgasbord’ .....	41
<b>COMPENSATORY REMEDIES: CASE STUDY .....</b>	<b>44</b>
Problem scenario .....	44
Answer structure .....	45
<b>MONETARY AWARDS IN EQUITY.....</b>	<b>50</b>
Monetary awards in equity – equitable compensation.....	50
Substitutive compensation: falsification .....	52
Reparative compensation .....	56
Breaches of equitable duties of diligence and care .....	59
Equitable bars to relief .....	60

<b>SPECIFIC PERFORMANCE</b> .....	62
Introduction to specific relief .....	62
Qualifying contract? .....	63
Threshold: adequacy of damages .....	64
Discretionary considerations .....	64
Case study: Netline v QAV.....	66
<b>INJUNCTIONS</b> .....	69
<i>Introduction to injunctive relief</i> .....	69
Permanent (final) injunctions .....	69
Quia timet injunctions .....	71
Interlocutory injunctions.....	72
Statutory injunctions: ACL .....	72
Apologies .....	73
<b>LORD CAIRNS ACT</b> .....	80
<i>Origins of Lord Cairns Act damages</i> .....	80
Why seek Lord Cairns' Act damages? .....	81
Scope of application.....	81
Questions and debates .....	83
<b>SPECIFIC RELIEF: REFLECTIONS</b> .....	84
<b>GAIN-BASED AWARDS FOR WRONGS: RESTITUTIONARY &amp; DISGORGEMENT</b> .....	86
<i>Introduction to gain-based remedies</i> .....	86
<b>Step 1: is a GBAFW available?</b> .....	87
Restitutionary – property torts .....	87
Disgorgement – property torts .....	89
Tort of deceit .....	90
Tort of inducing breach of contract .....	90
Breach of contract.....	91
Statutory schemes .....	92
<b>Step 2: Calculating Df's benefit</b> .....	93
<b>Election of remedy: compensatory or GBAFW?</b> .....	97
<b>GAIN-BASED AWARDS FOR NON-WRONGS: UNJUST ENRICH. &amp; RESCISSION</b> .....	98
<b>Restitution for unjust enrichment</b> .....	98
'Restitution' and contract .....	101
Elements of unjust enrichment .....	101
Remedy: restitution .....	104
<b>Recission: setting aside transactions</b> .....	106
Principles of rescission .....	106
Legal rescission: 'complete restitutio in integrum' .....	107
Election to rescind .....	108
Bars to rescission .....	108
<b>PROPRIETARY REMEDIES</b> .....	110
<b>Proprietary remedies</b> .....	110
<b>Types of prop remedies</b> .....	111
Trusts .....	111

Liens .....	113
<b>Awarding prop remedies.....</b>	<b>114</b>
<b>Coherence problem and alternative models .....</b>	<b>117</b>
<b>Discretionary factors and bars to relief .....</b>	<b>119</b>
Common Bars / Considerations.....	119
Effect.....	119
Case Contrast.....	120

# INTRODUCTION

'Performance' and compensatory damages: breach of contract

<b>Exemplary damages</b>	<p><b>Aka punitive damages</b></p> <p><u>Aims:</u></p> <ul style="list-style-type: none"> <li>• Punishment</li> <li>• Deterrence</li> <li>• Appeasement of the plaintiff's desire for revenge</li> <li>• Public denunciation</li> </ul>
<u>Cf aggravated damages</u>	<p>Aim to compensate for the <b>humiliating way</b> in which a person's rights were breached</p> <ul style="list-style-type: none"> <li>• Comprise an <b>additional compensatory sum</b> to take account of the <b>special humiliation</b> suffered by the plaintiff due to the egregious nature of the defendant's conduct in the commission of a wrong.</li> <li>• An increased award to compensate for injury to a plaintiff's 'proper feelings of dignity and pride'</li> <li>• Don't seem to attract the same opprobrium as exemplary damages...</li> </ul>
<b>Beyond compensation</b>	
<i>Janney v Stellar Works</i>	<ul style="list-style-type: none"> <li>• The crane was installed not from necessity but to expedite construction of neighbouring apartments in Elwood.</li> <li>• Plaintiffs objected from the outset on grounds of <b>safety</b>. Requested <b>Deft pay for them to relocate during the build</b>.</li> <li>• Deft refused in high-handed manner. Last-minute offer to settle by defendant refused.</li> </ul> <p><b>Court findings:</b></p> <ul style="list-style-type: none"> <li>• Df proceeded and <b>constructed the crane despite being fully aware of the plaintiffs' concerns</b>, in complete disregard of their rights.</li> <li>• No evidence that, prior to the construction of the crane, the <b>Df had sought legal advice</b></li> <li>• No evidence that Df was acting otherwise than on the basis that it could <b>bully the plaintiffs into not pursuing their rights</b>.</li> </ul> <p><b>Court orders:</b></p> <ul style="list-style-type: none"> <li>• <b>Interlocutory injunction</b> awarded restraining the defendant from using the crane over the plaintiff's airspace</li> <li>• <b>No undertaking as to costs</b> required</li> </ul>

	<ul style="list-style-type: none"> <li>Costs awarded on an <b>indemnity basis</b>, reflecting the deliberate nature of the breach (<b>forced Df to negotiate again</b>)</li> <li><u>Potential other orders could've been done</u>: compensation for trespass (not required after indemnity costs)? Exemplary damages (not required at early stages)?</li> </ul>
<b>Apology?</b>	<p>E.g. statutory remedies in ACL -&gt; wrongdoer can be forced to publicly post corrections</p> <p><b>Can be coercive</b> – ‘say sorry or you’re going to jail’</p>
<b>\$1: Nominal v derisory / contemptuous damages</b>	<p><i>Dering v Uris</i></p> <p><b>Nominal</b> = <b>vindicate the plaintiff's rights</b> without significant financial compensation</p> <p><b>Contemptuous</b> = <b>express judicial disapproval</b> or disdain for the plaintiff's cause or conduct</p>
<b>Nature of remedies</b>	
<b>Myths</b> : ‘Court-ordered’? Only where there is a wrong?	<p>= ‘Court-ordered relief that supports a plaintiff’s right’</p> <ul style="list-style-type: none"> <li>Not all remedies require court intervention: consider <b>self-help remedies</b>.</li> </ul> <p><u>Do we only get a remedy where there’s a wrong?</u></p> <ul style="list-style-type: none"> <li>Remedies are <b>secondary obligations that respond to breaches of primary rights? NO</b> <ul style="list-style-type: none"> <li>Austin; Photo Production - the ‘primary/secondary obligation’</li> </ul> </li> <li><b>Fails</b> where there is <b>specific performance, debt, etc.</b> where court’s remedy enforces primary rights</li> </ul>
<b>Right vs Remedy</b>	<p>Legal position: <b>don’t need a ‘wrong’ to give rise to remedy</b></p> <ul style="list-style-type: none"> <li>E.g. <b>mistaken payment</b>: shopkeeper pays too much change by mistake, hasn’t done anything wrong but entitled to additional change (<u>restitution</u>)</li> <li>E.g. <b>undue influence</b> = don’t need wrongdoing of Df to give right to <u>restitution</u></li> </ul> <p><b>BUT</b> A ‘<b>wrong</b>’ can give rise to <b>broader range of remedies</b>:</p> <ul style="list-style-type: none"> <li>Reason for law to intervene strongly to denounce the wrongdoer’s fraud (e.g. <b>exemplary damages</b>)</li> </ul>
Monism v Dualism	<p><b>Dualism</b> – range of remedies might apply</p> <ul style="list-style-type: none"> <li><b>Preferred</b>: Aus courts used to judicial discretion</li> </ul>

	<ul style="list-style-type: none"> <li>• Cf <b>specific performance</b>: can't get specific performance where compensation is adequate remedy</li> <li>• ACL: provides a <b>remedial smorgasbord</b> (e.g. judges get used to choosing from variety of remedies)</li> </ul> <p><b>Cf Monism</b> = there is 1 correct remedy to be applied to a right</p> <ul style="list-style-type: none"> <li>• <b>'Efficient breach' theory: choose to perform the contract or pay damages</b> (which would allow other person to go out and get substitute performance in market)</li> <li>• BUT not popular in Aus</li> </ul> <p><b>Australia</b> = <b>separate analytical stage of remedies</b></p> <ul style="list-style-type: none"> <li>• They have their own jurisprudence &amp; considerations</li> <li>• Separated from cause of action questions</li> </ul>
<b>Common law vs equity</b>	<p><b>Different remedies – CL vs Eq</b></p> <ul style="list-style-type: none"> <li>• <b>CL</b> favoured <b>damages</b> (jury awards) – could hide a multitude of motives/aims (eg punishment/expressive)</li> <li>• <b>Equity</b> favoured <b>specific relief</b>, backed by contempt proceedings</li> </ul> <p><b>Compensation is generally primary remedy</b></p> <ul style="list-style-type: none"> <li>• <b>Efficient remedy</b> – Df can pay it whenever they can</li> <li>• <b>Kind to Df autonomy</b> – Df has multitude of ways to pay it (sell car, borrow from bank etc)</li> </ul>
<b>Impact of legislation</b>	<p><b>Statutes can have own remedial provisions</b></p> <ul style="list-style-type: none"> <li>• <i>Civil Liability Act</i></li> <li>• <i>ACL</i> and cognate statutes (eg <i>ASIC Act, Retail Tenancies Acts</i> etc)</li> <li>• Statutory compensation schemes (eg workers' compensation schemes)</li> </ul> <p>We will mostly focus on the general law principles with some reference to the Civil Liability Act and ACL as relevant. But it should never be forgotten that statutory incursions are increasingly profound...</p>
<b>Damages vs Compensation</b>	<p><b>Damages</b> = monetary sum</p> <ul style="list-style-type: none"> <li>• Traditionally, damages were just <u>jury award</u> which could hide multiplicity of aims (e.g. <b>deterrence, punishment</b> etc)</li> </ul> <p>Over time, '<b>compensation</b>' came to be seen as the primary (even 'the only' principled) remedy</p>

	<ul style="list-style-type: none"> <li>• 'damages' simply indicating a monetary award, the purpose of which will vary from case to case.</li> <li>• On this approach, you can have compensatory damages, restitutionary damages, disgorgement damages, exemplary/punitive damages, nominal damages, 'contemptuous' damages...</li> <li>• Damages arguably are less coercive of debts than specific relief – reason to favour them anyway?</li> </ul> <p>'Damages are the <u>pecuniary compensation</u>, obtainable by success in an action for a wrong which is either in tort or a breach of contract...'</p>
Remedies beyond loss	<p><b>Weller case (UK)</b></p> <ul style="list-style-type: none"> <li>• Published pics of musician's families</li> <li>• Paparazzi claimed that there was no harm suffered</li> </ul> <p><u>Court: 'stretched out' ideas of loss</u></p> <ul style="list-style-type: none"> <li>• Distress of infant when they grew up</li> <li>• Increased chances of kidnapping etc.</li> </ul> <p><b>Hambly v Trott</b></p> <ul style="list-style-type: none"> <li>• Someone 'kidnaps' horse and takes it for ride but returns it</li> <li>• No 'loss' per se (horse even better off w the exercise)</li> <li>• BUT <u>remedy should be awarded beyond 'loss'</u>: the <b>wrongdoer had an unlicensed use of the horse</b> -&gt; should pay back the benefit (Edelman J)</li> </ul>
***Basic ( / former) approach - compensation	<ol style="list-style-type: none"> <li>1. <u>Identify global loss</u> by reference to relevant yardstick (<i>Robinson, Livingstone</i>, equitable/statutory rules)</li> <li>2. <u>Causation/contribution</u></li> <li>3. <u>Scope of liability</u> <ol style="list-style-type: none"> <li>a. 'Novus actus interveniens' (intervening act)</li> <li>b. Remoteness rules (vary from claim to claim)</li> <li>c. Contributory negligence (not always available)</li> <li>d. Mitigation</li> </ol> </li> </ol>
<b>(1) Identify global loss</b>	
Compensatory principles	<p><u>Tort</u></p> <p><b>Livingstone v Rawyards</b>: That sum of money which will put the party who has been injured <u>in the position they would have been in had the tort not occurred</u>. (backwards looking)</p> <p><u>Contract</u></p>

	<p><b>Robinson v Harman:</b> That sum of money which will put the party so far as money can do it in the position they would have been in if the contract had been performed (forward looking)</p>
<b>Loss:</b> tort vs contract	<p>Facts: purchase a business pursuant to contract which warrants that business earns \$10k / week. They actually make \$5k / week.</p> <p><u>Tort (Livingstone):</u> hadn't been subject to deceit -&gt; <b>would've never purchased the business</b> = difference in value of business that you paid for – value of what you received</p> <ul style="list-style-type: none"> <li>• Actual loss of money I paid for business</li> <li>• (NB: <b>reliance loss</b> – how much did you lose on reliance of tort)</li> </ul> <p><u>Contract (Robinson):</u> extra \$5k / week so you would've earned 410k / week</p> <ul style="list-style-type: none"> <li>• (NB: <b>expectation loss</b> -&gt; only lost something because contract says so, haven't had anything taken from me)</li> </ul>
<b>Direct v indirect (/consequential) loss</b>	<p><u>Direct:</u> Business fails based on fraudulent conduct</p> <p><u>Indirect:</u></p> <ul style="list-style-type: none"> <li>• Mortgage house to support loan</li> <li>• Develop depression/anxiety</li> <li>• Go on holiday to cheer up and get attacked by shark</li> <li>• Sustain bad injuries</li> <li>• Can never work again</li> </ul> <p>This loss is all historically attributable to purchase of business</p>
<b>(2) Causation</b>	
<b>Causation</b>	<p><u>Factual v legal causation</u> (in <b>remedies</b>, only <b>factual</b> considered)</p> <p><u>Factual tests:</u> **use <i>but for</i>, if fails then cont. factor**</p> <ul style="list-style-type: none"> <li>• <b>'But for' test</b> <ul style="list-style-type: none"> <li>◦ <u>Limitations:</u> fails where there is <ul style="list-style-type: none"> <li>▪ <b>2 sufficient causes</b> (e.g. two fires would've burned somewhere down, neither satisfies 'but for')</li> <li>▪ <b>2 insufficient causes</b> (e.g. neither fire would've burned down but together they did)</li> </ul> </li> </ul> </li> <li>• <b>'Contributing factor' test:</b> enough to show that misleading conduct was <u>a</u> cause</li> </ul>
<b>(3) Scope of liability</b>	

Limitations on liability	Once the global potential loss that has been caused by the breach has been identified, the law starts to cut back on liability: <ul style="list-style-type: none"> <li>• ‘<b>Intervening cause</b>’</li> <li>• **<b>Remoteness rules</b></li> <li>• <b>Contributory negligence</b></li> <li>• **<b>Mitigation requirements</b></li> </ul>
‘ <b>Novus actus interveniens</b> ’	= <i>Intervening cause</i>  Something which <b>(legally) breaks the chain of causation</b> between breach of duty and loss <ul style="list-style-type: none"> <li>• Can operate as an ‘<b>extreme</b>’ remoteness rule</li> </ul>
Remoteness rules	<ul style="list-style-type: none"> <li>• <b>Contract</b> – think about <b>reasonable people in the position of the parties would have understood</b> they were taking on in terms of liability at the time of entering into the contract.</li> <li>• <b>Tort</b> – <b>depends on the loss</b> <ul style="list-style-type: none"> <li>○ <b>negligence</b> (reasonable foreseeability)</li> <li>○ <b>deceit</b> (all directly caused loss, even if not reasonably foreseeable...)</li> </ul> </li> <li>• <b>Equity</b> – different</li> </ul>
Contributory negligence	<p><b>Traditional CL position</b></p> <ul style="list-style-type: none"> <li>• <b>Contract</b> – <b>CN not relevant</b> <ul style="list-style-type: none"> <li>○ Whole point of contract is that you are allocating risks within the contract</li> </ul> </li> <li>• <b>Tort</b> – available as a <b>complete defence</b></li> <li>• <b>Deceit</b> – <b>CN not relevant</b>, otherwise would always excuse Df           <ul style="list-style-type: none"> <li>○ E.g. scams always involve CN on Pf</li> <li>○ Should</li> </ul> </li> </ul> <p><b>Now, statute intervenes</b></p> <ul style="list-style-type: none"> <li>• <b>Tort</b> – apportionment, no longer complete defence</li> <li>• <b>Deceit</b> – has affirmed CL position</li> </ul>
Mitigation	<p><b>Is Pf obliged to mitigate their loss?</b></p> <ul style="list-style-type: none"> <li>• At some point, <b>Pf must mitigate to stop compounding of their losses</b></li> <li>• Often looks like CN, but <b>arises after breach</b> (and usually loss).</li> </ul>
<b>NOT compensation</b>	
Things which aren't compensation	<ul style="list-style-type: none"> <li>• <i>Clark v Macourt / Edelman / Winterton</i></li> <li>• <b>‘Performance’ damages</b></li> </ul>