
1. Is ‘remedies’ a subject?

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Why study private law remedies? And if we do, what precisely are we studying? Do these remedies constitute a subject in their own right, or merely an extended footnote to substantive legal principles?

1 ‘REMEDIES’

What we make of ‘remedies’ has always depended on what is happening elsewhere in private law scholarship. On the assumption that there are solid and serious studies of Contract, Tort and Property, then traditionally ‘Remedies’ sought to fill in the gaps left in the study of private law. So for many years, the staples of Remedies courses were damages, restitution and equity. But in time, both the equity lawyers and the restitution lawyers began to argue that their topics merited distinct treatment as disciplines in their own right, though these claims have not been universally accepted. And an increasingly diverse scholarship – whether using doctrinal analysis or other methodologies – has meant that there are many other aspects of remedies clamouring for attention. These and other factors mean that today there is actually considerable diversity in what ‘remedies’ is taken to comprise.¹

Indeed not everyone accepts that ‘remedies’ has its own unique subject-matter. Many prefer to tie remedies to the substantive principles of liability that trigger them. So remedies for torts are, on this view, best dealt with alongside principles of the law of torts, and so forth. From this ‘integrationist’ standpoint, it is not obvious that there is a distinct legal topic of ‘remedies’ at all. On this view, while there would be considerable point to a deep and rigorous study of *procedure* (filling a major gap in common law academia), ‘remedies’ simply marks the intersection of procedure and doctrine, and we should not necessarily expect any kind of coherent doctrine or theme to emerge there.

Others disagree, holding that this ‘integrationist’ approach gives an extremely misleading picture of how the legal system actually operates. The law of remedies involves many matters which qualify or cut across the concerns of substantive law. Substantive legal studies tend to look at the issues from the perspective of a judge ruling between competing arguments; but the motor of civil litigation is not the judge but the litigating parties, and understanding what those litigants want out of the process is arguably at least as important as what principles the judge will ultimately apply (if, indeed, parties ultimately leave it up to the judge, rather than settling). Focusing on remedies reveals issues and problems that are invisible if we take the substantive law as our starting-point and main focus.

¹ For a partial intellectual history of the subject see D Rendleman, ‘Remedies: A Guide for the Perplexed’ (2013) 57 St Louis ULJ 567. See also D Laycock, ‘How Remedies became a Field: A History’ (2008) 27 Review of Litigation 161.

To date, most remedies scholarship has taken the form of doctrinal analysis of one sort or another. However, other approaches, including empirical work on the frequency and the effect of remedies, are becoming more common. Some particular issues in remedies have long been studied from an economic perspective – particularly the issue of efficient breach of contract.² More might have been expected on this front, however, especially given that remedies and law-and-economics share a focus on 'the bottom line' to a degree that mere doctrinalism does not.³ A more systematic engagement between the disciplines may now be emerging.⁴

Ultimately, what we make of 'remedies' as a discrete subject, and to what extent we use 'integrationist' arguments to absorb remedies into our understanding of the substantive law, is a matter of perspective. Each of the various angles from which we can view 'remedies' tells us *something* about the legal system; this chapter is one long meditation on the differences between these different viewpoints. Section 2 examines what a 'remedy' is taken to be, and the various ways in which remedies can be classified. Section 3 considers the relation between remedies and the substantive law. And Section 4 examines civil legal process from the point of view of remedies, and the different questions that emerge when we think in terms of remedies rather than merely of substantive law.

2 WHAT ARE REMEDIES?

There are many shades of meaning that may be involved when considering 'remedies', much as there are when considering 'rights', with which remedies are often contrasted. There have been a number of attempts to define 'remedies'.⁵ While at their worst these exercises simply illustrate (sometimes at unnecessary length) that the word 'remedies' is used in a variety of ways, for the most part they are of value in indicating the reach of the subject, and the difficulty of reducing it to any one simple formula.

a Are Remedies Simply Court Orders?

Usually when we talk of remedies the focus is on the courts. If a contract is broken by one party and the court awards damages to the other party, we would say that the claimant has been awarded a remedy in damages. Some confine 'remedies' to this situation: a 'remedy' is a court order, a *judicial* remedy.⁶ Others take a broader view: a remedy is *any* means by which a claimant may secure redress. So an action for damages is indeed a 'remedy', but so also is a right to terminate a contract for breach or to have it declared frustrated, or to exercise any

² On this concept see G Klass, 'Efficient Breach' in G Klass, G Letsas and P Saprai (eds), *Philosophical Foundations of Contract Law* (Oxford University Press 2014) ch 18. For a more general survey see A Porat, 'Economics of Remedies' in F Parisi (ed.), *The Oxford Handbook of Law and Economics, Volume 2: Private and Commercial Law* (Oxford University Press 2017) ch 13.

³ S Bray, 'Remedies, Meet Economics; Economics, Meet Remedies' (2018) 38 OJLS 71, 72.

⁴ See Bray (n3).

⁵ For a useful summary of a range of views see R Zakrzewski, *Remedies Reclassified* (Oxford University Press 2005) ch 3.

⁶ E.g. Zakrzewski (n5) 44–8. Zakrzewski excludes orders which merely assist in preparation for a trial (such as interrogatories), or in preparation for a future order (such as contempt orders) (ibid, 45).

sort of self-help.⁷ On this wide view, the availability of a court order is often an important circumstance, but the focus is on what the claimant can do in response to the other party's objectionable behaviour, whether that response involves a court or not. Court orders are on this view an important remedy, but only part of the picture.

There is no very obvious way of resolving this kind of disagreement. Birks even argued that the word 'remedy' should be 'eliminated from our analytical vocabulary',⁸ its ambiguity being so extreme: it has a core sense of 'a cure for something nasty',⁹ but beyond that our only hope for clarity would be to get agreement on some artificially precise technical sense of the word.¹⁰ And at one level, disputes over how we should use the word 'remedy' are often illuminating, particularly as to the range of different circumstances over which the law has something to say, or should have something to say. Are they at root, however, merely semantic disputes with no right answer? Should we not simply accept that 'remedy' is used in more than one way, and move on?

Perhaps we should. But we should not neglect the issue buried within this semantic dispute, of the perspective from which we are viewing the matter. If we are looking *from the judges' point of view*, it makes sense to confine 'remedy' to some order the court is asked to grant, and to seek some sort of rationality in the panoply of possible orders and the sort of grounds relevant to granting them. If we are looking *from the point of view of the disputing parties*, a different and more varied picture emerges, in which we ask what the owner of a right can lawfully do if that right is infringed. From this very different perspective, it makes sense to think of self-help and court action as alternative remedies; or even to think of court action as one species of self-help (because generally speaking the court will only act if one party asks it to). And, as Porat remarks, if we are interested in the real-world impact of the legal system then '[a]nalyzing the substantive law without its remedial part is almost meaningless ... Indeed, it is hard to imagine the creation of the substantive law, either by legislatures or courts, without careful consideration of the remedial consequences of its breach.'¹¹

This difference of approach becomes even more pronounced when we note that most victims of breaches of rights do *not* obtain any kind of judicial remedy, or even formally ask for one. Even if they decide to make an issue of the matter at all, they may find other and better means of redress than going to a court of law; even if legal process is commenced, it will usually turn out to be more convenient for all concerned if there is a mutually agreed settlement before a court is ever asked to make an order.¹² It has been true for most of human history that legal proceedings are slow and expensive; and in modern legal systems it is actual official policy that parties should be encouraged to settle unless a full trial serves some demonstrable

⁷ E.g. D Harris, D Campbell and R Halson, *Remedies in Contract and Tort* (2nd edn, Cambridge University Press 2005) chs 3 and 21.

⁸ P Birks, 'Rights, Wrongs and Remedies' (2000) 20 OJLS 1, 3.

⁹ *Ibid.*, 9.

¹⁰ Birks's detailed suggestions are discussed in S Smith, 'Rights, Remedies, and Causes of Action' in C Rickett and R Grantham (eds), *Structure and Justification in Private Law* (Hart Publishing 2008) ch 20 and M Tilbury, 'Remedy as Right', *ibid.*, ch 21.

¹¹ Ariel Porat, 'Economics of Remedies' in F Parisi (ed.), *The Oxford Handbook of Law and Economics, Volume 2: Private and Commercial Law* (Oxford University Press 2017) 308.

¹² E.g. H Genn, *Paths to Justice: What People Do and Think about Going to Law* (Hart Publishing 1999).

purpose.¹³ The image of the judge making a formal ruling on the merits of the dispute is a powerful cultural icon, but it is not in fact how most disputes end – nor could it be. So self-help is a vital part of the remedies picture. Yet there must be limits. The notion that a claimant should, in principle, have to come to court for redress, rather than forcibly taking back what they say is theirs, is an important principle of civil peace, with a very long history.¹⁴

b How Do We Classify Judicial Remedies?

'Theoretically, almost every legal question could be posed in terms of remedies, but this would give the word so wide a meaning as to be useless.'¹⁵ Clearly some deeper classification is needed. Classification tends to be a rather dry exercise. It does, however, serve a number of purposes. Significantly, it reminds us of the wide range of different remedies that there are, and the corresponding difficulty of making sensible generalisations about them. And most classifications are made with a purpose: the classifier is not usually arguing merely that their favoured classification can logically be made, but that making it tells us something significant about the remedies so classified.

Firstly, some classifications are historical, or (what in practice is rather similar) relate to the source of the law which authorises the remedy. So equitable remedies are sometimes thought of as different from common law remedies, and both as distinct from remedies granted by statute. Does the history matter? Some argue not: legal historians need to know that law and equity were, in earlier centuries, dispensed in different courts, and that statutory remedies were introduced to fill gaps which law and equity had left; but modern lawyers do not need to know this, and should be trying to develop a single integrated legal way of thinking rather than perpetuating outdated distinctions.¹⁶ Others respond that, outdated or not, there are still important differences in this regard, and need attention accordingly. Equitable remedies are markedly different from common law remedies, and this is a difference in the here-and-now, not merely the past.¹⁷ And certainly the traditional role of equity – to smooth the rougher edges

¹³ E.g. Civil Procedure Rules (for courts of England and Wales), where the 'overriding objective of enabling the court to deal with cases justly and at proportionate cost' is stated to include 'encouraging the parties to co-operate with each other in the conduct of the proceedings' (1.4.2(a)), 'deciding promptly which issues need full investigation and trial' (1.4.2(c)) and 'helping the parties to settle the whole or part of the case' (1.4.2(f)).

¹⁴ Note especially the Statute of Marlborough 1267 (52 Henry 3), s 1, by which an aggrieved claimant must seek a remedy in a court of law, rather than taking 'Revenge or Distress of his own Authority'. At the time of writing, this is the oldest unrepealed statute in the UK; the Law Commissions have recently decided against repeal, arguing that despite its age the section 'appear[s] to have continuing value' (Law Commission and Scottish Law Commission, *Statute Law Repeals: Twentieth Report* (Cm 9059, 2015) para 6.37).

¹⁵ S Waddams, 'Remedies as a Legal Subject' (1983) 3 OJLS 113, 113.

¹⁶ E.g. A Burrows, 'We Do This at Common Law But That in Equity' (2002) 22 OJLS 1; S Smith, 'Form and Substance in Equitable Remedies' in A Robertson and M Tilbury (eds), *Divergences in Private Law* (Hart Publishing 2016) ch 16.

¹⁷ E.g. K Barnett and S Harder, *Remedies in Australian Private Law* (Cambridge University Press 2014) 12; P Ridge, 'Modern Equity: Revolution or Renewal from Within?' in S Worthington, A Robertson and G Virgo (eds), *Revolution and Evolution in Private Law* (Hart Publishing 2018) ch 12.

of the law, and to prevent law's rules from being abused by those who know them better than their victims do – still seems a necessary one.¹⁸

Secondly, some classify remedies according to the sort of behaviour the court requires of the defendant: to pay money (whether a 'liquidated' sum specified in the claim, or an 'unliquidated' sum assessed by the court), or to do some other act, or to refrain from acting in a certain way; or again, some orders have implications for the defendant's rights without directly requiring anything, as when the court declares what the parties' rights already are, or will be for the future (as where a court pronounces that the parties are now divorced from one another). The most obvious point this classification brings out is the extent to which a court, asked to make an order, will prioritise administrative convenience over other considerations, and accordingly strongly prefer simple declarations or orders to pay money over more complicated remedies, compliance with which may be hard to monitor.

A third way to classify remedies is to ask whether the remedy attempts merely to restore to a claimant what was taken from them ('replicative' remedies), or whether it tries to give the claimant something new ('transformative' remedies).¹⁹ In itself this is not a very useful distinction. Genuinely 'replicative' remedies certainly exist – many injunctions can be so classified – but they are only a small part of the picture. Most remedies turn out to be in an intermediate ('reflective') category: the court cannot give claimants precisely what they have lost, but can give them something which somehow reflects or represents it, such as a sum of money calculated to be somehow equivalent. To many, therefore, this does not seem a very useful classification. However, it can be valuable, as it forces us to ask precisely what the court is doing and why. If my negligence permanently loses you the use of your leg, then a truly 'replicative' remedy is out of the question; but some 'reflective' remedies (such as a sum based on the value of what you have lost) are more like replication than others (such as punitive awards to censure my behaviour). Or again, compensation for damaging property may be 'reflective' in very different ways, either by estimating its reduced value or by calculating the cost of repair.²⁰ Different views are held on whether (say) damages for injured feelings or bruised dignity can really be said to be 'reflective' or must be justified on some other ground, and if so, what.

Fourthly, some classify remedies according to function, or (what is similar in practice) according to the interest the remedy protects. The classic example is Fuller and Perdue's classification of damages in contract as representing what the claimant would have received had the contract been performed ('expectation interest'), or resources the claimant wasted on the false assumption that performance would take place ('reliance interest'), or the gain the defendant made by failing to perform ('restitution interest').²¹ This 'functional' approach is now an accepted part of remedies discourse, and a standard question to ask on any damages award is what interest or measure it embodies. However, the precise function of remedies is

¹⁸ H Smith, 'Fusing the Equitable Function in Private Law' in K Barker, K Fairweather and R Grantham (eds), *Private Law in the 21st century* (Hart Publishing 2017) ch 9.

¹⁹ See especially Zakrzewski (n5) ch 13.

²⁰ See S Smith, 'Substitutionary Damages' in C Rickett (ed.), *Justifying Private Law Remedies* (Hart Publishing 2008) ch 5.

²¹ L Fuller and W Perdue Jr, 'The Reliance Interest in Contract Damages' (1936) 46 *Yale Law Journal* 52 and 373.

often open to dispute.²² For example, a common view is that Fuller and Perdue's 'expectation interest' fails to distinguish between cases where the court is merely seeking to compensate for a performance which is now rendered impossible, and cases where the court can and does achieve something pretty close to performance ('the performance interest').²³ In relation to tort, various additional or more specialised interests have been proposed, including a 'restoration interest',²⁴ an interest in vindication,²⁵ and an interest in autonomy.²⁶ Various different accounts can be given of the functions or interests remedies further; some reject this general approach to remedies precisely because of its inherent uncertainty.

Finally, some writers attempt to define a special category of 'expressive' remedies, where the court appears not merely to be resolving the immediate dispute between the parties but to communicate some broader meaning or message.²⁷ For example, granting a remedy may signal that the defendant has behaved wrongly; an award of exemplary or punitive damages may do this with particular emphasis.²⁸ Yet it is probably not right to delineate a distinct category of 'expressive' remedies; all remedies send some sort of message. But the expressive dimension of remedies often needs distinct consideration, not least because in some instances it may be inappropriate. Not everyone accepts that a court ruling should as a rule be about sending messages to the wider community; some do not think it ever should be, unless that message is that the court will do justice to the immediate parties. Issues over the availability of 'expressive' damages therefore raise fundamental questions over what litigation is for.²⁹

²² For criticism see R Craswell, 'Against Fuller and Perdue' (2000) 67 *University of Chicago Law Review* 99; M Chetwin, 'Fuller and Perdue's limitations' in J Berryman and R Bigwood, *The Law of Remedies – New Directions in the Common Law* (Irwin Law 2010) ch 3; S Smith, "'The Reliance Interest in Contract Damages' and the Morality of Contract Law' (2001) 1 *Issues in Legal Scholarship* 1 <https://ssrn.com/abstract=2695243>.

²³ See C Webb, 'Performance Damages' in G Virgo and S Worthington (eds), *Commercial Remedies: Resolving Controversies* (Cambridge University Press 2017) ch 9; D Winterton, *Money Awards in Contract Law* (Hart Publishing 2015).

²⁴ E.g. O Ben-Shahar and A Porat, 'The Restoration Remedy in Private Law: A Novel Approach to Compensation for Emotional Harm' (24 October 2017) <https://ssrn.com/abstract=3058186>.

²⁵ J Varuhas, 'The Concept of "Vindication" in the Law of Torts: Rights, Interests and Damages' (2014) 34 *OJLS* 253; for a contrasting view see K Barker, 'Private and Public: The Mixed Concept of Vindication in Torts and Private Law' in S Pitel, J Neyers and E Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (Hart Publishing 2013) ch 3.

²⁶ T Keren-Paz, 'Compensating Injury to Autonomy: A Conceptual and Normative Analysis' in K Barker, K Fairweather and R Grantham (eds), *Private Law in the 21st Century* (Hart Publishing 2017) ch 20.

²⁷ For discussion see A Gold, 'Expressive Remedies in Private Law' (26 November 2013) <https://ssrn.com/abstract=2360219>. Note also the (related, but distinct) argument that tort as a whole can be regarded as an expressive institution: S Hershovitz, 'Treating Wrongs as Wrongs: An Expressive Argument for Tort Law' (2018) 10 *Journal of Tort Law* (2) <https://ssrn.com/abstract=3054163>.

²⁸ On which, see generally J Goudkamp and E Katsampouka, 'An Empirical Study of Punitive Damages' (2018) 38 *OJLS* 90.

²⁹ For some of the issues see J Edelman, 'In Defence of Exemplary Damages' in C Rickett (ed.), *Justifying Private Law Remedies* (Hart Publishing 2008) ch 10; A Beever, 'Justice and Punishment in Tort: A Comparative Theoretical Analysis', *ibid*, ch 11; D Rendleman, 'Common Law Punitive Damages: Something for Everyone?' (2010) 7 *University of St Thomas Law Review* 1; J Goudkamp, 'Exemplary Damages' in G Virgo and S Worthington (eds), *Commercial Remedies: Resolving Controversies* (Cambridge University Press 2017) ch 14.

No classification of remedies is perfect; on the contrary, such exercises often highlight the great variety to be found in relation to remedies, and the difficulty of making valid generalisations about them.

c Flexibility in Judicial Remedies

That the law of remedies shows considerable diversity is not in doubt; and while broad principles can often be stated, their application is often far from obvious. Historical explanations can be given for this: such as the persistence of juries through most of the common law's history, as well as a vigorous equity tradition that stressed the need for a relaxation of the rigidities of pure common law. But flexibility is not the same thing as unpredictability, and it would be inaccurate to suggest that litigants approach the remedies stage of their dispute with no idea of what a court might do.

In the case of money awards, it is in most cases pretty clear at least what the court is *trying* to do (functional/interest analysis is particularly useful here) and the uncertainty, while real, has at least a predictable focus. Where the complaint is that the claimant has been deprived of money or something otherwise of commercial value, argument will focus on how to quantify the precise value lost. Where what was lost is clearly very hard to reduce to money (such as a complaint of injury to feeling or lost dignity) there is frequently a dispute over whether the law will recognise this injury at all, and if so, what precise sum amounts to appropriate recognition. Issues of the defendant's responsibility, which are typical of the liability issue, frequently continue into remedy issues as well: which losses can be said to have been caused by the defendant; which are too remote from the defendant's conduct and so not fairly blamed on him/her; whether the claimant should share the blame. Considerations of responsibility often prompt unusual damages measures: where the defendant has behaved outrageously but nonetheless caused minimal loss, some sort of punitive award may be considered. Punitive awards are often considered to be random, unpredictable and often excessive, though a counter-view is that this merely reflects lack of serious attention to them, and that properly understood they are less objectionable. In some situations it matters how the claimant intends to use any money awarded.³⁰ In limited contexts, statute introduces what are by any standard discretionary money awards – discretionary both in how the award is calculated, and whether they are available at all.³¹

For non-money awards, a similar or perhaps even greater degree of flexibility is exercised, though always against the background of the twin difficulties of defining precisely what should be done, and whether it has in fact been done. Such awards are rare, and often reflect quite specific objects of the law.³² Equitable remedies are traditionally stated to be 'discretionary', though that blanket term in fact covers a range of different situations, in some of which

³⁰ E.g. S Rowan, 'Cost of Cure Damages and the Relevance of the Injured Promisee's Intention to Cure' (2017) 76 CLJ 616.

³¹ E.g. Law Reform (Frustrated Contracts) Act 1943 s 1(3).

³² This is a neglected area of the scholarship. For some of the issues, see A Goymour, 'Remedies for Vindicating Ownership Rights in Real Property' in G Virgo and S Worthington (eds), *Commercial Remedies: Resolving Controversies* (Cambridge University Press 2017) ch 8.

a court does indeed have great freedom of choice; in others the relevant criteria are so well established that they can for practical purposes be stated in the form of rules.³³

As will be obvious enough, judicial decisions as to remedies frequently involve value-judgements of one sort or another: as to responsibility, as to the value of particular objects or activities, as to the seriousness of the injustice that would result if no remedy were awarded. Putting a value on a life lost or a reputation lost is never a simple matter, nor can it be value-free. This is where the argument about which interests remedies protect has an influence: which interest the court is seeking to protect defines what it tries to do. The values revealed in such cases do not always attract praise: the behaviour of the courts in relation to remedies may often be criticised, either for displaying inappropriate values,³⁴ or as showing a level of judicial creativity best left to legislatures.³⁵ A recent and controversial example is the so-called 'super-injunction' granted to protect certain privacy interests, which potentially could lead to criminal proceedings against any person seeking to reveal its existence.³⁶

Recent decades have seen a number of attempts to standardise remedies, usually in the belief (not always borne out by events) that this will result in more predictable rulings. Jury discretion in damages has come under closer control, and in all UK jurisdictions the very existence of civil juries is becoming tenuous. And there have been various attempts to standardise damages awards, so that the amount a court may award may be specified in advance – or at least a narrow range within which the award will fall will be so specified. Calculations of earnings lost over a lifetime lost may now be aided by official tables,³⁷ and the range of likely pain and suffering awards aided by a published list of ranges.³⁸ Damages for breach of privacy may be evolving in the direction of standardisation, or at least greater consistency.³⁹ There have even been suggestions that the law of remedies should be codified,⁴⁰ though whether this will lead to greater certainty is debatable. Attempts to allow parties themselves to standardise

³³ For further discussion, see Zakrzewski (n5) ch 6.

³⁴ E.g. G Grant, 'Judging Gender in Tort Thresholds' (2016) 25 Griffith Law Review 104; R Avraham and K Yuracko, 'Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages' (19 April 2017) <https://ssrn.com/abstract=2955165>.

³⁵ D Campbell, 'The *Heil v Rankin* Approach to Law-Making: Who Needs a Legislature?' (2016) 45 Common Law World Review 340.

³⁶ On which see e.g. *Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice* (the Neuberger Report) (20 May 2011) <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/super-injunction-report-20052011.pdf> (accessed 27 April 2019).

³⁷ See especially the 'Ogden Tables' (officially the 'Actuarial Tables with explanatory notes for use in Personal Injury and Fatal Accident Cases', judicial use of which is authorised by Civil Evidence Act 1995 s 10).

³⁸ E.g. Judicial College, 'Guidelines for the Assessment of General Damages in Personal Injury Cases' (14th edn, Oxford University Press 2017).

³⁹ See in particular *Gulati v MGN* [2015] EWHC 1482 (Ch) (appeal refused [2015] EWCA Civ 1291). See also B van der Sloot, 'Where is the Harm in a Privacy Violation? Calculating the Damages Afforded in Privacy Cases by the European Court of Human Rights' (2017) 8 JIPITEC 4 <https://www.jipitec.eu/issues/jipitec-8-4-2017/4641>, accessed 8 May 2019.

⁴⁰ E.g. N Andrews, 'Codification of Remedies for Breach of Commercial Contracts: A Blueprint' in G Virgo and S Worthington (eds), *Commercial Remedies: Resolving Controversies* (Cambridge University Press 2017) ch 23.

damages by providing in advance for damages levels are usually seen as desirable, though there is still the traditional fear that this will lead to the imposition of illegitimate ‘penalties’.⁴¹

3 HOW DO REMEDIES RELATE TO THE SUBSTANTIVE LAW?

This is perhaps the most fraught of all the theoretical issues concerning remedies. Courts do not dispense remedies merely on a whim or because it seems just to do so: a court-ordered remedy will issue only when substantive law indicates that a remedy of some sort is available. (For example, damages in contract flow only where the contract has been broken, which is a matter of substantive law.) What implications does this have for the content of the remedy? For some (the integrationists) the substantive law dictates the remedy, or at least goes a long way towards defining it. For others the connection is looser: a number of factors can and should influence the court, and the reasoning which establishes the entitlement to a remedy may not feature very strongly when determining what that remedy should consist of. Flexibility and sensitivity in remedies may indeed be seen as the antidote to the rigidity often to be found in the substantive law. At root, as Samuel notes, ‘[i]t is really a question of where one starts’: with abstract rights, or with the remedy actually asked for.⁴²

It is important not to focus unduly on the more extreme positions taken in this debate. All agree that there must be *some* connection between the remedy and the actual circumstances which led to a remedy being available. Equally, all agree that there are *some* matters of remedies that are not reducible to individual areas of substantive law but cut across them all.⁴³ Nonetheless, there is a real difference of emphasis here. In its origins, common law was all about remedies, and the substantive law was barely noticeable: ‘So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure ...’⁴⁴ The pendulum has now swung far the other way, but *how* far? For some, it is obvious that any remedies available should follow the substantive law, and the contrary would mean that the tail was wagging the dog. (It makes no sense to say that the remedy is for a wrong, if the remedy does not reflect the nature of the wrong.) For others, it is obvious that we should look first to the remedy, and view the substantive law in that light. (If no legal remedy is available, or the remedy is one that no claimant would ever want, it makes little sense to say that substantive law regards a defendant as a wrongdoer.) These different perspectives have long been summed up in the competing common law maxims *ubi ius ibi remedium* (‘where there’s a right, there’s a remedy’) and *ubi remedium ibi ius* (‘where there’s a remedy, there’s a right’).

⁴¹ On which see e.g. S Worthington, ‘Penalty Clauses’ in G Virgo and S Worthington (eds), *Commercial Remedies: Resolving Controversies* (Cambridge University Press 2017) ch 16.

⁴² G Samuel, *A Short Introduction to Judging and to Legal Reasoning* (Edward Elgar 2016) ch 3, the quoted sentence is at 77.

⁴³ Indeed, it has even been suggested that remedies should be treated as one aspect of a ‘general part’ of obligations law, rather than dividing remedies up between the ‘special parts’ such as contract and tort: S Smith, ‘The Limits of Contract’ in J Neyers, R Bronaugh and S Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009) ch 1.

⁴⁴ H Maine, *Dissertations on Early Law and Custom* (Murray Albemarle 1883) 389.

The most famous talking-point here is usually (though not always accurately) attributed to Oliver Wendell Holmes,⁴⁵ using contract as an example. If a contract is broken, certain remedial consequences follow – usually an award of damages. Some read this as exemplifying the primacy of substantive law. People who make contracts should keep them, or the law will remedy the situation: the substantive law insists on performance, and remedies are the law's tool for achieve this. Holmes, and many others, read it differently. In most such situations the *only* remedy is damages, often on a limited measure; and if the breach is not considered to have caused actionable loss, damages may be nominal only. From that perspective, it is too crude to say that the law 'insists on performance'. In reality there is no duty to perform; rather, the law grants the contract-breaker an option either to perform or to pay damages.

Clearly, there is a considerable gap between the idealism implicit in the morality of promising, and the mundane reality that the contract-breaker is merely made to pay a sum of money. It gives a profound importance to common law's general emphasis on compensatory remedies, and its treatment of literal orders to perform as exceptional remedies. Views differ on whether this is a regrettable, if unavoidable, failure of the law to enforce its own morality, or on the contrary that it shows that the law in fact espouses different, and possibly less exalted, values entirely.⁴⁶

The integrationist view, demanding consistency between substantive law and the remedies it triggers, is perhaps at its most convincing when the defendant can clearly be labelled as a wrongdoer, and the remedy is a response to that wrong. In that context, it clearly makes sense to insist that the remedy should reflect the wrong done, and in that sense many of the rules on remedies can be said to flow directly from the substantive law. Even that case, however, is not so simple, as there could be many possible responses that could be said to reflect the wrong, particularly as the court is usually confined to awarding a sum of money. How is a non-monetary loss to be reflected in a monetary award? Can the courts award a sum to reflect the claimant's injured feelings, or must they confine themselves to provable money losses? Can they award a sum as a punishment, and if so how do they calculate it? And can the sum awarded reflect a gain the defendant made through their wrong? These and related questions are always cropping up, and cannot be answered merely by reiterating that the defendant is a wrongdoer; the court will have to choose *how* to respond to the wrong, out of the many possibilities.

The integrationist view is still weaker where the defendant cannot fairly be described as a 'wrongdoer' in the first place. This is true in many cases of contract and tort (where the duty is often strict), and is also true in most instances of restitution. The classic example of a restitutionary remedy – the action for the return of a payment mistakenly made – does not depend on showing that the defendant was in any way at fault. In such cases, the supposed division between substantive law and remedies seems to break down, absent some drastic re-writing of what we take the substantive law to be (such as by postulating that there is a duty to refund the mistaken payment, which the defendant has broken⁴⁷). Again, the so-called *Wrotham Park*

⁴⁵ On what Holmes actually meant see J Perillo, 'Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference' (2000) 68 *Fordham Law Review* 1085.

⁴⁶ See e.g. M Chen-Wishart, 'Specific Performance and Change of Mind' in G Virgo and S Worthington (eds), *Commercial Remedies: Resolving Controversies* (Cambridge University Press 2017) ch 5.

⁴⁷ For discussion see S Smith, 'A Duty to Make Restitution?' (2013) 26 *Canadian Journal of Law and Jurisprudence* 157; F Wilmot-Smith, 'Should the Payee Pay?' (2017) 37 *OJLS* 844.

remedy (where the claimant is awarded the amount s/he would have demanded if the defendant had asked permission to do the act complained of⁴⁸) is hard to make sense of in terms of ‘wrongdoing’. And the discretionary language of equitable remedies, which considers many factors to determine which remedy is appropriate, is clearly taking into account matters beyond merely whether a wrong was done or how serious it was. So while there are some situations where the integrationist view makes sense – the substantive law defines the claimant’s rights, the remedy is designed to give that right teeth – there are others where it makes no sense at all.

Considerations of this sort have led some to doubt the credentials of ‘restitution’/‘unjust enrichment’ as a substantive legal topic, as distinct from a matter of remedies. A principle that ‘the defendant must not be unjustly enriched at the claimant’s expense’ has a straightforward, untechnical appeal when referring to remedies: it makes sense as a reference to the ‘bottom line’ after substantive matters have been resolved. As a principle of substantive law, it makes less sense. The law has no dislike for enrichment as such (rather the reverse); and the suggested principle seems unnecessary if it is referring to acquisition of enrichment *by unjust means*, as those unjust means will already have been defined and addressed by other, better established legal principles. The success of ‘unjust enrichment’ as a matter of substantive law therefore turns on how successfully it can identify a class of claims where retention of an enrichment is unjust *even though no identifiable injustice was involved in its acquisition*: a category which has no very obvious support in morality or practical considerations, and which clearly has difficulties of definition.

The main motivation for the integrationist approach seems to be to keep the law of remedies under some sort of control; to confine it, or at least to constrain its ability to develop novel solutions. From this perspective, the law’s *bête noire* would be complete judicial freedom in remedying breaches of the substantive law, subject to no intelligible constraint. This prospect – the prospect of ‘discretionary remedialism’ – is regarded by some with alarm. Birks defined discretionary remedialism as the notion that the judge:

must behave like a doctor faced with a sick patient. The doctor exercises a clinical judgment and comes up with what he believes to be the best possible cure. Similarly, on this new view, judges must exercise a strong discretion to apply the remedy which they consider to be most appropriate in the circumstances. Here ‘strong’ denotes a discretion which must not be bedded down by precedent. It must be kept fresh from case to case, albeit guided by a list of criteria of appropriateness ...⁴⁹

‘Discretionary remedialism’ implies that judges should have a very wide menu of choices, and considerable freedom between them. Birks regarded this as objectionable on a number of grounds: that it was an unjustified break from the past, that it made litigation less predictable, and that it would undermine respect for the rule of law.

⁴⁸ These awards are named for *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 1 WLR 798. Their precise basis has long been controversial; see e.g. A Burrows, ‘Are “Damages on the *Wrotham Park* Basis” Compensatory, Restitutionary, or Neither?’ in D Saidov and R Cunnington (eds), *Current Themes in the Law of Contract Damages* (Hart Publishing 2008) 165 <https://ssrn.com/abstract=2280322>.

⁴⁹ P Birks, ‘Three Kinds of Objection to Discretionary Remedialism’ (2000) 29 *Western Australia Law Review* 1, 3.

The suggestion that 'discretionary remedialism' is both a real phenomenon, and an undesirable one, has attracted a good deal of commentary.⁵⁰ The most obvious response to it is that the issue is not a simple binary one: there is a wide spectrum of views on *how* discretionary the law of remedies should be, and labelling one part of that spectrum as 'strong discretion' is a much vaguer exercise than Birks seems to have assumed. And it is rather naïve to assume that making remedial rules more precise leads to more predictability in litigation; on the contrary, greater precision might increase the number of technical points on which advocates may take different views, and therefore have the reverse effect. But the debate is useful, as pointing the way to an important question: just how flexible are remedies, and what are the benefits and costs that flow from this flexibility? It has to be said, however, that much of the heat in the debate was generated by the view that certain trust remedies were highly discretionary and unpredictable; as that perception has faded,⁵¹ so too has the temperature of the arguments over 'discretionary remedialism'.

4 REMEDIES AS PART OF LEGAL PROCESS

Models of the legal system which emphasise substantive law tend to paint a simple view of legal process. Viewed in this perspective, the parties set out their different views of the facts in the form of pleadings; the court determines the true facts, applies the law to them, and in the light of that determines the appropriate remedy. Obviously this is more than a little simplistic, and no-one suggests otherwise: litigants (and potential litigants) will often have been thinking from the first about what remedy may result from the legal process, and so the law of remedies is an influence at every stage of the legal process. Features which seem to require emphasis from a remedial standpoint include the following:

- Much potential litigation is anticipated well before it actually happens. Contracting parties will be aware of the more likely sources of mutual dissatisfaction and the remedies that might be sought in consequence, and may anticipate these problems by taking security or a deposit, bargaining for express termination clauses, arranging for insurance, or otherwise. Some argue that the law does not make it easy enough for the parties to plan ahead in this way.⁵² Many potential tort defendants (employers, landowners, vehicle owners) can anticipate the more likely actions against them well in advance, and take steps to reduce their risk or to protect themselves with insurance; indeed, very often this is actually required by law. Automatic means may be used to anticipate and forestall certain types of legal wrongdoing.⁵³ Potential defendants may seek to channel any dispute towards an arbitrator, who will typically have more limited remedial powers than would a judge. In all these ways, the

⁵⁰ E.g. D Jensen, 'The Rights and Wrongs of Discretionary Remedialism' [2003] *Singapore Journal of Legal Studies* 178; S Evans, 'Defending Discretionary Remedialism' (2001) 23 *Sydney Law Review* 463.

⁵¹ See Y Liew, 'Reanalysing Institutional and Remedial Constructive Trusts' (2016) 75 *CLJ* 528; C Webb, 'The Myth of the Remedial Constructive Trust' (2016) 69 *CLP* 353.

⁵² E.g. N Andrews, 'Breach of Contract: A Plea for Clarity and Discipline' (2018) 134 *LQR* 117.

⁵³ See e.g. G Smith, 'Towards a Filtered Internet: The European Commission's Automated Prior Restraint Machine' (25 October 2017) <https://www.cyberleagle.com/2017/10/towards-filtered-internet-european.html> (accessed 27 April 2019).

existence of legal remedies, and the form they are likely to take, have an influence on the parties' behaviour considerably before any legal remedy is explicitly sought.

- A claimant whose rights have been infringed may very often have potential legal actions against a number of different defendants. Which the claimant acts against will very probably reflect the remedies available against each. Or again, the immediate victim of a wrong might receive help from some benefactor and so no longer seeks the law's help, but the benefactor in turn might seek a remedy (perhaps by way of subrogation) against the wrongdoer. Often, indeed, any actual litigation over the wrong does not involve the actual parties to the wrong: what appears on the surface to be the victim claiming from the wrongdoer is in reality the victim's insurer seeking to recoup themselves from the defendant's insurer. Consideration of the remedies available may often be a clue to identifying who the dispute is really between; who the parties are, their motivations, and their fortitude in handling the rigours of litigation are all vital to what happens next.
- Actually commencing legal process is a decision with considerable financial implications; what the claimant can expect to obtain from it, and how much it will cost to do so, are obviously vital considerations. Indeed, a claimant with a clear case may nonetheless find action unaffordable, or might not wish to jeopardise an otherwise profitable commercial relationship with the defendant, or for other reasons may decide that legal process is not the way to go.⁵⁴ It is in this context that extra-judicial remedies may come to the fore: for example, a claimant is unlikely to consider suing on a broken contract if s/he can obtain almost as much by simply repudiating that contract.⁵⁵ The attractiveness or practical availability of remedies may depend on a number of factors that are much more about procedure than they are about the substantive law: such as the current regime of legal costs, and what methods of litigation financing are currently available. Collective concerns may in practice dominate. On the claimant side, an otherwise unaffordable claim may be financially viable if part of some mass action or other coalition of claims with similar complaints: whether the action can proceed will depend on the extent to which actions can be joined in this way.⁵⁶ On the defence side, many defendants are 'repeat players', engaged in multiple disputes, and so very probably viewing each claim largely by reference to how it will affect their overall budget and resources; such a defendant is likely to treat individual claims rather differently from the way they would if that claim stood alone.⁵⁷
- Litigation is a process largely conducted and managed by the parties themselves, who are of course very much focused on where the process is going, and to what remedy it might lead.⁵⁸ This is none the less so because of the involvement of court administrators, or because key steps in the process are under judicial supervision, or indeed because the process may be considerably lengthened by the need to wait for a judge to become available. Rather than waiting for a court to ultimately grant a remedy, most litigants are looking

⁵⁴ See especially D Engel, *The Myth of the Litigious Society: Why We Don't Sue* (University of Chicago Press 2016).

⁵⁵ E.g. J O'Sullivan, 'Repudiation: Keeping the Contract Alive' in G Virgo and S Worthington (eds), *Commercial Remedies: Resolving Controversies* (Cambridge University Press 2017) ch 3.

⁵⁶ See e.g. R Mulheron, 'The UK's New Opt-Out Class Action' (2017) 37 OJLS 814.

⁵⁷ On this concept, see M Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law and Society Review* 95.

⁵⁸ E.g. R Lewis, 'Humanity in Tort: Does Personality Affect Personal Injury Litigation?' (2018) 71 *Current Legal Problems* 245.

for some quicker and cheaper solution, such as a settlement, 'alternative dispute resolution' or some judicial remedy which (while technically merely 'interim') will in practice resolve the dispute. In some situations at least, the theoretical availability of some remedy, should the case proceed that far, is a useful bargaining chip, leading to an advantageous settlement without actually receiving the remedy.⁵⁹ In recent decades, there has been a noticeable shift in official rhetoric, whereby settlement before trial has become not merely something that may happen, but something that should be officially encouraged to happen, and indeed in a well-run legal system should be the norm. Indeed, some reforms of court process seem designed to ensure that a court can order remedies that traditionally have only been available through settlement.⁶⁰

When considering whether the legal system is currently fit for purpose, it is never enough to ask merely whether the substantive rules are fair; remedies are key. This is particularly so when asking whether current procedures give the victims of wrongdoing a result they can be satisfied with. Questions arise, such as whether current rules for calculating personal injury damages (which make certain rough-and-ready assumptions about victims' future financial needs) correspond to the realities of victims' lives.⁶¹ More broadly, it might be questioned whether the remedy the law provides is of the right type, or whether the law's emphasis on money damages is really appropriate. Many victims of defamation might prefer a correction or open statement in court rather than damages; many victims of personal injury torts might prefer an explanation of how the accident happened, or a credible guarantee that it will not happen in the future. While popular attitudes often condemn litigants as gold-diggers, it should not be forgotten that the choice to provide for damages rather than any other remedy was not the litigants'. The character of a legal system depends not simply on what it recognises as grounds for action, but also on what remedies those actions lead to.

A recurrent issue here is whether the legal system should do more to encourage apologies as an important aspect of settlement. The issue is a complex one. Strong points can be made in favour of apologies, in certain circumstances at least.⁶² Apologies are what a lot of claimants want (or, at least, consistently say they want); some suggest that they encourage early settlement. But others question what an emphasis on apologies would mean in practice. Some suggest that apologies actually *increase* the likelihood of litigation.⁶³ The sincerity of any

⁵⁹ E.g. Y Arbel, 'Contract Remedies in Action: Specific Performance' (2015) 118 *West Virginia Law Review* 100 <https://ssrn.com/abstract=1641438>.

⁶⁰ See e.g. Courts Act 2003 s 100 (power to order periodical payments of damages). An older example is the introduction of a formal power to apportion responsibility between claimant and defendant, which traditionally was not a course open to a court but which had nonetheless often been achieved through settlement. On the history of this statute, see J Steele, 'Law Reform (Contributory Negligence) Act 1945: Collisions of a Different Sort' in T T Arvind and J Steele (eds), *Tort Law and the Legislature* (Hart Publishing 2013) ch 8.

⁶¹ E.g. P Vines, M Butt and G Grant, 'When Lump Sum Compensation Runs Out' in K Barker, K Fairweather and R Grantham (eds), *Private law in the 21st century* (Hart Publishing 2017) ch 15.

⁶² P Vines, 'The Apology in Civil Liability: Underused and Undervalued?' (6 June 2013) <https://ssrn.com/abstract=2275208>; A Allan and R Carroll, 'Apologies in a Legal Setting: Insights from Research into Injured Parties' Experiences of Apologies after an Adverse Event' (2017) 24 *Psychiatry, Psychology and Law* 10.

⁶³ B McMichael, R Van Horn and K Viscusi, 'Sorry Is Never Enough: How State Apology Laws Fail to Reduce Medical Malpractice Liability Risk' (2019) 71 *Stanford Law Review* 341. <https://ssrn.com/abstract=2883693>.

particular apology will often be in doubt, at least if it is given largely to avoid adverse legal consequences: will victims care about this, or will apparently insincere apologies nonetheless provide adequate recognition that a wrong has been done?⁶⁴ And what effect will apologies have in relation to other remedies? Some even argue that apologies entice claimants to accept less generous settlements, and that this reduces the cumulative deterrent effect of liability – ‘apologies dilute deterrence’.⁶⁵ Much of the recent scholarship urges caution, and that the law’s solution here may need to be carefully nuanced.⁶⁶ These issues raise fundamental questions about appropriate methods of dispute resolution, as does the related question of settlements by non-disclosure agreement, whereby a victim agrees to accept money but also to co-operate in the concealment of the wrong for which the settlement is the remedy.⁶⁷

5 CONCLUSION

Ultimately, a focus on remedies is simply one viewpoint from which to study the legal system. While there is much to see from this standpoint – much, indeed, that is hard to discern from any other – the need for multiple viewpoints must always be stressed.

⁶⁴ G van Dijck, ‘The Ordered Apology’ (2017) 37 OJLS 562.

⁶⁵ Y Arbel and Y Kaplan, ‘Tort Reform through the Back Door: A Critique of Law and Apologies’ (2017) 90 Southern California Law Review 1199, 1201.

⁶⁶ See e.g. R Carroll and J Berryman, ‘Making Amends by Apologising for Defamatory Publications: Developments in the 21st Century’ in K Barker, K Fairweather and R Grantham (eds), *Private Law in the 21st Century* (Hart Publishing 2017) ch 23; P Vines and R Carroll (eds), ‘The Place of Apology in Law’ (2017) 7 Oñati Socio-Legal Series (3) <http://opo.iisj.net/index.php/osls/issue/view/65>, accessed 8 May 2019.

⁶⁷ See e.g. R Philip, ‘Silence at Our Expense: Balancing Safety and Secrecy in Non-Disclosure Agreements’ (2003) 33 Seton Hall Law Review 845; S Levmore and F Fagan, ‘Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases’ (2018) 103 Cornell Law Review 311.