



Measuring Damages in the Law of Obligations: The Search for Harmonised Principles

Sirko Harder

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Damages are defined as the monetary award made by a court in consequence of a breach of contract, a tort, or an equitable wrong. In all these causes of action, damages usually aim to put the claimant into the position the claimant would be in without the wrong. Even though the main objective of damages is thus the same for each cause of action, their measure is not. This book challenges certain differences between contract, tort, and equity in relation to the measure (in a broad sense) of damages. While some aspects of the measure of damages are more or less harmonized between contract, tort and, equity (e.g. causation in fact and mitigation), significant differences exist in relation to: 1) remoteness of damage, which is the question of whether, when, and to which degree damage needs to be foreseeable to be recoverable; 2) the compensability of non-pecuniary loss, such as pain and suffering, distress, and loss of reputation; 3) the effect of contributory negligence, which is the victim's contribution to the occurrence of the wrong or the ensuing loss through unreasonable conduct prior to the wrong; 4) the circumstances under which victims of wrongs can claim the gain the wrongdoer has made from the wrong; and 5) the availability and scope of exemplary (or punitive) damages. For each of the five topics, this book examines the present position in contract, tort, and equity, and it establishes the differences between the three areas. The book goes on to scrutinize the arguments in defense of existing differences. The conclusion on each topic is that the present differences between contract, tort, and equity cannot be justified on merits and should be removed through a harmonization of the relevant principles.

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