

LAWS5103: REMEDIES

key

Start of topic

Section in code

Element

case

or (case)

***CF = compare

TYPES OF REMEDIES

Self-help remedy

- When your neighbour's trees overhang your property....
 - Cause of action (law allows you to intervene): nuisance (trespass)
 - Self-help remedy: abatement (when use of neighbouring land limits your own enjoyment of your land so you can take actions to remove it)
- When you have had a particularly good night out...
 - Cause of action (law allows you to intervene): trespass
 - Self-help remedy: ejectment (kick you out for breaching the peace)
- Ball goes over your neighbour's fence in backyard cricket
 - Cause of action (law allows you to intervene): temporary license to enter on the land
 - Self-help remedy: recaption (take back your property)
 - Risk of trespass and ejection
- Overdrawn account fees, late fees, dishonour fees
 - Liquidated damages clauses (protect the bank)
 - Self-help remedy of contractual drafting: don't with the idea to avoid dispute (e.g., exclusion of liability clauses)

Exemplary damages

- Exemplary damages are used for compensation
- Aim:
 - Punishment
 - Deterrence
 - Appeasement of the plaintiff's desire for revenge
 - Public denunciation

Aggrieved damages

- Comprise an additional compensatory sum to take account of the special humiliation suffered by the plaintiff due to the egregious nature of the defendant's conduct in the commission of a wrong.
- An increased award to compensate for injury to a plaintiff's 'proper feelings of dignity and pride'
- Don't seem to attract the same opprobrium as exemplary damages...
- When someone has been 'borrowing' your equipment...
 - Need to show loss
 - Remedy: charge a license fee for using the equipment (give back the benefit as a result of the wrong)

Janney v Stellar Works Pty Ltd: The crane was installed not from necessity but to expedite construction of neighbouring apartments in Elwood. Plaintiffs objected from the outset on grounds of safety. Requested Deft pay for them to relocate during the build. Deft refused in high-handed manner. Last-minute offer to settle by defendant refused. Key findings: The defendant proceeded and constructed the crane despite being fully aware of the plaintiffs' concerns, in complete disregard of their rights. There is no evidence that, prior to the construction of the crane, the defendant had sought legal advice or was acting otherwise than on the basis that it could bully the plaintiffs into not pursuing their rights.

- Orders:
 - Interlocutory injunction awarded restraining the defendant from using the crane over the plaintiff's airspace
 - No undertaking as to costs required
 - Costs awarded on an indemnity basis, reflecting the deliberate nature of the breach
 - What other orders could have been sought? Should they have been? Could have been exemplary damages but wasn't necessary

Apology remedy

- Can be done punitively (say sorry or go to jail)
- Can be done voluntarily where it will reduce the penalty

Nominal v derisory/contemptuous damages

- Nominal damages: are awarded when a legal right has been violated, but no actual financial loss or harm has been suffered.
- Derisory damages: (also sometimes referred to as contemptuous damages) are awarded when the court finds the plaintiff's claim frivolous, vexatious, or not serious enough to warrant more than a token sum.

Dering v Uris:

- Dr. Wladyslaw Dering, a Polish-born, British-naturalized doctor, sued author Leon Uris and the publishers of the novel Exodus for libel.
- Dering claimed the novel defamed him by stating he had performed 17,000 castrations and sterilizations without anaesthetic on Auschwitz inmates.
- The case was notable as it involved evidence about the atrocities committed in concentration camps during World War II.
- The jury found that Dering had been libeled, but awarded only a halfpenny in damages, the smallest coin of the realm.
- This award was considered "derisory" because it was so small, reflecting the court's opinion that the claim was not serious or deserving of significant compensation.
- The defendants had previously offered a token sum of £2 into court, which Dering had rejected.
- Because Dering rejected the settlement offer, he was ordered to pay the majority of the legal costs, which were substantial.
- Dering, therefore, ended up with a Pyrrhic victory – he won the case in principle, but the financial consequences were devastating

The nature of remedies

- 'Court-ordered relief that supports a plaintiff's right'?
 - Not all remedies require court intervention: consider self-help remedies.

- Are remedies secondary responses to breach of primary rights? Cf the 'primary/secondary obligation' dichotomy drawn by Austin and discussed in (*Photo Production v Securicor*.)
- Does a plaintiff's right always need to be breached before you can have a remedy? Think about restitution of mistaken payments.

The relation between right and remedy

- A shopkeeper pays you too much change by mistake. What is her remedy?
 - Restitution (vitiating factors: don't need to prove the wrong from the defendant)
- What if you deliberately induced the mistake?
 - Deceit and deliberate fraud
 - Consequential losses/account of profits/exemplary damages
- I contract with you to paint my house duck-egg blue. You paint it ice-white. What are my potential remedies and what are some of the considerations that bear on that answer?
 - Remedy: require specific performance (however practically unfeasible, breakdown in the relationship, issues with slavery)
 - ALTERNATIVE REMEDY: defendant to pay the costs of someone else to repaint it
- What do your answers tell you about the nature of the relationship between right and remedy?
 - Preferred choice in the law (monism: 1 right <-> 1 remedy)
 - Australia has a Dualist system (once liability has been determined, the court can exercise its discretion to choose the most appropriate remedy in the particular case at hand)

Monism v Dualism

- The role of discretion
 - 'Efficient breach' theory: perform or pay damages
 - Cf the place of specific performance
 - The remedial smorgasbord of section 243 ACL and Finn... (see Bant and Paterson article for further discussion)

Common law v equity

- The role of procedure (again! Compare with Equity & Trusts)
 - Common law favoured damages (jury awards) – could hide a multitude of motives/aims (eg punishment/expressive)
 - Equity favoured specific relief, backed by contempt proceedings
 - Are there better reasons for why compensation tends to be the primary remedy, and other relief is only available when it is 'inadequate'?
- Compensation is kind to defendant autonomy, specific performance is not kind to defendant autonomy

Note impact of legislation

- *Civil Liability Act*
- *ACL and cognate statutes (eg ASIC Act, Retail Tenancies Acts etc)*
- Statutory compensation schemes (eg workers' compensation schemes)
- 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...

Damages and compensation

- 'Damages' and the role of the jury
- Awards often addressed issues other than compensation for loss, such as deterrence, punishment, 'consolation' and vindication.

- Over time, ‘compensation’ came to be seen as the primary (even ‘the only’ principled) remedy:
 - ‘Damages are the pecuniary compensation, obtainable by success in an action for a wrong which is either in tort or a breach of contract...’
- Recently, there has been a swing back towards ‘damages’ simply indicating a monetary award, the purpose of which will vary from case to case.
- On this approach, you can have compensatory damages, restitutionary damages, disgorgement damages, exemplary/punitive damages, nominal damages, ‘contemptuous’ damages...
- Damages arguably are less coercive of debts than specific relief – reason to favour them anyway?

The Weller Case:

- Paul Weller and his children were photographed during a family outing in California, including a shopping trip and a visit to a cafe.
- Mail Online published these photographs online, including the children's faces, without their consent or that of their father.
- Paul Weller, acting as the litigation friend for his children, sued Associated Newspapers for misuse of private information and breach of the Data Protection Act.
- The case explored the legal tests for establishing a reasonable expectation of privacy, the balance between privacy rights and freedom of expression, and the specific considerations related to children's privacy.
- The High Court sided with the children, determining that the publication of the photographs constituted a misuse of their private information. The court also found a breach of the Data Protection Act.

Hamblly v Trott: *If A, being a liveryman, keeps his horse standing idle in the stable and B, against his wishes and without his knowledge rides or drives it out, it is no answer to A for B to say: ‘Against what loss do you want to be restored? I restore the horse. There is no loss. The horse is none the worse: it is better for the exercise...’*

Basic approach (formerly?)

- Identify global loss by reference to relevant yardstick (*Robinson v Harman*, *Livingstone v Rawyards*, equitable/statutory rules)
- Causation/contribution
- Scope of Liability
 - ‘Novus Actus Interveniens’
 - Remoteness rules (vary from claim to claim)
 - CN (not always available, eg deceit, some equitable wrongs)
 - Mitigation

The compensatory principle/s

- Identify the global loss
 - *Livingstone v Rawyards*: That sum of money which will put the party who has been injured in the position they would have been had the tort not occurred.
 - *Robinson v Harman*: That sum of money which will put the party so far as money can do it in the position they would have been if the contract had been performed.
- What is the difference between the two principles?

- Address the wrong doing by putting the person in the position as if the wrong never happened
- Differences in practice
- Contract: forward looking is how you measured your loss
- Tort: backwards looking, where would you be without the wrong

Hypothetical

- I purchase a business pursuant to a contract which warrants that the earnings of the business are \$10,000 a week. They turn out to be barely \$5,000 a week.
- Suppose I have claims for breach of contract and deceit (because the misrepresentations were fraudulently made). What is my *prima facie* (or ‘direct’) measure of loss?
 - Contract: had to promise been fulfilled, what would I have got(expectation measure)
 - Had I known I would not have purchased it
 - Get back the difference of what I paid for and what I earned

Expectation v reliance measures

- What did I expect to gain from performance of the contract? (Note the weird ‘normative’ loss involved here... it is only a loss because the contract will be enforced).
- What did I lose in reliance on the misrepresentation?
 - Contract case: normative loss (no real loss)
 - Tort case: monetary loss
- What other losses might be present?

Direct v indirect (or consequential) loss

- Suppose I borrow money to keep my business afloat. I mortgage my house to support the loan. Initially, I am just distressed by events but I later develop depression and anxiety. I take a holiday to try to improve my condition and am attacked by a shark on Cottesloe Beach. I sustain terrible injuries and can never work again...
- This loss is all historically attributable to the purchase of the business. Should the defendant be liable for all that loss?
 - Historically linked to the purchase of the business
- What rules should limit the defendant’s scope of liability?

Causation

- Show that loss was caused by the breach
- Factual v ‘legal’ or ‘commonsense’ causation
 - ‘But for’ v ‘a factor’ (start with but for then move to a factor)
- Multiple sufficient causes (two fires example: 2 fires burning down a barn, applying but for, neither is responsible because if one fire didn’t exist the other fire would still burn it down) (cereal example: I buy a packet of cereal and buy a specific one because it says it was made in Australia but turns out it wasn’t, my only reason for buying cereal wasn’t just because it was Australian made so applying a factor, the Australian made factor needs to be a high cause in my decision to produce causation)
- Multiple insufficient causes (20 small fires – Nb ‘NESS’ test)

Limitations on defendant liability

- Should the defendant be liable for all of it
- Once the global potential loss that has been caused by the breach has been identified, the law starts to cut back on liability:
 - ‘Intervening cause’
 - Remoteness rules

- Contributory negligence
- Mitigation requirements

Novus actus interveniens

- New intervening act = breaks the chain of causation
- Shark...? Decision to go on holiday? Decision to keep trying with the business when anyone else would have sold it off...?
- Do any of these events as a matter of historical fact ‘break’ the chain of causation?
- What is the concept doing, then?
- Animal related injuries are usually treated as novus actus interveniens
- Is it completely unreasonable for an individual to have kept going given the circumstances

Remoteness rules

- Privately audited rules (where would the parties lay the boundaries of the conduct)
- Contract rules – think about reasonable people in the position of the parties would have understood they were taking on in terms of liability at the time of entering into the contract.
- Tort – compare negligence (reasonable foreseeability) with deceit (all directly caused loss, even if not reasonably foreseeable...)
- This is different again in Equity.

Contributory negligence

- Leads up to the breach or contemporaneously with the breach
- Seems obviously relevant to claims in negligence (and used to operate as a complete bar)
- But what about contract?
 - Not relevant
 - Allocate risks in the contract not after a dispute occurs
- What about deceit?
 - Is available as a complete defence for the tort of negligence
 - Deceit never allowed this as a defence = people who get scammed work off greed so you contribute to your own deceit and cant use this defence
- Why might the principle work differently, in a more restricted way or not at all in these cases?

Mitigation

- Happens after the breach
- You should take steps to mitigate your loss
- So-called ‘duty to mitigate’ not really a duty in a strict sense.
- Often looks like contributory negligence, but arises after breach (and usually loss).
- Does it apply in our hypothetical example?
- What does your answer say about the reason for the rule?
 - Problematic about an individual watching losses mount

COMPENSATION FOR BREACH OF CONTRACT

Step 1: Identify the cause of action

- E.g. determine if a breach of contract has occurred.
- Approach:
 - Identify the specific contractual obligation(s) that the defendant (D) was required to perform.
 - Assess whether D failed to perform this obligation as stipulated in the contract.
 - Example: In ***Bellgrove v Eldridge***, the builder breached the contract by constructing a house with defective foundations and walls, failing to meet the contracted specifications.
- Application:
 - Review the problem question to pinpoint the contractual term(s) allegedly breached.
 - Confirm the breach by comparing D's actions (or inactions) to the contractual requirements.
 - Consider whether the breach is material (significant enough to warrant remedies).

Step 2: Determine the heads of damage

- What is the individual seeking advice complaining about?
- Expectation loss:
 - **Robinson v Harman**: That sum of money which will put the party so far as money can do it in the position they would have been if the contract had been performed.
 - This same principle prevents a plaintiff from being placed by an award of compensatory damages in a better position than that which the plaintiff would have been in had the contract been performed.
- Approach (old):
 - **Clark v Macourt**: Hayne J's 3 ways to identify 'loss' (plaintiff's reliance, defendant's profit/gain, or lost performance)
 - Performance loss in contract is a normative loss
 - P bears onus – note role of nominal damages
- Approach (current)
 - Identify consequential loss, subject to
 - Causation/contribution
 - Scope of Liability
 - 'Novus Actus Interveniens'
 - Remoteness rules
 - Contributory negligence
 - Mitigation
 - Focus on expectation/performance damages as the primary remedy, aiming to put P in the position they would have been in had the contract been performed (***Robinson v Harman***).
 - Consider four common measures of expectation loss:

- Loss of expected profit (e.g., lost profits from a business deal, as in the “scratchie” case).
- Loss of chance (e.g., *Chaplin v Hicks*—chance to win a beauty contest; *Cth v Amann*—chance to renew a contract).
- Difference in market value (e.g., defective goods, as in the “defective widgets” case).
- Cost of cure/rectification (e.g., *Bellgrove*—cost of demolishing and rebuilding a defective house; *Tabcorp Holdings*—cost of restoring a foyer; *Clark v Macourt*—cost of sourcing replacement sperm straws).
- If expectation damages are speculative or difficult to quantify, consider reliance damages (e.g., *McRae v Cth Disposals Commission*—wasted expenditure on a non-existent tanker; *Cessnock City Council*—cost of constructing a hangar).
- Assess whether consequential loss applies, such as wasted expenditure, lost profits, or non-pecuniary losses (e.g., distress in *Baltic Shipping v Dillon* for breach of a pleasure-based contract).
- Application:
 - Analyse the problem to determine which measure of loss fits the facts.
 - For expectation damages, calculate the monetary substitute for the promised performance.
 - For reliance damages, identify reasonable expenditure incurred by P in anticipation of contract performance (*Cessnock*).
 - For consequential losses, check for economic or non-pecuniary harm beyond the performance interest (*Moore v Scenic Tours*).

Step 3: Consider each head of damage

- For each head of damage identify the measure of loss and the quantum of loss
 - Measure of loss: compensation principle (put them back in the place had the contract been performed)
 - Quantum of loss: actual expenditure representing the costs lost
- Approach:
 - For expectation/performance damages:
 - Use the relevant measure (e.g., cost of cure, difference in value, loss of profit, or loss of chance).
 - Ensure damages reflect the value of the promised performance (*Clark v Macourt*—cost of sourcing compliant sperm straws).
 - Avoid over-compensation by ensuring P is not placed in a better position than if the contract had been performed (*Robinson v Harman*).
 - For reliance damages:
 - Identify wasted expenditure incurred due to the breach (*McRae*—expenditure on salvage expedition).
 - P bears the initial onus to prove reasonable expenditure; D must then show that the expenditure would have been wasted even if the contract was performed (*Cessnock*).
 - For consequential loss:
 - Include economic losses (e.g., lost profits) or non-pecuniary losses (e.g., distress in *Baltic Shipping*) if within the scope of liability.

- Consider the timing of assessment:
- Expectation/performance damages are typically assessed at the date of breach.
- Consequential losses may account for hindsight, subject to remoteness rules.
- Application:
 - Quantify the loss based on the problem's facts (e.g., cost of remedial work in *Bellgrove*, replacement costs in *Clark v Macourt*).
 - Apply any reductions for remoteness, mitigation, or contributory negligence.

Step 4: Establish causation

- Approach:
 - Apply the "but for" test: Would P's loss have occurred if D had not breached the contract?
 - Consider exceptions or complexities:
 - Multiple sufficient causes (e.g., two fires independently causing damage).
 - Multiple insufficient causes (e.g., applying the **NESS** test-Necessary Element of a Sufficient Set).
 - Novus Actus Interveniens (e.g., an intervening act breaking the chain of causation, such as an injury at a warehouse unrelated to the breach).
 - Material contribution (e.g., where the breach was "a factor" in the loss, per *Lewis v ACT*).
- Application:
 - Trace the causal link between the breach and the loss in the problem scenario.
 - Address any potential intervening events or contributing factors that might disrupt causation.

Step 5: Scope of liability

- Approach:
 - Evaluate limitations on liability:
 - Novus Actus Interveniens: Ensure no intervening act breaks the causal chain.
 - Remoteness: Apply the **Hadley v Baxendale** test:
 - First limb: Losses arising naturally in the usual course of things from the breach.
 - Second limb: Losses within the reasonable contemplation of both parties at the time of contracting, based on information communicated to D (**Victoria Laundry**).
 - Contributory Negligence: Check if P's actions contributed to the loss. Note that at common law, contributory negligence does not typically apply to breach of contract (**Astley v Austrust**), but statutory apportionment may apply for concurrent breaches of contract and tort duties (e.g., **Law Reform Act 1947 (WA) s3A**).
 - Mitigation: Confirm that P took reasonable steps to minimize loss:
 - P cannot recover for avoidable loss.