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## Introduction: Remedies Discussion Forum

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## INTRODUCTION: REMEDIES DISCUSSION FORUM

Russell L. Weaver\*

Each year, the Remedies Discussion Forum brings together prominent remedies scholars from all over the world to discuss important and topical remedial issues. In 2019, the forum met at the Université Paris Dauphine PSL Research University (Paris, France). For this forum, participants were invited to write about any of three topics: *remedies related to obligations* (a topic could be approached comparatively or could involve an examination of how and when the courts of one country can or should enforce judgments from other countries); *controversial remedies* (which could be broadly defined but, in particular, can involve remedies for sexual misconduct and/or sexual harassment); *recent developments in remedies*, which could involve recent remedial developments from the author's own country or could involve a comparative perspective. The papers being submitted here were "discussion drafts," submitted in advance of the forum to stimulate discussion, which have been refined in light of the discussions.

Professor Sirko Harder's contribution to the forum was entitled *Negotiating Damages in English Contract Law*.<sup>1</sup> The article focuses on the U.K. Supreme Court's holding in *One Step (Support) Ltd. v. Morris-Garner*,<sup>2</sup> which held that damages for breach of contract may be measured by the amount that the innocent party (the claimant) could have demanded from the breaching party for a release of the latter from the relevant obligation. In other words, a court may award a "notional fee," essentially permitting the negotiation of damages, designed to compensate for the claimant's loss of the right to control the use of an asset. Professor Harder examines the development of this remedial approach in English contract law and seeks to evaluate the efficacy of the approach.

Professor Anthony Sebok's article is entitled *Going Bare in the Law of Assignments: When Is an Assignment Champertous?*<sup>3</sup> In this article, he discusses David Capper's article, *The Assignment of a Bare Right to Litigate*,<sup>4</sup> which analyzes both the English Court of Appeal's holding in *Simpson v.*

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<sup>1</sup> Sirko Harder, *Negotiating Damages in English Contract Law*, 14 FIU L. REV. 45 (2020).

<sup>2</sup> [2018] UKSC 20, [2019] AC 649.

<sup>3</sup> Anthony Sebok, *Going Bare in the Law of Assignments: When Is an Assignment Champertous?*, 14 FIU L. REV. 85 (2020).

<sup>4</sup> David Capper, *The Assignment of a Bare Right to Litigate* (unpublished manuscript).

*Norfolk & Norwich University Hospital NHS Trust*<sup>5</sup> and the Irish Supreme Court's decision in *SPV Osus Ltd. v. HSBC Institutional Trust Services (Ireland)*.<sup>6</sup> In his article, Capper makes several observations: maintenance is less offensive to the law of champerty than the assignment of "bare" claims; and the law of champerty can, and ought to, distinguish the assignment of bare claims from other types of assignment, and the historical trend of allowing the assignment of choses of action should not be extended to bare assignments. Professor Sebok attempts to draw parallels between the treatment of champerty and maintenance in the United States and the Commonwealth, and he uses American approaches to illustrate the limitations of Capper's approach.

Professor John McCamus' article is entitled *Restitutionary Remedies in Three-Party Cases: A Comparative Perspective*.<sup>7</sup> He begins by noting that almost all restitution litigation involves "two-party" cases in which the plaintiff claims that the defendant has been unjustly enriched at the plaintiff's expense. McCamus' focus is on "three-party" situations in which a third-party has transferred value to the defendant, which for reasons of justice ought to have been or should now be transferred to the plaintiff. As he notes, not all of these cases involve wrongful conduct by the third-party, but there will be situations when the plaintiff may have a greater right to the enrichment. McCamus analyzes the traditional English position concerning third-party claims, and he contrasts that doctrine with recent developments in American and Canadian restitutionary doctrine, noting that American and Canadian doctrine allows restitutionary relief in a much broader range of three-party cases.

Professor Margaret Allars' article is entitled *Private Law Remedies and Public Law Standards: An Awkward Statutory Intrusion into Tort Liability of Public Authorities*.<sup>8</sup> She notes that statutes have modified the civil liability of public authorities, but she sets up her analysis by analyzing the common law which preceded the statutory intrusions. She then analyzes Australian and UK law on the subject and concludes that Australian statutory alterations have not necessarily produced either good or desirable results.

Professors Elise Bant and Jeanne Marie Paterson submitted an article to the forum entitled *Evolution and Revolution: The Remedial Smorgasbord for Misleading Conduct in Australia*.<sup>9</sup> In their article, they focus on the Trade

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<sup>5</sup> [2011] EWCA Civ 1149, [2012] QB 640.

<sup>6</sup> [2011] EWCA Civ 1149, [2012] QB 640.

<sup>7</sup> John D. McCamus, *Restitutionary Remedies in Three-Party Cases: A Comparative Perspective*, 14 FIU L. REV. 65 (2020).

<sup>8</sup> Margaret Allars, *Private Law Remedies and Public Law Standards: An Awkward Statutory Intrusion into Tort Liability of Public Authorities*, 14 FIU L. REV. 5 (2020).

<sup>9</sup> Elise Bant & Jeannie Marie Paterson, *Evolution and Revolution: The Remedial Smorgasbord for Misleading Conduct in Australia*, 14 FIU L. REV. 25 (2020).

Practices Act 1974 (Cth) which prohibited statements in commerce or trade that are “misleading or deceptive or likely to mislead or deceive.” The Act does not require fault as a condition precedent to liability and is important because it introduced a host of remedies for misleading conduct, including the power to vary contracts retroactively. They note that the Act has been “proven enormously influential, having been re-enacted, replicated and repeated dozens of times in different contexts under various Australian state and federal legislation,” and reaching “into almost every corner of commercial life.” In addition, the Act’s remedial approach has influenced analogous common law and equitable remedies and shifted Australian views regarding the relationship between “right and remedy in Australian law and practice.”

Finally, my article examines the problem of “nationwide injunctions.”<sup>10</sup> Over the last twenty years, but especially during the Obama and Trump administrations, trial courts have become increasingly comfortable with the idea that they can enter so-called “nationwide injunctions.” While nationwide injunctions are usually issued against the federal government, they have also been issued against private entities, and in both contexts have been controversial. For one thing, the exercise of that authority runs counter to the idea that the judicial authority under Article III of the Constitution is limited to the “case” or “controversy” before the court. More importantly, lower courts often “get it wrong” in the sense that their nationwide injunctions have been completely overturned or significantly modified by the U.S. Supreme Court. In addition, nationwide injunctions create potential problems. Instead of allowing major legal issues to percolate their way through the lower courts, thereby providing the Court with the views and analysis of a variety of lower court judges, nationwide injunctions cases often move quite quickly through the court system to the Court. In the past, the U.S. government has been able to adopt a position of non-acquiescence to lower court decisions. In other words, it agrees to accept the decision in the particular jurisdiction in which a decision was rendered but continues to maintain a contrary position in other jurisdictions. Generally, if the government continues to lose in these other jurisdictions, that is the end of the matter. The U.S. Supreme Court is disinclined to review the matter. On the other hand, if the government’s position prevails in other jurisdictions, the U.S. Supreme Court eventually intervenes because there is a split among the circuits that needs to be resolved. By that point, the facts and the legal issues have come into sharper focus and the U.S. Supreme Court can more readily decide the issues. As a result, even some supporters of nationwide injunctions recognize that nationwide injunctions encourage forum shopping, politicize the courts,

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<sup>10</sup> Russell L. Weaver, *Nationwide Injunctions*, 14 FIU L. REV. 103 (2020).

create the risk of conflicting injunctions, and potentially give enormous power to a single district court judge.