

Legal Remedies

Replevin & Ejectment: Replevin (restoring possession of personal property) and ejectment (restoring possession of real property) are the only legal remedies that are specific, rather than substitutional. As such, they are distinct from damages, which are always substitutional. Also, these two remedies -- along with quasi-contract / unjust enrichment, and legal rescission and restitution -- are the only restitutionary legal remedies, with damages focusing solely on plaintiff's loss.

Legal Damages

Definition: Damages are compensation in money for a loss or detriment caused by another's wrongful act. The measure of the loss determines the dollar amount of the award.

Legal Remedy: Money damages are a legal remedy which take precedence over equitable relief if they adequately compensate the plaintiff. A judgment at law changes legal title to property, and can be enforced by the sheriff, who can attach defendant's property and sell it at auction to satisfy the judgment.

Substitutional: Damages, by their nature, are a substitutional remedy, whenever the distinction carries weight. That is, a damages award substitute money for defendant's performance of a contract, or for plaintiff's health and wholeness.

Compensatory: The largest and most important category of damages, which encompasses the nature of the remedy, is compensatory damages, so called because, unlike nominal, punitive, or liquidated damages, they are measured by the loss plaintiff has suffered.

Compensatory Damages

THE BASIC RULE FOR COMPENSATORY DAMAGES:

Make the plaintiff whole: no better or worse off than she would be if the harm had not occurred.

What Interests of the Plaintiff Are Compensated?

1. Expectancy Interest: Plaintiff's interest in the position she expected to occupy if not for defendant's breach of duty. This interest almost always arises in contracts, plaintiff's expectancy being to receive the "benefit of the bargain" if defendant had performed under the contract.

2. Reliance Interest: Plaintiff's interest in the position she occupied before defendant's wrongful act. This interest is compensated by calculating what loss or detriment the defendant caused, often by a tortious act. However, plaintiff's reliance interest is also often compensated in a contracts action, by measuring her "out of pocket" loss.

3. Restitution Interest: Not logically part of "damages," this refers to Plaintiff's interest in seeing that defendant does not benefit by her wrongful act. It is not compensatory, and does not look to Plaintiff's detriment, or seek to make her whole. Instead, an unjust benefit to defendant is disgorged, with the judgment awarded to plaintiff. Though restitution is an independent legal theory, restitution money judgments are often thought of as "damages."

The Requirements

Whether the cause of action is in torts, contracts, or unjust enrichment, an award for compensatory damages must meet these four requirements:

1. Causality: Damages will be awarded only for losses caused by defendant's breach of duty, determined by the "but for" test.

2. Foreseeability: Damages must be foreseeable, though this is analyzed differently for torts than for contracts.

3. Certainty: Damages must be certain. Future damages cannot be too speculative.

4. Unavoidability: Plaintiff has a duty to take reasonable steps to mitigate her damages. Damages that could have been avoided by reasonable steps to mitigate are not recoverable.

Measuring the Loss

The amount of the award depends on how it is measured. The measure used can be dictated by the claim or remedy, by the available facts, or by the goals of the plaintiff or discretion of the court. For the most part, the methods of measuring compensatory damages are divided into tort theories and contract theories.

Torts

Measuring Damages

Non-Economic: Personal injury actions, unlike contracts and other torts, permit recovery for Non-Economic loss, or General Damages.

General vs. Special: General damages do not require proof, but are understood to flow naturally from the injury itself. The dollar amount is up to the jury's discretion. General damages include pain and suffering, emotional anguish, and loss of enjoyment of life.

Foreseeability: Though all damages have a foreseeability requirement, in torts cases this is included within the proximate cause concept. It is understood that special damages such as lost wages in a personal injury action, could not have been foreseen by the defendant, though general damages are foreseeable. Special damages must be specially pleaded to give notice to the defendant.

Certainty & Emotional Distress: All damages must be "certain," though sometimes this refers to a certain measure, and sometimes merely to certainty that some injury did in fact occur. The latter is the case with IIED and NIED, where some physical manifestation of the emotional distress is very helpful in proving damages. If the jury is certain some harm was suffered, more uncertainty is tolerated with regard to the amount.

Survival actions: At common law, the right to sue for a personal tort was extinguished upon death, even if death was hastened by the tort. Modernly, survival statutes provide for a decedent tort victim's next of kin to maintain an action in decedent's name. The measure of damages depends on the statute, with most confining the award to pre-death damages, extinguishing lost future wage claims.

Wrongful death actions: Claim by next of kin arises upon tortiously-caused death. Measure of damages may be (1) loss to estate (projected lost value added to decedent's estate if she had lived, or (2) loss to survivors, measured by lost support of decedent over projected life. May include loss of society, consortium, etc.

Presumed: Certain causes of action provide for presumed damages, eliminating the necessity of proving damages. E.g., slander per se.

Loss of use: In situations of temporary dispossession of property, plaintiff is entitled to damages for loss of use, in conjunction with a claim for trespass to chattels, replevin, trespass to land, or ejection.

Mesne damages: The rental value of real property wrongfully possessed or trespassed upon. Plaintiff may measure mesne damages by either of two methods: fair market rental value OR actual benefit to the defendant.

Diminution in Value: The standard measure of damages for injury to property not constituting destruction or dispossession. Plaintiff may also elect the measure of actual cost of repair/removal.

Offsetting benefits: When defendant's conduct creates a benefit to plaintiff as well as a detriment, the general rule is that plaintiff's damages are reduced by the value of the benefit received.

Non-Compensatory

Nominal: Not compensatory, and in fact only available when actual, compensatory damages are not present. Available, e.g., in trespass actions, to establish the rights of the parties and acknowledge the trespass as a wrong.

Punitive: Serve to punish the defendant for intentional, willful, wanton, malicious, or reckless wrongdoing. Thus, plaintiff's harm is not the measure, although due process requires that the punitive damages have some reasonable relationship to the compensatory damages. Punitive damages are available only in torts.

Contracts

Measuring Damages

Economic only: Damages in contracts, unjust enrichment, and some torts are limited to economic damages. That is, a loss that is naturally capable of being calculated as a dollar amount.

Expectation damages: The standard measure for breach of contract damages, otherwise known as the "Benefit of the Bargain." It is arrived at by determining how much it would cost the non-breaching party to purchase substitute performance, and subtracting the contract price.

Contract Price: In some situations, the contract price itself is the measure of damages for breach, such as when the non-breaching party has performed fully under the contract. In other cases, it is part of the calculation of the expectation measure.

Fair market value: The most common measure of what it would cost the non-breaching party to obtain substitute performance. Also the measure for quasi-contractual actions, and restitution-and-rescission actions, even if different from the original contract price.

Quantum Meruit / Valebut: In a quasi-contract action to prevent unjust enrichment, the standard measure for the value of the benefit received by defendant. Quantum meruit is the reasonable value of services rendered and quantum valebut is the reasonable value of goods delivered.

Substitute goods or sale: Under the UCC, when one party to a contract for sale of goods is in breach, the other has the right to obtain actual substitute goods, or actually resell the goods, and the measure of damages will be this actual substitute, even if different from fair market value.

Reliance measure: An alternative to the standard measure of expectation damages, used when expectation damages are too speculative and uncertain. The reliance measure is "out of pocket" rather than "benefit of the bargain." That is, rather than putting the plaintiff where she would be if the contract was performed, reliance puts her where she would be if the contract had never been entered into.

Consequential: An additional measure used in conjunction with the expectation measure, allowing the plaintiff to recover for further losses caused by the breach, but not part of the contract, if they are reasonably foreseeable. Plaintiff has burden of proof regarding special circumstances.

Foreseeability: In the contracts context, foreseeability is measured at the time the contract was entered into, under the Hadley v. Baxendale formula. The general measure is harm likely to occur in the ordinary course of events. Special damages are those foreseeable by defendant with knowledge of the facts.

Certainty & Future Profits: Damages must be sufficiently certain. The court may consider such factors as availability of evidence, certainty of actual loss, and defendant's culpability. In terms of future business profits, a key factor is whether the business is established, with a history of profits (sufficiently certain) or a new business (too speculative).

Duty to mitigate: Plaintiff, upon breach or anticipatory repudiation, has a duty to mitigate her damages. Damages incurred because of failure to mitigate are not recoverable. This may be an affirmative duty (reasonable medical care if injured) or negative (stop construction work if owner repudiates).

Liquidated damages: Parties may agree by the terms of a contract what the damages will be in case of breach. Such provisions will be upheld if, at the time the contract was entered into, it appeared that damages would be difficult to calculate, and the agreed damages term was a reasonable forecast. Otherwise, it is an invalid penalty, and actual proven damages will control.

Nominal damages: May be awarded when there are no actual damages, to identify the breaching party.

No punitive damages: In contracts actions.