

## Tort & Contract topics for the Final Exam

### INTRODUCTION TO DAMAGES

#### There are five broad types of damages:

- **Nominal**: where the plaintiff proves the wrong but fails to establish a claim for any other type of damages),
  - Available for common law wrongs actionable *per se* (without proof of damage)
  - Available in trespass actions in tort and actions for breach of contract
  - Should be a TOKEN AMOUNT - Tend to vary between \$1 and \$25
  - Damages not available in any tort actions where proof damage is an element of the action e.g. negligence
- **Compensatory**: reflecting the plaintiff's proved injury, and including "aggravated" damages)
  - a distinction is usually made between "common law damages" and "equitable compensation" for legal and equitable wrongs respectively, as both are based on the same notion of "compensation" but the common law limiting devices (intervening causes, remoteness, mitigation, contributory negligence) have no role to play in compensating equitable wrongs;
  - The amount or "quantum" is "assessed"
  - **Two inquiries**
    - Is P worse off than he/she would have been if wrong wasn't committed (essentially "but for" causation)
      - e.g. *Cattanach v Melchior* (2003) (4:3 yes), *Harrington v Stephens* (2006) (6:1 no)
      - Principles for measuring loss depend mainly on nature of injury
    - And, if so, what is the monetary equivalent of worse-offness
    - (Limiting devices) should damages be adjusted (usually downward) for intervening causes, remoteness, failure to mitigate and/or contributory negligence
      - Depends mainly on nature of cause of action
      - Contributory negligence important in personal injury, often the difference between a reasonable and an unreasonable offer

- **Restitutory or gain-based** (reflecting defendant's gain)
  - A distinction is usually made between a:
    - "Licence/user fee" (tort),
    - "An account of profits" (equity and some statutory actions) and
    - "Restitutory damages for unjust enrichment" (a common law action which is neither tort nor contract, but sometimes referred to as "quasi-contract")
  - If the defendant's conduct is also wrongful, and the plaintiff has an alternative cause of action at law, the plaintiff can generally only recover under one of the actions: **Baltic Shipping Co v Dillon (1993)**.
    - E.g. where the defendant steals the plaintiff's car and sells it to an innocent third party; the plaintiff may proceed under the tort of conversion (for the market value of the car) or under the unjust enrichment action of "money had and received" (to recover the amount the defendant sold the car for).
  
- **Lord Cairns' Act damages** (or "equitable damages"), only available in lieu of, or in addition to, an injunction or specific performance;
  - (under Lord Cairns' Act) are a statutory remedy, available where court has "power" to grant an injunction or specific performance.
  
- **Exemplary or punitive** (to punish the defendant and to deter others).

## **DAMAGES FOR PERSONAL INJURY:**

Part 2 of the *Civil Liability Act 2002* (NSW); *Sharman v Evans* (1977) 138 CLR 563; *Griffiths v Kerkemeyer* (1977) 139 CLR 161; *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638; *Wynn v NSW Insurance Ministerial Corporation* (1995) 184 CLR 485; *Medlin v State Government Insurance Commission* (1995) 182 CLR 1; *Norris v Blake (No 2)* (1997) 41 NSWLR 49; *Hill v Forrester* (2010) 79 NSWLR 47)

Damages for personal injury modified by *Civil Liability Act 2002* (NSW)

Which may be excluded where D's conduct is intentional:

- And/or by NSW motor accidents and workers compensation legislation and, in statutory defective products actions, by *Competition and Consumer Act 2010* (Cth)
- If plaintiff has died, damages recoverable by estate limited by survival legislation (generally to period between injury and death), and restrictions differ depending on whether death was or was not related to injury

**Heads of Damage:** The Civil Liability Act fundamentally distinguishes between injury-caused "economic" and "non-economic" losses:

### **"Economic loss" comprising**

- Loss of earning capacity;
- Medical and related needs; and
- Inability to provide services to others, or the loss of "parenting" or "domestic" capacity (whilst the common law regarded this as a non-economic loss of amenity, statutory reforms place it in the "economic" category),

AND

### **"Non-economic loss" comprising**

- Physical pain and suffering;
- Loss of the amenities or enjoyment of life;
- Loss of expectation of life; and
- Disfigurement.

## ECONOMIC LOSSES:

### 1. Loss of Earning Capacity

- Awarded for lost capacity to earn rather than lost earnings, depends on extent to which P would have exercised capacity and extent to which P can exercise any residual capacity:  
*Medlin v SGIC (1995) HCA*
- Pre-injury earning capacity reduced for expenses necessarily incurred in earning (eg travel):  
*Sharman v Evans (1977)*
  - But not child care: *Wynn v NSW (1995) HCA*
- CLA caps pre-injury earnings at 3 times average weekly earnings, but adds employer superannuation contributions
- Damages usually reduced for contingencies/vicissitudes (uncertainties of life), generally future component but sometimes also pre-trial: *Malec v Hutton (1990) HCA*
  - Standard NSW reduction is 15% for general contingencies, may be adjusted up or down having regard to specific circumstances: *Wynn v NSW (1995) HCA*
  - or not applied at all eg if short period is involved, P close to retirement, in good health with secure employment
  - may be increased where evidence is that positive contingencies outweigh negatives:  
*Norris v Blake (No 2) (1997)*
- But “collateral” benefits conferred by benefactors ignored: (*Zheng v Cai (2009) HCA*)

### 2. Medical and Related Needs

- Damages awarded for "needs" - To extend what would be "reasonable" to satisfy
- Not Restricted by CLA
- Reasonable cost of expenses recoverable (incl vehicle, home modifications).
- Test - *Sharman v Evans*: “the touchstone of reasonableness...is...cost matched against health benefits” – “if cost if very great and benefits to health slight or speculative...clearly be unreasonable”

### 3. Gratuitous Assistance

- Damages awarded where care is free to Plaintiff from family/friends
- *Griffiths v Kerkemeyer*: P (quadriplegic) got sum for nursing etc and other services gratuitously provided for him by fiancée and family.
  - Held: whether or not later events means services are provided gratuitously does not change nature of loss.
  - P entitled to market value of services provided: *Griffiths v Kerkemeyer (1977)*
- Even if care provider also defendant: *Kars v Kars (1996)*
- Policy reasons explained in *Van Gervan v Fenton (1992)*
- Weekly award (40 hours) and hourly award (1/40 average weekly earnings) now capped by CLA
- **S 15 CLA**: restrict claims for gratuitous services:
  - (2) No damages may be awarded to a claimant for gratuitous attendant care services unless the court is satisfied that:
    - a) There is (or was) a reasonable need for the services to be provided, and
    - b) The need has arisen (or arose) solely because of the injury to which the damages relate, and
    - c) The services would not be (or would not have been) provided to the claimant but for the injury.
  - (3) Further, no damages may be awarded to a claimant for gratuitous attendant care services if the services are provided, or are to be provided:
    - a) For less than 6 hours per week, and
    - b) For less than 6 months.
- **S 18(1)(b) CLA**: no interest on gratuitous attendant care services

*Hills v Forrester (2010) NSWCA* - no damages unless services "(a) for at least 6 hours per week, and (b) for a period of at least 6 consecutive months"

- (a) Is continuing requirement, damages can only be awarded for 6-hour weeks (3:0)
- (b) Is threshold requirement, once 6-month period satisfied, P can recover for prior period of less than 6 months (2:1)