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# Update Summary

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**UPDATE 15**

**APRIL 2014**

## COMMERCIAL DAMAGES

**S Jacobs**

### Highlights

- Commentary has been added to the following chapters:
  - Chapter 6 – The Measure of Damages in Tort;
  - Chapter 7 – Trade Practices Act and Competition and Consumer Act damages;
  - Chapter 9 – Causation;
  - Chapter 25 – Damages for breach of confidence and breach of covenants in restraint of trade;
  - Chapter 29 – Compensation that a wronged mortgagor can claim.

### Note

The author welcomes any positive criticism, comment, or indeed any dialogue on the topics covered by this work. Correspondence should be addressed to [sjacobs@wentworthchambers.com.au](mailto:sjacobs@wentworthchambers.com.au), and may be copied to Thomson Reuters at [ariel.galapo@thomsonreuters.com](mailto:ariel.galapo@thomsonreuters.com).

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## COMMENTARY

Commentary and case materials have been updated in the following chapters which have been revised:

- Chapter 6 – The Measure of Damages in Tort;
- Chapter 7 – Trade Practices Act and Competition and Consumer Act damages;
- Chapter 9 – Causation;
- Chapter 25 – Damages for breach of confidence and breach of covenants in restraint of trade;
- Chapter 29 – Compensation that a wronged mortgagor can claim.

New paragraphs/sections have been added at:

### **[6.5120] Costs not recoverable as damages in current proceedings**

(1) A plaintiff may not recover against a defendant as damages in an action any part of the plaintiff's costs of that action: *Cockburn v Edwards*; *Hobartville Stud*.

(2) Where there is more than one defendant to the action, that rule applies to preclude the recovery by the plaintiff as damages against an unsuccessful defendant of any costs of the action that relate to a claim against a successful defendant: *The Tiburon*; *British Racing Drivers' Club Ltd*; *Penn v Bristol & West Building Society*.

(3) The same rule applies to a cross claim in proceedings, so that a defendant cannot as cross claimant recover as damages against a cross defendant any part of any costs of the proceedings: *Penn v Bristol & West Building Society*.

As summarised by Hamilton J in *Queanbeyan Leagues Club Ltd v Poldune Pty Ltd* [2000] NSWSC 1100 para [45].

### **[9.65] Civil Liability Act: what scenarios does it not apply to?**

Section 5D of the *Civil Liability Act 2002* (NSW) applies where through a failure to exercise reasonable care and skill, harm has been caused.

This language is apt to describe the duty of care owed by professionals such as lawyers, doctors, auditors, some bankers, engineers, architects, and perhaps specialised sub-contractors and like persons.

The section appears to have no application to breaches of warranty of fitness for purpose/ merchant ability, to many breaches of contract, e.g. the obligation of a builder to build in accordance with the plans and specifications; breaches of a lease; a franchise; a distribution agreement; and so forth.

## **[9.1810] Physical injury**

A failure to follow instructions can be sufficient to break the chain of causation: *Lavin v QM Properties Pty Ltd* [2012] QCAT 539 at [15], citing *McKew*. See also *Kessey v Golledge* [1999] NSWCA 424.

On the other hand, the facts and outcome in *Medlin v The State Government Insurance Commission* [1995] HCA 5; (1995) 182 CLR 1, demonstrate that voluntary or deliberate or unusual conduct on the part of a plaintiff does not necessarily sever the causal nexus so as to relieve a negligent defendant from liability for loss suffered by a plaintiff; and "...it is necessary to have regard to the extent to which the plaintiff's voluntary conduct has been constrained by the defendant's misconduct, and then to ask whether as between plaintiff and defendant it was reasonable of the plaintiff to make the choice which was the immediate cause of the loss": *Hirst v Nominal Defendant* [2005] QCA 65 at [14].

## **[29.10]**

There has been a controversy as to whether the mortgagee's duty is (merely) an equitable to act in good faith in exercising the power of sale or whether there is a higher and more stringent duty to use reasonable care to achieve the best price possible. Until the amending legislation referred to below, the duty was said, in jurisdictions such as NSW and Victoria, to be (merely) equitable, with the consequence that the remedy was to seek an account (not damages). There is specific legislation in the states and territories, each of whose provisions must be consulted.

## **Chapter 25 Damages for breach of covenants in restraint of trade, breach of confidence, copyright and passing off**

This Chapter has been renamed, completely restructured and revised with a major section added on *Direct costs of selling, general overheads and opportunity costs* [25.1150].

### **Additional new sections added:**

#### **COPYRIGHT**

Two competing measures of damages	[25.1000]
Ordinary damages	[25.1015]
Depreciation of a chose in action caused by the infringement	[25.1030]
Use for non-commercial, cultural or educational purposes	[25.1045]
Licence fee as opposed to lost profits	[25.1100]
Where the infringer would not have paid the asking price	[25.1120]
Lost profits including apportionment of profits and deductibility of expenses	[25.1140]

Direct costs of selling, general overheads and opportunity costs	[25.1150]
Incremental v absorption approach to general overheads	[25.1160]
Apportionment of profit	[25.1170]
Impact on remedy where applicant has unclean hands	[25.1200]
Where the plaintiff's own work is pirated	[25.1220]
Amount by which the value of the rights have been depreciated	[25.1290]
Market erosion – past and future	[25.1310]
Architect's plans	[25.1330]
Pain, suffering and humiliation	[25.1350]
Election	[25.1360]
Additional damages under s 115(4) of the Copyright Act 1968	[25.1370]
Beware of the uncritical application of English law	[25.1390]
Flagrancy and benefit	[25.1410]
All other relevant matters: s 115(4)(b)(iii)	[25.1430]
Mark of court's displeasure	[25.1450]
<b>Copyright: Damages for conversion based on s 116 of the Act</b>	
Introduction	[25.1510]
Historical background and the fiction of s 116	[25.1530]
How to value damages	[25.1550]
Retail prices as distinct from wholesale prices	[25.1570]
The severability of infringing copies – a restrictive approach	[25.1590]
Assignment of cause of action for breach of copyright	[25.1630]
<b>PASSING OFF</b>	
Definition of passing off	[25.2000]
Damages for passing off	[25.2200]
Injunctions and account of profits	[25.2300]

## INDEX

The Index has been updated.