1 INTRODUCTION

I Introduction

This chapter considers the law of civil remedies: the definition and nature of 'remedies' and the relationship between remedy and right. It provides extracts which discuss the ongoing debate about whether judges should have discretion in the remedies they grant. It considers the nature of the common law and equity divide in Australian law as expressed in case law and in academic discussion. Finally, it outlines a functional approach to remedies.

II What is a remedy?

Concept	Short explanation	Relevant authorities	Principles text
What is a remedy?	A civil remedy can be viewed as a secondary right arising from the breach of a primary right (such as the right to performance of a contract). However, it has been suggested that the definition of remedy include the rights arising from judicial enforcement of a pre-litigation grievance, usually an actual or threatened infringement of a right.	*Ashby v White* (1703) 92 ER 126 John Austin, *Lectures on Jurisprudence*, Robert Campbell and John Murray (eds), (J. Murray, 5th ed, 1885) vol 2, lecture XLV, 788–95 *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 Rafal Zakrzewski, *Remedies Reclassified* (Oxford University Press, 2005) 1–2	Chapter 1: [1.4]–[1.16]
Monism and dualism	There is a debate as to the relationship between remedy and right, and the extent to which a judge should have discretion.	Peter Birks, 'Three Kinds of Objections to Discretionary Remedialism' (2000) 29(1) *University of Western Australia Law Review* 1	Chapter 1: [1.17]–[1.20]

Concept	Short explanation	Relevant authorities	Principles text
	The monist view asserts the remedy is simply a mirror of the plaintiff's cause of action and there is no or little discretion. The dualist view asserts that the judge should chose whatever remedy is appropriate for the case. The compromise position asserts there is a 'sticky' relationship between remedy and right which allows for some discretion.	Grant Hammond, 'Rethinking Remedies: The Changing Nature of the Conception of the Relationship Between Legal and Equitable Remedies' in Jeff Berryman (ed), *Remedies: Issues and Perspectives* (Carswell, 1991) 85 David Wright, 'Wrong and Remedy: A Sticky Relationship' (2001) (2) *Singapore Journal of Legal Studies* 300	

The extracts in this section deal with the legal definition of private law remedies, and the relationship between remedies and fundamental rights. The next case explains the importance of remedies in legal systems.

Ashby v White (1703) 92 ER 126

Facts and issues

A bailiff prevented an eligible voter from casting his vote. The voter's preferred candidate was elected anyway.

Decision

Holt CJ's dissent (later upheld by the House of Lords) is relevant for his discussion of rights and remedies.

Holt CJ (nominate)

> [**953**] If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for … want of right and want of remedy are reciprocal. … [**954**] Where a man has but one remedy to come at his right, if he loses that he loses his right. It would look very strange, when the commons of England are so fond of their right of sending representatives to Parliament, that it should be in the power of a sheriff, or other officer, to deprive them of that right, and yet that they should have no remedy; it is a thing to be admired at by all mankind.

The extract which follows is taken from the writings of John Austin (1790–1859), an English legal theorist who was strongly influenced by the legal positivism of the time. His theories of rights and remedies have been influential.

John Austin, *Lectures on Jurisprudence*, Robert Campbell and John Murray (eds), (J. Murray, 5th ed, 1885) vol 2, lecture XLV, 788–95

[**788**] … There are facts or events from which rights and duties arise, which are legal causes or antecedents of rights and duties, or of which rights and duties are legal effects or consequences. There are also facts or events which extinguish rights and duties, or in which rights and duties terminate or cease. The events which are causes of rights and duties may be divided in the following manner: namely, into acts, forbearances, and omissions, which are violations of rights or duties, and events which are not violations of rights or duties.

Acts, forbearances, and omissions, which are violations of rights or duties, are styled delicts, injuries, or offences.

Rights and duties which are consequences of delicts, are sanctioning (or preventive) and remedial (or reparative). In other words the ends or purposes for which they are conferred and imposed, are two: first to prevent violations of rights and duties which are not consequences of delicts; secondly to cure the evils or repair the mischiefs which such violations engender.

…

[**789**] All the rights and duties which I style sanctioning or secondary, are undoubtedly means or instruments for making the primary available. They arise out of violations of primary rights, and are mainly intended to prevent such violations: though in the case of the rights and duties which arise out of civil injuries, the secondary rights and duties also answer the subordinate purpose of giving redress to the injured parties.

But though secondary rights and duties are merely adjective or instrumental, many of the rights and duties which I style primary are also of the same character. …

In short, rights and duties are of two classes:

1st. Those which exist in and per se: which are, as it were, the ends for which law exists: or which subserve immediately the ends or purposes of law. 2ndly. Those which imply the existence of other rights and duties, and which are merely conferred for the better protection and enforcement of those other rights and duties whose existence they so suppose.

Though secondary rights and duties (or rights and duties arising out of injuries) are of this instrumental character, many rights and duties which are primary or principal (or which do not arise out of injuries) are also of the same nature. …

[**790**] Those which I call primary do not arise from injuries, or from violations of other rights and duties. Those which I call secondary … arise from violations of other rights and duties, or from injuries, delicts, or offences.

The rights and duties which I style secondary, suppose that the obedience to the law is not perfect, and arise entirely from that imperfect obedience. If the obedience to the law were absolutely perfect, primary rights and duties are the only ones which would exist; or, at least are the only ones which would ever be exercised, or which could ever assume a practical form. If the obedience to the law were absolutely perfect, it is manifest that sanctions would be dormant: and that none of the rights and duties which sanction others, or which are mainly intended to protect others from violation, could ever exist in fact or practice, although they would be ready to start into existence on the commission of injuries or wrongs. If the disposition to obey the law were perfect,

and if the law were perfectly known by all, there would be no injuries or violations of the law: and, by consequence, all the law relating to injuries, to the rights, duties, and other consequences flowing from injuries, and to procedure, would lie dormant.

…

[**791**] I do not deny that rights of the sort which I have called primary, may arise from injuries in a remote and consequential manner; as, for example, the rights arising from a judgment, or the lien of the plaintiff on the lands and goods of the defendant. But these rights do not arise so much from the injury itself, as from a peculiar title or mode of acquisition, namely the judgment and the institution of the suit. In order, however, to meet this objection, I will define primary rights and duties to be those which do not arise from violations of other rights or duties directly.

…

[**792**] It is said by Heineccius, 'actio non est *jus*, sed *medium* jus persequendi.'[1] But it is impossible to distinguish completely a *right of action* from the action or procedure which enforces it. For much of the right of action consists of rights to take those very steps by which the end of the action is accomplished.

It is perfectly true, that the scope or purpose of the right of action is distinct from the procedure resorted to when the right is enforced. Much of the procedure consists of rights which avail against the ministers of justice rather than against the defendant. And the parts of it which consist of rights against the defendant himself, are totally distinct from the end which it is the object of the process to accomplish.

But still it is impossible to extricate the right of action itself from those subsidiary rights by which it is enforced. And it is manifestly absurd to deny that the process involves *rights*, because the rights which it involves are instruments for the attainment of another right. And this is a reason for joining the law of procedure to the law of civil injuries and crimes.

…

[**793**] … In most systems of law, a vast number of primary rights and duties are not separated from the secondary: That is to say; The primary right and duty is not described in a distinct and substantive manner; but it is created or imposed [**794**] by a declaration on the part of the legislature, that such or such an act, or such and such a forbearance or omission, shall amount to an injury: And that the party sustaining the injury shall have such or such a remedy against the party injuring; or that the party injuring shall be punished in a certain manner.

Nay, in some cases, the law which confers or imposes the primary right or duty, and which defines the nature of the injury, is contained by implication in the law which gives the remedy, or which determines the punishment.

And it is perfectly clear that the law which gives the remedy, or which determines the punishment, is the only one that is absolutely necessary. For the remedy or punishment implies a foregone injury, and a foregone injury implies that a primary right or duty has been violated. And, further, the primary right or duty owes its existence as such to the injunction or prohibition of certain acts; and to the remedy or punishment to be applied in the event of disobedience.

The essential part of every imperative law is the imperative part of it: ie the injunction or prohibition of some given act, and the menace of an evil in case of non-compliance.

1 This translates to: 'An action is not a right; but it is the means the law affords for pursuing the right'.

The reason for describing the primary right and duty apart; for describing the injury apart; and for describing the remedy or punishment apart, is the clearness and compactness which results from the separation. The cause of the greater compactness is that the same remedial process is often applicable, not merely to this particular right, but to a great variety of classes of rights; and, therefore, if it be separated from the rights to which it is applicable, it may be disposed of at once; otherwise it must be frequently repeated. But it is perfectly clear that the description of any of the separate elements, is not complete without reference to the rest. I have no right, independently of the injunction or prohibition which declares that some given act, forbearance or omission, would be a violation of my right; nor would the act or forbearance be a violation of my right, [**795**] unless my right and the corresponding duty were clothed with a sanction, criminal or civil.

In strictness, my own terms, 'primary and secondary rights and duties,' do not represent a logical distinction. For a primary right or duty is not of itself a right or duty, without the secondary right or duty by which it is sustained; and *e converso*.

So complete is the complication of the one branch of the law with the other, that some primary duties cannot be described with any approach to completeness in their own part of the law; they can only be apprehended by looking at the description of the corresponding injury. [Footnotes omitted]

The distinction between primary rights and secondary rights has been accepted by Lord Diplock in the following case.

Photo Production Ltd v Securicor Transport Ltd [1980] AC 827

Facts and issues

The primary issue was whether an exclusion clause in a contract was effective to exclude an accidental fire caused at Photo Production's factory by an employee of Securicor.

Decision

For present purposes, only Lord Diplock's discussion of the rights arising from a breach of contract is relevant.

Lord Diplock

[**848**] A basic principle of the common law of contract, to which there are no exceptions that are relevant in the instant case, is that parties to a contract are free to determine for themselves what primary obligations they will accept. They may state these in express words in the contract itself and, where they do, the statement is determinative; but in practice a commercial contract never states all the primary obligations of the parties in full; many are left to be incorporated by implication of law from the legal nature of the contract into which the parties are entering. But if the parties wish to reject or modify primary obligations which would otherwise be so incorporated, they are fully at liberty to

do so by express words. Leaving aside those comparatively rare cases in which the court is able to enforce a primary obligation by decreeing specific performance of it, breaches of primary obligations give rise to substituted or secondary obligations on the part of the party in default, and, in some cases, may entitle the other party to be relieved from further performance of his own primary obligations. These secondary obligations of the contract breaker and any concomitant relief of the other party from his own [**849**] primary obligations also arise by implication of law – generally common law, but sometimes statute … . The contract, however, is just as much the source of secondary obligations as it is of primary obligations; and like primary obligations that are implied by law, secondary obligations too can be modified by agreement between the parties, although, for reasons to be mentioned later, they cannot, in my view, be totally excluded. In the instant case, the only secondary obligations and concomitant reliefs that are applicable arise by implication of the common law as modified by the express words of the contract.

Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach; but, with two exceptions, the primary obligations of both parties so far as they have not yet been fully performed remain unchanged. This secondary obligation to pay compensation (damages) for non-performance of primary obligations I will call the 'general secondary obligation.' It applies in the cases of the two exceptions as well.

The exceptions are: (1) Where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract, the party not in default may elect to put an end to all primary obligations of both parties remaining unperformed. (If the expression 'fundamental breach' is to be retained, it should, in the interests of clarity, be confined to this exception.) (2) Where the contracting parties have agreed, whether by express words or by implication of law; that *any* failure by one party to perform a particular primary obligation … irrespective of the gravity of the event that has in fact resulted from the breach; shall entitle the other party to elect to put an end to all primary obligations of both parties remaining unperformed. …

Other theories seek to relate remedies to their judicial origin. For example, Rafal Zakzrewski sets out a theory of remedies which links remedies to their source: judicial commands and orders.

Rafal Zakrzewski, *Remedies Reclassified* (Oxford University Press, 2005) 1–2

[**1**] The word 'remedy' is constantly on lawyers' lips. Legal remedies are claimed, sought, found, had, requested, elected, chosen, pursued, used, available, refused, allowed, obtained, awarded, dispensed, granted, given, provided, fashioned, and [**2**] enforced. They are described

as common law, equitable, statutory, discretionary, as of right, *in rem, in personam*, proprietary, personal, specific, substitutional, monetary, non-monetary, coercive, non-coercive, enforceable, constitutive, declaratory, judicial, non-judicial, self-help, civil, private, public, or administrative. But, rather disturbingly, as Burrows points out '[t]he concept of a remedy has rarely been subjected to rigorous analysis.'

As a consequence, remedy is used synonymously with a wide range of different terms and, what is probably worse, by way of contrast to an equally long and diverse list. It is used synonymously with action, response, redress, and relief. It is used in contradistinction to wrong, injury, cause of action, liability, substance, institution, and doctrine. Most confusingly, it is used both as a synonym of right and in opposition to it. In short, the concept of a remedy is unstable. It comprises a number of different but insufficiently differentiated legal concepts.

…

Remedies will be broadly approximated to court orders. They will be rigorously separated from substantive rights, that is, rights which can be said to exist prior to the making of a court order. More strictly, remedies will be identified as the rights immediately arising from certain judicial commands and statements which aim to redress a pre-suit grievance, usually an actual or threatened infringement of a substantive right. [Footnotes omitted]

A Monism and dualism

There are three sources of remedies in Australian law: common law, equity and statute.

Australian law generally takes a discretionary approach to remedies, particularly in equity and statute. As Paul Finn has noted,[2] this stems from Australia's commitment to traditional equity, and from the influence of the *Trade Practices Act 1974* (Cth) (now the *Australian Consumer Law*) and the unhierarchical 'basket of remedies' available under that statute. By contrast, English legal scholarship has tended to decry discretionary remedialism. In what follows, the 'monist', 'dualist' and moderate approach to remedies will be outlined.

Peter Birks, the Regius Professor of Civil Law at the University of Oxford from 1989 until his death in 2004, expressed a monist view of remedies, saying, '[t]he secondary obligation to pay compensatory damages is … the same thing as the right looked at from the other end'.[3] While he was very influential in England, his theories were rejected by the High Court on several occasions,[4] and thus should be treated with care in an Australian context.

2 P Finn, 'Equitable Doctrine and Discretion in Remedies' in WR Cornish, R Nolan and J O'Sullivan (eds), *Restitution Past, Present and Future* (Hart Publishing, 1998) 251.

3 P Birks, 'Definition and Division: A Meditation on Institutes 3.13' in P Birks (ed.), *The Classification of Obligations* (Clarendon Press, 1997) 24.

4 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635; *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269.

Peter Birks, 'Three Kinds of Objections to Discretionary Remedialism' (2000) 29(1) *University of Western Australia Law Review* 1

Birks defines 'discretionary remedialism' as:

> [3] The simplest way to sum this up might be to say that discretionary remedialism remakes the civil law into the mould of the criminal law. In the latter the judge generally has a discretion to impose the sentence which he thinks best. In some cases, not very many, the sentence will be fixed. In the rest it will usually be only rather loosely constrained. Where the criminal judge has a discretion, there will be principles of sentencing to take into account, but the discretion remains a strong discretion. The proof of that is that the law does not set itself any goal gradually to eliminate discretion as matters become better understood. The judge's sentencing discretion is a permanent feature of the criminal landscape. Attempts by politicians to fix sentences are generally greeted with howls of dismay. Meanwhile, the question whether the accused is guilty or not guilty – the equivalent of 'liability' on the civil side – remains closely defined by the law. … Once the accused is found guilty, he is at the mercy of the judge's sentencing discretion.

Birks advances three objections to discretionary remedialism. The first, 'No historical legitimacy' is outlined at 8:

> **[8]** The first and most immediate of the three families of objection is that discretionary remedialism can only be introduced by statute. It is beyond the [9] range of interpretative creativity. This is an argument chiefly from authority. As an interpreter a judge must limit his creativity to what can be said to be already the case, according to arguments consonant with the rules of recognition operative in the jurisdiction in question.
>
> …
>
> One might agree with the discretionary remedialists that where conduct amounts to a legal wrong … a choice does initially have to be made between a variety of responses. There is no naturally correct response to a civil wrong. Choices have to be made. However, it has not in the past been for the judges to choose. It has been for the law to make the choice and, where the law makes no final selection, for the plaintiff. For example, a question arises whether the wrongdoer shall pay punitive damages. The law makes the choice, not the judge. Again, shall the wrongdoer give up his gain? Once more, the law makes the choice. As the choice is made, the law confers on victim-plaintiffs a defined remedial right.

The second, 'Managing dispute settlement', is outlined at 14–15:

> [14] Uncertainty as to the sum winnable will undermine important decisions all along the line. Settlements are generally looked on as a good thing: 'interest rei publicae ut sit finis litium' (it is in the public interest that there should be an end to quarrels). They are not a good thing, but a simple engine of injustice when the uncertainty of the law leads to a despairing splitting of differences.
>
> The pleader faces special problems. … The new doctrine makes the whole basket of possible orders available to the court. Perhaps the pleader has only to ask, quite generally,

> for 'a remedy', since the basket is in the court's keeping. One suspects that the courts would not be happy [**15**] with that. If they are not, what would the pleader have to do? It would be pointless to list the whole contents of the basket every time. On the other hand, the strong discretion seems to mean that the plaintiff cannot be confined to those remedies which he asks for.

The third, 'Losing faith in the rule of law', is outlined at 15–16:

> [**15**] The most precious values of our civilisation can come to be taken for granted, just as the value of peace is less keenly felt as memories of war recede. The third set of objections to discretionary remedialism arise from the need to reinforce our commitment to the rule of law. The suggestion that judges should be free to apply whatever remedy they think best for the trouble in hand emanates from our taking the rule of law for granted.
>
> …
>
> [**16**] We are learning to value the sub-cultures of its different ethnic and religious groups and its different socio-economic groups. Society is plural, and its interlocking sub-cultures are well-informed and articulate. In such a society law which is demonstrably a rational system of rules striving to reach determinate results can be acceptable to all. Reason legitimates. Reason communicates. Judicial discretion is by contrast dangerous. Discretionary remedialism requires all the very different sub-cultures to accept the judges' instinct for the just result. If discretionary remedialism will work anywhere, it will work in a monolithic society. In a plural society judges should regard it as political dynamite. The judge as expert in applying the law is entitled to respect. The judge as a fountain of intuitive justice is not. [Footnotes omitted]

Grant Hammond, a former judge of the New Zealand Court of Appeal and former President of the New Zealand Law Commission, has expressed a dualist view of remedies law in the extract which follows.

Grant Hammond, 'Rethinking Remedies: The Changing Nature of the Conception of the Relationship Between Legal and Equitable Remedies' in Jeff Berryman (ed), *Remedies: Issues and Perspectives* (Carswell, 1991) 85

[**90**] The historically close relationship between rights and remedies has often been remarked on. Indeed some scholars have been overtly concerned as to whether there *is* such a thing as a *remedy*, which exists separate and apart from a cause of action or a *right*. Hence it is necessary to deal with this at the outset. If we cannot establish a rational basis for a separate remedies regime, then the whole intellectual and operational framework of modern remedies would need to be reassessed.

There are two possible schools of thought on this issue. It is generally claimed that a man has a 'right' to his reputation. The Monist asserts that the existence of such a right is, in general, meaningless. 'Rights are not protected interests, but the means by which interests are protected.'

Thus, unless and until, for instance, a court declares that the plaintiff has been defamed and awards monetary compensation (and, sometimes, exemplary damages) there is no 'right'. Abstract rights can be, and in practice often are, disregarded. So, the argument goes, on any realistic basis there is no such thing as a 'right to reputation' but only a particular form of relief if a person's name is unjustifiably impugned. There is thus a complete congruence of right and remedy.

The Dualist school of thought asserts that there *is* a valid distinction between an antecedent 'right' in respect of which 'relief' or a 'remedy' may be given. The late Professor Derham offered three reasons to support [**91**] this line of thought. First, 'the language of the law becomes difficult if we ignore such antecedent rights as a right to property, a right to reputation.' Second, '[l]aw does not exist only to provide constraint but also to create the conditions under which community life is possible and to increase the powers of men.' Law, in short, is larger than litigation, and rights have a meaning of their own, independent of enforcement. Third, 'the law *in fact* allows some antecedent rights to be specifically enforced.' Derham gives the example of specific performance of a contract.

…

[**92**] A sensible remedial system would provide a sufficient range of choice between remedies to allow an appropriate solution to be fashioned in the particular case.

…

[**93**] As matters stand, the remedial hierarchy is still the single greatest constraint on a more responsive system of judicial remedies. It sets up an artificial primacy. Those countries which derive their law from the [94] common law tradition have a marked preference for money awards. Equity remedies rank second. Declaratory relief is a distant third.

As long ago as 1923, Roscoe Pound criticised the development of remedial justice applied 'through money damages … [W]e hesitate to employ restitution or coercion or specific action or prevention until we are convinced that our common law remedial technique will not suffice. … This attitude colours our whole administration of justice.' …

In face of these legitimate and forcefully expressed concerns, the continued formal preference of money-based remedies over performance based remedies is puzzling. … [Footnotes omitted]

Hammond goes on to outline the factors he thinks are relevant to the exercise of discretion when judges choose remedies: at **[101]** ff. His list includes:

- the relative severity of the claimed remedies on the parties
- economic efficiency
- the 'weight' or moral value to be attached to the interest at stake
- the effect of a given remedy on third parties or the public
- the conduct of the parties
- the difficulty of calculating loss and
- the practicability of enforcement.

In between the two extremes, Australian academic Dr David Wright has suggested a middle ground between a monist approach and a dualist approach.