



General Issues in Remedies

Torts
Eric E. Johnson
ericejohnson.com



Konomark
Most rights sharable

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.

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.

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.

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.

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.



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

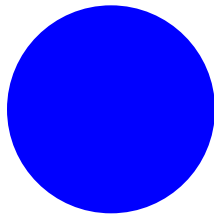
Compensatory vs. Punitive Damages

Compensatory damages

- Focused on plaintiff
- To make plaintiff whole

Punitive damages

- Focused on defendant
- To punish defendant, make an example of defendant



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



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



Compensatory vs. Punitive Damages

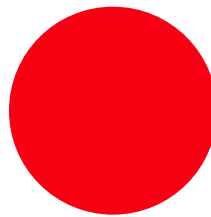
Compensatory damages

- Focused on plaintiff
- To make plaintiff whole



Punitive damages

- Focused on defendant
- To punish defendant, make an example of defendant



Compensatory vs. Punitive Damages

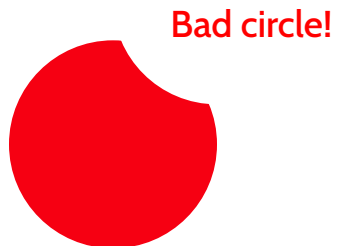
Compensatory damages

- Focused on plaintiff
- To make plaintiff whole



Punitive damages

- Focused on defendant
- To punish defendant, make an example of defendant



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



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

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
- Consider the asymmetricality of risk with questions of awarding attorneys fees.**

Award of Attorneys Fees

- English Rule
- A
- a
-

Consider the asymmetricality of risk with questions of awarding attorneys fees.

PITFALL!

utory

ng

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

[shown-in-class photos of
Kierin Kirby and Ulala
omitted from this print-out]

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).
 - Can include medical expenses, pain and suffering, lost wages
 - 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!

Taxation of Damages

- Generally “origin of the claim”
- Exception: compensatory damages based on “personal physical injuries or physical sickness” are excluded from taxable income under § 104(a)(2).
 - Can include medical expenses, lost wages, etc.
 - Punitives, even if springing from personal injury, are always taxable
- You must keep tax in mind when negotiating a settlement!
 - Don't be afraid to consult a tax attorney!



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)

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)



Choose the choice ...

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
- \$20,000 for medical expenses; \$80,000 for damage to the car and property inside it

Choose the choice ...

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 ←
- \$20,000 for medical expenses; \$80,000 for damage to the car and property inside it

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