**Remedies for Torts**

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1. REMEDIES: AN INTRODUCTORY MAP
2. What is a ‘remedy’?

‘what courts do for claimants who come to them asking for help’: S Smith, *Rights, Wrongs, and Injustices: The Structure of Remedial Law* (OUP, 2019), p.19

‘…rulings issued as part of the resolution of a legal action’: Smith, p.19.

Remedies are a kind of *court order*

* + 1. Self-help ‘remedies’

The word ‘remedy’ is sometimes used other than to refer to a court ruling/court order, but more broadly to actions that a person is permitted to do, independently of a court order, to enforce their rights in the face of a violation or impending violation.

Our focus, however, is on remedies as court-orders granted in response to torts or threatened torts.

1. Classifications of remedies
2. Money remedies, e.g. damages v non-money remedies, e.g injunctions.
3. Remedies that enforce primary rights v Remedies that enforce secondary rights
4. A purposive or functional classification:
   1. Preventive (injunctions)
   2. Compensatory (compensatory damages)
   3. Restitutionary (disgorgement/account of profits)
   4. Punitive (exemplary damages)
   5. Symbolic (nominal damages)
   6. Determinative (declarations)

Our focus is on damages and injunctions.

1. COMPENSATORY DAMAGES
2. The basic principle

*Livingstone v Rawyards Coal* [(1879-80) LR 5 App Cas 25](https://www.lexisnexis.com/uk/legal/docview/getDocForCuiReq?lni=4JT8-8WN0-TXD8-60JJ&csi=296986&oc=00240&perma=true&elb=t), 39:

“that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation”.

Is compensation assessed differently in tort compared to contract?

No: the measure is the same (‘put the right-holder in the position they would have been had the wrong not occurred), it’s just the wrongs are different (in contract: breach of a promise, in tort, whatever the duty imposed by the tort).

Consider:

D sells C a ring, telling C that the ring contains a real diamond. D knows this is false. C buys the ring. It is worth £50. C paid £150. If the ring had been a diamond ring, it would have been worth £500.

Damages in tort? Damages in contract?

1. Limits on compensatory damages:

You will already have studied at least some of these rules earlier in the course, and we won’t be repeating that coverage here. The reason why these rules are relevant earlier and also now is that sometimes ‘causation’ and ‘remoteness’, for example, are relevant to *whether* a tort has been committed, and sometimes they are *also* relevant to quantifying a person’s liability in relation to an established tort. In that latter way, causation, remoteness etc are relevant to *remedial* questions.

* 1. Causation
     1. Duty to mitigate: if C unreasonably fails to mitigate their loss, this will break the chain of causation between D’s breach and that part of C’s loss.
  2. Remoteness
  3. *SAAMCO* (or ‘scope of duty’)
  4. Contributory negligence (see last class)
  5. Collateral Benefits

*Bradburn v Great Western Railway Co* (1874) LR 10 Ex 1

*Parry v Cleaver* [1970] AC 1

1. Compensation without loss?

User damages and negotiating damages

*Inverugie Investments Ltd v Hackett* [1995] 1 WLR 713

*One Step v Morris-Garner* [2018] UKSC 20, [25]-[30] – according to Lord Reed, user damages compensate for loss.

For discussion, see S Steel, ‘Damages without Loss’ (2023) 139 Law Quarterly Review 219 (available on SSRN)

Property damage cases

*Coles v Hetherton* [[2013] EWCA 1704](http://www.bailii.org/ew/cases/EWHC/Comm/2012/1599.html) [2015] 1 WLR 160

Compare: *Jobling v Associated Dairies* [1982] AC 794

What is the meaning of ‘loss’? Does tort law grant compensation in the absence of loss?

What is the justification, if any, for user damages? Consider *Inverugie*, and Lord Reed’s analysis in *One Step*.

Specific issues within compensation:

1. Aggravated damages

These are conceptualised as compensation for emotional distress when the defendant has behaved in an arrogant or high-handed manner in committing the tort or their post-tort conduct.

Oriental Daily Publisher Ltd v Ming Pao Holdings Ltd (2012) 15 HKCU 1952

Aggravated damages are part of the compensatory award and may be granted to “compensate for additional injury caused to the plaintiff’s feelings by the defendant’s conduct of the action, as when he persists in an unfounded assertion that the publication was true, or refuses to apologise, or cross-examines the plaintiff in a wounding or insulting way”. (Ribeiro PJ.)

J. Murphy, “The Nature and Domain of Aggravated Damages” [2010] CLJ 353 (arguing that aggravated damages compensate for infringement of a person’s dignitary interest)

1. Damages for non-pecuniary loss more generally

These are divided into: (i) pain and suffering; (ii) loss of amenity

How are these kinds of loss given a monetary value? In personal injury cases, the judges apply ‘guidelines’ which fix a ‘tariff’ for particular kinds of injury. For instance, total blindness might be valued under these guidelines at 2.5 million HKD. These awards could in theory be adjusted up or down to reflect the greater or lesser than average pain/loss of amenity suffered by a particular claimant. In practice, there is a significant amount of ‘standardisation’ of these awards.

*Wise v Kaye* [1962] 1 QB 638

*West v Shepherd* [1964] AC 326

An unconscious person will be spared pain and suffering and will not experience the mental anguish which may result from knowledge of what has in life been lost or from knowledge that life has been shortened. The fact of unconsciousness is therefore relevant in respect of and will eliminate those heads or elements of damage which can only exist by being felt or thought or experienced. The fact of unconsciousness does not, however, eliminate the actuality of the deprivations of the ordinary experiences and amenities of life which may be the inevitable result of some physical injury. (Lord Morris.)

1. NON-COMPENSATORY DAMAGES AWARDS

(a) Nominal damages

*Constantine v Imperial Hotels* [1944] KB 693

Is there a good justification for nominal damages?

(b) Exemplary or punitive damages

Hong Kong appears to follow English law in restricting the availability of exemplary damages to three categories of case, as established by *Rookes v Barnard* [1964] AC 1129 (see Lord Devlin’s speech):

1. Oppressive, arbitrary, or unconstitutional acts of government servants
2. Wrongful conduct calculated to yield a benefit in excess of the compensation likely to be payable to the plaintiff

*Cassell & Co v Broome* [1972] AC 1027

1. Statutory rules permitting punitive damages

No ‘cause of action restriction’: *Kuddus v CC of Leicestershire Constabulary* [2001] UKHL 29, [2002] 2 AC 122

Even if the case falls within (i)-(iii), exemplary damages will only be awarded if other remedies are inadequate to punish: *Cassell* (the ‘if, but only if’ rule), and only if the defendant’s conduct is sufficiently culpable.

Are there coherent limits on punitive damages in tort? In particular, does it make sense to limit their availability to the three *Rookes* categories?

Is punishment a legitimate aim of tort law?

The procedural safeguard(s) objection

The windfall/no right objection

(c) Account of profits [Sometimes called: ‘Disgorgement’, and sometimes called ‘Restitutionary’ damages]

*Oughton v Seppings* (1830) 1 B & Ad 241, 109 ER 776

*Devenish v Sanofi-Aventis* [2009] 3 All ER 27, [2009] Ch 390 – an account of profits *only* available for ‘proprietary’ torts

Cf *AG v Blake* [2001] AC 268 (account of profits available in exceptional cases for breach of contract)

Is it ever possible to recover the profits a person makes from committing a tort? Should such a remedy only available if the tort is ‘proprietary’ in character?

1. DAMAGES AND DEATH

**(i) *Law Amendment and Reform Ordinance (Cap 23)***

**s.20(1) preserves victim’s right to sue tortfeasor for the benefit of the victim’s estate (excluding certain causes of action, e.g. defamation)**

Damages compensate for loss suffered by victim until their death.

**(ii) *Fatal Accidents Ordinance (Cap 22)***

The Fatal Accidents Ordinance creates rights of action for the tort victim’s *dependants* in cases in which the former has been caused to die by the tort.

* + - 1. ***Claim for loss of support to ‘dependents’***

*E.g. Tortfeasor* wrongfully kills *Parent* who paid *Child* a yearly sum of $50,000 HKD, and who would have continued to do so but for their death. *Child* can recover the loss of this yearly payment.

*Chavez v Fong Ka Yiu* [2001] 3 HKLRD 1

*Who are ‘dependants’?*

**Defined in s 2(1) of the Ordinance**, includes: surviving spouse, or former spouse or person whose marriage was declared void; surviving concubine taken before 7 October 1971; surviving unmarried, heterosexual cohabiting partner who had been cohabiting for the 2 previous years and living as the husband or wife of the deceased; any parent (or step-parent) of the deceased; any child, step child or other descendant of the deceased; any siblings, aunts, uncles and cousins;

any godchild or godparent of the deceased according to Chinese custom.

***B. Claim for bereavement damages***

s.4 of FAO confers a claim for bereavment damages. It is excluded if the person seeking the damages has already recovered a sum for loss of society under s.20C(1) of the LARO.

As of 2023, the sum is: $242, 000.

For the list of persons who can sue for such damages, see s.4(2). The damages are split equally in the event of multiple persons being entitled: s.4(4)

1. ***Funeral expenses***

Under s 6(5) of the FAO, the dependants may recover for funeral expenses which are actually incurred.

1. INJUNCTIONS

*Lawrence v Fen Tigers* [2014] UKSC 13, [2014] AC 822

Mandatory v prohibitory injunctions

Mandatory = (roughly) duty to do a positive act

Prohibitory = (roughly) duty not to do an act

The victim of a tort is generally entitled to a prohibitory injunction in torts against land, but this entitlement can be defeated in various circumstances: see *Lawrence*. Mandatory injunctions are less readily available.

Here are two important examples: (i) when the effect of the injunction will be ‘oppressive’ on the defendant, the damage to the claimant’s rights is small and can be adequately compensated by a small money payment (*Shelfer v City of London* [1895] 1 Ch 287), and (ii) when there is an overriding public interest (e.g. *Dennis v Ministry of Defence* [2003] EWHC 793).

Should injunctions be available as a default remedy for all torts?

Are the courts right to take into account public interest considerations in deciding whether to grant an injunction?

Quia timet = an injunction awarded in anticipation of a future wrong which not yet occurred (can be mandatory or prohibitory).

J Murphy, “Rethinking Injunctions in Tort Law” (2007) 27 *OJLS* 509-.

1. ELECTION BETWEEN REMEDIES

Sometimes the award of one remedy will wholly or partly fulfil the function of another remedy. In such cases, an election will need to be made between the ‘overlapping’ remedies.

For example:

Suppose you steal my watch and sell it for $1,000. My watch is in fact only worth $500. If I sue you for the profits you made from the sale (restitution), I can’t *also* recover $500 in compensation for my loss. I need to choose between compensation and restitution. This is because compensation *also* has the effect of reducing the defendant’s profit, and a claim for profit *also* has the effect of reducing the claimant’s loss.