



General Issues in Remedies

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Konomark
Most rights sharable

Law vs. Equity

Law vs. Equity, Historically

- Courts of law and courts of equity entertained different causes of action and dispensed different remedies
- Courts of law had juries, obeyed precedent, provided only certain remedies, notably damages, replevin and ejectment
- Courts of equity did not have juries, were not constrained by precedent, had broad authority to fashion remedies, notably injunctions

Law vs. Equity, Today

- Some state court systems still have separate courts of law and equity
- Most courts are unified, however, and consider both legal and equitable causes of action and dispense legal and equitable remedies.
- Legacies of the legal/equitable distinction persist, including a jury not being involved in the awarding of an injunction.
- Asking for an injunction or other equitable remedy can possibly surrender the right to a jury trial, so be careful.

Law vs. Equity, Relation to what we have been learning

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Law vs. Equity, Relation to what we have been learning

- Most of what we have been learning in torts descends from courts of law.
- If you think about it, battery, assault, negligence, trespass, etc. has all been about precedent, which is how courts of law work.

Damages

- An award of money
- Some kinds:
 - Compensatory damages
 - Punitive damages
 - Nominal damages
 - Statutory damages
 - Treble damages

Compensatory vs. Punitive Damages

Compensatory damages

- Focused on plaintiff
- To make plaintiff whole

Punitive damages

- Focused on defendant
- To punish defendant, make an example of defendant

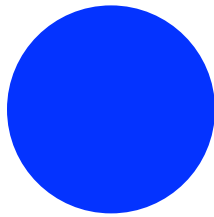
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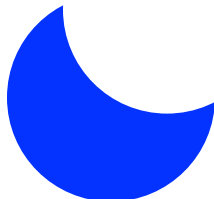
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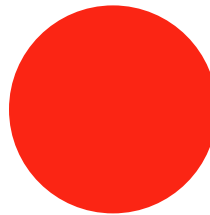
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Bad circle!

Remittitur and Additur

- Remittitur, a way for a court to indirectly decrease the damages awarded by a jury verdict by refraining from ordering a new trial if the plaintiff agrees to decreased damages.
- Additur, a way for a court to indirectly increase damages awarded by a jury verdict by refraining from ordering a new trial if defendant agrees to increased damages.

Award of Attorneys Fees

- English Rule: Loser pays.
- American Rule: Parties bear their own attorneys fees.
 - But loser can still be made to pay:
 - By contract
 - By statutory provision (particularly for statutory causes of action)
 - Bad-faith exception to American Rule
 - Where loser acted in bad faith in bringing the action; a vexatious litigant

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**Consider
asymmetricality of
risk with questions
of awarding
attorneys fees.**

Taxation of Damages

- Generally “origin of the claim”
- Exception: compensatory damages based on physical injury are excluded from taxable income IRC §104(a)(2).
 - Can include medical expenses, pain and suffering, lost wages
 - Punitives, even if springing from physical injury, are always taxable
- You must keep tax in mind when negotiating a settlement!
 - Don't be afraid to consult a tax attorney!

Taxes and Fees: The Bottom Line

Realistic example:

Verdict:	\$1,000,000
Taxes:	(-\$350,000)
Attorneys fees 38%:	(-\$380,000)
<u>Experts, travel, transcripts, etc.</u>	<u>(-\$150,000)</u>
Net recovery:	\$120,000

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Fees, taxes, and costs make a huge difference to what plaintiffs actually recover! (Litigation is a costly process.)

Injunctions

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An injunction is:

An order to do or not do something.

Injunctions

Requirements:

- No adequate remedy at law
 - Money won't make up for it
 - E.g., "irreparable harm"
- Feasible to enforce
 - Courts won't issue pointless injunctions
- Balance of hardships tips in P's favor
 - Balancing "the equities" is the quintessential function of a court sitting in equity

Injunctions

Examples:

- Don't show a movie.
- Don't come within 50 feet of someone.
- Tear down a building.
- Don't tear down a building.

Injunctions

Kinds (by effect):

- Mandatory
 - Do something.
- Prohibitory
 - Don't do something.

Injunctions

Kinds (by duration):

- Temporary restraining order (“TRO”)
- Preliminary injunction
- Permanent injunction

Injunctions

Permanent injunction

- Issued with judgment
- Lasts forever, or until it expires on its own terms.

Injunctions

Preliminary injunction

- Must be noticed
- Never ex parte
- Can be proceeded by hurry-up discovery
- Lasts until conclusion of trial
 - (Possibly years)
 - Can effectively decide some cases

Injunctions

Preliminary injunction

Standards:

- Varies by court, but generally:
- (1) A likelihood of success on the merits in obtaining a permanent injunction, and
- (2) A likelihood of suffering irreparable harm in the interim without obtaining the preliminary injunction

Injunctions

Temporary restraining order

- Can be obtained ex parte
- Usually only lasts 10 days, at most
 - (Until noticed hearing for preliminary injunction)
- When you need a court order FAST

Injunctions

Temporary restraining order Standard:

- Varies by court, but:
- Generally the same as for a PI, but with the added burden that it's okay that it be obtained ex parte

From the casebook ... p, 338

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?