
Foreword

Coming from a background in German law where the measure of damages is generally the same for all civil wrongs, I am struck by the fact that the measure of damages in common law jurisdictions differs to a large extent between contract, tort and equity. The diversity seems problematic, not least because concurrent liability in two or even all three of those areas is by no means uncommon. This raises important questions: What exactly are the differences between contract, tort and equity with regard to the measure of damages? Are the differences mere accidents of legal history or can they be justified on merits? This book attempts to address those questions.

The book covers five aspects of the measure of damages: remoteness of damage, which is the question of whether, when and to what degree damage needs to be foreseeable to be recoverable; the compensability of non-pecuniary loss such as pain and suffering, distress and loss of reputation; the effect of contributory negligence, which is the victim's contribution to the occurrence of the wrong or the ensuing loss through unreasonable conduct prior to the wrong; the circumstances under which victims of wrongs can claim the gain the wrongdoer has made from the wrong; and the availability and scope of exemplary (or punitive) damages.

For each of the five topics, this book examines the present position in contract, tort and equity and establishes the differences between the three areas. It goes on to scrutinise the arguments in defence of existing differences. The conclusion on each topic is that the present differences between contract, tort and equity cannot be justified on merits and should be removed through a harmonisation of the relevant principles. The arguments in support of that conclusion relate specifically to the relevant aspect of the measure of damages. They are consistent with, but not dependent on, the idea of a fusion of common law and equity.

Parts of this book have grown out of a PhD thesis which I wrote at the University of Aberdeen. I am very grateful for many helpful comments and challenging questions from my PhD supervisors Professor Angelo Forte and James Chalmers and from my PhD examiners Professor Hector MacQueen and Professor Roger Brownsword.

I have discussed aspects of this book with my colleague Normann Witzleb and, while working at the University of Leicester, with my then colleagues Christopher Bisping and Edward Goodwin. I would like to thank all of them for their patience and insightful comments. I am grateful to the University of Leicester for granting me study leave for this project.

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Finally, I would like to thank the team at Hart Publishing for their diligence and support.

The book focuses on the law of England and Wales, although there are numerous references to material from all major common law jurisdictions and from Scotland. I have considered material available to me before 1 January 2010.

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Sirko Harder

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