PREVIEW COPY

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Preview of Notes (Total Pages: 193)

INTRODUCTION TO NCA REMEDIES COURSE

Understanding the Course:

Remedies is a course about the relief a court may grant after a legal wrong has already been established. In subjects such as Contract and Tort, remedies are often studied only after determining whether the defendant is liable. In this course, however, the remedy itself is the central focus.

The key question is not simply, "Has the defendant committed a legal wrong?" Instead, candidates must ask:

- What remedy is available to the plaintiff?
- What interest is that remedy intended to protect?
- How should the remedy be measured or quantified?
- What principles may limit the plaintiff's recovery?
- Is a common law or equitable remedy more appropriate?
- How should the competing interests of the plaintiff and defendant be balanced?

The syllabus covers both monetary and equitable remedies. These include damages for breach of contract, economic and property loss, punitive damages, mitigation, supervening events, the date of assessment, equitable damages, specific performance, injunctions, Mareva orders and Anton Piller orders.

What the NCA Expects from Candidates:

The NCA Remedies examination does not merely test whether candidates can memorize and reproduce legal rules. Candidates are expected to demonstrate a practical and analytical understanding of remedial principles.

A strong answer should show the ability to:

1. **Identify the precise remedial issues raised by the facts.**
2. **State the applicable legal principles accurately**, supported by the relevant assigned cases.
3. **Apply those principles to the particular facts**, rather than providing a general summary of the law.
4. **Recognize and assess competing arguments** available to both parties.
5. **Quantify damages clearly** where figures are provided.
6. **Explain why a particular remedy or measure of damages is appropriate.**
7. **Distinguish strong legal arguments from weak or unsupported arguments.**
8. **Reach a reasoned and practical conclusion.**

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CHAPTER 1: OVERVIEW OF DAMAGES LAW

INTRODUCTION

A remedy is the relief granted by a court after the plaintiff establishes that the defendant has violated a legal right. Damages are the most commonly awarded remedy in civil cases.

Damages refer to a monetary amount awarded by the court in response to a legal wrong. Their primary purpose is to compensate the plaintiff for the loss caused by the defendant. However, damages may also be used to reverse a benefit obtained by the defendant, recognize the violation of a legal right, punish serious misconduct or deter similar conduct in the future.

Traditionally, remedies were treated as an afterthought. Courts and legal scholars focused mainly on determining whether the defendant was liable. Once liability was established, it was often assumed that the appropriate remedy would automatically follow.

However, liability and remedy are separate questions. Even after a legal wrong has been established, the court must still decide:

- What interest of the plaintiff requires protection?
- What remedy is appropriate?
- How should the plaintiff's loss be measured?
- When should the damages be assessed?
- Did the defendant obtain a benefit from the wrong?
- Are there any principles that limit the plaintiff's recovery?

Therefore, the law of damages must be studied as an independent area of law and not merely as an addition to Contract or Tort Law.

PRINCIPLES OF REMEDIAL SELECTION

The selection and measurement of remedies involve a considerable degree of judicial judgment. A particular cause of action may give the court a choice between different remedies. Even where damages are clearly appropriate, there may be more than one possible method of calculating them.

The appropriate remedy is one that properly identifies and protects the plaintiff's legitimate interest without unfairly burdening the defendant or harming other private or social interests recognized by law.

For example, where a contract has been breached, the court will ordinarily award expectation damages. These damages place the plaintiff in the position the plaintiff would have occupied if the contract had been properly performed.

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Preview of IRACs (Total Pages: 93)

IRACs for NCA Remedies Law Topics

IRAC 1: General Assessment of Compensatory Damages

Cover:

- Purpose of compensatory damages
- Identification of the protected interest
- Factual and legal causation
- Certainty and proof of loss
- Remoteness
- Mitigation
- Avoided loss
- No double recovery
- Pecuniary and non-pecuniary damages

This should be the general introductory IRAC that you can use whenever a question asks, “What damages can the plaintiff recover?”

IRAC 2: Expectation, Reliance and Restitutionary Measures

Cover:

- Expectation interest
- Reliance interest
- Restitution interest
- Choosing between expectation and reliance
- Wasted expenditure
- Losing contracts
- Burden of proving that expenditure would not have been recovered
- Limits on recovering both expectation and reliance loss

Key authorities include:

- *Canlin v Thiokol Fibres Canada*
- *R.G. McLean v Canadian Vickers*
- *Fuller and Perdue’s reliance-interest article*

IRAC 3: Cost of Cure, Diminution in Value and Loss of Amenity

Cover:

- Cost of correcting defective performance
- Difference in market value
- Reasonableness and proportionality
- Intention to complete repairs
- Economic waste
- Consumer surplus or loss of amenity
- Betterment

Key authority:

- *Ruxley Electronics v Forsyth*

This is essential because it directly relates to the pool-liner question in the official sample exam.

IRAC 4: Lost Profits, Loss of Opportunity and Contingent Loss

Cover:

- Established and future profits
- Proof of a real and substantial possibility
- Loss-of-chance valuation
- Commercial contingencies
- New-business uncertainty
- Benefits dependent on third-party decisions
- Discounting according to probability

Key authorities include:

- *Ticketnet v Air Canada*
- *Folland v Reardon*
- *Bhatnagar v Cresco Labs*
- *PreMD v Ogilvy Renault*

IRAC 5: Mental Distress and Aggravated Damages for Breach of Contract

Cover:

- Ordinary rule against recovery for disappointment
- Peace-of-mind or psychological-benefit contracts
- Foreseeability of mental distress
- Degree of proven distress
- Aggravated damages
- Avoiding duplication with ordinary damages

Key authorities:

- *Fidler v Sun Life*
- *C.M. Callow v Zollinger*

IRAC 6: Contractual Remoteness and Consequential Loss

Cover:

- Ordinary loss arising naturally from breach
- Special circumstances communicated when contracting
- Objective contemplation of the parties
- Type or kind of loss
- Assumption of responsibility
- Consequential expenses, penalties and third-party liabilities
- Unusual or disproportionate loss

Key authorities include:

- *Hadley-based principles reflected in the syllabus cases*
- *Sunshine Vacation Villas*
- *Hamilton v Open Window Bakery*
- *Emkay Canada Fleet Services*

IRAC 7: Negligence Causing Pure Economic Loss

Cover:

- Measure of damages after negligence is assumed
- Transaction loss
- Consequential economic loss
- Negligent professional services or information
- Lost opportunity
- Contingencies
- Avoiding recovery for an unrelated or legally unprotected expectation

Key authorities include:

- *V.K. Mason Construction*
- *Rainbow Industrial Caterers*
- *Beaver Lumber*
- *Budai*
- *Messineo*
- *Bowman v Martineau*

IRAC 8: Damages for Harm to Property

Cover:

- Cost of repair
- Replacement cost
- Diminution in value
- Reasonableness of repair
- Betterment deductions
- Loss of use
- Consequential loss
- Pre-existing vulnerability and impecuniosity
- Total destruction versus repairable damage

Key authorities include:

- *Liesbosch Dredger*
- *Darbishire v Warran*
- *James Street Hardware*
- *Miller v Brian Ross Motorsports*
- *Nan v Black Pine Manufacturing*

IRAC 9: Punitive Damages

Cover:

- Independent actionable wrong where applicable
- Malicious, oppressive or high-handed misconduct
- Marked departure from ordinary standards
- Punishment, deterrence and denunciation
- Rationality and proportionality
- Other compensatory awards and penalties
- Defendant's blameworthiness, vulnerability and profit
- Appellate review

Key authorities:

- *Whiten v Pilot Insurance*
- *Cassell v Broome*
- *McCabe*
- *Baker v Blue Cross*

IRAC 10: Supervening Events and the Compensatory Principle

Cover:

- Events occurring after breach or injury
- Whether later events should reduce damages
- Difference between actual loss and hypothetical loss
- Certainty of a supervening event
- Avoiding overcompensation
- Interaction with the assessment date

Key authorities:

- *Penner v Mitchell*
- *Sunrise Co. v The Lake Winnipeg*
- *Golden Strait*

IRAC 11: Mitigation, Avoided Loss and Substitute Transactions

Cover:

- Reasonable steps after breach
- Defendant's burden of proof
- Availability of a substitute
- Reasonable expenditure and risk
- Refusal of substitute performance or employment
- Benefits obtained through mitigation
- Independent benefits
- Loss avoided by resale
- Mitigation where specific performance is claimed

Key authorities include:

- *Southcott Estates*
- *Erie County Natural Gas*
- *Cockburn*
- *Jamal*
- *Slater*
- *Sells*
- *Finelli*

IRAC 12: Date of Assessment and Damages in Lieu of Specific Performance

Cover:

- Traditional breach-date rule
- Later assessment where necessary for compensation
- Rising property value
- Plaintiff's reasonable pursuit of specific performance
- When specific performance becomes unavailable
- Damages at common law versus equitable damages in lieu
- Mitigation and election
- Intermediate resale agreement or proven lost profit

Key authorities:
- *Johnson v Agnew*
- *Wroth v Tyler*
- *Asamera Oil*
- *Semelhago*
- *306793 Ontario v Rimes*
- *Inmet Mining*

This IRAC is directly required for Question 1 of the official sample examination.

IRAC 13: Specific Performance

Cover:
- Valid and sufficiently certain contract
- Breach or threatened non-performance
- Plaintiff ready, willing and able to perform
- Inadequacy of damages
- Uniqueness and availability of substitutes
- Land after *Semelhago*
- Scarcity of ordinary goods
- Hardship and third-party interests
- Clean hands, delay and unfairness
- Supervision and personal services
- Alternative damages

Key authorities include:

- *Semelhago*
- *Sky Petroleum*
- *Aulakh v Nahal*
- *Harle*
- *Lucas*
- *Vijayakumar*
- *Falcke v Gray*

IRAC 14: Permanent, Mandatory and Quia Timet Injunctions

Cover:

- Underlying legal or equitable right
- Actual or threatened violation
- Inadequacy of damages
- Permanent prohibitory relief

- Mandatory corrective orders
- Future or quia timet harm
- Strong probability of serious damage
- Clarity, feasibility and proportionality
- Hardship, public interest and damages in lieu
- Encroachments and continuing nuisance

Key authorities:

- *Fletcher v Bealey*
- *Palmer*
- *Redland Bricks*
- *Miller v Jackson*
- *Krieser v Garber*
- *1711811 Ontario v Buckley*

This IRAC would help answer Question 2 of the sample exam concerning removal of the fence and encroaching eaves.

IRAC 15: Interlocutory Injunctions

Cover:

- Jurisdiction and underlying right
- Serious question to be tried
- Irreparable harm
- Balance of convenience
- Status quo
- Public interest
- Third-party effects
- Undertaking as to damages
- Interim and without-notice relief

Also include a separate branch for:

- Mandatory interlocutory injunction
- Strong prima facie case under *R v CBC*

Key authorities:

- American Cyanamid
- Yule
- *Mott-Trille*
- R v CBC
- Blake
- City Wide Towing

IRAC 16: Mareva Orders

Cover:

- Strong prima facie case
- Defendant's assets within the court's reach
- Real risk of intentional removal or dissipation
- Purpose of defeating judgment
- Irreparable enforcement harm
- Balance of convenience
- Full and frank disclosure
- Meaningful undertaking and security
- Living, legal and business expenses
- Banks and innocent creditors
- Worldwide orders
- No security, ownership or creditor priority

Key authorities:

- *Mareva Compania Naviera*
- *Aetna Financial Services*
- *Z Ltd.*
- *Trade Capital Finance*
- *10390160 Canada v Casey*

IRAC 17: Anton Piller Orders

Cover:

- Strong prima facie case
- Very serious actual or potential damage
- Convincing evidence that the respondent possesses incriminating material
- Real possibility of destruction before discovery
- No adequate less-intrusive remedy
- Full and frank disclosure
- Independent supervising solicitor
- No forced entry
- Opportunity to obtain legal advice
- Privilege protocol
- Electronic evidence, inventory and sealed custody
- Post-search report and court review

Key authorities:

- *Anton Piller*
- *Celanese*
- *State Industries*

Additional Essay Frameworks

Essay 1: Fuller and Perdue - The Reliance Interest

- Difference between expectation and reliance
- Restoring the status quo versus creating the promised future position
- Why reliance protection appears easier to justify
- Why expectation damages require additional justification
- Relationship between promise, exchange and institutional protection of contractual expectations

This directly prepares you for Question 5 of the sample exam.

Essay 2: Why a Mareva Order Is Not Security Before Judgment

- No execution before judgment
- Personal nature of the order
- No ownership, lien, charge or priority
- Requirement of judgment-defeating dissipation
- Rights of secured and judgment creditors
- Difference between Mareva and proprietary relief
- *Aetna* and *Trade Capital Finance*

This directly prepares you for Question 4 of the sample exam.

Essay 3: Damages versus Equitable Remedies

- Primacy of damages
- Meaning of inadequacy
- Specific performance and injunctions
- Equitable discretion
- Hardship, clean hands, delay and third parties
- Why extraordinary interlocutory remedies require stronger safeguards

Continued …..

Preview of NCA Sample Exam Answer Script (Total Pages: 36)

QUESTION ONE (20 marks, 36 minutes)

In October 2019, P agreed to buy a commercial building in Barrie, Ontario from V for $1.2 million. The agreed closing date was March 1, 2020. In January 2020, P agreed to sell the property to B for $1.7 million, with a closing date of June 1, 2020. P and B agreed that the sale by P to B would be conditional on the agreement between P and V closing as scheduled on March 1.

In early February, V repudiated the agreement with P. P immediately initiated an action against V for specific performance or, alternatively, damages in lieu of specific performance or, in the further alternative, damages at common law. A short time later P learned that V had sold the property to a third party, T, for $1.8 million. (T had no notice of V's agreement with P, or of P's agreement with B.) Upon learning of the sale to T, P amended his statement of claim by dropping his request for specific performance.

The market value of the property as of March 1, 2020 was $1.9 million. Its value as of June 1, 2020 was $2.1 million. In September 2020, when the action came to trial, the property was worth $2.4 million.

a) Discuss, clearly and concisely, how the trial judge is likely to assess the damages payable by V.

b) How, if at all, would your answer in (a) differ if P had never agreed to sell the land to anyone else? Explain, clearly and concisely.

<u>**Sample Answer**</u>

Issues:

- whether P is entitled to common-law damages or damages in lieu of specific performance?
- the appropriate date for assessing P's loss?
- the effect of P's agreement to resell the property to B? and
- whether the result changes if P had not entered into the resale agreement?

Rules:

The applicable principles are:

- Contract damages protect the plaintiff's expectation interest by placing the plaintiff, as far as money can, in the position that performance would have produced.
- For a vendor's failure to convey land, the ordinary measure is the difference between the property's market value at the relevant date and the contract price.
- Damages are ordinarily assessed at the date of breach or the contractual closing date. However, this is not an inflexible rule: *Johnson v Agnew*.
- A purchaser who reasonably pursues a legitimate claim for specific performance may receive damages assessed at a later date where necessary to provide proper compensation: *Wroth v Tyler* and *Asamera Oil*.
- Specific performance is not automatically available for every contract involving land. The plaintiff must demonstrate a fair, real and substantial justification for it, including that damages are inadequate: *Semelhago v Paramadevan*.
- Damages in lieu of specific performance should provide the monetary equivalent of the performance the plaintiff would have received.
- The court must assess the plaintiff's actual loss and avoid overcompensation or double recovery.

A. Damages where P had agreed to sell the property to B

Nature of P's Interest in the Property

P immediately commenced an action seeking specific performance or, alternatively, damages. However, the mere inclusion of a claim for specific performance does not establish an entitlement to that remedy.

Under *Semelhago*, land is not presumed to be unique. P must show that the property possessed qualities making a substitute unavailable and that damages would not adequately protect P's contractual interest.

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Preview of Questions and Answer Set (Total Pages: 177)

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7	Negligence causing pure economic loss	25
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QUESTION 1: General Assessment of Compensatory Damages

30 Marks | 54 Minutes

Northstar Events Ltd. contracted with Glacier Convention Centre to hold a three-day technology conference at the Centre in May. Northstar agreed to pay $180,000 for the venue. It expected to earn revenue from ticket sales, sponsorship agreements and exhibitor fees.

Three days before the conference, Glacier informed Northstar that the venue would not be available because it had accidentally accepted a more profitable booking from another organization.

Northstar immediately rented a smaller venue for $240,000. Because of its limited capacity, Northstar refunded $70,000 in ticket sales and lost two sponsorship agreements worth $50,000. However, it saved $20,000 in catering and security expenses. It also earned an unexpected $15,000 from providing online access to the conference.

Northstar claims:

1. the additional cost of the substitute venue;
2. all refunded ticket revenue;
3. the lost sponsorship revenue;
4. $25,000 spent advertising the original venue;
5. $10,000 for injury to its commercial reputation;
6. $20,000 for the managing director's stress and embarrassment; and
7. punitive damages because Glacier preferred the more profitable booking.

Glacier admits breach but argues that some losses are speculative, remote or duplicative. It also argues that Northstar should have cancelled the conference instead of renting a more expensive venue.

Advise Northstar regarding the damages it is likely to recover. Address causation, certainty, remoteness, mitigation, avoided loss, benefits obtained through mitigation, pecuniary and non-pecuniary loss, and double recovery.

Sample Answer

Issues

1. whether Northstar acted reasonably in renting the substitute venue;
2. which financial losses were caused by Glacier's breach and are sufficiently certain and foreseeable;
3. how the saved expenses and online revenue affect the calculation;
4. whether the advertising and reputational claims overlap with the expectation measure;
5. whether the managing director's stress is recoverable; and
6. whether Glacier's deliberate, profit-motivated breach justifies punitive damages.

Rules

The applicable principles are:

- Compensatory damages place the plaintiff, as far as money can, in the position it would have occupied if the contract had been performed.
- The plaintiff must prove factual and legal causation and establish its loss with reasonable certainty.
- Under the contractual remoteness principle, losses are recoverable if they arise naturally from the breach or were within the parties' reasonable contemplation when the contract was made.
- Reasonable expenses and losses incurred while attempting to continue or salvage a commercial enterprise are recoverable: *Ticketnet Corp v Air Canada*.
- Commercial profit is a foreseeable purpose of business contracts, although the amount claimed must still be proven: *Canlin Ltd v Thiokol Fibres Canada Ltd*.
- The plaintiff must take reasonable steps to mitigate. The defendant bears the burden of proving that the plaintiff acted unreasonably and that the loss would otherwise have been avoided.
- Reasonable mitigation expenses are recoverable even where the mitigation is not completely successful.
- Expenses and benefits avoided because of the breach must be deducted.
- Benefits obtained through mitigation must also be accounted for where they result from the breach and substitute for the lost contractual benefit.
- Expectation and reliance losses may be recovered together only where they do not overlap.

- Mental-distress damages depend on causation and reasonable foreseeability: *Fidler v Sun Life Assurance Co of Canada*.
- Punitive damages require exceptional, malicious, oppressive or high-handed conduct and an independently actionable wrong where applicable. They must be rational and proportionate: *Whiten v Pilot Insurance Co* and *Vorvis v Insurance Corporation of British Columbia*.

Analysis:

1. Purpose of the Damages Award

Glacier admits that it breached the agreement by failing to make the convention centre available. Northstar is therefore entitled to be placed in the financial position it would have occupied if the conference had proceeded at Glacier's venue.

The assessment must compare:

- the position Northstar would have occupied if Glacier performed; and
- the position Northstar actually occupied after taking reasonable steps in response to the breach.

Northstar cannot recover more than its actual net loss. Saved expenses and substitute income must therefore be considered.

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