BOOK REVIEW

REMEDIES IN CONTEXT: COMMENTARY AND MATERIALS

By Anne Cossins

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THE law of remedies is part of the elective programme of many Australian law schools. The appeal of the subject lies in its potential for drawing together a number of core areas of civil law, including contract, torts, equity and restitution. Students who choose this subject have the opportunity to revisit areas of law which they studied earlier in their degrees but which, for various reasons, often concentrated on the substantive law rather than secondary obligations. Remedies helps to create an understanding of the relationship between these various areas as it is often only in this context that the function and character of a body of law finds concrete expression.

From an academic perspective, the law of remedies is an important building block for a coherent development of the law of civil obligations. Beyond law school, a clear and holistic understanding of secondary rights is also of immense practical benefit in giving clients meaningful legal advice. This is even more true if these principles are embedded in an introduction to non-judicial methods of dispute resolution such as mediation and negotiation.

Remedies is thus a field of enormous breadth, which can be studied for a variety of reasons. This makes it crucial to choose appropriate materials for teaching the unit. As far as Australian casebooks are concerned, Tilbury, Noone & Kercher's *Remedies*[1] has for the last 15 years enjoyed a monopoly. Now in its fourth edition it is refined and comprehensive. Without doubt, the fact that the classic text in this area has acquired such maturity in its structure and content is one reason why Anne Cossins has adopted a different approach in her casebook.

In the Introduction, the author promises that her book 'will provide students and practitioners with a cultural and social framework within which to understand judicial decision-making as it pertains to civil remedies for the following main causes of action: breach of contract, negligence, breach of fiduciary duties and restitution'.[2] The book pursues this aim in nine chapters. The first two chapters explore the parameters of the law of remedies and the boundary between tort and contract from

1. M Tilbury, M Noone & B Kercher *Remedies: Commentary and Materials* 4th edn (Sydney: Law Book Co, 2004).
2. Para 1.1.1.

a remedial perspective. Chapter 3 seeks an answer to the question, Why does the law impose secondary obligations? The following chapter presents material on the principles that limit recovery of damages in contract and tort. Chapter 5 deals with damages for loss of expectation in negligence law; this is followed by a short chapter on concurrent liability in tort and contract. The boundaries between law and equity from a remedial perspective are examined in chapter 7. The penultimate chapter is dedicated to coercive relief in equity, namely specific performance and injunctions, while the final chapter traverses unjust enrichment and restitution.

The author's emphasis on illustrating and contextualising the working of remedial principles gives the book its appeal. In many instances, case studies are employed to bring the legal principles to life. The subject-matter of these case studies is mostly well chosen, with many of them having a distinctly feminist outlook. The question why the law imposes secondary obligations, and the answers given by law and economics scholars, feminists and relational contract theorists, are discussed with reference to the enforceability of a surrogacy contract. The discussion of factors which limit claims for damages (eg, remoteness, causation, certainty, contributory negligence and mitigation) is prefaced by an introduction to cases of wrongful birth, in particular *CES v Superclinics (Australia) Pty Ltd*.[3] Although this decision must now be read in the light of *Cattanach v Melchior*,[4] damages for wrongful birth are particularly apt to illustrate how judges may be influenced by (sometimes concealed but increasingly acknowledged) considerations of policy. Perhaps the next edition of the book will expand on this case study and also incorporate other relevant cases such as *McFarlane v Tayside Health Board*[5] and *Rees v Darlington Memorial Hospital Trust*.[6]

While the contextual approach has much to commend it, it is also responsible for a number of idiosyncrasies which make it more difficult to employ the book in courses that follow a different structure or have a different emphasis. One example of this is the coverage of equitable compensation. The book devotes more than 90 pages to the (substantive) question of when a fiduciary relationship exists, in particular whether the Commonwealth owed a fiduciary obligation to the so-called Stolen Generation. In comparison, the material on the remedial (and also highly controversial) issue of how equitable compensation is to be assessed comprises 40 pages. The High Court's strict and plaintiff-friendly approach to equitable compensation finds a counterpart in its refusal to accept remoteness and contributory negligence as distinct factors for limiting damages under sections 82 and 87 of the Trade Practices Act 1974 (Cth).[7] Extracts from recent High Court decisions such as *Henville v*

3. (1995) 38 NSWLR 47.
4. (2003) 215 CLR 1.
5. [2000] 2 AC 59.
6. [2004] 1 AC 309.
7. Amendments to the Trade Practices Act 1974 (Cth) under the Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004 (Cth) have now established the availability of contributory negligence in claims for misleading and deceptive conduct: s 82(1B).

Walker[8] and *I & L Securities Pty Limited v HTW Valuers (Brisbane) Pty Limited*[9] would have added depth to the discussion of these questions. But monetary awards under the Trade Practices Act are only briefly discussed – somewhat oddly, under the heading 'The measure of damages in tort and contract law'.

It would be an impossible task to compile the materials for a casebook in a way that suited all potential readers. However, it is important to be aware of the choices made by an author in assessing the usefulness of his or her book for teaching and learning purposes. As far as monetary remedies are concerned, Cossins' book concentrates on compensatory awards for economic loss. This means, for example, that the current uncertainty over the suitability and scope of gain-based or exemplary awards in the law of contract receives little attention. While there is an extract from the House of Lords' decision in *Attorney-General v Blake*,[10] the impact of this decision is not discussed. Punitive awards do not feature in the book despite the fact that the question whether the law of equity could accommodate punitive awards has received much judicial attention (most recently in *Harris v Digital Pulse Pty Ltd*)[11] as well as academic comment throughout the common law world – and raises some fundamental issues of the remedial aims of equity. On the other hand, it is questionable whether inclusion of the chapter on unjust enrichment was essential given that this subject is taught in most law schools as a separate unit. Further, the area of restitution law, which is most closely linked to the causes of action covered in the book and which would have provided another dimension to that discussion, is expressly excluded. Lastly, the book's focus on the tort of negligence has as its corollary that non-pecuniary losses (outside the area of personal injury) are only touched upon.[12]

On the whole, the selection of materials outside the areas of the case studies reveals a preference for broad principles. As far as case extracts are concerned, the book mostly opts for lengthy extracts from the seminal cases rather than shorter extracts from a wider range of decisions.[13] As a result, the book does not take account of the most recent developments in personal injury law (eg, *Wynn v NSW Insurance Ministerial Corporation*[14] and *Kars v Kars*[15]) or the far-reaching statutory reforms resulting from the so-called insurance crisis and the Ipp Review of the law on

8. (2001) 206 CLR 459.
9. (2002) 210 CLR 109.
10. [2001] 1 AC 268.
11. (2003) 56 NSWLR 298.
12. See the short extract from *Baltic Shipping Co v Dillon* (1992) 176 CLR 344.
13. Eg, on personal injury damages there are only extracts from *Sharman v Evans* (1977) 138 CLR 563; *Skelton v Collins* (1966) 115 CLR 94; *Burford v Allen* (1993) 60 SASR 428; *Van Gervon v Fenton* (1992) 175 CLR 327; R Graycar 'Women's Work: Who Cares?' (1992) 14 Syd LR 86.
14. (1995) 184 CLR 485.
15. (1996) 187 CLR 354.

negligence.[16] In this and other areas, subsequent qualifications or glosses on the basic principles laid down in the leading cases are not brought to the reader's attention. Nonetheless, in conjunction with the introductory comments and occasional flowcharts, the extracts are usually well-suited to providing a general overview of the area.

Another point that needs to be noted is that navigation within the book is difficult. This is partly due to the book's structure, which covers issues (eg, expectation interest and apportionment) in more than one place, or which deals with them in quite unexpected contexts (eg, restitutionary awards for breach of contract are dealt with under the heading 'Equitable monetary remedies'). The search for answers to particular questions can be time-consuming because the book has no index or table of cases. As a result, the reader's orientation is critically dependent on the Table of Contents, which is not well put together. The headings to sub-sections often appear incoherent and do not provide a pathway through the book.[17]

Notwithstanding these criticisms, Cossins' book is a stimulating read and a welcome addition to the teaching materials for courses on the law of remedies. It combines detailed contextual analysis of some key issues with case-centred coverage of many other areas. The author's choice of materials and style of writing are more personal than in many other casebooks. Her work will give readers a broad-based understanding of the principles, and contribute to a vibrant debate on the forces and attitudes that shape this area of the law.

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16. Commonwealth of Australia *Review of the Law of Negligence: Final Report* (Canberra: Dept of Treasury, 2002).
17. For example, the sub-headings to the section on 'The common law remedy of compensation' read: 'The secondary obligation to pay compensation', 'Elements of the substantive law of contract', 'Elements of substantive tort law', 'Other causes of action in tort law', 'Statutory schemes', 'What Chapters 2 and 3 deal with', 'Lump sum payments', 'An unconditional award', 'The once and for all rule', 'Continuing causes of action', and 'A third exception to the once and for all rule': see p vii.