

The following excerpt is from the Introduction to **REMEDIES: CASES AND PROBLEMS 3d** edition, by Elaine W. Shoben, William Murray Tabb, and Rachael M. Janutis, Foundation Press, 2002.. It provides the structure of the book through the introduction to the subject.

## **BASIC REMEDIAL TOOLS**

### **A. TYPES OF REMEDIES**

The study of remedies is concerned principally with the nature and the measurement of relief to which a party may be entitled. An appreciation of the nature of each legal and equitable remedy includes an understanding of the prerequisites for entitlement to it. It is not sufficient to establish the violation of a substantive right; a plaintiff must also establish the basis for any desired remedy.

A remedies course is a unique combination of substance and procedure because the subject focuses upon declaration and enforcement of rights, compensation for past violations of rights, and prevention of future threatened harms. As the name suggests, Remedies is a multi-faceted field that draws principles from many legal disciplines. The study is simultaneously practical and theoretical because the subject examines unifying themes and problems with relief across many substantive areas of the law while always focusing upon the important "bottom line" for parties in litigation.

Multiple substantive claims may spring from a single core of facts and several choices of remedies may arise from a single claim. There are four basic types or classifications of remedies: (1) coercive remedies, (2) damages, (3) restitution, and (4) declaratory relief. The processes and principles by which the most effective remedies are selected, and the relationship of alternative remedies to each other, are the central themes of this casebook.

*Coercive Remedies.* A coercive remedy, such as an injunction or specific performance order, is available from a court sitting in equity. The judge determines whether the plaintiff is entitled to the "extraordinary relief" of an order commanding the defendant to do or refrain from doing specific acts. (Chapters 3 and 4) These remedies, like all equitable ones, are subject to the equitable defenses, including unclean hands, laches, estoppel, and unconscionability. (Chapter 5)

Upon a compelling showing, a plaintiff may receive injunctive relief even before full trial on the merits. A preliminary injunction gives the plaintiff temporary relief pending trial on the merits. Similarly, a temporary restraining order affords immediate relief pending the hearing on the preliminary injunction. The principle behind both of these types of interlocutory relief is to preserve the *status quo* to prevent irreparable harm. The plaintiff must make a strong showing of the necessity for such relief. (Chapter 6)

A coercive remedy is backed by the contempt power. A disobedient defendant can be jailed or fined or required to compensate the plaintiff for losses incurred by the willful disobedience of the order. (Chapter 7)

In modern law there are three types of injunctions in addition to preventive ones: restorative injunctions, prophylactic injunctions, and structural ones. A restorative injunction principally operates to correct the present by undoing the effects of a past wrong. The notion of "restoring" means that it focuses not only prospectively, as does the traditional preventive injunction, but also retroactively. A prophylactic injunction seeks to safeguard the plaintiff's rights by directing the defendant's behavior so as to minimize the chance that wrongs might recur in the future. A structural injunction, such as a school desegregation order, derives its name from the involvement of the courts in the institutional policies and practices of the defendant entities. (Chapter 8)

Special problems with fashioning injunctive relief arise in cases involving prior restraints of speech, abatement of nuisances orders, and injunctions of crimes. In addition to the common law limitations that have evolved in such areas, the legislature occasionally affects the process of judicial discretion in these areas and others. Statutes may prohibit some remedies in some contexts; or they may provide for some remedies but not others; or some rare statutes mandate particular relief, such as an injunction, in circumstances that would otherwise be left to the court's discretion. (Chapter 9)

*Damages.* The purpose of the damages remedy is to compensate plaintiffs for losses sustained in violation of their rights. Once a plaintiff has established both the claim in substantive law and the entitlement to a particular type of damages, the problem of measurement remains. For example, if a car is severely damaged in an automobile accident, is the appropriate measure of damages the cost of repair or the diminution in fair market value of the car? (Chapters 10 and 11) Similarly, certain adjustments may be made to the award, such as to account for the use and changing value of money in the awards for personal injury victims with permanent injuries. (Chapter 12)

The common law imposes certain limitations on damages. They cannot be too remote, speculative, or uncertain. (Chapter 13) Other forms of limitation come from rules such as the collateral source rule and the avoidable consequences rule. (Chapter 14)

There are limitations on the types of losses that a plaintiff can claim; not all losses are compensable ones. Substantive law imposes restrictions on certain types of losses, such as the restrictions on the recovery of mental distress damages in the absence of physical injury and the limitations on recovery of purely economic losses. Similarly, liquidated damages provided by contract are not always recoverable. (Chapter 14)

The only exception to the compensation goal of damage law is punitive damages. These damages, which are also called exemplary damages, are designed to punish and deter wrongdoers in cases involving egregious conduct. (Chapter 15)

*Restitution.* The goal of restitution is to restore property to its rightful owner by returning the plaintiff to a position held before a wrong, or to disgorge from a defendant any unjust enrichment occasioned by the wrong to the plaintiff. The recovery may or may not involve money, but its goal is not a compensatory one. The measurement of restitution is the defendant's gains rather than the plaintiff's losses. For example, an embezzler who purchases land with the misappropriated money is not allowed to keep any profit from the investment in the land. A plaintiff may receive the land itself by imposition of a constructive trust. If money profits can be traced, those profits can be received. The plaintiff thus may receive more than was lost in the original embezzlement, but the defendant wrongdoer is prevented from being enriched by his own intentional wrong. Other types of restitutionary remedies include equitable liens, rescission, and suits in assumpsit for quasi-contract.

A distinction must be made between substantive restitution and remedial restitution. Substantive restitution concerns the entitlement to a restitutionary remedy: courts evaluate whether the defendant has acquired or holds a benefit which, if retained, would constitute unjust enrichment. Remedial restitution concerns the measurement of that remedy. (Chapters 16 and 17)

*Declaratory Remedies.* The purpose of a declaratory remedy is to obtain a declaration of the rights or legal relations between the parties. This remedy is often used to determine the constitutionality of a statute or to construe a private instrument so that the interested parties may obtain a resolution of the dispute at an early stage. Federal and state statutes provide that declaratory relief is to be liberally administered, but the parties must demonstrate a justiciable controversy rather than one of a hypothetical or advisory nature. (Chapter 20)

Nominal damages (Chapter 20) also serve to declare the relative rights of the parties. They are awarded when a plaintiff establishes a substantive claim but cannot establish damages.

Other areas important to the study of remedies are jury trial rights and attorneys' fees. Under the Seventh Amendment there is a right to a jury trial in legal cases but not equitable ones. Although this amendment does not apply to the states, the states generally follow that same distinction. Differences between federal and state law occur in some areas, however, such as cases where there are mixed claims of law and equity. (Chapter 18)

The American Rule on attorney fees is that parties bear their own costs of litigation. There are a few common law exceptions to this rule, and several important statutory ones. The major area of statutory change is in the area of civil rights. Further statutory changes have been proposed, including a "loser pays" model. (Chapter 19)

## **B. REMEDIES AT LAW AND IN EQUITY**

The term "to do equity" in everyday speech implies that a decision-maker has reached a fair and impartial result in a conflict. An "equitable result" usually means a resolution that does not come from established principles but simply derives from common sense and socially acceptable notions of fair play. In the judicial system this popular concept of "equity" is not the

essence of equitable jurisprudence; equity refers to a system of jurisprudence distinguishable from the system "at law." Although the judge sitting in equity has discretion whether to allow a particular remedy, that process is guided by principles established by *stare decisis*.

Equity was originally a separate court system that afforded relief to petitioners who had no adequate remedy at law because of some harsh legal doctrine. Sometimes a remedy at law was unavailable because the cause of action was not one recognized at law, such as shareholders' derivative actions. Sometimes petitioners came to equity for protection from the legal enforcement of contracts. Equity was the original source of concepts such as promissory estoppel and unconscionability. Today those historically equitable doctrines have been incorporated into legal jurisprudence as well. Indeed, in most American jurisdictions there has been a merger of law and equity such that one no longer thinks of two separate systems of justice.

Despite the diminished importance of recognizing the substantive contributions of equity, the concept of equitable remedies distinct from legal ones remains important. Equitable remedies include flexible coercive orders such as injunctions and specific performance orders. Some restitutionary remedies are equitable, such as constructive trusts or rescission and restitution in contract.

The most prevalent legal remedy is damages. Some restitutionary remedies are also legal, such as quasi-contract. In a merged system of law and equity, a plaintiff may seek both legal and equitable remedies in the same claim. The importance of the distinction between legal and equitable remedies, however, lies with the availability of a jury trial.

The Seventh Amendment of the Constitution provides that there is a right to trial by jury for causes "at law." There is no similar right to trial by jury for actions in equity. In the federal system, this constitutional right has been interpreted to mean that causes of action seeking legal remedies as opposed to equitable ones must be afforded trial by jury. An action seeking only equitable remedies may be tried by the judge without a jury, although an advisory jury can be impaneled.

The United States Supreme Court has held that it is the type of remedy that controls jury trial rights rather than the historical origin of the substantive right. Moreover, if a plaintiff presents a mixed claim of law and equity, the legal issues must be tried first by the jury and any remaining equitable issues may be tried by the judge in a manner not inconsistent with the jury verdict. Both plaintiffs and defendants possess jury trial rights, which may be waived.

In the state court systems the right to trial by jury is often different. The Seventh Amendment has not been held to apply to the states. Some states have constitutional provisions of their own affecting the right, but others rely entirely upon historical precedent. Cases in which the plaintiff seeks only legal remedies usually entitle the parties to trial by jury; cases seeking only equitable remedies do not. In a merged state court system, a mixed claim of legal and equitable remedies may not entitle the parties to a jury trial if the primary character of the case is equitable. The doctrine of "equitable clean-up" may control whereby the judge as trier of

fact in equity may decide also any incidental damages issues.

### C. INTRODUCTORY REMEDIES PROBLEMS

Consider the following problem concerning the injury or possible destruction of a farm's productivity. At the end of the problem there are a number of questions concerning appropriate remedies. The notes that follow give capsule summaries of how related problems have been resolved by the law in the past. The purpose of the problem is to illustrate recurring remedial problems; future chapters will provide greater depth on these issues.

#### **Problem: The Waste Lagoon**

Jim and Joan Pollard own a farm on which they grow feed corn. A few years ago Krystal Refining Co. constructed wastewater lagoons on the land adjacent to the Pollards' farm land. Last year the Pollards began experiencing crop losses on the strip of land immediately adjacent to the Krystal Refining lagoons. Although the crops on other fields did very well that year, the corn in the field adjacent to the lagoons did very poorly. The Pollards hired a soil analyst who informed them that a new chemical recently introduced into Krystal's refining process has seeped from the wastewater lagoons into the soil on the Pollards' land. This chemical was responsible for the poor crop last year. Moreover, the expert informed the Pollards that the increased presence of this chemical may now have irreversibly precluded that strip for any farm cultivation. Only expensive additional testing could determine the permanency of the damage.

*Legal Remedies.* Assuming that the Pollards can establish a cause of action against Krystal Refining, what should be the available remedies? First consider that the damage to the land may be reversible, but only at enormous cost. Should the high cost of restoration be the measure of damages? What if that amount exceeds the fair market value of the land? Would it matter if the Pollards depended upon farming for their livelihood and there were no other acres for sale in the vicinity? If the court rejects the cost of restoration as the measure of damages, what are alternative measures?

Now consider the result if the chemical has caused irreversible injury. What should be the measure of damages? Is it appropriate to award the fair market value of the land when the land itself—as opposed to its productivity—has not been destroyed?

What measure of damage should be used for the injury to last year's crops? Consider both the appropriate measure of damages and the kind of evidence that the plaintiffs should have to produce to support their claim.

Who should have to pay for the expensive test in anticipation of litigation to determine the permanency of the damage to the soil? What if the Pollards do not pay for the test but simply plant again the next year to let the new crop itself be the "test" of the soil's productivity while litigation is pending? Should they recover damages for losses to this new crop as well?

*Equitable Relief.* Should a court issue an injunction against Krystal to prevent future use

of the waste lagoons? Should there be an injunction limiting the use by prohibiting the injurious chemical? Should Krystal be required to drain the lagoons currently in existence? Would it matter if a state or federal environmental protection statute expressly prohibited the discharge of the chemicals into water bodies such as the lagoon? Conversely, what if a zoning ordinance permitted the operation of the chemical plant as it is presently being conducted? Consider, with respect to these questions, whether it would matter if the cost of draining the lagoon or seeking alternative disposal of the waste would exceed the value of the Pollards' land.