



General Issues in Remedies

Torts
Eric E. Johnson
ericejohnson.com



Konemark
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

- 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

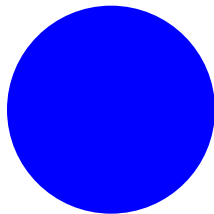
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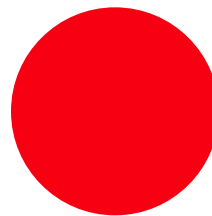
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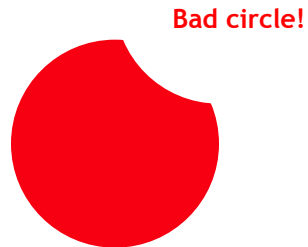
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Remittitur and Additur

- 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

Award of Attorneys Fees

- English Rule
- American Rule

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

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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)
Experts, travel, transcripts, etc. (-\$150,000)
Net recovery: \$120,000

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

Choose the choice ...

Your client is a retired schoolteacher. Tomatoes from a new variety she cultivated in her garden are stolen by a multi-billion-dollar agribusiness company that turns them into a new line of commercially available tomato seeds. Assume all of these causes of action have a 60/40 chance of succeeding. Which should you allege in your complaint?

- Trespass to land
- Trespass to chattels
- Conversion
- Accounting (which is an equitable cause of action)
- State statute § 9198(k) (which provides for treble damages and award fees to the prevailing party)

Choose the choice ...

Your client was injured in a car crash and her car was destroyed. Which settlement do you recommend?

- \$80,000 for medical expenses; \$20,000 for damage to the car and property inside it
- \$20,000 for medical expenses; \$80,000 for damage to the car and property inside it