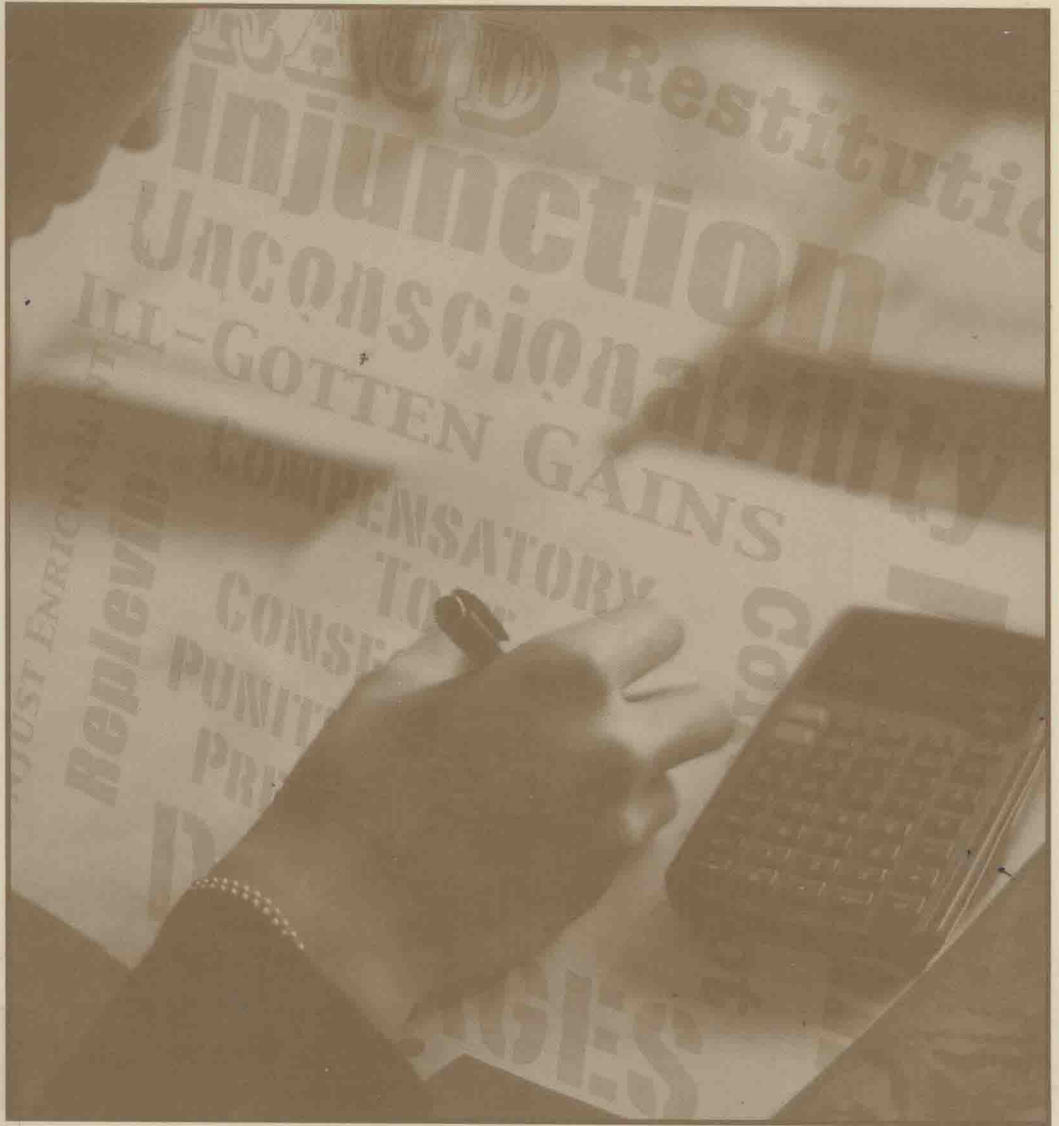


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Remedies

Richard L. Hasen



EXAMPLES & EXPLANATIONS



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Remedies

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Loyola Law School, Los Angeles

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Wolters Kluwer

Law & Business

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This book owes an intellectual debt to two exemplary scholars and teachers. In 1997, Laurie Levenson, then Loyola Law School's associate dean, agreed to let me come as a visitor to teach Remedies, a course I had never taught before. I was anxious to get back to L.A., and I was willing to come even if it meant teaching a course I did not especially want to teach. Now, having taught the course numerous times, it has become one of my favorites to teach, pulling together interesting tidbits from all parts of the first-year curriculum, and allowing me to move back and forth between theory and practice with seasoned law students.

The other scholar to whom I owe a debt is Doug Laycock, whose Remedies casebook is a tremendous teaching tool and a wonderful resource. That casebook (and its Teacher's Manual) was my bible in 1997 and it has guided me in understanding Remedies both in and out of the classroom. Doug also has been consistently responsive to e-mail questions I have peppered him with over the years. Anyone familiar with Laycock's book will see the influence his view of Remedies has had on mine.

I also owe a debt to my Remedies students, beginning with my 1997 guinea pigs. I was assigned the 8:10-10:10 P.M. slot, twice a week, for the course. I expected a group of tired, graduating students with little interest in the course. To my pleasant surprise, the students were intellectually engaged, serious, and blessed with an understanding of the real world that only evening students have. For my Remedies students through the years, the course is really a nice capstone, bridging the law school and real worlds. I have learned a great deal from my students.

This book is much stronger because of the excellent research assistance of Vince Shang and Christina Wang, with additional assistance from Danielle De Smeth, Tony Sain, and Joel Yanovich, and the terrific library assistance of Lisa Schultz and the Loyola Law School library staff. Lynn Churchill and Barbara Roth at Aspen have provided constant encouragement and sage advice. Betty Kinuthia, Valda Hahn, and the Loyola faculty support staff provided wonderful administrative support. A slew of anonymous reviewers provided important suggestions and corrections to the manuscript. All remaining errors are mine alone.

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Los Angeles
March 2007

How to Use This Book

No matter how your professor starts this course, you should begin with Chapter 1. It sets forth some basic terminology and ideas that are used throughout the book, including the important “rightful position” standard. After Chapter 1, you can begin at the beginning of Part I (on damages), Part II (on injunctions and other equitable remedies), Part III (on restitution), or Part IV (presenting the remedies topics of punitive damages, declaratory judgments, ancillary (or helping) remedies, and remedial defenses). Within each Part (except for Part IV), I expect that you will begin with the first chapter in each Part, which defines basic concepts and sets the stage for what comes next.

You should save the last chapter, Chapter 19, for the end of the course. It is to help you with issue spotting and choosing remedies skills that you cannot test until you first master the material in the first 18 chapters.

For the most part, this book follows standard Bluebook citation format. However, I usually avoid putting in pin cites in an effort not to clutter up the text, and I don’t always note when I’ve deleted internal citations or footnotes. Before quoting any material in this book, be sure to check the original source. There are two sources that I cite so often that I just use a short form. I cite DAN B. DOBBS, *LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION* (1993) simply as DOBBS § _____. I cite DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* (3rd ed. 2002) simply as LAYCOCK _____.

Summary of Contents

<i>Contents</i>	xii
<i>Acknowledgments</i>	xvii
<i>How to Use This Book</i>	xix

Chapter 1	Read This Chapter First: Why Remedies? What Remedies?	1
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PART I. COMPENSATORY DAMAGES

Chapter 2	Introduction to Damages: Show Me the Money	13
Chapter 3	Tort Damages	35
Chapter 4	Contract Damages	59
Chapter 5	The Unusual: Expectancy Damages in Tort and Reliance Damages in Contract	95
Chapter 6	Assuring the Rightful Position: A Look at Certainty, Mitigation, Offsetting Benefits, and the Collateral Source Rule	113

PART II. EQUITABLE REMEDIES

Chapter 7	Injunctions and Other Equitable Remedies: Stop Me Before I Harm (Again)!	137
Chapter 8	Advanced Topics in Injunctions	167
Chapter 9	Preliminary Injunctions and Other Preliminary Relief	185
Chapter 10	Enforcing the Injunction: The Power of Contempt	211

PART III. RESTITUTION

Chapter 11	No Gain, No Pain: Restitution and the Unjust Enrichment Principle	237
Chapter 12	Unjust Enrichment: Measuring Ill-Gotten Gains and Apportioning Profits	263
Chapter 13	Advanced Topics in Restitution: Constructive Trusts, Equitable Liens, and Other Restitutory Remedies	281
Chapter 14	Rescission and Reformation	309

PART IV. OTHER IMPORTANT REMEDIES CONCEPTS

Chapter 15	Dishing It Out: Punitive Damages and Their Constitutional Limits	325
Chapter 16	Declaratory Judgments and Related Remedies	347
Chapter 17	Help! I Need Somebody: Ancillary Remedies	363
Chapter 18	Remedial Defenses	383
Chapter 19	Putting It All Together: Taking a Remedies Exam	401
	<i>Table of Cases</i>	427
	<i>Table of Books and Articles Cited</i>	433
	<i>Table of Statutes, Constitutional Provisions, Restatement Sections, and Uniform Commercial Code (UCC) Provisions</i>	435
	<i>Index</i>	437

Contents

<i>Acknowledgments</i>	xvii
<i>How to Use This Book</i>	xix

Chapter 1	Read This Chapter First: Why Remedies? What Remedies?	I
1.1	Why Should a Law Student Care About Remedies?	1
1.2	Why Should a Lawyer Care About Remedies?	2
1.3	Remedies as the Lawyer's Toolbox	3
1.4	The Categories of Remedies	4

PART I. COMPENSATORY DAMAGES

Chapter 2	Introduction to Damages: Show Me the Money	13
2.1	Compensatory Damages as Substitutionary Relief	13
2.2	Compensatory Damages and the Rightful Position Standard	15
2.3	Valuing Compensatory Damages	19
2.3.1	Damages in a Well-Functioning Market	19
2.3.2	Damages Without a Well-Functioning Market	23
2.4	Nominal Damages	25
2.5	Time and the Value of Money	26
2.5.1	Prejudgment and Postjudgment Interest	26
2.5.2	Present Value	28
Chapter 3	Tort Damages	35
3.1	Introduction to Tort Damages	35
3.2	Pain and Suffering, Emotional Distress, and Other "Noneconomic" Damages	37

Contents

3.3	Special Rules for Wrongful Death, Survivor, and Loss of Consortium Actions	41
3.3.1	Wrongful Death	41
3.3.2	Survival of Personal Injury Actions	43
3.3.3	Loss of Consortium Claims	44
3.4	Presumed Damages (Defamation)	45
3.5	Other Limits on Tort Damages: Proximate Cause and the Economic Harm Rule	47
Chapter 4	Contract Damages	59
4.1	Introduction to Contract Damages: Expectancy vs. Reliance	59
4.2	The Theory of Efficient Breach	62
4.3	Consequential Damages	64
4.4	Liquidated Damages and Other Contractual Limitations on Remedies	69
4.5	Contract Damage Issues under Article 2 of the Uniform Commercial Code	72
4.5.1	Buyers' Remedies	73
4.5.2	Sellers' Remedies, Including the "Lost Volume Seller"	77
4.5.3	UCC Article 2 Limitations on Remedies	81
Chapter 5	The Unusual: Expectancy Damages in Tort and Reliance Damages in Contract	95
5.1	Review of the Usual Tort and Contract Damage Measures	95
5.2	Expectancy Damages in Tort? The Special Case of Fraud	96
5.3	Reliance Damages in Contract?	100
Chapter 6	Assuring the Rightful Position: A Look at Certainty, Mitigation, Offsetting Benefits, and the Collateral Source Rule	113
6.1	The Certainty Requirement	113
6.2	The Mitigation Requirement	116
6.2.1	Avoidable Losses: Rules and Economic Rationale	116
6.2.2	Mitigation under Article 2 of the U.C.C.	120
6.2.3	What Are "Reasonable" Steps in Mitigation?	121
6.3	Offsetting Benefits	123
6.4	The Collateral Source Rule	126

PART II. EQUITABLE REMEDIES

Chapter 7	Injunctions and Other Equitable Remedies: Stop Me Before I Harm (Again)!	137
7.1	Introduction: Injunctions as Specific Relief	137
7.2	Requirements for Injunctions, the Origins of Equitable Relief, and a Note on Replevin	140
7.3	The Propensity Requirement and the Scope of Injunctions	143
	7.3.1 Propensity, Ripeness, and Mootness	143
	7.3.2 The Proper Scope of Injunctive Relief	146
7.4	The Irreparable Injury Requirement	148
7.5	Other Policy Reasons for Courts to Deny Injunctions	150
Chapter 8	Advanced Topics in Injunctions	167
8.1	Structural Injunctions	168
	8.1.1 Structural Injunctions, the Rightful Position, and the Roving Commission to Do Good	168
	8.1.2 Consent Decrees	172
	8.1.3 How Congress May Limit Remedies: The Prison Litigation Reform Act Example	174
8.2	Modifying Existing Injunctions	177
8.3	Injunctions and Third Parties	179
Chapter 9.	Preliminary Injunctions and Other Preliminary Relief	185
9.1	Introduction to Preliminary Relief	185
9.2	Preliminary Injunctions (and Stays)	188
9.3	Injunction Bonds, with a Note on <i>Ne Exeat</i>	196
9.4	Temporary Restraining Orders	200
Chapter 10	Enforcing the Injunction: The Power of Contempt	211
10.1	Introduction to the Contempt Power	211
10.2	Civil Coercive Contempt	213
10.3	Criminal Contempt	217
10.4	Civil Compensatory Contempt	219
10.5	The Collateral Bar Rule (More on Criminal Contempt)	222
10.6	Contempt and Third Parties	225

PART III. RESTITUTION

Chapter 11	No Gain, No Pain: Restitution and the Unjust Enrichment Principle	237
11.1	Introduction to Restitution	237
11.2	The Meaning of “Unjust Enrichment”: When Is Restitution Available?	241
11.2.1	Introduction	241
11.2.2	Benefits Conferred by Mistake	242
11.2.3	Benefits Conferred by Transferor with Defective Consent or Authority	244
11.2.4	Benefits Conferred Intentionally in Emergency, by Officious Intermeddlers, and by Contract	245
11.2.5	Benefits Obtained Through Tortious or Otherwise Wrongful Conduct	251
11.3	Why Allow for the Recovery of Defendant’s Gains in Cases of Unjust Enrichment?	253
11.4	More on Losing Contracts: Should the Contract Price Be the Cap?	255
Chapter 12	Unjust <i>Enrichment</i>: Measuring Ill-Gotten Gains and Apportioning Profits	263
12.1	Measuring Ill-Gotten Gains	263
12.2	Apportioning Profits	270
Chapter 13	Advanced Topics in Restitution: Constructive Trusts, Equitable Liens, and Other Restitutionary Remedies	281
13.1	Constructive Trusts	281
13.1.1	Constructive Trusts: The Basics	281
13.1.2	Advanced Tracing Problems	287
13.2	Equitable Liens	291
13.3	Other Restitutionary Remedies	294
13.3.1	Replevin and Ejectment	294
13.3.2	Subrogation, Contribution, and Indemnity	296
Chapter 14	Rescission and Reformation	309
14.1	Introduction: Are Rescission and Reformation Restitutionary Remedies?	309

Contents

14.2	The Remedy of Rescission	310
14.3	The Reformation Remedy	315
14.4	The Choice Between Rescission and Reformation	317

PART IV. OTHER IMPORTANT REMEDIES CONCEPTS

Chapter 15	Dishing It Out: Punitive Damages and Their Constitutional Limits	325
15.1	Introduction to Punitive Damages	325
15.2	Punitive Damages and Contract	331
15.3	Constitutional Limits on the Amount of Punitive Damages	335
Chapter 16	Declaratory Judgments and Related Remedies	347
16.1	Introduction: Why Declaratory Judgments?	347
16.2	Ripeness Requirements for Declaratory Judgments	352
16.3	Declaratory Judgments and Federalism	354
16.4	Other Declaratory Remedies	356
Chapter 17	Help! I Need Somebody: Ancillary Remedies	363
17.1	Collecting Money Judgments	363
17.2	Pre-Judgment Freeze Orders, Attachments, and Receiverships	370
17.3	Attorney's Fees and Litigation Expenses	375
Chapter 18	Remedial Defenses	383
18.1	Plaintiff's Bad Conduct: Unconscionability, Unclean Hands, and <i>In Pari Delicto</i>	383
18.2	Estoppel and Waiver	389
18.3	Laches and Statutes of Limitation	393
Chapter 19	Putting It All Together: Taking a Remedies Exam	401
19.1	How to Prepare for a Remedies Exam	401
19.2	Sample Remedies Essay Examination Questions and Answers	403

Contents

<i>Table of Cases</i>	427
<i>Table of Books and Articles Cited</i>	433
<i>Table of Statutes, Constitutional Provisions, Restatement Sections, and Uniform Commercial Code (UCC) Provisions</i>	435
<i>Index</i>	437

Read This Chapter First: Why Remedies? What Remedies?

1.1 WHY SHOULD A LAW STUDENT CARE ABOUT REMEDIES?

Students may have many reasons to take a course in Remedies. In places like California, for example, Remedies is heavily tested on the bar exam, and many students feel obligated to take a “bar course.” Even in states that do not test Remedies independently on the bar, it is a good bar preparation course because much material from the first year of law school — particularly from Contracts, Property, and Torts — gets covered, albeit from a different angle. Other students may take Remedies because they like the instructor teaching it or because it fits into their schedule. I have run into very few students (though there are some) who take Remedies out of an intrinsic interest in the subject.

Fortunately, however, many students complete a course in Remedies with their (admittedly low) expectations exceeded — there are some intellectually interesting issues related to Remedies, many of which are covered in this book. Consider these examples:

- Jane steals Bill’s idea for a new invention and makes millions of dollars selling it. Should a court award Bill a sum of money equal to his loss (perhaps the amount of money he would have charged Jane to use his intellectual property) or Jane’s gain (some or all of her profits from the invention)? In some cases, there can be huge differences between these two figures.

I. Read This Chapter First: Why Remedies? What Remedies?

- Gary makes repeated defamatory statements about Roxanne, injuring Roxanne's business reputation. May a court order Gary to shut up about Roxanne, or does such an order run afoul of the First Amendment?
- Phillip fraudulently induces Hector to enter into a contract. Can Hector have the court rewrite the contract more to his liking or must the contract be cancelled, with Hector entitled to nothing more than a return of his consideration?
- Tomorrow Acme Wrecking Company is going to bulldoze what the Main Street Preservation Society believes is a building of historical importance protected by state law. How should a court decide, in the face of much ignorance on the merits of the Society's case because there is no time to get up to speed, whether to issue an order temporarily preventing the demolition?
- From 1850 to 1950, the State of Pacifica discriminated against African-Americans in education and housing opportunities. Since 1950, there has been no official state discrimination, but African-American residents of Pacifica still lag behind in education, and much of the state's housing market remains unintegrated. What remedies, if any, can — or should — a judge order against Pacifica today to assist Pacifica's current African-American residents, many of whom were born after the period of official state discrimination?
- Sarah and Larry rob a bank together agreeing to split the loot equally. Sarah doesn't give Larry his half. Should courts allow Larry's suit against Sarah to go forward, or should the suit be barred because of Larry's bad conduct?

If the intellectual feast in store in answering these questions does not convince you why Remedies is a course well worth your attention, there is an even more compelling reason for a student to take a course in Remedies: your future clients want you to do so.

1.2 WHY SHOULD A LAWYER CARE ABOUT REMEDIES?

Ask a practicing lawyer what clients care about the most, and the answer typically is the bottom line. The client's attitude is often: don't talk to me about abstractions — problems of proximate cause, pendent jurisdiction, or the Statute of Frauds — tell me what I have to lose or gain in this case. How likely is it that I'll prevail? If I prevail, how much will I get? Or if I lose, how much will it cost me?

In that sense, clients care about remedies most because remedies translate abstract legal rules into concrete consequences. Suppose that even if Bill has a good case for prevailing on the merits against Jane for her