

# RECONSTRUCTING DAMAGES

MICHAEL TILBURY\*

[In modern law, damages are associated with compensation. Some jurists have suggested, however, that damages should simply be construed as a monetary award made in response to a wrong. In addition to compensatory awards, damages would then encompass awards aimed at restitution and punishment. This article argues that the realisation of such a concept of damages would produce incoherence that would impede the progressive development of the law. That development requires, rather, the identification of the objective(s) of each remedy and the development of a law of remedies around those objectives. Analysis of the objectives of compensatory and exemplary damages suggests that 'satisfaction' should be recognised as an independent objective of the law of remedies.]

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## I INTRODUCTION

Professor Harold Luntz is Australia's foremost authority on the law of damages. His magnum opus, *Assessment of Damages for Personal Injury and Death*, now in its fourth edition,<sup>1</sup> is routinely cited in the highest courts of the common law world. Yet Luntz is not an uncritical defender of the law of damages. He is disappointed that his book has seen four editions.<sup>2</sup> It was his fervent hope that by

\* LLB (London), BCL (Oxon); Commissioner, New South Wales Law Reform Commission; Professorial Fellow, Faculty of Law, The University of Melbourne. My thanks to the anonymous referees of this article for their helpful suggestions.

<sup>1</sup> Harold Luntz, *Assessment of Damages for Personal Injury and Death* (4<sup>th</sup> ed, 2002).

<sup>2</sup> In the second edition of his book, Luntz expresses his 'hope' that there will be no need for further editions: Harold Luntz, *Assessment of Damages for Personal Injury and Death* (2<sup>nd</sup> ed, 1983) viii. He was realistic enough, however, to expect he would be required to write a third edition: at viii.

imposing some order on the mass of authorities dealing with the assessment of damages in personal injury and death cases,<sup>3</sup> his work would expose the contradictions and inadequacies of applying damages in such cases.<sup>4</sup> In combining these contradictions with an appreciation that the ‘retention of the common law remedy is a wastefully expensive method of meeting the needs of only a small proportion of accident victims’,<sup>5</sup> the case for no-fault compensation would become irresistible, notwithstanding all the difficulties of implementing such a scheme in a federal system.<sup>6</sup>

It was not to be. As initially proposed, the implementation of no-fault compensation would have inevitably involved a substantial extension of the social security system, an extension unsupportable in the political climate of the last two decades of the 20<sup>th</sup> century.<sup>7</sup> I share Luntz’s view that our society is the worse, certainly the less compassionate, for failing to embrace no-fault compensation in personal injury and death cases. Requiring damages to be obtained in a ‘lottery by law’<sup>8</sup> after proof of fault in a once-and-for-all assessment — which is often no more than a wild ‘guesstimate’ bound to be wrong<sup>9</sup> — ought simply to be rejected as a means of compensating victims in such cases.

But beyond personal injury and death, damages seem, at least at first blush, an unexceptional remedy. In ordinary language, damages are commonly associated with ‘compensation’. And compensation, understood broadly as ‘recompense for loss’<sup>10</sup> (and thus as a paradigm of corrective justice), is no doubt what the person on Bondi beach usually regards as the appropriate response to an event that has caused injury. Whether this everyday understanding has influenced the legal concept of damages or vice versa, it does accord with the experience of common law and other legal systems that compensation for injury is ‘the most important, but not the exclusive, approved purpose governing remedies afforded by private law.’<sup>11</sup> In practice, it is also the preferred remedy of claimants.<sup>12</sup> In modern

<sup>3</sup> [T]his book cannot pretend to be a scientific statement of the law’: Harold Luntz, *Assessment of Damages for Personal Injury and Death* (1<sup>st</sup> ed, 1974) viii.

<sup>4</sup> Luntz refers to the ‘chaotic internal illogicality of the law of damages’: Luntz, *Assessment of Damages* (2<sup>nd</sup> ed), above n 2, viii; Harold Luntz, *Assessment of Damages for Personal Injury and Death* (3<sup>rd</sup> ed, 1990) vi.

<sup>5</sup> Luntz, *Assessment of Damages* (2<sup>nd</sup> ed), above n 2, viii; Luntz, *Assessment of Damages* (3<sup>rd</sup> ed), above n 4, vi.

<sup>6</sup> Luntz, *Assessment of Damages* (2<sup>nd</sup> ed), above n 2, viii; Luntz, *Assessment of Damages* (3<sup>rd</sup> ed), above n 4, vi; Luntz, *Assessment of Damages* (4<sup>th</sup> ed), above n 1, xi.

<sup>7</sup> The possibility of achieving a more rational personal injury regime through first party insurance in a free market is investigated by Patrick Atiyah, ‘Personal Injuries in the Twenty First Century: Thinking the Unthinkable’ in Peter Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (1996) 1.

<sup>8</sup> See Patrick Atiyah, *The Damages Lottery* (1997) 143.

<sup>9</sup> *Lim Poh Choo v Camden & Islington Area Health Authority* [1980] AC 174, 183 (Lord Scarman).

<sup>10</sup> See *Nelungaloo Pty Ltd v Commonwealth* (1947) 75 CLR 495, 571 (Dixon J). An appeal to the Privy Council was dismissed for lack of jurisdiction: *Nelungaloo Pty Ltd v Commonwealth* (1950) 81 CLR 144.

<sup>11</sup> Hans Stoll, ‘Consequences of Liability: Remedies’ in André Tunc (ed), *International Encyclopedia of Comparative Law: Torts* (1983) vol 11, [8-1].

<sup>12</sup> See Guenter Treitel, *Remedies for Breach of Contract: A Comparative Account* (1988) [46] (Germany), [49] (France), [70] (Scotland, Louisiana, Quebec, South Africa and Sri Lanka).

Australian law, this finds expression in the proposition that compensation is the fundamental principle of the law of damages,<sup>13</sup> and that other objectives (found in exemplary,<sup>14</sup> restitutionary,<sup>15</sup> nominal,<sup>16</sup> contemptuous<sup>17</sup> and vindictory damages)<sup>18</sup> are strictly exceptional.<sup>19</sup> The most important of these exceptional cases are exemplary damages, whose objective is to punish and deter,<sup>20</sup> and restitutionary damages, here defined as those monetary awards measured by the expenditure saved by the defendant as a result of the wrong done to the plaintiff.<sup>21</sup>

However, damages have not always been associated with compensation. In the early period of common law development, judges and juries did not have the functions they now have,<sup>22</sup> issues of fact and law were not clearly separated<sup>23</sup> and judges were anxious to transfer to jurors as many difficult issues as possible.<sup>24</sup> Most significantly, damages were a ‘jury question’. Notwithstanding that amounts awarded by the jury were at varying times subject to control — especially by a writ of attain for erroneous assessment — there was no need to articulate the function of damages, which seem, in practice, to have been awarded to serve a number of purposes.<sup>25</sup> Damages were, basically, ‘an arcanum

These sources demonstrate the preference for damages over specific performance in breach of contract cases.

- <sup>13</sup> See, eg, *Atlas Tiles Ltd v Briers* (1978) 144 CLR 202, 208 (Barwick CJ); *Haines v Bendall* (1991) 172 CLR 60, 63 (Mason CJ, Dawson, Toohey and Gaudron JJ). See also Luntz, *Assessment of Damages* (4<sup>th</sup> ed), above n 1, [1.1.4].
- <sup>14</sup> *Gray v Motor Accident Commission* (1998) 196 CLR 1, 6, 9 (Gleeson CJ, McHugh, Gummow and Hayne JJ) (‘Gray’).
- <sup>15</sup> See Harvey McGregor, *McGregor on Damages* (16<sup>th</sup> ed, 1997) [18].
- <sup>16</sup> Nominal damages are awardable only in cases of torts actionable per se and breach of contract: Luntz, *Assessment of Damages* (4<sup>th</sup> ed), above n 1, [1.8.1].
- <sup>17</sup> *Ibid* [1.8.3].
- <sup>18</sup> Butterworths, *Halsbury’s Laws of Australia*, vol 9 (at 1 July 2003) 135 Damages, ‘6 Factors Inflating Compensatory Damages’ [135-610] (awardable in defamation actions).
- <sup>19</sup> See generally McGregor, *McGregor on Damages*, above n 15, [12]–[18]. See also Harvey McGregor, ‘Restitutionary Damages’ in Peter Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (1996) ch 9. Cf *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157, 196–7 (Hill and Finkelstein JJ) (‘damages may be either compensatory or non-compensatory’).
- <sup>20</sup> But see below nn 207–10 and accompanying text.
- <sup>21</sup> Butterworths, *Halsbury’s Laws of Australia*, vol 9 (at 1 July 2003) 135 Damages, ‘5 Damages Not Founded on Compensation’ [135-520]–[135-525]. The expression is sometimes used more broadly to include all gain-based awards, including an account of profits: see Michael Tilbury, ‘Restitutionary Damages’ in Robyn Carroll (ed), *Civil Remedies: Issues and Developments* (1996) 2, 6–7. In this broader sense, the expression is arguably unnecessary: see Sam Doyle and David Wright, ‘Restitutionary Damages — The Unnecessary Remedy?’ (2001) 25 *Melbourne University Law Review* 1. However, Doyle and Wright (at 18–19) make no attempt to deal with restitutionary damages in the sense used in the text of this article.
- <sup>22</sup> The best account of the development of trial by jury and the changing functions of judge and jury is by James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898) chs 2–3. For later development, see A H Manchester, *A Modern Legal History of England and Wales 1750–1950* (1980) 87–99.
- <sup>23</sup> Even though, from the beginning, it appears that jurors were to speak only about facts: see Sir Frederick Pollock and Frederic Maitland, *The History of English Law* (2<sup>nd</sup> ed, 1898) vol 2, 629–30.
- <sup>24</sup> *Ibid* 631.
- <sup>25</sup> See generally George Washington, ‘Damages in Contract at Common Law’ (1931) 47 *Law Quarterly Review* 345; George Washington, ‘Damages in Contract at Common Law II: The Period Transitional to the Modern Law’ (1932) 48 *Law Quarterly Review* 90.

of the jury box into which judges hesitated to peer'.<sup>26</sup> This is reflected by the way in which damages were understood for many centuries. As late as the 17<sup>th</sup> century, Sir Edward Coke described damages as 'the recompence that is given by the jury to the plaintife or defendant, for the wrong the defendant hath done unto him.'<sup>27</sup> Omitting the role of the jury, the essence of this description is captured in Joseph Sayer's definition in the first book written specifically on damages in the late 18<sup>th</sup> century: 'Damages are a pecuniary Recompence for an Injury'.<sup>28</sup>

The changing roles of judge and jury, particularly the increasing judicial control of juries in the course of trials, meant that judges sometimes had to identify the function of damages to enable the jury to perform its task. That compensation should be at least one such function seems to emerge in the 18<sup>th</sup> century. Thus Sir William Blackstone, in the context of considering judgments as a means of acquiring property, wrote of 'damages given to a man by a jury, as a compensation and satisfaction for some injury sustained'.<sup>29</sup> By the time Theodore Sedgwick wrote the first modern textbook on damages in the United States in the mid-19<sup>th</sup> century, the object of damages was beyond doubt:

in all cases of civil injury, or breach of contract, with the exception of those cases of trespasses or torts, accompanied by oppression, fraud, malice or negligence so gross as to raise a presumption of malice, where the jury have a discretion to award exemplary or vindictive damages; in all other cases the declared object is to give *compensation* to the party injured for the loss sustained. ... This compensation is furnished in the damages, which are awarded according to established rules ...<sup>30</sup>

This rationalisation of damages as compensation was confirmed in two classic 19<sup>th</sup> century English authorities. In *Livingstone v Rawyards Coal Co*, Lord Blackburn said in the context of a tort that a court should award 'that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation'.<sup>31</sup> This envisages restoration of the injured person to the position in which they were before the tort. *Robinson v Harman*<sup>32</sup> had already applied a similar measure in breach of contract cases, with the clarification that the injured party is, in such cases, restored to the position which would have been obtained had the contract been performed.

<sup>26</sup> *Cassell & Co Ltd v Broome* [1972] AC 1027, 1125 (Lord Diplock) ('Cassell').

<sup>27</sup> Sir Edward Coke, *The First Part of the Institutes of the Laws of England* (first published 1832, 1979 ed) vol 2, [257a] (citations omitted).

<sup>28</sup> Joseph Sayer, *The Law of Damages* (1792) 1.

<sup>29</sup> William Blackstone, *Commentaries on the Laws of England* (1<sup>st</sup> ed, 1766) vol 2, 438 (emphasis omitted).

<sup>30</sup> Theodore Sedgwick, *A Treatise on the Measure of Damages: Or an Inquiry into the Principles which Govern the Amount of Compensation Recovered in Suits at Law* (2<sup>nd</sup> ed, 1852) 28–9 (emphasis in original).

<sup>31</sup> (1880) 5 App Cas 25, 39.

<sup>32</sup> (1848) 1 Ex 850, 855 (Parke B).

Some recent scholarship, associated principally with the writings of Professor Birks,<sup>33</sup> Professor Burrows<sup>34</sup> and Dr Edelman,<sup>35</sup> has argued for a return to a wider understanding of ‘damages’ as simply a monetary award for a wrong. This is not merely an argument about what remedies are appropriately labelled ‘damages’. Rather, the argument divorces damages from its modern definition as ‘pecuniary compensation ... for a wrong which is either a tort or breach of contract’<sup>36</sup> and brings within the legal category of damages all monetary responses to wrongs regardless of their purpose or jurisdictional origin. For convenience, I will refer to this as the ‘expansionist view’ of the law of damages. While I recognise that the expansionists do not in all respects put forward precisely the same argument, the differences between them are not such as to make it inappropriate to refer to a generalised approach.<sup>37</sup>

This article examines the desirability of, and obstacles to, the adoption of a single monetary remedy in response to a wrong that serves a variety of purposes in the manner suggested by the expansionists — particularly one that encompasses both gain-based and exemplary awards.<sup>38</sup> Its purpose is not to discuss the legitimacy of such awards (whether styled ‘damages’ or not). Part II sets out the expansionists’ thesis and explains how it marks a departure from the existing law. Part III examines the development of the existing law of damages. Part IV evaluates the expansionist thesis against the background of that development, and Part V revisits the compensatory and punitive functions of damages.

## II THE EXPANSIONIST THESIS

In his recent Hochelaga Lectures, Professor Andrew Burrows conveniently set out the bare bones of the expansionist thesis as part of a unified regime of common law and equitable remedies for common law and equitable wrongs. He wrote:

there would be one underlying concept — a civil wrong; one monetary remedy — call it ‘damages’; three measures of damages (compensatory, limited by unifying rules of remoteness, causation, contributory negligence and the duty to mitigate; punitive; and restitutionary); awardable with interest including, where full relief demands it, compound, rather than merely simple, interest; available

<sup>33</sup> See, eg, Peter Birks, ‘Equity in the Modern Law: An Exercise in Taxonomy’ (1996) 26 *University of Western Australia Law Review* 1, 27–30; Peter Birks, ‘The Law of Restitution at the End of an Epoch’ (1999) 28 *University of Western Australia Law Review* 13, 52–4.

<sup>34</sup> See, eg, Andrew Burrows, *Fusing Common Law and Equity: Remedies, Restitution and Reform* (2002) 3–26.

<sup>35</sup> See, eg, James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (2002). See also James Edelman, ‘Non-Compensatory Damages for Breach of Contract and Torts’ (2002) 76 *Australian Law Journal* 328; James Edelman, ‘The Meaning of “Damages” at Common Law and in Equity’ in Andrew Robertson (ed), *The Law of Obligations: Connections and Boundaries* (forthcoming, 2003) 31.

<sup>36</sup> McGregor, *McGregor on Damages*, above n 15, [1].

<sup>37</sup> See below Part II(B).

<sup>38</sup> Although nominal, contemptuous and vindicatory damages, which are referred to above (see nn 16–18 and accompanying text), are also relevant to this article, they are not expressly considered because they are of limited application in practice (see, eg, McGregor, *McGregor on Damages*, above n 15, [426]–[429] (nominal damages)) and the expansionist thesis has been put forward in the context of restitutionary and punitive awards.

for anticipated as well as accrued wrongs; and subject to a unified range of defences.<sup>39</sup>

At first sight, this hardly seems revolutionary. To the extent to which the existing law of damages already embraces awards aimed at compensation ('damages'), restitution ('restitutionary damages')<sup>40</sup> or punishment ('exemplary damages'), it is merely confirmatory of the existence of these awards.<sup>41</sup> But this impression is misleading because the expansionists depart from existing law in two significant respects:

- 1 They insist that restitution or punishment should, like compensation, represent 'measures' of damages that are available, more or less generally, in response to wrongs;<sup>42</sup> and
- 2 They ignore the jurisdictional origin of remedies, so that nominate monetary remedies in equity aimed at compensation ('equitable compensation')<sup>43</sup> or restitution ('equitable compensation'<sup>44</sup> and 'account of profits')<sup>45</sup> are simply incorporated in 'damages'.

Five matters need clarification at the outset in order to understand the import of the expansionist thesis. The first is the difference between 'measures' of damages and 'objectives' of the law of damages. The second is the extent of variation in the several iterations of the expansionist thesis. The third is the jurisdictional 'crossover of remedies'.<sup>46</sup> The fourth is the difference between general and exceptional categories of damages. The fifth is the rationale of the thesis and its strength.

#### A 'Objectives' and 'Measures' of Damages

The expansionists tend to refer to compensation, restitution and punishment as *measures* of damages. This is misleading. These concepts refer, more accurately, to the *objectives* of monetary (and other) remedies, that is, to their 'purposive', rather than 'performative', functions within the legal system.<sup>47</sup> The object or

<sup>39</sup> Burrows, *Fusing Common Law and Equity*, above n 34, 26.

<sup>40</sup> As defined above in text accompanying n 21.

<sup>41</sup> See generally McGregor, *McGregor on Damages*, above n 15, [9]–[11] (compensatory damages), [18] (restitutionary damages) and ch 11 (exemplary damages).

<sup>42</sup> See below nn 92–4 and accompanying text.

<sup>43</sup> On which, see Michael Tilbury and Gary Davis, 'Equitable Compensation' in Patrick Parkinson (ed), *The Principles of Equity* (2<sup>nd</sup> ed, 2003) 797, 797–826. 'Equitable compensation' does not here need to include 'equitable damages' under Lord Cairns' Act (*Chancery Amendment Act 1858*, 21 & 22 Vict, c 27, s 2, incorporated into Victorian law by the *Supreme Court Act 1986* (Vic) s 38), since, although these may be granted in circumstances in which damages are not recoverable at law (at 827–9), their assessment follows the same principles as damages at law: at 836–7.

<sup>44</sup> On the assumption that this remedy includes a 'restitutionary' objective, see below nn 189–90 and accompanying text.

<sup>45</sup> *Contra Watson v Holliday* (1882) 20 ChD 780, 782, 784 (Kay J), holding that an 'account of profits is not damages': at 782; aff'd (1883) 52 LJ Ch 543. But see the decision in *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157, 196 (Hill and Finkelstein JJ) where an account of profits was equated with 'disgorgement damages'.

<sup>46</sup> The expression is that of Justice L J Priestley, 'A Guide to a Comparison of Australian and United States Contract Law' (1989) 12 *University of New South Wales Law Journal* 4, 29.

<sup>47</sup> See Allan Beever, 'The Law's Function and the Judicial Function' (2003) 20 *New Zealand Universities Law Review* 299, esp 303.

function of a monetary remedy is not necessarily the same as the measure of damages in any particular case. The point can be illustrated, most simply, by pointing to those situations in the current law of damages where there is a disjuncture between the compensation principle and the measure of recovery in a specific case, as where, perhaps for pragmatic reasons, a formulaic general measure of damages based on a model of paradigm loss is applied, notwithstanding that it does not reflect the plaintiff's actual loss.<sup>48</sup>

The point is also illustrated, more importantly, in those cases in which there is difficulty in identifying or assessing the plaintiff's loss, and hence in formulating the appropriate measure of damages in the particular circumstances. Luntz draws attention to a number of recent situations in personal injury and death cases in which direct appeal to the compensation principle does not provide a ready answer.<sup>49</sup> For example, where there is a claim for damages for domestic or voluntary services, it is arguable whether such damages should be recoverable in respect of the death of a parent where the services are, and will continue to be, provided by the surviving partner without cost.<sup>50</sup> Similarly, it is uncertain whether the value of such services should be recoverable in a personal injury claim against a compulsory insurer where the defendant is already providing the services<sup>51</sup> and, if damages are recoverable, whether they should be valued at commercial rates or according to the cost to the supplier.<sup>52</sup> And there are many other examples, including how to account for new for old in the assessment of damages for injury to property,<sup>53</sup> or how to deal with skimped performance in breach of contract cases.<sup>54</sup> While these cases present difficult questions about the measure of damages that best effect the principle of compensation, it is generally true to say that the cases are capable of resolution without overtly straining the principle itself,<sup>55</sup> for they are at least one step removed from it.

The importance of this point is that concepts such as compensation, restitution and punishment are generally used in law at a higher level of abstraction than is necessarily appropriate in the determination of the applicable measure of damages in any particular case. The concepts provide the aspiration and standard of evaluation for the measure of recovery without being conclusive of it.

### B Variations in the Thesis

Although the expansionists agree that a law of civil wrongs should have one monetary remedy (whether styled 'damages' or not) and that this remedy will

<sup>48</sup> Sale of goods cases often fall into this category: see Andrew Burrows, *Remedies for Torts and Breach of Contract* (2<sup>nd</sup> ed, 1994) 142–8. See also S M Waddams, 'The Principles of Compensation' in Paul Finn (ed), *Essays on Damages* (1992) 1, 1–4.

<sup>49</sup> Luntz, *Assessment of Damages* (4<sup>th</sup> ed), above n 1, ix–x.

<sup>50</sup> See, eg, *Nguyen v Nguyen* (1990) 169 CLR 245.

<sup>51</sup> See, eg, *Kars v Kars* (1996) 187 CLR 354.

<sup>52</sup> See, eg, *Van Gervan v Fenton* (1992) 175 CLR 327.

<sup>53</sup> See, eg, McGregor, *McGregor on Damages*, above n 15, [17].

<sup>54</sup> See, eg, *A-G (UK) v Blake* [2001] 1 AC 268, 286 (Lord Nicholls).

<sup>55</sup> *Ibid.*

yield at least three different ‘measures’,<sup>56</sup> namely compensation, restitution and punishment, they do not necessarily agree on two factors: first, the circumstances in which each ‘measure’ is available; and second, the extent to which uniform rules apply to the general monetary remedy regardless of the applicable ‘measure’.

### 1 *The Availability of the Several ‘Measures’*

The debate here centres on the availability of damages reflecting the gain to the defendant (‘gain-based damages’), there being at least implied agreement that compensatory and exemplary damages will continue to be available in the circumstances in which they are currently recoverable. This reflects the fact that compensatory and exemplary damages are well developed in modern law, in contrast to gain-based damages which, at least in a generalised sense, are relatively underdeveloped as a result of the diverse factors that need to be addressed in determining their availability.<sup>57</sup>

Neither Professor Burrows nor Professor Birks has a firm position on the *general* circumstances in which gain-based damages are recoverable. Burrows points out that, where recoverable in response to torts, such damages focus on the protection of ‘the facultative institution of private property’<sup>58</sup> and on deterring cynical wrongdoing,<sup>59</sup> rationales that find expression in the cases dealing with breaches of equitable wrongs,<sup>60</sup> and even in breach of contract cases.<sup>61</sup> One should also note, however, that *Attorney-General (UK) v Blake* now justifies gain-based awards where ‘the plaintiff’s interest in performance may make it just and equitable that the defendant should retain no benefit from his breach of contract.’<sup>62</sup> Although Birks originally identified three situations in which gain-based relief was permissible — namely, anti-enrichment (as opposed to anti-harm) wrongs, cynical wrongdoing and deterrence of the mere possibility of harm (‘prophylaxis’),<sup>63</sup> recanting from the first because of its uncertainty<sup>64</sup> — he now believes that recognition of the multi-causality of restitution and of the ‘false monopoly of compensation’ mean that ‘it will not be long before all gain-based awards for wrongs are brought together and placed on a principled basis’.<sup>65</sup>

Dr James Edelman has now undertaken this task, contending that the circumstances in which gain-based damages are recoverable can be identified and the

<sup>56</sup> Both Birks, ‘Equity in the Modern Law’, above n 33, 29 and Edelman, *Gain-Based Damages*, above n 35, 7 point to the availability of nominal awards but it is not clear whether they would continue to allow their recovery. See above n 38.

<sup>57</sup> See also below nn 149–61 and accompanying text.

<sup>58</sup> Burrows, *Remedies*, above n 48, 306, relying on I M Jackman, ‘Restitution for Wrongs’ [1989] *Cambridge Law Journal* 302.

<sup>59</sup> Andrew Burrows, *The Law of Restitution* (2<sup>nd</sup> ed, 2002) 479–80.

<sup>60</sup> *Ibid* 491–507.

<sup>61</sup> *Ibid* 480–91, 507–8.

<sup>62</sup> [2001] 1 AC 268, 285 (Lord Nicholls).

<sup>63</sup> Peter Birks, *An Introduction to the Law of Restitution* (1985) 326–33.

<sup>64</sup> Peter Birks, ‘Civil Wrongs: A New World’ in *Butterworths Lectures 1990–1991* (1991) 55, 97.

<sup>65</sup> Birks, ‘The Law of Restitution at the End of an Epoch’, above n 33, 54.

law stated in a comprehensive fashion.<sup>66</sup> He argues that there are two types of gain-based damages: first, ‘restitutionary damages’, which reverse a wrongful transfer of value by subtracting from the defendant a benefit — usually an objective benefit — transferred from the plaintiff; and second, ‘disgorgement damages’, which strip a defendant of a profit made from the wrong whether or not there has been a transfer of value.<sup>67</sup> Dr Edelman maintains on corrective justice grounds that restitutionary damages should be available in all cases where a wrongful transfer has occurred pursuant to a wrong.<sup>68</sup> However, disgorgement damages, which are squarely aimed at deterrence, are appropriate in only two situations in which compensatory damages are inadequate to deter: first, where a wrong is committed with a view to gain; and second, where there is a fiduciary relationship that requires the stripping of profits made innocently but wrongfully.<sup>69</sup>

## 2 *The Unity of the Proposed Monetary Remedy*

The starting point here is to recall that Professor Burrows limits his ‘unifying rules of remoteness, causation, contributory negligence and the duty to mitigate’ to compensatory damages,<sup>70</sup> a proposition which clearly accords with the existing law to the extent that these notions are unknown in exemplary and restitutionary damages, and are only traceable with difficulty in account of profits.<sup>71</sup> Professor Birks would, however, apply a remoteness test to account of profits, though the general test (‘the first non-subtractive receipt’) would not be the same as the general test of remoteness (‘foreseeability’ or ‘contemplation’) in compensatory damages.<sup>72</sup> Dr Edelman envisages that rules of causation, remoteness and mitigation will apply to gain-based damages and that they will, at least in the case of remoteness, be similar to the rules (perhaps especially those in tort) applicable to compensatory damages.<sup>73</sup>

### C *General and Exceptional Categories of Damages*

The consensus of present law is, as we have seen, that objectives other than compensation are exceptional. A more stringent, but minority, view is that objectives other than compensation are ‘anomalous’, in the sense that they are somehow illegitimate.<sup>74</sup> Whichever view we take, it requires a rejection, in limine, of the argument that the existence in current law of exemplary and restitutionary damages demonstrates that damages are already a monetary remedy for wrongs that encompass objectives other than compensation.<sup>75</sup> The

<sup>66</sup> Edelman, *Gain-Based Damages*, above n 35.

<sup>67</sup> *Ibid* ch 3.

<sup>68</sup> *Ibid* 80–1.

<sup>69</sup> *Ibid* 82–6.

<sup>70</sup> Burrows, *Fusing Common Law and Equity*, above n 34, 26.

<sup>71</sup> See Edelman, *Gain-Based Damages*, above n 35, 103–11.

<sup>72</sup> Birks, *An Introduction to the Law of Restitution*, above n 63, 351–4.

<sup>73</sup> Edelman, *Gain-Based Damages*, above n 35, 108.

<sup>74</sup> See *Cassell* [1972] AC 1027, 1086 (Lord Reid) (‘highly anomalous’).

<sup>75</sup> *Contra* especially Edelman, *Gain-Based Damages*, above n 35, ch 1 who uses exemplary damages as a starting point to demonstrate that damages awards can in general ‘be based on

truth is that damages encompass such objectives only exceptionally or anomalously, unless it can be argued that the reason for their exceptional or anomalous status is due to considerations other than incompatibility with the compensatory function of damages. Although the exceptional status of exemplary damages is also a result of other considerations (for example, the relative infrequency of the type of conduct that justifies their award),<sup>76</sup> their incompatibility with the principle of compensation is the *ultimate* reason for this status.<sup>77</sup> This is also true in respect of restitutionary damages.<sup>78</sup> Moreover, as will be apparent from the discussion below,<sup>79</sup> to base any reasoning on a premise that existing law already embraces exemplary and restitutionary damages overlooks the insecurity of both types of award.

There is, obviously, a great deal of difference between, on the one hand, conceding the existence of exceptional categories of damages directed to objectives other than compensation and, on the other hand, starting from the point that all damages can, potentially at least, serve a number of different objectives. The former approach, representative of the current law, means that the exceptional categories are narrowly (though, as we shall see, not always clearly)<sup>80</sup> delineated, while compensation remains the dominant principle of the law of damages. The expansionist approach assumes and implies that damages may include, more or less generally, objectives other than compensation. How generally it does so is discussed below.<sup>81</sup>

#### D Crossover of Remedies

A particular bar to the realisation of the expansionists' thesis arises in Australia. The thesis envisages that damages can be made available in breach of jurisdictional patterns derived from the period of the institutional separation of law and equity, as would be the case if exemplary damages (a common law remedy) were made available in support of a breach of fiduciary duty protected in equity,<sup>82</sup> or if an action for money had and received at law were available *on terms* in the same manner as an account of profits.<sup>83</sup> Developments of the law in such directions may involve a 'fusion fallacy', that is,

the administration of a remedy, for example common law damages for breach of fiduciary duty, not previously available either at law or in equity, or the

principles other than compensating for loss': at 1. See also Peter Birks, 'The Concept of a Civil Wrong' in David Owen (ed), *Philosophical Foundations of Tort Law* (1995) 29, 35–6, making similar arguments using restitutionary and exemplary damages.

<sup>76</sup> See *Gray* (1998) 196 CLR 1, 9 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

<sup>77</sup> See generally *A v Bottrill* [2003] 1 AC 449, 455, 459, 463–4 (Lord Nicholls).

<sup>78</sup> See *A-G (UK) v Blake* [2001] 1 AC 268, 279 (Lord Nicholls).

<sup>79</sup> See below nn 143–8 and accompanying text (exemplary damages) and nn 149–61 and accompanying text (gain-based damages).

<sup>80</sup> See below nn 142–61 and accompanying text.

<sup>81</sup> See below nn 92–4 and accompanying text.

<sup>82</sup> Consider *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 305–6 (Spigelman CJ), 391–2 (Heydon JA), cf 325–9 (Mason P dissenting).

<sup>83</sup> See Michael Tilbury, *Civil Remedies — Volume One: Principles of Civil Remedies* (1990) [4098]–[4101] on apportionment particularly.

modification of principles in one branch of the jurisdiction by concepts which are imported from the other and thus are foreign ...<sup>84</sup>

Australian law does not, at least in most cases, permit developments in the law that involve fusion fallacies.<sup>85</sup>

The crossover problem is not a focus of this article, which is concerned with more general issues relating to the proposed recasting of damages. It suffices to note that arguments asserting that developments in the law are impermissible only because they could not have taken place in a pre-judicature system are, quite simply, unconvincing. The importance of the arguments lies, rather, in the warning that ignorance of jurisdictional origin can lead to the creation of inappropriately uniform rules.<sup>86</sup> Examples would be arguments for the imposition of exemplary damages in cases of breach of fiduciary duty, without investigation of the real nature of the particular duty breached, including its origin in equity,<sup>87</sup> and calls for the rationalisation of account of profits as one species of damages, without making allowance for the discretionary nature of the remedy and the fact that it can be imposed on terms.<sup>88</sup>

### E Rationale of the Thesis

For Professor Burrows, the realisation of the thesis would ensure that like cases are treated alike, particularly in the sense that like cases would not be subjected to different outcomes simply by reason of their jurisdictional origin.<sup>89</sup> For Dr Edelman, the appeal of the thesis seems to lie, first, in its explanatory power — its ability to rationalise cases in which courts have clearly allowed recovery beyond compensation in cases of wrongs<sup>90</sup> — and second, in agreement with Professor Birks,<sup>91</sup> in the fact that it would support the principled development of the law, particularly the recognition of the fact that there is no reason why monetary awards not founded on compensation should be regarded as anomalous.

The principled development of the law does appear to provide a powerful argument in favour of the development of a single monetary remedy that responds to wrongs in a variety of measures. The reason for this is as follows. Once a wrong is established, damages are awarded as a matter of course, since the availability of damages, being a remedy of common law origin, is not

<sup>84</sup> R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (4<sup>th</sup> ed, 2002) [2-105].

<sup>85</sup> See, eg, *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, deciding that there was no power to award exemplary damages for the breach of fiduciary duty there in issue.

<sup>86</sup> See Michael Tilbury, 'Remedies and the Classification of Obligations' in Andrew Robertson (ed), *The Law of Obligations: Connections and Boundaries* (forthcoming, 2003) 11.

<sup>87</sup> See especially *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 306 (Spigelman CJ). See also Justice William Gummow, 'Compensation for Breach of Fiduciary Duty' in T G Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) 57, 75–80, 91–2.

<sup>88</sup> See Gareth Jones, *Unresolved Problems in the Law of Restitution* (2001) 29–30, 39–42.

<sup>89</sup> Burrows, *Fusing Common Law and Equity*, above n 34, 3, 4, 25–6.

<sup>90</sup> Edelman, *Gain-Based Damages*, above n 35, esp 6–9 (generally), 9–22 (explaining exemplary damages), 66–93 (explaining 'restitutionary' and 'disgorgement' damages).

<sup>91</sup> Birks, 'The Law of Restitution at the End of an Epoch', above n 33, 54.

dependent on the discretion of the court. As loss suffered by the plaintiff would no longer be a prerequisite to recovery, as it is with compensation,<sup>92</sup> the courts would not be able to deny recovery simply on the basis that there is no loss,<sup>93</sup> and would not otherwise strain the compensation principle in justifying recovery.<sup>94</sup> In short, determination of the objective of damages in any case would be made on a level playing field in which there is no bias in favour of compensatory damages, as there is in the current law. Rather, the courts would be forced to articulate the basal principles governing recovery both in cases in which there is loss and in cases in which there is no loss. The old maxim ‘where there is a right there is a remedy’ would, at last, be meaningfully transmogrified into ‘where there is a wrong there is a monetary remedy’.

The force of this appealing argument needs to be evaluated against the background of the development of the law of damages.

### III THE DEVELOPMENT OF THE LAW OF DAMAGES

#### *A Consolidation of the Principle of Compensation*

The principled development of the law of damages only began in the course of the 19<sup>th</sup> and 20<sup>th</sup> centuries, when damages ceased to be a ‘jury question’ because juries began to disappear from civil trials.<sup>95</sup> The period coincides with the emergence of the modern law of torts and contract, in which the basis of most civil liability was, and still is, found outside statute. The purpose of that liability is most frequently explained, instrumentally, in terms of deterrence and compensation.

Deterrence is the more problematic explanation. All monetary awards are, of course, deterrent in the weak sense that they act as a sanction on conduct. This does not depend on their function as compensatory, restitutionary or punitive. But the deterrent effect of any particular award on the future conduct of either the defendant or others is debatable normatively,<sup>96</sup> and there is no empirical evidence to suggest that damages have a deterrent effect,<sup>97</sup> even where the court expressly intends this by awarding exemplary damages.<sup>98</sup> Indeed, there are

<sup>92</sup> See above nn 31–2 and accompanying text.

<sup>93</sup> See, eg, *McKenna & Armistead Pty Ltd v Excavations Pty Ltd* [1957] 57 SR (NSW) 515 (bailment); *Stoke-on-Trent City Council v W & J Wass* [1988] 3 All ER 394 (trespass or nuisance); *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705 (breach of contract).

<sup>94</sup> As in ‘the lost-opportunity to bargain’ explanation of restitutionary damages: see Robert Sharpe and Stephen Waddams, ‘Damages for Lost Opportunity to Bargain’ (1982) 2 *Oxford Journal of Legal Studies* 290. For criticism of this explanation, see Edelman, *Gain-Based Damages*, above n 35, 99–102.

<sup>95</sup> See Frederick Lawson, *Remedies of English Law* (2<sup>nd</sup> ed, 1980) 54–5.

<sup>96</sup> Notwithstanding the courts’ routine acceptance of deterrence as a goal of monetary relief: see, eg, *Lamb v Cotogno* (1987) 164 CLR 1, 9 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ) in the context of exemplary damages. See also *Royal Bank of Canada v W Got & Associates Electric Ltd* [1999] 3 SCR 408, 421 (McLachlin and Bastarache JJ), deciding that compensatory awards are usually sufficient to achieve deterrence in breach of contract cases.

<sup>97</sup> Peter Cane, *The Anatomy of Tort Law* (1997) 217–25.

<sup>98</sup> See Harry Street, *Principles of the Law of Damages* (1962) 36, who argues that the absence of this evidence makes it impossible to say whether or not exemplary damages are desirable. In *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122, 138–9 (‘*Kuddus*’),

doubts about the normative and empirical force of deterrence in its heartland of the criminal law,<sup>99</sup> where it is one of the aims of criminal punishment.<sup>100</sup> Given their prominence, these doubts cannot but cast a shadow over the effectiveness of deterrence in civil law, particularly in relation to exemplary damages, the civil remedy most closely associated with the criminal law.

Unsurprisingly, compensation has come to be generally preferred as the aim of civil liability. By 1881, Oliver Wendell Holmes had found the ‘general purpose’ of tort law in compensation,<sup>101</sup> a rationale fuelled by the development of liability insurance in the late 19<sup>th</sup> century.<sup>102</sup> By 1966, Windeyer J was able to write in *Uren v John Fairfax & Sons Pty Ltd* that ‘[c]ompensation is the dominant remedy if not the purpose of the law of torts today.’<sup>103</sup> This statement could be applied with equal force to the law of contract, whose purpose is ‘to satisfy the expectations of the party entitled to performance’.<sup>104</sup> Compensation effects that objective where specific performance is unavailable, as it often is in common law systems where it is a remedy of equitable origin and is available, theoretically at least, only where damages are inadequate, and then only in the discretion of the court.<sup>105</sup>

Predictably then, the development of the law of damages in the 20<sup>th</sup> century is characterised by the restatement and refinement of the compensation principle. The most important examples are these. First, the compensation principle has

Lord Mackay points to the continuing need for this study notwithstanding the full and careful consultation process underlying the Law Commission for England and Wales, *Aggravated, Exemplary and Restitutionary Damages: A Consultation Paper*, Report No 247 (1997).

<sup>99</sup> Empirical studies in the United States that seem to show a link between deterrence, incapacitation and crime reduction (see William Spelman, ‘What Recent Studies Do (and Don’t) Tell Us about Imprisonment and Crime’ in Michael Tonry (ed), *Crime and Justice: A Review of Research* (2000) vol 27, 419; William Spelman, ‘The Limited Importance of Prison Expansion’ in Alfred Blumstein and Joel Wallman (eds), *The Crime Drop in America* (2001) 97) do not (and cannot) distinguish between deterrence and incapacitation as the reason for crime reduction. In any event, the studies argue that any crime reduction has come at too high a price, a notable example being the mass imprisonment of at least one group of the population, namely, young black males in large urban centers: David Garland, ‘Introduction: The Meaning of Mass Imprisonment’ in David Garland (ed), *Mass Imprisonment: Social Causes and Consequences* (2001) 1, 1–2. One reason for the repeal of the Northern Territory’s mandatory sentencing laws in respect of property offences was that they had not had, or were not perceived to have had, any deterrent effect: see the second reading speech for the Juvenile Justice Amendment Bill (No 2) 2001 (NT), Juvenile Justice (Consequential Amendments) Bill 2001 (NT), Sentencing Amendment Bill (No 3) 2001 (NT) and Sentencing (Consequential Amendments) Bill 2001 (NT): Northern Territory, *Parliamentary Debates*, Legislative Assembly, 17 October 2001, 56 (Peter Toyne, Attorney-General).

<sup>100</sup> See Tasmania Law Reform Institute, *Sentencing*, Issues Paper No 2 (2002) 48–55.

<sup>101</sup> See Oliver Wendell Holmes, *The Common Law* (first published 1881, 1968 ed) 115 where such ‘general purpose’ is described as ‘to secure a man indemnity against certain forms of harm to person, reputation, or estate, at the hands of his neighbors, not because they are wrong, but because they are harms.’

<sup>102</sup> See Cane, above n 97, 220–1.

<sup>103</sup> (1966) 117 CLR 118, 149 (‘Uren’).

<sup>104</sup> *Co-Operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, 15 (Lord Hoffman). This statement is neutral on whether the satisfaction of the principle is achieved by requiring actual performance or allowing the defendant to pay damages for failure to perform — the Holmesian view of contract that finds expression in the theory of efficient breach: see Richard Posner, *Economic Analysis of Law* (5<sup>th</sup> ed, 1998) 103.

<sup>105</sup> See Meagher, Heydon and Leeming, above n 84, [20-030]–[20-175]. Cf Douglas Laycock, *The Death of the Irreparable Injury Rule* (1991).

driven the clear trend towards the deductibility of collateral benefits in the assessment of damages.<sup>106</sup> Second, some cases have abandoned a general formulae in the assessment of damages in particular types of cases in favour of a measure that, in the circumstances, more accurately gives effect to the principle of compensation. Of particular note in this respect are (i) Lord Wright's speech in *Liesbosch Dredger v SS Edison*,<sup>107</sup> abandoning the application of a general formula for the measure of damages in the case of destruction of a ship in favour of a measure that reflected the value of the ship as a going concern, so as to encompass loss of profits; and (ii) the decision of the High Court in *Butler v The Egg & Egg Pulp Marketing Board*,<sup>108</sup> which subjected the conventional measure of damages in conversion to the general principle of compensation. Third, the decision of the House of Lords in *British Transport Commission v Gourley*,<sup>109</sup> and its Australian endorsement in *Cullen v Trappell*,<sup>110</sup> held that, in accordance with the compensation principle, personal injury plaintiffs are only entitled to recover after-tax earnings in awards for lost earning capacity since they cannot have 'lost' what they would never have 'received'. Fourth, the decision of the High Court in *Hungerfords v Walker*<sup>111</sup> is yet another example of the refinement of the compensation principle, holding that compensation in the form of interest is recoverable by plaintiffs who have suffered loss by reason of being deprived or kept out of their damages (or other money).

The fifth example, undoubtedly the high watermark of the compensation principle in the 20<sup>th</sup> century, is Lord Devlin's famous speech in *Rookes v Barnard*,<sup>112</sup> subsequently endorsed by the House of Lords in *Cassell*.<sup>113</sup> *Rookes v Barnard* restricted the circumstances in which exemplary damages could be recovered to three categories, essentially because in a system in which the compensation principle predominated, such damages were exceptional.<sup>114</sup> In *Uren*,<sup>115</sup> the High Court expressly rejected Lord Devlin's restatement of the law of exemplary damages, the rejection being affirmed by the Privy Council.<sup>116</sup> The nature of that rejection needs to be carefully understood. What the High Court refused to endorse was Lord Devlin's restriction of the availability of exemplary

<sup>106</sup> Luntz, *Assessment of Damages* (4<sup>th</sup> ed), above n 1, [8.1.5]. See also Law Commission for England and Wales, *Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits*, Report No 262 (1999) [10.4]–[10.8] which notes a 'shift in emphasis' (at [10.6]) towards deductibility being the starting point.

<sup>107</sup> [1933] AC 449.

<sup>108</sup> (1966) 114 CLR 185.

<sup>109</sup> [1956] AC 185. *Contra R v Jennings* [1966] SCR 532; *North Island Wholesale Groceries Ltd v Hewin* [1982] 2 NZLR 176; *Horsburgh v New Zealand Meat Processors Industrial Union of Workers* [1988] 1 NZLR 698.

<sup>110</sup> (1980) 146 CLR 1, overruling *Atlas Tiles Ltd v Briers* (1978) 144 CLR 202.

<sup>111</sup> (1989) 171 CLR 125.

<sup>112</sup> [1964] AC 1129.

<sup>113</sup> [1972] AC 1027.

<sup>114</sup> See *Rookes v Barnard* [1964] AC 1129, 1221 where Lord Devlin begins the relevant part of his speech as follows: 'Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter.'

<sup>115</sup> (1966) 117 CLR 118.

<sup>116</sup> *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221.

damages to the three categories of case his Lordship specified,<sup>117</sup> categories informed neither by logic nor principle,<sup>118</sup> nor compelled by authority.<sup>119</sup> Rather, exemplary damages were to continue to be available in Australia, in principle, in all cases where the plaintiff had an action for damages in tort and the defendant's conduct satisfied the description of 'conscious wrongdoing in contumelious disregard of another's rights'.<sup>120</sup>

The approach in *Uren* makes the availability of exemplary damages co-extensive with their punitive rationale<sup>121</sup> as, more consciously, does the decision of the High Court in *Gray*<sup>122</sup> to the effect that, even where the defendant's conduct is of the requisite type, it will not support a claim for exemplary damages to the extent that the defendant has already been subjected to substantial criminal punishment in respect of that very conduct.<sup>123</sup> Linking their availability to their rationale ensures that exemplary damages are only recoverable in Australian law in exceptional circumstances,<sup>124</sup> just as the 'three-categories approach' does in English law. And this is further reinforced in Australian law by the acceptance of those aspects of Lord Devlin's speech in *Rookes v Barnard* that limit the recoverability of exemplary damages to cases in which a compensatory award is not large enough to bring home to the defendant that tort does not pay,<sup>125</sup> as well as, more importantly, cases that expound the distinction between compensatory damages, especially of the aggravated type,<sup>126</sup> and exemplary damages.<sup>127</sup> Indeed, the acceptance of this distinction swept away the 'chaos'<sup>128</sup> that marked the law's failure to distinguish between such damages before 1964.

### B *The Criticisms of Rookes v Barnard*

*Rookes v Barnard* attracts strenuous censure, with Lord Nicholls most recently lamenting that England is 'still toiling in [its] ... chains'.<sup>129</sup> There are three major criticisms:

1 That Lord Devlin gave a false monopoly to compensation;

<sup>117</sup> See *Gray* (1998) 196 CLR 1, 8 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

<sup>118</sup> See Michael Tilbury, 'Factors Inflating Damages Awards' in Paul Finn (ed), *Essays on Damages* (1992) 86, 103–4.

<sup>119</sup> *Rookes v Barnard* [1964] AC 1129, 1226 (Lord Devlin).

<sup>120</sup> See *Gray* (1998) 196 CLR 1, 7 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

<sup>121</sup> See *Kuddus* [2002] 2 AC 122, 145 (Lord Nicholls).

<sup>122</sup> (1998) 196 CLR 1.

<sup>123</sup> *Ibid* 14 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

<sup>124</sup> *Ibid* 9.

<sup>125</sup> See, eg, the application of the 'if, but only if' formula in *Rookes v Barnard* [1964] AC 1129, 1228 (Lord Devlin) by the Victorian Court of Appeal in *Backwell v A A A* [1997] 1 VR 182, 184–5 (Tadgell JA), 206–10 (Ormiston JA).

<sup>126</sup> Aggravated damages are damages compensating a plaintiff for the increased harm to reputation and feelings that is assumed to flow from the egregious conduct of the defendant in the commission of the tort.

<sup>127</sup> The distinction drawn between aggravated and exemplary damages in *Rookes v Barnard* [1964] AC 1129, 1221–6, 1229–31 (Lord Devlin) was accepted in *Uren* (1966) 117 CLR 118, 129–30 (Taylor J), 149 (Windeyer J).

<sup>128</sup> *Cassell* [1972] AC 1027, 1070 (Lord Hailsham LC).

<sup>129</sup> *A v Bottrill* [2003] 1 AC 449, 459.

- 2 That Lord Devlin unduly restricted the availability of exemplary damages; and
- 3 That the category of ‘aggravated damages’ is, in any event, illusory.

### 1 *The False Monopoly of Compensation*

The view that Lord Devlin gave a ‘false monopoly’ to compensation<sup>130</sup> needs to be considered both historically and from the standpoint of the present. From a historical perspective, it is difficult to believe that Lord Devlin could have done anything but identify compensation as the primary objective of the law of damages. *Rookes v Barnard* squarely raised the issue whether the damages recoverable in the circumstances could contain a punitive element. Order could only be imposed on the mass of relevant but conflicting authority, which reflected the old arbitrary power of the jury over damages,<sup>131</sup> but which had recently been so brilliantly rationalised by Dr Harvey McGregor<sup>132</sup> by identifying the underlying purpose(s) of the award of damages and relating any punitive element in damages to that underlying rationale(s). Given the compensatory focus underlying civil liability in tort and contract,<sup>133</sup> it is hardly surprising that compensation should emerge triumphant as the general objective of the law of damages.

From a present day perspective, it is less obvious that compensation should have quite the prominence that *Rookes v Barnard* suggests. Compensation is no longer regarded as the only, or primary, focus of tort law,<sup>134</sup> which is now seen to effect other purposes as diverse as expressing disapproval of the defendant’s conduct and education.<sup>135</sup> Nor is it the sole explanation of contractual liability.<sup>136</sup> Further, the forceful emergence of the modern law of restitution with its gain-based recoveries has highlighted the prevention of unjust enrichment as one of the aims of civil liability.<sup>137</sup> The common law has yet to, and probably will never, commit itself to any underlying theory of tortious liability, let alone civil liability more generally<sup>138</sup> — a theory that, in any event, would necessarily be evolutionary. But this means only that any suggested objectives of civil liability cannot be dismissed, a priori, simply because they are not compensatory. It does

<sup>130</sup> See especially Birks, ‘The Law of Restitution at the End of an Epoch’, above n 33, 52–4.

<sup>131</sup> *Cassell* [1972] AC 1027, 1070 (Lord Hailsham LC), citing Theodore Sedgwick, *A Treatise on the Measure of Damages: Or an Inquiry into the Principles which Govern the Amount of Pecuniary Compensation Awarded by Courts of Justice* (9<sup>th</sup> ed, 1912) vol 1, 688–9.

<sup>132</sup> Harvey McGregor, *Mayne and McGregor on Damages* (12<sup>th</sup> ed, 1961) [212]–[214]. Cf W G Earengay, *Mayne’s Treatise on Damages* (11<sup>th</sup> ed, 1946) 41.

<sup>133</sup> See above nn 101–5 and accompanying text.

<sup>134</sup> See especially Lord Wilberforce’s speech in *Cassell* [1972] AC 1027, 1114.

<sup>135</sup> See Cane, above n 97, 206–8; André Tunc, ‘Introduction’ in André Tunc (ed), *International Encyclopedia of Comparative Law: Torts* (1983) vol 11, [1-154]–[1-178].

<sup>136</sup> See Arthur von Mehren, ‘A General View of Contract’ in Arthur von Mehren (ed), *International Encyclopedia of Comparative Law: Contracts in General* (1982) vol 7, [1-21]–[1-29].

<sup>137</sup> For a short summary, see Birks, ‘The Law of Restitution at the End of an Epoch’, above n 33, 15–16. The major impetus to the development of the modern law of restitution was the publication of Professor Birks’s seminal *An Introduction to the Law of Restitution*, above n 63.

<sup>138</sup> In *Cassell* [1972] AC 1027, 1114, Lord Wilberforce rejects the proposition that there are any underlying theories of civil damages that would maintain compensation as a dominant purpose, and punishment as an anomalous element, commenting (at 1114) that ‘English law has not committed itself to any of these theories: it may have been wiser than it knew.’

not mean that the monopoly, or at least dominance, of compensation is ‘false’. In practice, compensatory awards are, and will remain, the most numerous, the other awards being exceptional.<sup>139</sup> More importantly, as compensation clearly represents corrective justice,<sup>140</sup> its legitimacy as an objective of monetary recovery can almost be taken for granted. The same cannot be said for punishment and restitution which, at first sight, appear to breach corrective justice by allowing the plaintiff to recover what is seemingly a ‘windfall’. In the case of punishment, the windfall comes in the form of a fine payable to the plaintiff rather than the state. In restitution, the windfall is the defendant’s gain (or part of it) that may never have been realised, or even realisable, by the plaintiff. While most (if not all) windfall arguments are in themselves question-begging,<sup>141</sup> they point to deeper concerns about extending the availability of punitive and restitutionary awards in response to wrongs.

As far as punitive awards are concerned, the legitimacy of awarding a monetary remedy in civil proceedings with the objective of punishing the defendant must stand or fall by whether or not the legal system can accommodate at least a perceived ‘confusion’ of the civil and criminal laws. The confusion arises because exemplary damages permit the grant in civil proceedings (and therefore without the protections of the criminal law), of a fine for conduct which, in itself, may not otherwise be judged ‘wrongful’, let alone ‘criminal’.<sup>142</sup> Notwithstanding the apparent willingness of the courts to award exemplary damages in a greater number of cases than in the past, both a majority of the High Court of Australia in *Gray*<sup>143</sup> and the House of Lords in *Kuddus*<sup>144</sup> have pointed out that neither court has yet addressed the fundamental question of whether exemplary damages should continue to be available in their respective legal systems.<sup>145</sup> In a globalised world in which only common law systems support punitive awards in civil proceedings,<sup>146</sup> and in which the experience of the most significant common law jurisdictions — those in the United States — is hardly one to be emulated,<sup>147</sup> the

<sup>139</sup> See above nn 11–19 and accompanying text.

<sup>140</sup> See especially Ernest Weinrib, ‘Restitutionary Damages as Corrective Justice’ (2000) 1 *Theoretical Inquiries in Law* 1, 2 (‘The reparation of injury seems satisfied by compensating the plaintiff for his or her loss’), 4–5. See also above nn 10–12 and accompanying text.

<sup>141</sup> Edelman, *Gain-Based Damages*, above n 35, 21.

<sup>142</sup> See especially *Cassell* [1972] AC 1027, 1087 (Lord Reid), whose classic objections to exemplary damages have never been satisfactorily answered. See also *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 386–90 (Heydon JA) (exemplary damages involve the judicial creation of new criminal sanctions), cf 303 (Spigelman CJ); Nicholas McBride, ‘Punitive Damages’ in Peter Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (1996) 175. Consider also *Gray* (1998) 196 CLR 1, 7–8 (Gleeson CJ, McHugh, Gummow and Hayne JJ) (historical intermingling of crime and tort suggests that the sharp cleavage between criminal law on the one hand and torts and contract on the other has been exaggerated).

<sup>143</sup> (1998) 196 CLR 1, 5, 12–13 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

<sup>144</sup> [2002] 2 AC 122, 134–5 (Lord Slynn), 137–8 (Lord Mackay), 146–7, cf 147–9 (Lord Hutton). See also at 155–7 (Lord Scott dissenting).

<sup>145</sup> See also *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 (exemplary damages not recoverable in the remedy of compensation in equity).

<sup>146</sup> Punitive damages are unknown in civil law countries (see *Gray* (1998) 196 CLR 1, 42 (Callinan JJ)) and in the member states of the European Union other than England: see *R v Secretary of State for Transport; Ex parte Factortame Ltd* (1998) 81 CMLR 1353, 1414–15 (Hobhouse LJ, Collins and Moses JJ).

<sup>147</sup> See *Gray* (1998) 196 CLR 1, 10–12 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

future of exemplary damages is open to question. This is particularly so in England where s 8 of the *Human Rights Act 1998* (UK) c 42, which applies to the award of damages in respect of unlawful acts of public authorities, may well influence, or in some cases require, a reconsideration of the availability of exemplary damages.<sup>148</sup>

The legitimacy of restitutionary awards made pursuant to wrongs also raises fundamental questions, which often reflect a lack of development in the current state of the law. First, and most basically, there is doubt whether restitutionary awards are a response to wrongs at all, rather than simply a response to a situation requiring that the defendant not be unjustly enriched at the expense of the plaintiff.<sup>149</sup> As Professor Birks puts it:

Although it is impossible and unnecessary to deny the existence of restitutionary awards for wrongs qua wrongs, it is none the less true that if a broad interpretation of ‘at the expense of’ is adopted a great many of the cases which seem to exemplify restitution of wrongful enrichment — restitution for wrongs as such — become susceptible of alternative analysis as cases of unjust enrichment. Moreover ... the law does increasingly appear to be adopting a broad interpretation.<sup>150</sup>

Second, there is debate whether there is only one restitutionary response governed by the same principles but yielding two different measures (representing, in the language of the present law, ‘restitutionary damages’ and ‘account of profits’ respectively),<sup>151</sup> or two sharply divided measures governed by different principles as Dr Edelman has argued.<sup>152</sup> In practice, the cases yield a variety of measures.<sup>153</sup> Third, as far as restitutionary damages are concerned, it is unclear whether their recoverability in a somewhat indeterminate group of cases involving the protection of proprietary rights<sup>154</sup> already represents a principled position on corrective justice grounds, namely, that such rights include the opportunity to gain from their exploitation.<sup>155</sup> Dr Edelman’s suggestion that corrective justice

<sup>148</sup> See *Kuddus* [2002] 2 AC 122, 137–8 (Lord Mackay). See also English Law Commission and Scottish Law Commission, *Damages under the Human Rights Act 1998*, Report Nos 266 and 180 (2000) [3.47]–[3.53], [4.71]–[4.73], [5.5] fn 9. See also the decision of the South African Constitutional Court in *Fose v Minister of Safety and Security* [1997] 3 SALR 786 refusing to award constitutional damages in a punitive measure against police who had acted in flagrant violation of the plaintiff’s rights.

<sup>149</sup> See McGregor, ‘Restitutionary Damages’, above n 19. This is part of a much wider debate: see Justice Keith Mason, ‘Where Has Australian Restitution Law Got to and where Is It Going?’ (2003) 77 *Australian Law Journal* 358, 365–7.

<sup>150</sup> Peter Birks, ‘At the Expense of the Claimant: Direct and Indirect Enrichment in English Law’ [2000] *Oxford University Comparative Law Forum* <<http://ouclf.iuscomp.org/articles/birks.shtml>>. See also Andrew Burrows, *The Law of Restitution* (2<sup>nd</sup> ed, 2002) 459, 461. Compensation also dominates in civil systems of law where there is an absence of pressure to develop a category of ‘restitution for wrongs’ by reason of the existence of a general enrichment action: see Francesco Giglio, ‘Restitution for Wrongs: A Comparative Analysis’ [2001] *Oxford University Comparative Law Forum* <<http://ouclf.iuscomp.org/articles/giglio.shtml>>.

<sup>151</sup> An assumption underlying *A-G (UK) v Blake* [2001] 1 AC 268.

<sup>152</sup> Edelman, *Gain-Based Damages*, above n 35, esp ch 3.

<sup>153</sup> See cases cited in *ibid* 73–6. See also James Gordley, ‘The Purpose of Awarding Restitutionary Damages: A Reply to Professor Weinrib’ (2000) 1 *Theoretical Inquiries in Law* 39 (drawing attention to the fluidity of measures in restitution).

<sup>154</sup> See Tilbury, ‘Restitutionary Damages’, above n 21, 25–8, 33–9.

<sup>155</sup> See Weinrib, above n 140; Gordley, above n 153.

requires the recoverability of restitutionary damages in all cases seems prima facie more appealing, especially if its wide understanding of ‘transfer’ of value is linked to a proprietary rationale.<sup>156</sup> Fourth, as far as account of profits is concerned, there remains an absence of any authoritative general statement identifying the circumstances in which the remedy is available, though there are clearly established categories of cases in which the action lies without controversy.<sup>157</sup> Given the weakness of deterrence as an explanation for the basis of any liability,<sup>158</sup> those circumstances are likely to be found in factors such as the protection of facultative institutions,<sup>159</sup> the censure of cynical wrongdoers<sup>160</sup> and the inadequacy of compensatory damages.<sup>161</sup>

## 2 *The Restrictions on Exemplary Damages*

The second criticism of *Rookes v Barnard*,<sup>162</sup> a particularised variation of the principal criticism just discussed, is that Lord Devlin unduly restricted the availability of exemplary damages. Strictly, this criticism is irrelevant to our topic, since it relates only to the way in which the category of exemplary damages is drawn. However, the narrower the boundary of this category, the more the compensation principle is stressed. To this extent, it is relevant to say that there are justifiable criticisms of the three categories of case in which Lord Devlin held that exemplary damages are recoverable,<sup>163</sup> even though the ‘three categories approach’ remains the law in England.<sup>164</sup> But the further criticism that *Rookes v Barnard* additionally restricted the availability of exemplary damages to those causes of action in which they had been recoverable before 1964 is unjustified. The better view is that the House of Lords introduced this unprincipled restriction in its subsequent decision in *Cassell*,<sup>165</sup> now expressly overruled on this point by *Kuddus*.<sup>166</sup>

## 3 *The Category of Aggravated Damages*

A third criticism is that so far as it isolates a category of ‘aggravated’ from ‘exemplary’ damages, the reasoning in *Rookes v Barnard* is puzzling since aggravated damages often overlap with, and cannot be easily separated from, damages for mental distress.<sup>167</sup> This is a factor which led the Law Commission for England and Wales to recommend that aggravated damages should only be

<sup>156</sup> Edelman, *Gain-Based Damages*, above n 35, 67–8.

<sup>157</sup> See Tilbury, *Civil Remedies*, above n 83, [4079]–[4101].

<sup>158</sup> See above nn 96–100 and accompanying text.

<sup>159</sup> Jackman, above n 58.

<sup>160</sup> See especially Birks, *An Introduction to the Law of Restitution*, above n 63, 326–7; Law Commission for England and Wales, *Aggravated, Exemplary and Restitutionary Damages*, above n 98, [3.51].

<sup>161</sup> See *A-G (UK) v Blake* [2001] 1 AC 268, 284–5 (Lord Nicholls).

<sup>162</sup> [1964] AC 1129.

<sup>163</sup> See above nn 117–19 and accompanying text.

<sup>164</sup> But see *Kuddus* [2002] 2 AC 122, 145–6 where Lord Nicholls casts serious doubt on the continued viability of the Devlin categories.

<sup>165</sup> [1972] AC 1027.

<sup>166</sup> [2002] 2 AC 122.

<sup>167</sup> Law Commission for England and Wales, *Aggravated, Exemplary and Restitutionary Damages*, above n 98, [2.21]–[2.25].

available for mental distress.<sup>168</sup> With respect, this confusing recommendation is misplaced. As is well known, *Rookes v Barnard* involved the tort of intimidation, in which an element of the damages is ‘at large’.<sup>169</sup> Damages are ‘at large’, in a technical sense, when they are awarded in support of a right that protects the plaintiff’s dignitary interests,<sup>170</sup> which are incapable of exact pecuniary measurement.<sup>171</sup> Such harm involves not only injury to feelings, but also injury to reputation and perhaps liberty, therefore going beyond simple mental distress.<sup>172</sup> It is only where the plaintiff’s claim, or a substantial portion of it, is for such an injury that the damages are capable of being aggravated by the defendant’s ‘high-handed, oppressive, insulting or contumelious’ conduct.<sup>173</sup> While this is, of course, the sort of conduct that can also justify an award of exemplary damages, aggravated damages remain compensatory since they give redress for the assumed increased injury to the plaintiff that is attributable to the defendant’s conduct.<sup>174</sup> In contrast, exemplary damages aim to punish the defendant for the conduct in question (and also to serve other punitive purposes, such as deterrence) whether or not the plaintiff can be assumed to have suffered increased injury.

At first blush, this criticism does not seem of immediate relevance to us because it does not appear to reflect directly on the distinction between the functions of compensatory damages and punitive damages. However, the difficulties of making the distinction between aggravated and exemplary damages, of which the Law Commission for England and Wales’s view is one illustration, may suggest that the division between aggravated and exemplary damages is illusory, even in terms of function. Lord Devlin bears some of the responsibility for this view since, towards the end of the part of his speech dealing with exemplary damages, he writes that ‘[a]ggravated damages in this type of case can do most, if not all, of the work that could be done by exemplary damages’.<sup>175</sup> Unfortunately, this has fostered the mistaken belief, supported by both judicial<sup>176</sup> and academic authority,<sup>177</sup> that there is a vestigial punitive

<sup>168</sup> Ibid [2.42]. The recommendation may support the neologism to which Lord Hailsham drew attention in *Cassell* [1972] AC 1027, 1073.

<sup>169</sup> [1964] AC 1129, 1221, 1232–3 (Lord Devlin).

<sup>170</sup> *Broken Hill Proprietary Co Ltd v Fisher* (1984) 38 SASR 50, 66 (Olsson J), relying on Luntz, *Assessment of Damages* (2<sup>nd</sup> ed), above n 2, 63–73

<sup>171</sup> *Cassell* [1972] AC 1027, 1071, 1073 (Lord Hailsham LC).

<sup>172</sup> See Tilbury, *Civil Remedies*, above n 83, [3210]–[3216]. See also Allan Beever, ‘The Structure of Aggravated and Exemplary Damages’ (2003) 23 *Oxford Journal of Legal Studies* 87, 88–92 who restricts ‘aggravated damages’ to compensating claimants for invasions of their dignity but not for mental distress: at 90. In the cases, though, ‘aggravated damage’ does not exclude all reference to injury to feelings or mental distress.

<sup>173</sup> *McCarey v Associated Newspapers Ltd [No 2]* [1965] 2 QB 86, 104 (Pearson LJ). See also *Oldham v Lawson [No 1]* [1976] VR 654, 659 (Harris J).

<sup>174</sup> *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 50–1 (Mason CJ, Deane, Dawson and Gaudron JJ). See also Tilbury, *Civil Remedies*, above n 83, [3216].

<sup>175</sup> *Rookes v Barnard* [1964] AC 1129, 1230.

<sup>176</sup> See *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 98–9 (McHugh J dissenting), and authorities there cited.

<sup>177</sup> See Julius Stone, ‘Double Count and Double Talk: The End of Exemplary Damages?’ (1972) 46 *Australian Law Journal* 311. Cane, above n 97, 114 argues that aggravated damages should be abolished as a category as they are effectively indistinguishable from punitive damages.

element in aggravated damages. The point is of some importance in jurisdictions like New South Wales where statute renders exemplary damages irrecoverable in defamation cases,<sup>178</sup> and thus it becomes integral that the purpose of the claimed damages be clearly identified. In order to facilitate recovery, there may be a tendency in such jurisdictions to view conduct that is logically relevant to exemplary damages only as capable of being subsumed in ‘aggravated’ damages. Hunt J warned against this tendency in *Bickel v John Fairfax & Sons Ltd*,<sup>179</sup> where his Honour pointed out that it cannot be assumed that conduct that had traditionally been considered relevant to aggravation in the pre-1964 cases is now automatically relevant to aggravated, rather than exemplary, damages. Each species of conduct requires careful examination to see if it is of the requisite type to aggravate the plaintiff’s loss, rather than simply being egregious conduct meriting punishment by exemplary damages.<sup>180</sup>

#### IV AN EVALUATION OF THE THESIS

The various criticisms that have been made of *Rookes v Barnard* do not, however, reach Lord Devlin’s central achievement. By removing the ‘punitive’ from ‘aggravated damages’ and the ‘compensatory’ from ‘exemplary damages’, Lord Devlin drew a functional distinction that, at least potentially, provided the framework within which each species of damages could develop on a principled basis. This has yet to occur in England because of the difficulties associated with the three categories in which Lord Devlin held that exemplary damages were permissible. I suggest, however, that the potential has been realised in Australia and New Zealand where a principled development of the law of damages continues to take place in the context of refining the objectives identified in *Rookes v Barnard*.<sup>181</sup>

The expansionist thesis would cut across this further development of the law by creating a single monetary remedy for wrongs that takes us back to a period in which damages were undifferentiated in terms of function. The powerful argument in favour of the thesis is that it would enable the courts to determine the circumstances in which compensatory, restitutionary and exemplary damages are available, free of any presumption in favour of compensation.<sup>182</sup> There are, however, at least five objections to this argument. Taken cumulatively, I suggest that they undermine the expansionists’ position and favour the progressive development of the law in accordance with Lord Devlin’s methodology — that is, by the ongoing identification and refinement of the objectives of the law of damages.

The first objection is that the argument from the ‘false monopoly of compensation’ is grossly overstated. It fixes on the assertion, by any standards a minority view, that damages not founded on compensation are anomalous in the sense

<sup>178</sup> *Defamation Act 1974* (NSW) s 46(3)(a).

<sup>179</sup> [1981] 2 NSWLR 474, 496–7; aff’d [1982] 1 NSWLR 498.

<sup>180</sup> For examples in defamation, see Michael Tilbury, *Civil Remedies: Remedies in Particular Contexts* (1993) vol 2, [11 012]–[11 023].

<sup>181</sup> See especially *Gray* (1998) 196 CLR 1; *Bottrill v A* [2001] 3 NZLR 622; rev’d [2003] 1 AC 449.

<sup>182</sup> See above nn 92–4 and accompanying text.

of being illegitimate. The correct view is that damages not founded on compensation are exceptional. This view is hardly surprising. It reflects the historical understanding of the purposes underlying civil liability — an understanding that is constantly evolving.

The second objection is a particular example of the first, namely, that the exceptional status of awards not based on compensation is not, in practice, a bar to the principled development of non-compensatory awards. The basic questions relating to the recovery of exemplary and restitutionary awards pose issues about the intrinsic desirability of these awards, without necessarily assuming that they do not meet a paradigm of compensation. In short, those questions are likely to be put and answered in the same terms regardless of whether the pattern of the existing law is maintained, or a new single monetary remedy undifferentiated by function is adopted.

The third objection is that, notwithstanding the fact that the basic questions regarding the recovery of non-compensatory awards are likely to remain the same, the proposed new remedy will throw the existing law into confusion, at least initially. As it will no longer be assumed that exemplary and restitutionary awards are exceptional, existing patterns of recovery and particular rules of law will be tested and re-examined. To take one example, if exemplary damages merely represent one measure of recovery available in a general monetary remedy for wrongs, it is difficult to believe that there is any reason why such damages should continue to be ‘parasitic’ on compensatory (or other) monetary awards.<sup>183</sup> Indeed, there is likely to be a general pressure to make exemplary awards more widely available. Lord Nicholls appreciated this in *Kuddus*. He opined that the House’s abolition of the rule that exemplary damages were only available in causes of action in which they had been awarded before *Rookes v Barnard* would ‘revolutionise the law’s approach to exemplary damages’ in the sense that ‘far from being an undesirable anomaly whose use is to be restricted, exemplary damages are now regarded as a convenient tool which the law should seize and be able to use more widely.’<sup>184</sup>

The fourth objection, a specific example of the third, is that a particular pressure will be the demand for the application of uniform rules to the various measures of relief that the expansionists envisage. While the responses to such a demand enliven a real possibility of significant advances in the law, they also carry the danger of the inappropriate development of the law, particularly the imposition of uniformity for the sake of uniformity. For example, Dr Edelman’s version of the expansionist thesis would seek to apply limiting rules of damages more or less uniformly.<sup>185</sup> Yet the limiting factors in relation to compensatory damages have been developed to place boundaries on the defendant’s liability for losses. Those boundaries are generally governed by tests similar to those that

<sup>183</sup> *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1985) 155 CLR 448, 468–9 (Brennan J).

<sup>184</sup> *Kuddus* [2002] 2 AC 122, 144. But this has not in fact been the experience in Australia: see above n 124 and accompanying text. See also *A v Bottrill* [2003] 1 AC 449, 462–3 (Lord Nicholls).

<sup>185</sup> See above n 73 and accompanying text.

determine responsibility in the particular cases to which they are applicable.<sup>186</sup> A priori, it seems unlikely that the same reasons of policy that determine the defendant's liability for losses should also control the defendant's liability for gains made at the plaintiff's expense. For this reason it is not surprising that Professor Burrows confines the current limitations on damages to awards in the compensatory measure,<sup>187</sup> while Professor Birks develops an alternative limitation test for restitutionary awards.<sup>188</sup>

The fifth, and most serious, objection to the expansionist thesis is that the monetary remedy it proposes fails, in itself, to delineate the circumstances in which its various 'measures' apply. To this extent, the proposed remedy not only fails to mark any advance on the present law, but also obscures the only real purpose of having a category of 'money remedy for a wrong', namely, to alert us to the fact that responses in this category are substitutionary and thus focus on the appropriateness of such relief as opposed to relief *in specie*. Further, to the extent that the expansionists propose a monetary remedy devoted to a multitude of objectives, they are advocating confusion. A remedy with more than one purpose is inherently likely to generate greater controversy than one with a clearly defined singular purpose. Anyone who doubts this need only consult the rapidly developing remedy of equitable compensation, whose many controversial aspects are largely attributable to the indeterminacy of its functions which, at least since *Target Holdings Ltd v Redfern*,<sup>189</sup> go beyond compensation as traditionally understood to encompass 'restitutionary' functions, at least in the way that term is sometimes articulated.<sup>190</sup>

The incoherence of the law before *Rookes v Barnard* arose out of a failure to distinguish between the compensatory and punitive functions of monetary awards. The reinvention of damages as a general monetary remedy in response to wrongs has the potential to reintroduce that incoherence. This is because the progressive development of the law of damages depends on the incisive identification of the functions that damages are supposed to serve. At base, that identification requires a profound analysis of the bases of liability in general. Neither damages nor any other remedy can exist in the abstract, and thus the function of damages must reflect, at least primarily, the underlying right that it effectuates. In itself, the expansionists' appeal to the false monopoly of compensation that results in the creation of a single monetary remedy for a wrong attempts to influence, or perhaps even avoid, this analysis by ensuring the greater availability of monetary awards without initial regard to their function. Yet it is only by having regard to function that the proper balance, whatever it might be, between compensation, restitution, punishment and other considerations in monetary awards can be struck.

<sup>186</sup> See especially *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* [1961] AC 388, 422–3 (Viscount Simonds) ('*The Wagon Mound [No 1]*'), which applied a foreseeability test in determining both the existence and extent of liability.

<sup>187</sup> See above n 70 and accompanying text.

<sup>188</sup> See above n 72 and accompanying text.

<sup>189</sup> [1996] 1 AC 421.

<sup>190</sup> See Charles Rickett, 'Equitable Compensation: Towards a Blueprint' (2003) 25 *Sydney Law Review* 31.

## V THE PRINCIPLES OF DAMAGES REVISITED

The corollary of the last point is that the utility of any functional classification of the law of damages depends on a constant review and analysis of the operation of its objectives, so as to ensure the principled development of the law. There is reason to doubt that any such examination would accredit all aspects of the objectives currently said to underlie compensatory and exemplary damages. In the case of compensatory damages, the problem relates to the objectives of an award in respect of non-economic loss. For exemplary damages, it relates to the more general functions of the award. I suggest that both compensatory and exemplary damages attempt to give effect to considerations that are independent of their respective rationales. There is therefore a need to review the objectives of compensatory and exemplary damages to determine if there is reason to excise from both considerations that are independent of a compensatory or punitive rationale. The brief treatment of the topic in this part suggests that there is an independent function of the general law of remedies that has yet to be fully identified and analysed. Drawing on other systems of law, that function can be called 'satisfaction'.

In their attempts to restore plaintiffs to the *status quo ante* in an award of compensatory damages, the courts compare the position of the plaintiff before and after the wrong. They identify the actual or notional losses sustained by the plaintiff as a result of the wrong, and they then make good those losses by awarding the plaintiff their value. Theoretically, this 'diminution of value' approach can be applied to the assessment of damages for non-economic loss. It is an approach that boasts the support of the Law Commission for England and Wales in the context of damages for personal injury.<sup>191</sup> However, the difficulty is that, in reality, it is only economic losses that are capable of being made good by a 'diminution of value' method of assessment. Non-economic loss, for which there is no market, has no monetary equivalent and so an award of damages cannot make such losses good in the same way.<sup>192</sup> Compensation can only be seen as the objective of damages for non-economic loss if the meaning of compensation alters, as it tends to in the Australian authorities dealing with damages for personal injury, where non-economic loss is treated as consolation to plaintiffs for their suffering.<sup>193</sup> In *Teubner v Humble*, Windeyer J put the matter succinctly: 'in so far as the possession of money can in a particular case give pleasure or provide comfort, money can properly be said to compensate for pain and suffering.'<sup>194</sup> And in the context of damages for defamation, Windeyer J commented that plaintiffs get damages *because* their reputations are

<sup>191</sup> Law Commission for England and Wales, *Damages for Personal Injury: Non-Pecuniary Loss*, Report No 257 (1999) [2.4]–[2.7].

<sup>192</sup> Margaret Radin, 'Compensation and Commensurability' (1993) 43 *Duke Law Journal* 56 claims that corrective justice cannot require restoration of incommensurable losses. See also Bruce Chapman, 'Wrongdoing, Welfare and Damages: Recovery for Non-Pecuniary Loss in Corrective Justice' in David Owen (ed), *Philosophical Foundations of Tort Law* (1995) ch 18.

<sup>193</sup> Luntz, *Assessment of Damages* (4<sup>th</sup> ed), above n 1, [3.1.2].

<sup>194</sup> (1963) 108 CLR 491, 507.

damaged, not *for* damaged reputation: ‘Compensation is here a solatium rather than a monetary recompense for harm measurable in money.’<sup>195</sup>

While they can, with some linguistic difficulty, be accommodated within the concept of compensation,<sup>196</sup> the simple truth is that solace, consolation and comfort are not, and cannot be, compensation in the more general ‘diminution of value’ sense.<sup>197</sup> Some legal systems recognise this by finding the remedial base of non-pecuniary losses in the ‘satisfaction’ that the award provides for the injured party,<sup>198</sup> that is, the ‘active recognition of the offended personality of the aggrieved person and, at the same time, a means to assuage his injury’.<sup>199</sup> Satisfaction usually takes the form of a monetary award,<sup>200</sup> distinguishable from compensation simply because its function is to assuage the injured party’s violated sense of justice.<sup>201</sup> The incorporation of such an objective within the law of damages could claim the support of Blackstone,<sup>202</sup> and would potentially justify a number of monetary responses to the problems of assessing non-economic loss — for example, the award of a nominal (or even a nil) amount where the plaintiff is rendered unconscious by the injury<sup>203</sup> and the development of a tariff of non-economic loss.<sup>204</sup> There is, however, no *a priori* reason why the recognition of such a principle should take place only in the law of damages, rather than in the law of remedies more generally.<sup>205</sup> And there are at least two reasons why a more general recognition of the principle is desirable. First, in theory, satisfaction is achievable in appropriate cases through means other than the award of a monetary sum, for example, by the grant of a declaration or the ordering of an apology.<sup>206</sup> Second, there is a real danger of undermining the value and effectiveness of any remedy by requiring it to serve a number of diverse objectives, especially objectives that can be stated very broadly.

Nowhere is this more apparent than in the law of exemplary damages. In *Lamb v Cotogno*, the High Court held that exemplary damages were recoverable against a tortfeasor even where a compulsory third party insurer would in fact pay them, on the grounds that the damages would deter the insured and would ‘serve to assuage any urge for revenge felt by victims and to discourage any

<sup>195</sup> *Uren* (1966) 117 CLR 118, 150. See also *Cassell* [1972] AC 1027, 1073, where Lord Hailsham equates aggravated damages with a solatium.

<sup>196</sup> See Michael Tilbury, ‘Non-Economic Loss and Personal Injury Damages: A Comment on the Law Commission’s Consultation Paper’ (1997) 5 *Torts Law Review* 62, 66.

<sup>197</sup> A point recognised as early as *McDade v Hoskins* (1892) 18 VLR 417, 421 (Higinbotham CJ, Holroyd and Hodges JJ).

<sup>198</sup> Stoll, above n 11, [8-10], [8-92]–[8-102].

<sup>199</sup> *Ibid* [8-92].

<sup>200</sup> *Ibid* [8-93].

<sup>201</sup> *Ibid* [8-10].

<sup>202</sup> Blackstone, above n 29, 438.

<sup>203</sup> See Luntz, *Assessment of Damages* (4<sup>th</sup> ed), above n 1, [3.3.2]–[3.3.4].

<sup>204</sup> *Ibid* [3.1.4]–[3.1.10].

<sup>205</sup> See Chapman, above n 192, 423–4.

<sup>206</sup> See Sandra Marshall, ‘Noncompensatable Wrongs, or Having to Say You’re Sorry’ in Matthew Kramer (ed), *Rights, Wrongs and Responsibilities* (2001) 209.

temptation to engage in self-help likely to endanger the peace'.<sup>207</sup> This extraordinarily weak reasoning, which the High Court itself recognised was probably more appropriate to an earlier age — presumably an age of dueling — and which Professor Luntz has rightly termed 'absurd',<sup>208</sup> only aligns exemplary damages with their objectives by expanding those objectives beyond punishment and deterrence. Likewise, a majority of the Privy Council, reversing a decision of the New Zealand Court of Appeal, has also recognised that, while the primary objective of an award of exemplary damages is to punish, it also serves as a deterrent and 'as an emphatic vindication of the plaintiff's rights'.<sup>209</sup> Dissenting in the New Zealand Court of Appeal, Thomas J had stated the objectives of exemplary damages even more broadly. His Honour said that, while the primary function of exemplary damages was punishment, the other functions were 'deterrence, vindication, condemnation, education, the avoidance of the abuses of ... power, appeasement of the victim and the symbolic impact of a decision as an expression of society's disapproval of certain conduct.'<sup>210</sup>

The problem with taking the law of exemplary damages in this direction is that its realisation will make exemplary damages so widely available that their punitive and deterrent effects (if any) will be lost. A good example of this is the decision of the Privy Council in *A v Bottrill*<sup>211</sup> itself, where their Lordships agreed with Thomas J and authorised an award of exemplary damages in a negligence action against a pathologist whose conduct was neither intentional nor consciously reckless. The loss of these effects is further felt in situations where there is insurance against professional negligence and exemplary damages simply become one cost of doing business. The effectiveness of exemplary damages depends on the constant reassertion of their punitive rationale.<sup>212</sup> This does not mean that there is no place for the recognition of satisfaction in a case like *A v Bottrill*. It means only that satisfaction is a consideration that ought to be addressed separately, rather than as merely another factor in exemplary damages.<sup>213</sup> It may require, for example, a non-monetary response or, if a monetary response is appropriate, a measure that does not reflect the objectives of exemplary damages.

<sup>207</sup> (1987) 164 CLR 1, 9 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ). However, legislation in many jurisdictions overrules this decision: see Luntz, *Assessment of Damages* (4<sup>th</sup> ed), above n 1, [1.7.16].

<sup>208</sup> Luntz, *Assessment of Damages* (4<sup>th</sup> ed), above n 1, [1.7.2] fn 462.

<sup>209</sup> *A v Bottrill* [2003] 1 AC 449, 457 (Lord Nicholls; Lords Hope and Roger agreeing). In contrast, the minority (Lords Hutton and Millett) held that 'the rationale of exemplary damages is not to mark the court's disapproval of outrageous conduct by the defendant, rather the award is made to punish the defendant for his outrageous behaviour': at 466. In this, the dissentients reflect a powerful decision of the New Zealand Court of Appeal: *Bottrill v A* [2001] 3 NZLR 622 (Richardson P, Gault, Blanchard and Tipping JJ; Thomas J dissenting).

<sup>210</sup> *Bottrill v A* [2001] 3 NZLR 622, 648.

<sup>211</sup> [2003] 1 AC 449.

<sup>212</sup> The importance of retribution among the various objectives of criminal sentencing is similarly stressed in Albert Alschuler, 'The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts about the Next' (2003) 70 *University of Chicago Law Review* 1.

<sup>213</sup> See also Beever, 'The Structure of Aggravated and Exemplary Damages', above n 172, 99. I suggest, though, that 'satisfaction' will not be taken seriously if subsumed under a label of 'therapeutic jurisprudence'.

## VI CONCLUSION

I have suggested elsewhere that the expansionist thesis may reflect a taxonomy of the legal system that focuses on the classification of obligations at the expense of any real classification of remedies, in the hope that the simple relabelling of all monetary relief in response to wrongs as ‘damages’ will facilitate the appropriate recovery of non-compensatory awards, particularly restitutionary awards.<sup>214</sup> This article demonstrates that the thesis can only be realised by abandoning the methodology, associated particularly with *Rookes v Barnard*, of developing the law of damages in accordance with its clearly identified functions. At least in the short term, the realisation of the expansionist thesis would cause great confusion in the law that will not be offset by any obvious compensating gains. The absence of such gains seems to arise simply because a definition of damages, without reference to their functions, states the concept at too high a level of generality to be of use, except as the focus of a comparison between substitutionary and specific relief.

Further, insofar as the thesis downplays the importance of functional analysis, it also impedes the progressive development of the law of remedies more generally. The constant re-examination of the objectives of remedies as part of the ongoing and principled development of the law requires that remedies serving the same objectives should be analysed together. Spigelman CJ recently pointed out that ‘exemplary damages’ are not really ‘damages’, since the plaintiff has not suffered ‘damage’ in any relevant respect.<sup>215</sup> In *Gray*, the High Court outlined the contexts with which exemplary damages have a real affinity.<sup>216</sup> Depending on the purpose and scope of the particular inquiry, those contexts include civil penalties, criminal injuries compensation, and the ability of judges to order restitution and compensation in a criminal proceeding. Of course, these contexts are provided for by statute and, to that extent, are always informed by, and subject to, the objectives of the particular statute in issue. But if considered generally in these contexts, the purposes of exemplary awards can be clearly appreciated, free of any suggestion that compensation should be the dominant remedy in cases of civil liability.

<sup>214</sup> See Tilbury, ‘Remedies and the Classification of Obligations’, above n 86.

<sup>215</sup> *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 303.

<sup>216</sup> (1998) 196 CLR 1, 7–8 (Gleeson CJ, McHugh, Gummow and Hayne JJ).