

LAWS50036 Remedies

CHECKLIST

Compensation (K, tort, ACL, eq)

Wrong

- K: also check LCA (P *could've* sought injunction before breach)
- ACL: in general, favour P b/c protective policy
- Tort: trespass – normative dmgs for interference w/ right in & of itself (*Anning, Smethurst*)

Loss

- If conversion, analyse user dmgs IN ADDITION to mkt value and conseq losses (tort section)
- Nominal dmgs as fallback

Limiting principles (factual causation, legal causation)

ED

Specific Relief

SP (positive ob)

Inadequacy of dmgs

Discretionary bars:

- General
- Specific to SP: mutuality, RWA, supervision

Injunction (negative ob): delineate possible injunctions; less draconian injunctions are more likely to succeed (discretion)

Interlocutory injunction (D about to do sthng)

Inadequacy of dmgs

Discretion (prej to P if no injunction vs prej to public interest if yes injunction)

LCA (*dmgs instead of injunction*)

Jurisdiction

Discretion

- Injunction would otherwise be granted (D seeks)
- Injunction refused on discretionary gds (P seeks)

Assessment

D makes secret profit etc. - Disgorgement

Available for eq

Not available for breach of K – seek negotiating dmgs instead

- Except for concurrent and coextensive duty of care where that exists alongside duty of care in the law of contract - use negligence analysis

Mitigation: P can't recover for unreasonably incurred losses once P has notice of wrong

Rationale

To encourage parties to take reasonable steps in reducing loss and thus economic waste, and avoid unfairness where losses can be easily avoided

3 principles

P can't recover for loss that it would've been reasonable to avoid

P CAN recover for loss incurred in reasonable attempts to avoid loss

P can't recover for avoided loss

Clark

Hayne J: Clark couldn't make a profit on the straws either way. However, if she could've and would've profited from the straws, then she's lost not only the value of the goods (mkt value), but also the profit she would've made. Given that the **straws could be purchased from the mkt**, it's reasonable to purchase them to avoid loss, so dmgs = mkt value of the straws only (don't get to also recover for lost profit). Also, if the purchase of the straws could result in greater profit, the difference in profit must be subtracted from the dmgs.

Burns

A truck w/ a reconditioned engine can be used for interstate haulage.

If engine was reconditioned, over the engine's useful life the P would've made \$220k more than if it wasn't reconditioned.

Maj: dmgs = \$70k = cost of reconditioning + **loss of profits** for time until discovery that the engine hadn't been reconditioned. After that point, loss becomes too remote. At a certain point, it's beyond the parties' contemplation, and it's not reasonable to hold the D liable for lost profits.

- CRITIQUE: they say it's abt remoteness, but in reality it seems like it's more abt mitigation
 - Maj also says that mitigation **can take into a/c impecuniosity** of P (whether they had funds to recondition it), but illogically don't take it into a/c in their so-called 'remoteness' analysis (they find that P indeed couldn't afford to recondition the engine yet it made no diff).

Brennan J (dissent) opts for \$220k, and his reasoning makes more sense (actually takes into a/c fact that P couldn't afford to recondition the engine).

Novus Actus

Unreasonable acts by P, or events out of P&D's ctrl (e.g. involuntary illness), after wrong could break the causal chain

Debt & Liquidated Dmgs

Rationale for law's limit to penalties: no exemplary dmgs for breach of contract

Does the penalties doctrine apply?

1. Applies where **contract provides for sum to be paid where there's a breach of contract**, e.g.:

Cl 1: A must deliver X to B by end of mth

- CRITIQUE: this unfairly leaves the burden of the losses on the P; it doesn't sufficiently respect prop rights
- BUT for intentional conseq loss, direct conseqs test seems more appropriate
 - RATIONALE: if you deliberately convert, then you assume all the risks as it's a wrongful act

Trespass: direct conseqs

Orthodoxy: directness, meaning uninterrupted link b/w D's wrongful act & given loss

- E.g. dmg rye -> loss of inspiration to write novels -> financial loss: NOT DIRECT b/c loss is principally caused by not writing, not by dmging rye
- For **Unintentional trespass**, there's debate re direct conseqs vs reasonable foreseeability
 - May suggests that where trespass is innocent or minor, test should be RF

TCN Channel Nine v Anning per Spigelman CJ: recog'd psychiatric illness not **probable conseq** of someone coming onto your land to interview you

- CRITIQUE – **UNSAFE AUTHORITY (BUT STILL MENTION)**: there's no doubt that direct conseqs test should apply as it's intentional trespass. This is not an application of the direct consequences test (which doesn't care about probability, only about novus actus). Rather, it seems like reasonable foreseeability test. In fact, it's stricter than negligence test, which only requires the consequence to not be far-fetched (cf pr > 50%).

Mayfair Ltd v Pears – **not yet accepted in Aus**: (novus actus, probable conseq)

- D parked on P's prop w/out permission. Car spontaneously combusts, burning down entire building. Building dmg not recoverable under direct conseqs test, but no reasoning provided
 - Presumably it's b/c combustion = novus actus – completely random, unforeseeable event beyond anyone's ctrl interrupting causal chain, analogous to a lightning strike
 - Under Spigelman CJ's modified formulation, it's even more straightforward – fire/prop dmg not probable conseq of parking on someone else's prop, esp as car is stationary when parked
 - Meanwhile, Somers J adopts more orthodox approach – direct conseqs, and also emphasises the importance of preserving right to exclusive possession of land in the CL tradition

Contributory Negligence (only applies to acts IN THE LEAD UP TO THE WRONG; for acts AFTER wrong, use novus actus & mitigation)

E.g. failing to do own due diligence before entering transaction (counter: P took reasonable care by going to a pro adviser)

Negligence

Wrongs Act 1958

S 25 Definitions:

"wrong" means an act or omission that—

There's a rising imperialism of loss-based thinking.

Account on the basis of wilful default

Breach of some other eq duty other than unauth'd disbursement; could be breach of DOC, fiduc duty, duty to take ctrl of the trust assets, duty to claim a debt owed to the trust before limitation period runs out, etc.

Nature of money award = compo, but q arises: what are the principles to be applied? Should there be analogy w/ negligence or contract? Or should other principles to be applied?

Disbursement cases

SEE ALSO: no-conflict/profit (e.g. skimming secret commission)

Note: availability of statutory relief for trustee – statute allows ct to reduce liability where it was purely an honest mistake and trustee took reasonable care

Re Dawson (orthodoxy: "debt view")

Funds were dispersed and completely dissipated

Street: duty to restore the trust funds are distinctive and of a higher nature & more absolute than duties to pay dmgs at CL; CL principles re remoteness & causation don't apply to these sorts of awards

- **Liability is strict** (doesn't matter if it's just a mistake)
- Remoteness & novus actus N/A

-> Consistent w/ debt view: **once funds have been taken out, there's no further inquiry.**

- **CRITIQUE:** However, in *Re Dawson* Street J makes a seemingly contradictory statement: 'the inquiry... would appear to be whether the loss would have happened if there had been no breach'; this suggests 'but for' analysis, which suggests nature of loss cf debt. Nonetheless, Edelman J in *Agricultural* explained that Street J doesn't mean 'but for'. By taking these funds out of the fund, a loss is caused ipso facto. Instead of this being a but for analysis, this is a loss suffered by unauthorised disbursement. The loss is inherent to the unauthorised disbursement. There would not be a gap in the fund now had there been no unauthorised disbursement. However, this does not necessarily implicate but-for analysis. Rather, just look at whether or not there was unauthorised disbursement. The loss to the fund is entailed in the making of an unauthorised disbursement. Still, Street J's statement still seems ambiguous.

WRITE: Timings – sum owed to the fund is assessed at the time of trial with full benefit of hindsight at the time of restoration.

- E.g. if what was disbursed was an asset and it was unauth'd and the asset ends up in someone else's hand, you can still sue the trustee for the money value of the asset. If the asset's value is higher at the time of trial than when disbursement occurred, any value of appreciation in the asset goes to the fund.
 - HERE: NZD appreciated vis-à-vis AUD
- This is diff fm CL, where it's usually at time of breach (although even in CL there's been a rise in flexibility to also allow consideration from time of trial).

Deceit of its nature involves an intentional telling of lies to induce someone to do sthng. This involves conscious wrongdoing, so naturally it's in realm of ED. Sets out a few further principles, including fact that ED will only be awarded where compo dmgs are insufficient for punishment

- E.g. in *Musca*, French J says ED shouldn't be awarded b/c D committed this wrong to make a profit, but the compo dmgs awarded exceeds amt of profit they made.
 - For 1 of the Ps: b/c **compo dmgs** are more than the gain they made through their wrongdoing, the fact that compo dmg has been awarded removes any incentive to engage in this conduct, ED isn't necessary. <- BUT THIS ISN'T DETERMINATIVE
 - But for the other P, their conduct is **more egregious**. D knew she was in a particularly vulnerable position (hypo example: not an experienced mkt trader, that's why she went to D for advice; govt entity acting in a high-handed way holding onto ppl's stuff) – single mother who had left current job to engage in this venture; yet he still lied to her knowing it was a bad deal for her; his knowledge of the econ vulnerability is a factor that imports into his conduct a more objectional character than his conduct towards the Muscas, who weren't as vulnerable; the rationale for ED being engaged here is that there's an appeasement element that C can feel legitimately aggrieved, and the award of ED would serve to appease her sense of injustice
 - Also his conduct is all the more objectionable b/c he knew she was vulnerable and yet went out of her way to tell her lies; there was conscious wrongdoing b/c he deliberately told her lies; contumelious disregard for her b/c he knew she was economically vulnerable and yet still lied to her <- what D KNOWS is a relevant factor

Specific Relief

Prelim

Equitable remedies cf CL remedies

Coercive orders of a ct that req someone to do sthng or omit fm doing sthng

Perfecting remedies – reqs D to *actually* perform their obs under K, or *actually* enforces P's rights

- Cf dmgs, which are 'second best'

Exclusive vs auxiliary jurisdiction

- Exclusive: protects equitable obs (e.g. fiduc duties or trust ob)
- Auxiliary jurisdiction: someone seeks to invoke eq to protect their CL rights (e.g. K or tort); threshold req has to be met – remedies u can get at CL are inadequate (principal remedy at CL = dmgs); otherwise auxiliary jurisdiction not enlivened; ct then has discretion re how to ex the power

Specific performance-proper = order for all duties under K to be performed; cf orders in the nature of specific performance = order for 1 duty to be performed; same principles apply

Should SP be the default remedy for breach of contract? In civilian systems, generally the presumptive remedy for breach of K is SP. In CL eq remedies only come into play where CL remedies are inadequate.

- Not a 'more probable than not' test
- **WRITE:** According to Gummow and Hayne JJ in *O'Neill*, it is 'sufficient that the plaintiff show a sufficient likelihood of success to justify in the circumstances that the preservation of the status quo pending the trial'.
 - **Very open-ended**; what does this req? They say it just depends on the case
- How strong the likelihood of success needs to be depends on, inter alia, 'nature of the rights' and 'practical consequences likely to flow' from the interlocutory injunction
- Reject idea that if P's claim neither vexatious nor frivolous then srs q to be tried
- ➔ Aligns Aus position w/ UK position, but the tests elaborated are problematic - this thing about 'how strong the likelihood of success needs to be depends on the nature of the right and practical consequences' is problematic: there seems to be conflation of the prima facie case test and the balance of convenience analysis; also, nature of right and practical conseqs seem irrelevant to whether or not there's a good claim or plausible argument on the merits

Kirby J: 'prima facie case' shouldn't be a separate req; strength of case should simply be one factor that's considered in the 'balance of convenience' req

Balance of convenience

Adequacy of dmgs/irreparable harm to P – one factor (*Samsung*)

Hardship

- Prejudice to P if order not given vs prejudice to D if order is given; most relevant is prejudice that can't be readily compensated w/ dmgs
- Wider interests potentially relevant (e.g. if conseq = shutting down bsns and putting many staff out of work)
- Contrast:
 - Restraint on releasing confidential pers info to the public: not much prejudice to D fm having to postpone the info if it turns out that they can indeed publish it; P would suffer irreparable harm if info wrongly released; very one-sided case
 - Shutting down D's bsns: *Potters-Ballotini* (D used to work for P. K: D can't use info gained fm work in own bsns for 1 yr after end of employment)
 - D's bsns is dependent on this info. Shutting it down would cause 'disastrous'/'catastrophic' effects b/c it'll put many staff out of work, & furthermore the bsns had just taken on a lot of debt that needed to be serviced
- Strength of P's case, strength of D's defences (*Samsung*)
- **Delay** is relevant, and mere delay may be sufficient (taking too long to seek injunction)
- **Other factors**, e.g. whether P has unclean hands

Assessment: SEE LCA DMGS ASSESSMENT

Personal Restitution for Unjust Enrichment

Key Concepts

Disgorgement involves profit-stripping, whereas restitution involves the reversal of a tfer of value, or a giving back

Wrongs [e.g. restitutionary dmgs for trespass] vs 'not-wrongs' [e.g. money had and received]

Unjust enrichment as normative basis for restitution

Unjust enrichment: One Big Idea?

The historical development of restitutionary claims has been through a series of specific actions

A big tension in this field : scholars over time have argued that all of these claims evince certain common characteristics, particularly involving enrichment at expense of P where that enrichment is unjust; scholars have tried to develop a general fwk of unjust enrichment that cuts across these diff types of actions; HCA has been hostile to this reduction of all these actions into 1 big idea, u risk passing up different characteristics, particularly that some of them are CL and some of them are eq, and therefore attract the application of different principles (Nettle, Gordon, Edelman in *Mann*)

1 possible concern is that this reduction could give the impression that u could just go to ct and say 'it's unjust enrichment' instead of bringing a specific cse of action

Nettle, Gordon, and Edelman in *Mann*: however, they could still bring coherence in how we think abt these claims; we can take the benefit of these general fwks while still not falling into the trap of treating them as being det've

Gageler J in *Mann*: real risk of over-abstraction; we've seen that in tort there's this idea of compo, but the way it manifests in diff torts may differ given the diff nature of the diff types of actions; similarly here u have diff types of claims, and the nature of them may differ

4-point fwk

Tries to distil the elements that are common to money had & rec'd, quantum meruit, and quantum valebat

1. **Enrichment** of D

- a. Generally assessed on an objective mkt measure
- b. Valuation at time of receipt
- c. 'Subjective devaluation': car washing example

2. At the **expense** of the P – 'transactional link'

3. **Unjust** factor

- a. Mistake
- b. Duress
- c. Failure of consideration/basis (conferral is done on premise of a certain state of affairs, which then disappears)

1944 words

I INTRODUCTION

Adopting a radical approach to the tort of false imprisonment, the High Court of Australia has committed numerous errors in its judgment in *Lewis v Australian Capital Territory*.¹ Edelman² and Gageler JJ's³ dismissal of normative losses has neither supporting authority nor coherent reasoning. Edelman⁴ and Gordon JJ's⁵ approaches to causation similarly ignores well-established common law authority and principles. Combined with severely problematic counterfactual analysis,⁶ the court's multiple errors in *Lewis* carry serious legal implications that should not be ignored.

II LOSS

The court's reasoning regarding loss lacks supporting authority. Edelman J conflates virtually all damages with consequential factual losses, claiming that "it is "strained and artificial" to describe a person who may be no worse off as a result of the wrong as having suffered a loss".⁷ This is fundamentally wrong: normative losses, which correspond with the invasion of a right in itself and do not depend on whether the claimant was left factually worse off, have long been a well-recognised feature in many areas of the common law,⁸ with *Leame v Bray*⁹ and *Reynolds v Clarke*¹⁰ being just two well-established examples in tort law. Additionally, as a matter of principle, the idea that "it would be unjustifiable to award compensatory damages to a plaintiff who has suffered no real loss" is problematic. According to this logic, damages should not be awarded for breach of contract, since one party's non-performance does not leave the other party any worse off; contract law would be

¹ *Lewis v Australian Capital Territory* [2020] HCA 26, ('*Lewis*').

² *Ibid*, [146] citing *Attorney General v Blake* [2001] 1 AC 268, 279.

³ *Ibid*, [31].

⁴ *Ibid*, [139].

⁵ *Ibid*, [76]–[78].

⁶ *Ibid* [90] (Gordon J), [179] (Edelman J).

⁷ *Ibid*, [146] citing *Attorney General v Blake* [2001] 1 AC 268, 279.

⁸ JNE Varuhas, 'Lewis v ACT: Valuing Freedom' (2020) 42 *Sydney Law Review* 124, 125–130.

⁹ (1803) 3 East 593, [601] (Lawrence J).

¹⁰ (1725) 1 Strange 634, 636 (Fortescue J).

1944 words

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Plenty v Dillon (1991) 171 CLR 635

R (Lumba) v Secretary of State for the Home Department (2012) 1 AC 245

R v Governor of Brockhill Prison; Ex parte Evans (No 2) [2001] 2 AC 19

Reynolds v Clarke (1725) 1 Strange 634

Ruddock v Taylor (2005) 222 CLR 612

Smethurst v Commissioner for Police [2020] HCA 14

Wotton v Queensland (No 5) [2016] FCA 1457

Wyzenbeek v Australasian Marine Imports Pty Ltd (in liq) (2019) 373 ALR 79

[C Legislation](#)

Wrongs Act 1958 (Vic)

1944 words