23. Remedies in General

"For every evil under the sun,
There is a remedy, or there is none.
If there be one, try and find it;
If there be none, never mind it."

— Mother Goose Nursery Rhyme, recorded in 1765

Introduction

It has sometimes been said that a law without a remedy is a suggestion.

One can spend so much time thinking about the elements of and defenses to tort liability, that remedies might be forgotten. Yet remedies are the point on the horizon towards which all of the plaintiff's ships are steered and around which all defendant's battlements are arrayed. Without remedies, everything else is irrelevant.

This chapter discusses some basic remedies concepts in broad outline. In the following chapters, we will explore two aspects of remedies in more detail: compensatory damages and punitive damages.

Legal and Equitable Remedies

Since the American court system descended from that of England, it maintains remnants of a distinction that pervaded the English courts – that between "law" and "equity." English courts of law impaneled juries and practiced the common-law method, with the actions of a court in any given case being bound by precedent of courts that had considered similar cases in the past. The English courts of equity descended from the use of royal power to grant remedies based on notions of fairness, and they were unconstrained by precedent.

The English courts of law and equity also offered different remedies. Courts of law were limited in the remedies they could provide. For the most part, courts of law awarded damages, but they could also

award some non-damages remedies, such as *replevin*, which allows for the pre-trial seizure of a wrongfully taken chattel, and *ejectment*, which can be used to force a defendant off the plaintiff's land. Courts of equity, sitting without juries, had broad power to fashion remedies on the basis of what seemed appropriate. Notably, equitable courts could issue an injunction, in which a party was ordered to specifically perform some action or refrain from performing some action.

In the United States, the distinction between courts of law and courts of equity has mostly vanished. One jurisdiction where the distinction remains alive and well is Delaware. In the First State, the Court of Chancery, which handles a heavy caseload owing to the great number of corporations registered in Delaware, is an equitable court in the classical tradition. The Delaware Court of Chancery measures its jurisdiction in equity in terms of the jurisdiction that was exercised by the High Court of Chancery of Great Britain at the time the American colonies formally separated themselves from British authority.

For the most part, the remaining distinction between legal and equitable relief in American law concerns whether or not the party seeking the remedy will be entitled to a jury. A suit for damages – owing to its legal nature – can be accompanied by a demand for a jury trial. This is important for plaintiffs' attorneys who often anticipate receiving a more favorable result from a jury than they would get from a judge sitting alone. In contrast, the decision as to whether or not to grant an injunction is generally left to a judge sitting alone. By seeking an equitable remedy, a plaintiff may lose the right to a jury.

Damages

An award of damages is a legal remedy ordering the defendant to pay money to the plaintiff.

At common law, there are three types of damages: compensatory damages, punitive damages, and nominal damages. The most basic kind of damages award is for **compensatory damages**. These are damages to compensate the plaintiff for harm endured, and they are measured by the amount needed to make the plaintiff whole again.

Compensatory damages, the subject of the next chapter, are focused on the plaintiff and are concerned with the plaintiff's experience. By contrast, **punitive damages**, the subject of Chapter 25, are aimed at punishing the defendant. The focus is not on the plaintiff, but on the defendant – whether the defendant acted with intent, malice, recklessness, etc. Then there are **nominal damages** – damages in name only. As discussed in connection with intentional torts, nominal damages are a symbolic amount, such as $1, which indicates that the plaintiff has proved the invasion of a legally protected right, even if no other damages are proved.

Other sorts of damages are created by statute. The variety of statutory causes of action on the books corresponds to a variety of damages schemes. For instance, in copyright law, successful plaintiffs can get a measure of compensatory damages determined by the defendant's profits derived from the infringement, or the plaintiff's lost sales, whichever is larger. Sometimes this amount, however, is trifling or nonexistent. In such cases, copyright holders who registered their copyright claim early enough will have the option of electing what are called **statutory damages**. In copyright, statutory damages are a minimum of $750 per infringement, even if the defendant acted innocently and without any commercial effect. 17 U.S.C. § 504. For willful infringers, per-infringement statutory damages can swell to $150,000. *Id.* Statutory damages can be found in state statutes as well. In California, a statute providing a cause of action for unauthorized use of a person's name, image, or likeness – called right-of-publicity infringement – provides for statutory damages of a minimum of $750. Cal. Civil Code § 3344.

Another species of damages created by statute is **treble damages**, where the plaintiff receives a total award of three times the computed compensatory damages. Treble damages are allowed in cases analogous to those supporting an award of punitive damages in common-law torts. Examples of statutes authorizing treble damages are civil racketeering suits, civil antitrust violations, patent infringement, and trademark infringement.

Additur and Remittitur

When a jury reaches a verdict that assesses a certain amount of damages, the parties can argue to the court that the amount needs to be increased or decreased. An increase or decrease of a jury's computation of damages can be accomplished through the twin doctrines of additur and remittitur. ("Additur" rhymes loosely with "mad at her," and "remittitur" sounds something like "ree-mitt-it-urr.")

Additur and remittitur involve some slight of hand. A judge may not directly increase or decrease a jury verdict. Instead, at the urging of one party, the court can threaten to order a new trial unless the other party agrees to accept a less favorable assessment of damages.

With additur, a plaintiff moves for a new trial if she or he believes the defendant has been undeservedly blessed with a lowball jury verdict. Assuming the court agrees that the measure of damages is too low, the court offers the defendant the chance to submit to an increased award – augmented to the point the court thinks is appropriate – instead of having the court grant the plaintiff's motion for a new trial.

In truth, additur is not much of a choice. If the defendant insists on a new trial, the award could be even bigger. If the new trial produces the same verdict or one even more favorable to the defendant, then the defendant faces to prospect of yet another additur.

Remittitur is the opposite. The defendant moves for a new trial on the ground that the plaintiff's award of damages is unreasonably large. The court agrees that the measure of damages is too much. Before ordering a new trial, the court offers the plaintiff the chance to take a reduced damage award – winnowed down to what the court thinks is appropriate. Again, it's not much of a choice, because if the plaintiff does go through a new trial, there is nothing to stop the plaintiff from facing remittitur again.

Although it seems counterintuitive, remittitur, while lowering the amount of damages, can be seen as doing the plaintiff a favor, since going through a new trial likely would only make things worse.

Attorneys Fees

At the end of the day, the lawyers need to be paid. You might think it would be fair for the losing side of a lawsuit to pay the attorneys fees of the winning side. Indeed, that is how it is done in most of the world. In the United States, however, each party is expected to bear its own costs, including paying their own lawyers, unless there is a contract or statute that requires an award of such fees to the prevailing side. This doctrine that everyone pays their own lawyers is called **the American Rule**.

The default rule in nearly every other country is called **the English Rule**. Under the English Rule, the losing side pays the winning side's fees. This rule is founded on the idea that since legal representation is a practical necessity in a lawsuit, forcing the side that was right all along to absorb the cost of that representation is a wrong that should be avoided.

The English Rule arguably aids the administration of justice by keeping marginal claims out of court. Yet it can also have a disproportionate effect of discouraging poorer parties from suing wealthier ones. Just as wealthier people tend to spend more on their houses and cars, so too they tend to spend more on their lawyers. The same is true for large versus small businesses. As a result, under the English Rule, when a David takes on a Goliath, the parties face asymmetrical risks. If David unsuccessfully sues Goliath, Goliath's victory, coming with an award of fees, could wipe out David's business entirely. In contrast, if Goliath wants to sue David, it faces minimal risk. Even if Goliath loses, David's fees can be readily absorbed into the bottom line.

Not only are the risks disproportionate under the English Rule, so are the benefits. After all, the more a defendant spends on attorneys fees – crafting better arguments, filing more motions, digging deeper with research and discovery, etc. – the more likely it is that the defendant will win and not have to pay any of those costs. By the same token, comparatively richer plaintiffs face proportionally smaller disincentives to filing marginal lawsuits. Not only can they better absorb a loss, and not only can they can increase their odds of

winning through extravagant spending on lawyers, but they also stand a better chance of getting a favorable settlement, since the defendant is likely looking to get out early and cut its losses.

There seems to be little question that the English Rule would be fair if attorneys fees were always kept low and affordable, and if courts never reached an unjust result. The American Rule, however, takes a more realist attitude in this regard. The emphasis is on access to the courts and not repelling plaintiffs because of their inability to bear the risk of paying the other side's fees.

Despite the broad rejection of the loser-pays system in the United States, there is a well-recognized **bad-faith exception to the American Rule**. As a court in the District of Columbia explained,

> A court may award attorneys' fees against a party who has acted in bad faith, vexatiously, wantonly, or for oppressive reasons in connection with the litigation. This bad faith exception is intended to punish those who have abused the judicial process and to deter those who would do so in the future. Courts also may award attorneys' fees against a party who exhibits a willful disobedience of a court order. In awarding attorneys' fees, however, a party is not to be penalized for maintaining an aggressive litigation posture, nor are good faith assertions of colorable claims or defenses to be discouraged. In attempting to deter bad faith litigation through attorney fee awards, the court must scrupulously avoid penalizing a party for a legitimate exercise of the right of access to the courts. For this reason, the standards of bad faith are necessarily stringent. Under these stringent standards, the awarding of attorneys' fees for bad faith litigation is proper only under extraordinary circumstances or when dominating reasons of fairness so demand.

In re Est. of Delaney, 819 A.2d 968, 997-98 (D.C. App. 2003) (cites and internal quotes omitted).

The bad-faith exception is not generally motivated by a desire to help worthy parties. Instead, the idea is "to punish those who have abused the judicial process and to deter those who would do so in the future." *Synanon Found., Inc. v. Bernstein,* 517 A.2d 28, 37 (D.C. App. 1986).

In addition to the bad-faith exception to the American Rule, many statutory causes of action come with fee-shifting provisions.

Sometimes statutes give courts discretion to award fees to the prevailing party where doing so would serve the interests of justice. Such flexibility allows courts to follow a bear-your-own-fees model in close cases where both sides could have reasonably thought they were likely to prevail. Yet the court can order fees from a plaintiff who pursued a non-meritorious case or from a bratty, foot-shuffling defendant who insisted on being taken to court rather than paying what was owed.

Other statutes are more aligned with the straight-up loser-pays English Rule. An example of this kind of provision is found in California's right of publicity statute, Cal. Civil Code § 3344, which provides, "The prevailing party in any action under this section shall also be entitled to attorney's fees and costs."

The case of *Kirby v. Sega of America, Inc.,* 144 Cal.App.4th 47 (Cal. App. 2006) shows how such a provision can work. The plaintiff, Kierin Kirby, is a singer best known as the singer for the group Dee-Lite, which produced the 1990 one-hit-wonder "Groove is in the Heart." Kirby sued videogame-maker Sega for right-of-publicity infringement based on Sega's in-game depiction of a character named Ulala in "Space Channel 5," a video game first released in North America in 2000. Kirby alleged that Ulala's look was a ripoff of Kirby's style. Ulala sported a cheerleader-type midriff-exposing outfit with a prominent "5," worn with platform boots, pigtails, and a blue jet-pack. Kirby produced evidence of having worn cheerleader-type skirts, cropped tops with numerals on the chest, a blue backpack, hair in pigtails, and similar footwear. Kirby sued both under the common-law right of publicity and under Cal. Civil Code § 3344. Both claims are similar, although § 3344 offers some potential upside with

statutory damages in exchange for showing that the defendant "knowingly" appropriated the claimant's identity.

The case was close on many fronts, but Kirby lost on appeal. When she did, because she had alleged § 3344, she was ordered to pay attorneys fees of more than $608,000. The appeals court wrote:

> Kirby concedes section 3344's directive that fees "shall" be awarded to the prevailing party in a statutory appropriation action is clearly mandatory. Nevertheless, she argues the statute should be applied permissively and only in cases in which the suit is deemed frivolous or brought in bad faith or without substantial justification. Otherwise, she insists, the statute "presents a clear disincentive for plaintiffs to enforce … ." Her argument is misdirected. The mandatory fee provision of § 3344(a) leaves no room for ambiguity. Whether the course is sound is not for us to say. This is the course the Legislature has chosen and, until that body changes course, we must enforce the rule. The fee award was proper.

Kirby, 144 Cal.App.4th at 62.

On top of the $608,000 in fees from trial court proceedings, Kirby was ordered to pay the additional fees incurred by Sega in the appeal.

If Kirby had alleged only the common-law tort of right of publicity, she would not have been exposed to the downside of paying Sega's legal bills. It's an important lesson to remember in practice: Always think about liability for attorneys fees when suing on a contract or statutory cause of action.

Another important difference between the United States and other countries on the question of attorneys fees is whether **contingency fees** are allowed. Instead of paying an hourly rate for a lawyer, plaintiffs in the U.S. can hire a willing lawyer on a contingent basis, such that the lawyer only gets paid if the client obtains a recovery.

The permissiveness toward contingency fees in the United States is largely unique in the world. American plaintiffs' attorneys paid on a

contingency fee basis typically take 33% to 40% of a recovery. As a point of comparison, England allows "conditional fees," but at a lower rate – no more than double what the lawyer would have charged by the hour. Most other countries ban contingent fee arrangements outright.

The American contingent fee system allows plaintiffs to avoid some of the risks posed by lawsuits. Specifically, it allows plaintiffs to avoid the risk of uncompensated attorneys fees, should they lose their suit. This risk is instead shifted to the plaintiff's attorney. The attorney is able to absorb that risk by taking on a basket of representations, where winners will offset losers.

Those who laud the contingency fee system say offers a means for deserving plaintiffs to get representation regardless of their financial wherewithal. Those who condemn contingency fees say they encourage wasteful litigation.

Contingency fees do not cover litigation costs apart from attorney fees. That is, they do not cover filing fees and expert-witness fees. Plaintiffs remain responsible for these, although in many places lawyers may make an arrangement by which they advance those costs to a plaintiff with the anticipation that they will write them off as a loss in the event the plaintiff does not prevail.

Taxation of Damages

Taxation of damages can be complicated. In general, however, the tax treatment of compensatory damages is based on "the origin of the claim" – that is, what the damages are replacing. Damages for the cost of property repairs may not be taxed at all, or in some cases, they might be treated as capital gains. Damages for lost wages or lost business earnings are typically taxed as income.

An important exception to the origin-of-the-claim doctrine is § 104(a)(2) of the Internal Revenue Code, which excludes from taxable income compensatory damages "received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness." Any damages springing from physical injury are tax-free under this

provision. That includes medical expenses, pain and suffering, and even lost wages – so long as the primary injury sued on is physical.

Punitive damages and interest are taxable. This is so even if they stem from a physical injury.

Settlements are taxed the same as if they were judgments. And because tax treatment is different depending on what the damages are meant to address, when lawyers are negotiating a settlement, they should keep the tax consequences in mind. If the plaintiff and defendant agree to characterize settlement amounts in certain ways, that could have an effect on the plaintiff's tax burden. It is often a good idea to consult a tax attorney when thinking about how to structure a settlement.

Taxes and Fees: The Bottom Line

Attorneys fees can interact with taxes to produce some surprisingly low recoveries for plaintiffs. Suppose the plaintiff, having hired an attorney on a contingency-fee basis, receives a $1 million judgment. If the plaintiff owes taxes on this amount, the plaintiff owes the taxes on the *entire* amount – without first deducting the fees. The tax bill will probably around $350,000. Then the plaintiff must pay the attorney's contingency fee. Suppose that fee is 38% or $380,000. Subtracted from the $650,000 remaining after taxes, that leaves the plaintiff with $270,000. So far, the government and the lawyer have gotten far more than the plaintiff. But the plaintiff still does not get to keep all of what remains. The Plaintiff must pay the various litigation costs – charges for court filings, deposition stenographers, videographers, and, of course, expert witnesses. Expert fees in particular can be enormous. A plaintiff's experts might include scientists, accountants, and medical doctors. One study found that the average fee for a medical expert witness is $555 per hour, with many experts requiring a minimum number of hours for testifying at trials and depositions. Experts' travel costs must be reimbursed, and some require first-class travel as a condition of signing a retainer agreement. The more complex the case, the higher the expert fees are likely to be. In its patent infringement suit against Samsung, Apple

Computers paid an accounting expert a $1.75 million in fees to come up with a multi-billion damages figure to propose to the jury.

It all adds up. It is not uncommon that after paying taxes, attorneys fees, and litigation costs, a successful but unlucky plaintiff may net virtually nothing.

Injunctions

Aside from an award of money, plaintiffs can ask the court for an order compelling the defendant to undertake some action or refrain from undertaking some action. The generic form of this remedy is called an injunction, and it is equitable in character, meaning it is for the judge to grant, and not within the province of a jury.

Injunctions are not as common as damages awards in the tort context. But they are often the go-to remedy in property-based torts, where a plaintiff may want the court to enjoin future trespasses or nuisances. And, although rare, injunctions can be issued as a prophylactic measure in an incipient negligence context, where the plaintiff convinces the court that the defendant is unreasonably risking injury to the plaintiff.

In general, to obtain an injunction, the applicant must convince the court of three things: (1) the lack of an adequate remedy at law, (2) feasibility of enforcement, and (3) that the balance of hardships tilts in the plaintiff's favor. Let's look at each of these in more detail.

First, for an injunction to be appropriate there must be **no adequate remedy at law**. That is to say, in order to be entitled to an equitable remedy, the plaintiff must show that no legal remedy would sufficiently protect the plaintiff's interests. Usually this means showing that an award of damages would be inadequate to make up for the harm. Often, an injunction applicant will allege "irreparable harm," that is, harm that cannot be repaired later on with money. Loss of life, for instance, is irreparable harm. The destruction of property having sentimental value could also be considered irreparable harm.

Second, an injunction will only be ordered if it is **feasible to enforce**. That is, a court will not issue pointless injunctions. The court may

decline an injunction as infeasible where it lacks the jurisdiction necessary to enforce the injunction through contempt proceedings. Here is another point of contrast with the legal remedy of damages awards: When it comes to damages, courts will award them on a nominal basis, even though an award of $1 might well be called pointless.

Third is the sine-qua-non requirement for injunctions – the determination that **the balance of hardships** tilts in favor of the party seeking the injunction. In keeping with their character as equitable remedies, injunctions require a balancing of the equities, taking into account the relative burdens placed on the parties by the issuance of an injunction of the lack of one. Where a plaintiff is merely inconvenienced, while the defendant is heavily hamstrung in conducting normal business, then a court will deny an injunction as a remedy – even if the plaintiff's underlying claim is a winning one.

The federal courts and some state courts also explicitly require a showing that the injunction is in the public interest, or at least not contrary to it. *See*, *e.g.*, *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

While a regular injunction is a remedy ordered after a full trial, there is also the possibility of getting a **preliminary injunction** before trial. A preliminary injunction can be obtained right at the beginning of a case – long before the factual record is fully developed through the discovery process. The outcome of a preliminary injunction hearing can be dramatic, as a preliminary injunction normally will endure until the conclusion of trial. That means it might last years. To get a preliminary injunction, a plaintiff must establish a likelihood of suffering irreparable harm unless preliminary relief is ordered as well as a likelihood of eventually succeeding on the merits of the after the process of discovery and trial has been run to its conclusion. In addition, the balance of equities must tip in the plaintiff's favor and, where the courts require it, there must be a showing that the public interest is served by the injunction.

A preliminary injunction always requires prior notice be delivered to the defendant and a chance for the defendant to appear in court to

oppose the injunction. Usually court rules require delivery of notice at least several days before a hearing is held on the matter.

For plaintiffs who can't wait that long, there is the possibility of a **temporary restraining order**. A "TRO," as its called, can be issued, if necessary, on an *ex parte* basis – that is, without the other party being present or even notified. Because of the due process concerns, a TRO lasts only a very short time, in the range of 10 to 14 days – about the amount of time necessary to set up a proper preliminary injunction hearing. The requirements for a TRO are generally the same as for the preliminary injunction, with the exception of the relaxed notice requirement.

Problem: Injunction on Ivan

Patricia is irritated that Ivan, while on his way to school every day, trespasses over a portion of her land consisting of a three-foot-wide dirt strip. In addition to seeking nominal damages for past trespasses, Patricia wants an injunction to prevent future trespasses. Ivan complains that if he cannot walk over the dirt strip, he will have to walk an additional hour out of his way to and from school each day.

How should a court rule on a request for a temporary restraining order, preliminary injunction, and permanent injunction?

Other Legal and Equitable Remedies

In addition to damages, injunctions, and awards of fees, there are other types of remedies as well. Without going into detail, the following will give you an idea of the range of what is out there.

Some remedies are **restitutionary**. Instead of seeking to make a plaintiff whole after a loss, a restitutionary remedy seeks to take away from the defendant a wrongful gain. One form of such a remedy is **quasi-contract**, a legal remedy where a court orders the defendant to pay to the plaintiff the amount the plaintiff likely would have been able to get if the parties had negotiated a contract ahead of time. If a defendant were somehow to save $10,000 on transportation costs by trespassing over the plaintiff's land, the quasi-contract remedy would allow the plaintiff to get an award of $10,000 –despite having suffered no damage.

The legal remedy of **replevin** allows a plaintiff to use an abbreviated fast-track court process to get back a wrongfully seized chattel without having to go through a full trial. The corresponding legal remedy of **ejectment** allows the plaintiff a fast-track procedure to throw a trespassing defendant off of the plaintiff's land.

The equitable restitutionary remedy of an **equitable lien** enables a court to use its equity power to impose a lien on property of the defendant that is traceable to money or property misappropriated from the plaintiff. An equitable lien can be very advantageous for the plaintiff if the defendant is near insolvent, because lien holders have a preferred position in bankruptcy, putting them ahead of other creditors in the queue seeking to get debts satisfied.

A similar equitable remedy is the **constructive trust**, where the defendant is treated as holding the plaintiff's wrongfully taken property "in trust" for the plaintiff. This remedy allows a plaintiff to capture any increases in value of the property during the time the defendant is in possession of it, and, like an equitable lien, it also puts the plaintiff in a preferred position if the defendant declares bankruptcy.