### Introduction

#### Functional Classification of Remedies

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### Remedies and Causes of Action

- **Cause of action**: Grounds on which a legal action may be brought, or on which judicial redress can be sought.

- Four main areas of law:
  2. Statutory – breach of ACL, breach of patent law, etc.
  4. Restitution – ‘unjust enrichment’

### GENERIC ANSWER STRUCTURE

1. Identify parties and their legal + other r/ship.
   a. Remedies for past/future behaviour?
   b. Resolution for costs, pain?
   c. Compelling another to honour promise?
3. Cause of action – n.b. 1) neg almost always an alternative to breach of K; 2) concurrent and coextensive.
   a. Limitations on the cause of action – e.g. ‘brought within ___ years’?
   b. Purpose of cause of action.
4. Toolbox of remedies available: What is the rem? How can the client get it? What will it give?
   a. Elements of each – IMPT SECTION – refer back to what client wants.
   b. Limits on recover/adjustments.
5. Tentative conclusion.

### 2. Contracts

#### Freedom of K principle – c.f. generally laissez-faire: “Parties to a K are free to determine for selves what primary obligations they accept”

- **Self Help (NON JUDICIAL)**
  1. Torts
  a) **Abatement of Private Nuisance**
     General: Can only do what is reasonably necessary to avert/curtail harm: *Traian v Ware* (1957) VSC.
     Adjoining land, rain, higher owners cut bank. HELD: Not justified – could have given notice (close proximity) → Given damages for actual damage = for high-handed manner.
     **Legal action preferred**: *Traian v Ware* (citing *Lagan Navigation Co v Lambeg*) (Risk of trespass)
     Trespass: Where can only be abated by going onto person’s land, must give notice: *Traian v Ware* (citing Lord Davey, *Lennon v Webb*).
     → EXCEPTION: Notice need not be given where such immediate danger to life or health as to render it unsafe to wait: *Traian v Ware* (quoting Jones v Williams).
     **Timing**: Do not need to wait until actual damage suffered: *Traian v Ware* (quoting *Baten’s Case*).
     **Damages**: A person who properly abates may recover expense of abatement from land occupier: *Proprietors of Strata Plan No 14198 v Cowell* (1989) NSWSC.
     → EXCEPTION: Where goes onto other party’s land and causes damage/disturbance to the land or property, may not be able to claim dam.: *Cowell* (quoting Lord Atkinson in *Lagan*).

b) **Evicting Trespassers to Land**

General: Person entitled to exclusive pos. of land may evict a trespasser in certain circs, subject to certain broadly recognised principles.

- May use reasonable force to evict:
  Intention: If intention is retributive and not deterrent, generally unreasonable: *Bird v Holbrook* (1928) – (Spring gun to defend tulips, no signs, purpose retributive).

- **NOTE – moral underpinnings of the law**: ‘The law of England will not sanction what is inconsistent with humanity’ – cannot act inhumanely to prevent a trespass: *Bird v Holbrook*.
  → **QUALIFICATION**: Although land owners must not maliciously injure trespassers, they otherwise owe no duty to trespassers: *Robert Addie & Sons v Dunbrack* (1926) AC. (If’s person killed on D’s land, wheel mechanism – ‘Dangerous machinery – do NOT enter’ sign, aware that people disregarded, HELD: No duty to trespassers, not designed to injure.

- **Proportionality**: *Hackshaw v Shaw* (1994) CLR: Petrol bowser, owner shot at car to immobilise, hit passenger. HELD: Negligent, no intent to harm, but should have known someone could be in car.

- **Tenants/Landlords**: Cannot evict persons who are/were tenants without recourse to legal process – subject to relevant statutes:
  → Confirmed by Denning MR in *McPhail v Persons Unknown* (1973) All ER. If trespassers had lawful right previously, must use legal process.

- **Squatters/Trespassers in possession**: Land owner entitled to evict, but not recommended: *McPhail v Persons Unknown* (Squatters changed locks, owner entitled to evict. Law would prefer jud. intervent).

c) **Self Defence Against Trespass to Person**

General: Can defend against attack with reasonable force: *Fontin v Kalapodi* (1962) CLR

- **Orus on D to prove reasonableness** (based on two factors):
  i. Must be necessary: Underhill *v Sherwell* (1997) NSWCA.
  ii. Must be proportionate to threat.

- **Cases**:
  1) **Dangerous environment**
     - ‘Dangerous machinery – do NOT enter’ sign, aware that people disregarded, HELD: No duty to trespassers, not designed to injure.

- **Proportionality**: *Hackshaw v Shaw* (1994) CLR: Petrol bowser, owner shot at car to immobilise, hit passenger. HELD: Negligent, no intent to harm, but should have known someone could be in car.

- **Tenants/Landlords**: Cannot evict persons who are/were tenants without recourse to legal process – subject to relevant statutes:

- **Freedom of K principle – c.f. generally laissez-faire: “Parties to a K are free to determine for selves what primary obligations they accept”**: *Diplock LJ in Photo Production v Securicor Transport* (1980) AC.

- **General**: Remedial clauses take natural, ord meaning. If any ambiguity, interpreted contra preferendum.

#### Elevating a term to a condition:

- **General**: Warranties – damages; Conditions – K can be terminated: L *Schuler*.

- **But if result so unreasonable that the court may decide that it could not have been the intention of parties**: L *Schuler v Wickman Machine Tool Sales* (1974) AC.

- Tools, W to distribute products in UK. Clause – cond that agent pay weekly visits to 6 spec’d dealers to promote products (very onerous). HELD: “Condition” not intended to have technical meaning. Strict interp.

- **Penalty Clauses v Liquidated Damages**

- **General**: Clauses acceptable if 1) a genuine pre-estimate of damages, and 2) not ‘in terrorem’; (aim to terify into compliance):
  - *Dunlop* upheld in *Ringrose v BP Australia* (2005) CLR.
  - If penalty, the clause unenforceable. Damages calc. according to normal principles of assessment.
  - *Dunlop Pneumatic Tyre Co v New Garage* (1915) AC.

- (Not resell tyres lower than list price. Clause: *Schuler v Wickman Machine Tool Sales* (1974) AC.

- Tools, W to distribute products in UK. Clause – cond that agent pay weekly visits to 6 spec’d dealers to promote products (very onerous). HELD: “Condition” not intended to have technical meaning. Strict interp.

- **Possible broadening of application of penalties doctrine (not limited to breach)**: *Andrews v ANZ* (2012) HCA.

- ANZ transaction fees for overdrawn accts. HELD: Penalties. Penalties can arise in broader circ than breach – incl. things that occur within parameters of K.

- **Impotence of bargaining power**: *Ringrose v BP Australia* – onerous clause upheld because made between two equals.
Reversal of a transaction → K declared void ab initio. Each party restored to og position.

1. Contract:
   - 2. Vitiating factor in formation of the K.
     - Fraud, duress, mistake, undue influence, u/c dealing, breach of fid. duty.

2. Restitutio in integrum (complete restoration) must be possible
   - Frequently used bar:
     - Destruction of the property
     - Brown v Smitt
     - Fruit shop, fraudulent misrep as to weekly takings. Supermarket development nearby. Actual fruit could not be returned and shop no longer open (shut down).
     - HE LD: Substantial restitution. S personified the K under such terms.

3. Election to Rescind the K.
   - Unequivocal election to rescind must be made: Vadasz v Pioneer Concrete
   - Rescission may be partial, need not be of whole K. Vadasz v Pioneer Concrete (1995) CLR. Personally guaranteed debts of co. Was told would apply only to future debts (but in fact covered all debts) – signed without reading. HE LD: Guarantee set aside for existing debts, but not future debts – would have entered the K under such terms.

4. Restitution in integrum (complete restoration) must be possible
   - Common law: Strict restitution required: Clarke v Dickson (1858) EB (Shares in personal partnership bought on fraud mtr, converted into a corp, could not have precise restitution → no rescission).
     - Substantial restitution required → PREFERRED IN AUS. Brown v Smitt,
     - Brown v Smitt (1924) HCA: Sale of farm, fraud misreps. S had already operated farm for three years, had paid for some improvements. HE LD: Substantial restitution. S compensated for ancillary costs, legal, and imprvts (not for enjoyment), but had to pay “occupation fee” – fairness.

5. Bars to Rescission
   - Common law: Restitution not possible.
     - 3rd party has acquired an interest in property - cannot restore P’s to pre-contractual position
     - Destruction of the property
       - OVERARCHING: Affirmation – Pl has affirmed the K by their conduct
         - Delay – can be seen as an affirmation
     - A clause in the K that Pl has not relied on reps – will not apply to fraudulent reps, only innocent.
     - Equity:
       - ‘He who seeks equity must do equity’;
         - Vadasz v Pioneer Concrete (SA) Made to pay for future amounts.
       - Frequently used bar: Hardship to D: Marigian v Int Society for Krishna Consciousness (2002) NSWSC, H transferred house to society under undue influence. IS disputed, claiming it was a community based on gifts – planned to use home. HE LD: U/C conduct – not substantial hardship.
TORTS

1. P1 has tortious cause of action against D
2. D’s tort has caused P1’s loss


Onus: On D to prove P’s loss caused by unforeseeable event.

APPLICATION OF REASONABLE FORESEEABILITY:

- s11(1)(a) CLA: ‘Factual causation’ – breach was ‘necessary cond.’ of the occurrence of the harm.
- ss12, 13(h) CLA: The causation test for tort.
- s11(1)(b) CLA: ‘Reasonable Foresseeability’ test.

(a) General test

- Ordinary medical negligence
- ‘Factual causation’
- ‘but for’ test
- Burden of proof: ’balance of probabilities’.

(b) Specific test

- ‘Reasonable Mitigation’
- ‘balance of probabilities’
- ‘if reasonable, failing mitigation’

(i) Reasonable Foresseeability Test

- ORIGINAL POS: Polama Test (Re Polama): (Bean, ship’s engine – ship burnt down. Liable for all loss.

ii. Wagon Mound Test: (1) Generally changed.

- Wagon Mound No 1: Only losses that are reasonably foreseeable are not too remote.
- Wagon Mound No 2: Clarified No 1. Reas. foreseeable to the P – “not far-fetched and fanciful”.

3. P1’s loss is not too remote

Scope of Reasonable Foresseeability

- Havenaar v Havenaar (1982): Alcohol from pancreatitis. HELD: not break. An involuntary action cannot sever the causal link and is within reas. foreseeable.

- RESTRICTIVE VIEW: Rowe v McCartney (1976): P let friend drive her while she passenger. Accident, friend became quadrip. P developed rare psychological condition from guilt. HELD: Unforeseeable kind of damage – would expect shock, not guilt. Does not sit well with Kavanagh v Akhtar (Inconsistent appl. of Wagon Mound – may be reverting to Polama).

APPLICATION OF REASONABLE FORESEEABILITY:

Type of Damage

- Hughes v Lord Advocate (1963): Manhole, injured by explosion from open flame that also fell. HELD: As long as general type of damage foreseeable, D liable – extent of loss irrelevant.
- Versta v Connor (1969): Death, drowned in gutter after car accident. HELD: Liable. Provided the end result (death) was foreseeable, the specific manner in which result achieved irrelevant.

- Extent of Harm – Egg-Shell Rule.

- Kavanagh v Akhtar (1998): Muslim lady shoulder injury from falling box, unable to care for long hair, cut without husband’s permission – divorce, psychological damage. HELD: Shop responsible for all of these losses. Pluralistic Aus society – consider cultural/religious setting.

4. P1 has not breached duty to mitigate unnecessary loss

To a large extent, principles in tort and K identical.

- P has duty to mitigate losses flowing from D’s wrong.
- Onus on D to prove P’s failure to mitigate.

Reasonable Mitigation -> ‘tip test’ (what would a reas. person in P’s cirсs have done?)


If mitigation provides benefit to the P -> deduct the benefit.

- Hoad v Scone Motors (1977): Ps tractor damaged by fire, bought new tractor (would usually buy new one every 30 years). HELD: Benefit of new tractor deducted from overall damages.

Reimbursement for mitigation costs -> only for reasonable costs.

- Costs incurred in mitigation, recoverable from D if reasonable, even if attempted mitigation incr. loss.

If D unsatisfied – suggested mitigation:

- SS(1): If D does not satisfy P’s actions to mitigate, D may give P written notice suggesting specific action P should take.

(a) gives examples: (a) undergo med. treatment; (b) return to work, seek employment; (c) undergo rehab/undertake specific programs.

(b) if D fails to mitigate by not following suggestions, reduce P’s damages to appropriate extent.

5. Establish and adjut quantum


- If claimant suffers damage partly because of his failure to take reas. care (contrib. neg) and partly because of wrong of someone else:

  - (a) claim not defeated; and
  - (b) damages to be reduced to extent court considers just and equitable

- Exclusion clauses: s10(2A): If a K/enactment providing for limitation of liab. applies, am’t of damages recoverable from KL not to exceed the max limit applying to the claim.

2. Contributory Negligence

- ss 23, 24 (CLA) – discussed below.

- s5 of Law Reform Act 1995 (Qld): A wrong means an act/omission that: (a) gives rise to a liability in tort for which a defence of cln is available at clt; or (b) Amounts to a breach of K cln or cln that is concurrent and coextensive with that cln in tort