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Russell L. Weaver

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INTRODUCTION: FIFTH REMEDIES DISCUSSION FORUM

*Russell L. Weaver**

The Fifth Remedies Discussion Forum was held at the Emory University School of Law on May 29–30, 2007.¹ As with prior fora, the purpose of this forum was to bring together a small group of prominent remedies scholars to discuss matters of common interest. The 2007 Forum focused on two topics: “damages” and “the most underrated remedies decision.”

Damage issues have consumed a good deal of judicial ink in recent years, and a great deal of space in law reviews. This symposium offered a number of interesting perspectives on damages. For example, Professor W. Jonathan Cardi’s *Damages as Reconciliation* observes that tort law is currently focused on enforcing a defendant’s legal and moral obligation to repair another’s loss, and he argues that a shift to an emphasis on reconciliation might “deliver to tort victims and wrongdoers something that is missing from the current order—a richer sense of justice, wholeness, and closure that many participants report lacking at the close of legal proceedings.”² He goes on to offer suggestions about how reconciliation concepts might be integrated into a modern tort system and how damage awards might be used to reinforce and support reconciliation.³

Two articles focused on areas of great difficulty for courts and commentators: the physical impact rule and damage recoveries for emotional or mental distress. Professor Rachel M. Janutis’s article, *The New Industrial Accident Crisis: Compensating Workers for*

* Professor of Law & Distinguished University Scholar, University of Louisville, Louis D. Brandeis School of Law.

1. Organizers of the Remedies Discussion Forum wish to express their appreciation to LexisNexis, Washington & Lee University School of Law & the University of Louisville’s Louis D. Brandeis School of Law for their financial support which made the forum possible.

2. Jonathan Cardi, *Damages as Reconciliation*, 42 LOY. L.A. L. REV. 5, 7 (2008).

3. *Id.* at 19–24.

Injuries in the Office, focuses on those issues in the context of workplace stress, workers compensation, and the law's tendency to differentiate between cases involving emotional injuries when "physical impact" is involved (in which recovery is allowed) and cases not involving such impact (for which recovery is not allowed).⁴ She notes that the law has historically denied damages in cases when there is no physical impact, on the theory that the existence and amount of damages can be uncertain, a denial which she characterizes as the "myth" of uncertainty. She goes on to argue that the denial reflects the "public perceptions about and biases against these types of injuries."⁵ Professor John D. McCamus's *Mechanisms for Restricting Recovery for Emotional Distress in Contract* also deals with recovery of damages for emotional distress but in the context of recoveries for breach of contract and provides perspective on the law in England, Australia, Canada, and the United States.⁶

The remaining damages articles focus on a diverse range of issues. For example, Professor Jeffrey Berryman's *The Compensation Principle in Private Law* discusses shifting notions of compensation in tort law as applied to concepts of equality and multiculturalism.⁷ Professor Caprice L. Robert's article, *Restitutory Disgorgement for Opportunistic Breach of Contract and Mitigation of Damages*, focuses on disgorgement of profit realized from a breach of contract and discusses the relationship between the concepts of disgorgement and the requirement of mitigation of damages.⁸ Professor Andrew Tettenborn's *Consequential Damages in Contract—The Poor Relation?* notes the difference between consequential losses and expectation or reliance losses, and he argues that there are sound reasons for distinguishing between these different types of losses.⁹ Finally, Professor James M.

4. Rachel M. Janutis, *The New Industrial Accident Crisis: Compensating Workers for Injuries in the Office*, 42 LOY. L.A. L. REV. 25 (2008).

5. *Id.* at 26.

6. John D. McCamus, *Mechanisms for Restricting Recovery for Emotional Distress in Contract*, 42 LOY. L.A. L. REV. 51 (2008).

7. Jeffrey Berryman, *The Compensation Principle in Private Law*, 42 LOY. L.A. L. REV. 91 (2008).

8. Caprice L. Roberts, *Restitutory Disgorgement for Opportunistic Breach of Contract and Mitigation of Damages*, 42 LOY. L.A. L. REV. 131 (2008).

9. Andrew Tettenborn, *Consequential Damages in Contract—The Poor Relation?*, 42 LOY. L.A. L. REV. 177 (2008).

Fischer's article, *The Puzzle of the Actual Injury Requirement for Damages*, focuses on the actual injury requirement and argues that courts have not developed a "consistent, coherent approach" to the actual injury requirement so that it can be called a "rule."¹⁰ However, when courts apply the actual injury requirement, the application is often motivated by other considerations.

A few of the authors focused on the "most underrated remedies decision" topic. Among these papers was my own contribution, *Frambach v. Dunihue: The Most Underrated Decision*.¹¹ In this article, I argue that *Frambach* is not underrated because of the "brilliance" of its legal reasoning but because of its "teachability." The case "presents issues which are not only unique but interesting and engaging" in the context of a non-traditional living arrangement that continues for several decades before dissolving into litigation.¹² Professor Sarah M. R. Cravens's *The Brief Demise of Remittitur: The Role of Judges in Shaping Remedies Law* discusses two decisions that briefly abolished remittitur, and she argues that the decisions reveal much about the role of judges and the relationship between the judiciary and the legislature.¹³ Last, but not least, Professor Gary Davis's *Flowering of Equitable Compensation in Australian Remedial Law: The Underrated Case of Biala Pty. Ltd. v. Mallina Holdings Ltd.* focuses on a recent Australian decision, which he regards as involving startling facts and a startling result: major business and political figures "crash, burn and end up in jail."¹⁴

10. James M. Fischer, *The Puzzle of the "Actual Injury" Requirement for Damages*, 42 LOY. L.A. L. REV. 197 (2008).

11. Russell L. Weaver, *Frambach v. Dunihue: The Most Underrated Decision*, 42 LOY. L.A. L. REV. 237 (2008).

12. *Id.* at 237.

13. Sarah M. R. Cravens, *The Brief Demise of Remittitur: The Role of Judges in Shaping Remedies Law*, 42 LOY. L.A. L. REV. 247 (2008).

14. Gary Davis, *Flowering of Equitable Compensation in Australian Remedial Law: The Underrated Case of Biala Pty. Ltd. v. Mallina Holdings Ltd.*, 42 LOY. L.A. L. REV. 271 (2008).

