



# General Issues in Remedies

Torts  
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**law**  
**vs.**  
**equity**

[shown-in-class images of  
old courts from England  
omitted from this print-out]

### 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, the most important being damages.
- Courts of equity did not have juries, were not constrained by precedent, had broad authority to fashion remedies, notably injunctions.

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## 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.

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**PITFALL!**

## 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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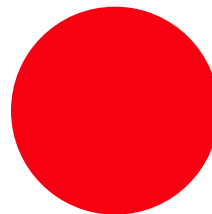
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Now the  
defendant has  
been punished.

## 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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[shown-in-class photos of  
fancy, wealthy English  
people omitted from this  
print-out]

[shown-in-class photos of  
Kierin Kirby and Ulala  
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## Taxation of Damages

- Generally “origin of the claim”
- Exception: compensatory damages based on “personal physical injuries or physical sickness” are excluded from taxable income. IRC § 104(a)(2).
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  - 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!

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## Taxes and Fees: The Bottom Line

Realistic example:

Verdict:	\$1,000,000
Taxes:	(-\$350,000)
Attorneys fees 38%:	(-\$380,000)
<u>Experts, travel, transcripts, etc.</u>	<u>(-\$150,000)</u>
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 somewhere in the neighborhood of a 60/40 chance of succeeding. Which should you allege in your complaint? Are there any hazards to consider?

- 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 an award of fees to the prevailing party)

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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
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Assuming it's appropriate to structure it either way (maybe check with your tax attorney first), then the first alternative is better for tax purposes, because of IRC § 104(a)(2), which excludes compensatory damages based on personal physical injury from taxable income.

## Injunctions

### An injunction is:

An order to do or not do something.

## 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

### 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