



# General Issues in Remedies

Torts  
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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

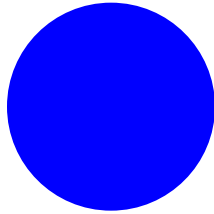
## Compensatory vs. Punitive Damages

### 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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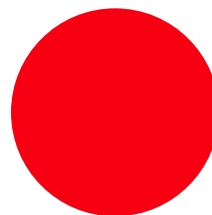
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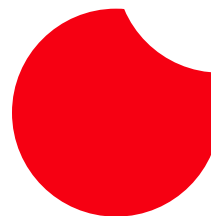
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Bad circle!

## 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)  
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

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Assuming it's appropriate to structure it either way (don't be afraid to check with your tax attorney), then the first alternative is better for tax purposes, because of IRC § 104(a)(2), which excludes compensatory damages based on physical injury from taxable income.

# Injunctions

## Injunctions

**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

## From the casebook ... p, 314

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 ... permanent injunction?

### Injunctions

#### Preliminary injunction Standards:

- Varies by court, but generally:
- (1) A likelihood of success on the merits in obtaining a permanent injunction (for which you use the regular injunction standards), 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