

Gain-Based Damages – Contract, Tort, Equity and Intellectual Property by

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Oxford: Hart Publishing, 2002, xxxiii + 279 pp (£30.00 hardback).
ISBN 1 84113 334 5.

It has become apparent, over the last ten years in particular, that legal systems have difficulties in determining a taxonomy for what gains, other than those where there is a precise matching of the gain with a loss to another, give rise to a claim against the gainer. In those legal systems that have exemplary damages rules, it has also become apparent that the relationship of them to, or within, such a taxonomy is important.

A few of the better-known examples, from the many situations analysed in this excellent, immensely detailed and intensely argued, book immediately suggest some of the potential difficulties: A takes and sells something that belongs to B, when A and B both believe it in all good faith to belong to A, and A is not in a situation where he knew or ought to have known it did not belong to him.¹ A is living in a house that, in fact, belongs to B and A has no right in law to live there.² Another, and very topical, is where A in breach of contract with B makes a gain.³ The first of these cases is, as it happens, a House of Lords decision from Scotland, often quoted for a dictum about compensation in tort/delict, though, it seems, never referred to for any other point in Scotland (it contains a large dose of precedent from the English courts of equity). From a background in a civilian system, or this reviewer's own of Scotland, the reaction to these fact patterns would be that these situations are within the law of unjustified enrichment. The taxonomy then proceeds to analyse them as cases of enrichment by taking on the part of the gainer, not transfer of the part of the claimant. That sort of analysis would be seen generally as applying in Scotland and, for instance, dicta such as that of Lord Shaw in another House of Lords Scottish case that the author refers to, *Watson Laidlaw and Company Ltd*⁴ (a patent case), are read that way. Then, it would look to see if there was a right of the claimant invaded (or, as some say, interfered) with. Throughout, cases that involve active transfer by the claimant would be seen in another box also within unjustified enrichment. But then there are some difficulties for such a system in working out its details. These prominently include what sort of right will qualify (a particularly challenging question with the third example) and what is the correct approach to assessing the amount of gain. The first and second examples are problematic looked at in this way as, in the first example, the facts were A could not have carried out the mining necessary to get at the subject and, in the second, A would not in practice (it being armed forces accommodation) have let on the open market, which in the case in England was reflected in subjective devaluation of the gain.

Broadly, the tradition of Anglo-American law has been to seek to cope with difficulties by focusing on a common contextual factor, that of a 'wrong' being present. However, that also leads to challenges from the open-ended nature of

1. *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, HL.
2. *Ministry of Defence v Ashman* [1993] 2 EGLR 102, CA.
3. *A-G v Blake* [2001] 1 AC 268.
4. *Watson Laidlaw and Co Ltd v Pott Cassells & Williamson* (1914) 31 RPC 104, HL.

that context and, further, what is part of the law of unjustified enrichment and what is part of the law of 'wrongs' (not just torts).

What this book does is to tease out with very great sophistication a taxonomy focussing on the background context and conduct that considers the question as one about remedies, in an in-depth analysis of English and Commonwealth case law (together with significant consideration of US material) and engaging, again at a high level of detail and depth, with a very large range of academic literature. Its analysis and taxonomy, it may be predicted, must be seen as the essential starting point for anyone now considering the right approach to these matters in English and Commonwealth law, and it is of interest, too, to those working out very different taxonomies in other systems.

The book is intensely argued and it is not possible to do justice to the analysis in the compass of a review. However, at the risk of oversimplification, the basics of the analysis may be stated as follows: First, the topic is 'damages'. That is the linking idea, as the title shows. For the situations to fall within the category 'damages', the background context must be a 'wrong'. To determine, then, in what context gains are required to be paid to someone else by the gainer that concept is unpicked. It is necessary to find rules to explain why different types of gain are treated differently. The tool used for this is (a) to incorporate exemplary damages within the taxonomy (as being a response to a 'wrong' at least to seek to deter trying to make a gain), and (b) to distinguish claims for profits from claims where the gain was generated from a transfer of value to the gainer. When that distinction is fully worked out, the solution for situations of gain is arrived at by determining what background contexts are 'wrongs' that are capable of giving rise to a successful claim in the different general categories, exemplary damages, gains generated from transfer of value to the gainer, and profits. To someone coming from a system such as this reviewer's own, it needs to be emphasised that the word 'transfer' here is not being used in this analysis as being contrasted with 'taking'. In a number of cases, such as in the case of a trespasser occupying land (the third of the examples mentioned above), the transfer of value comes from that person taking something. The focus is on the value that moves, not just on which party was active in the in its moving.

Making this type of distinction between the profits and gains generated from a transfer of value (in the author's meaning of transfer, of course) is fundamental in this analysis. The reader's eye is kept firmly on that throughout by the author developing his own terminology. The former category the author calls 'disgorgement damages', and the latter he calls 'restitutionary damages'. As he emphasises (p 78), 'this book uses the term disgorgement damages to refer only to cases in which the measure of the defendant's gain focuses on the actual value or profit which accrues to the defendant from the wrong'. As the former term, 'restitutionary damages', has been used by many to cover at least this, it might be suggested that it would have been better to develop some other term to cover gains generated through a transfer of value. However, the author is absolutely crystal clear about the distinction that he makes, and within his analysis the term has the attraction of pointing out that what is at issue is something that consists of value moving to the gainer, while at the same time focusing, through the word 'damages', on 'wrongs'.

It is also essential to his thesis that 'restitutionary damages' claims are not a remedy within the law of 'unjust enrichment', though not to reject the view that in some instances there may be a concurrent claim in unjust enrichment. This is

likely to give rise to some debate, as several prominent commentators in the field have recently rejected this. The author's view, however, springs from his distinguishing transfer cases without the background of a wrong, and ones where there is such. So, cases of void contracts, for instance, where there is innocent error, but a transfer made, would fall within unjust enrichment, but cases where the contract is voidable in the light of the act as a 'wrong' of the party to whom value was transferred, as, for example, where there was compulsion, give rise to 'restitutionary damages' claims. Amongst the reasons given for maintaining the distinction are three suggesting that the distinction is made for determining the application of ancillary rules, namely, the availability or non-availability of a change of position defence, the application of private international law rules, time bar rules, and rules relating to interest. With respect to the first of these, one suspects that there will be debate. A legal system could accept an adjusted change of position rule where there is a background of some sorts of wrong. It might be the rules about interest could be adjusted by legislation to be more finely tuned and the private international law questions arise also with systems that would treat these cases as enrichment by transfer cases. Whatever is the correct view, however, the author's focus does point out that where the conduct of the person receiving the transfer is at issue, we should be clear why we think that is relevant and in what ways.

Though much of its detailed treatment comes last in the book, the detailed analysis of what in the author's terminology is 'disgorgement damages' is equally important. The paradigm of a claim for profits is the claim against the fiduciary for profits made by him or her in the context of acting as a fiduciary. The author's clear separation of these types of claim from the others may, indeed, be further supported from a realisation that in the quite different taxonomy found in civilian systems, that focus on invasion of rights, such claims are difficult to fit in neatly, since it is not clear what right the person profiting has invaded. On the other hand, it may give pause for thought that the paradigm example of the fiduciary in the author's detailed analysis turns out to be quite unusual. His detailed analysis of 'disgorgement damages' is that the key is normally whether there was a 'cynical' making of the gain. But, in the paradigm example of the disgorgement of profits by a fiduciary, as is well known, the liability is strict and no such mental element is required to be shown. The rationale for that, as the author puts it (p 212), is 'the institution of trust and confidence requires such a protection as to warrant strict liability'. As such, the category of fiduciary is seen as an institution falling into a category that the law will promote by such a strong measure. There is some difficulty in determining what institutions the law should support in this kind of way. So, just as this category is difficult for legal systems that work with a sub-category within the law of unjustified enrichment as being about invasion of rights, the limits of the category are difficult to define where it is not considered necessary to require 'cynical' breach to be shown. The author is fundamentally cautious about recognising other examples where there is to be such a liability for profits without requiring some particular quality of gainer's conduct. The last part of the book on intellectual property contains, amongst other things, a very detailed consideration of this in that context. From the background of caution, also, he rejects the bits of authority in English law that indicate that gains made out of another's confidence, are always required to be disgorged to the subject of the confidence, and he is cautious about the aspect of copyright law where this is also the case.

This shows how the fundamental taxonomy really does matter. With confidential material that is, in truth, a commercial asset that would seem to make sense, a system working on a taxonomy starting from invasion of rights might well classify that as a form of property and it would follow that profits would be recoverable whether against the background of 'wrong' or not.

Being cautious is also reflected in the extremely full discussion of 'disgorgement damages' for breach of contract where the House of Lords approaches are seen as 'a cautious yet consistent extension of the law', and the biggest difficulty, the need to take account of the gainer's skill and effort, is accommodated by suggesting that a deduction be made to represent that, and any award where that is refused could be analysed as exemplary damages.

The concept of the cynical breach is logically connected to the author's acceptance of the appropriateness of law containing the remedy of exemplary damages. The link, as he puts (p 17) is that 'disgorgement damages' are the sharp axe to strip profits, but exemplary damages are another tool available, which is fundamentally to deter people seeking to make profits in these ways. This, then, is to reject the traditional wariness about the role of exemplary damages in tort law and to support it as having a distinct role to play. In this, the author's views are in line with a recent trend in England in work of the Law Commission, and also with much that is said in the case of *Kuddus* in the House of Lords in 2001.⁵ There has been a tendency recently for the idea of tort law having a deterrent effect to be emphasised. That was done also in *Lister*, considering vicarious liability.⁶ On the other hand, just how effective such rules would be, given that it is unlikely in most cases that there will be an action taken, may be impossible to determine. Some situations could be dealt with by a very generous approach to determining the quantum of profits in a 'disgorgement damages' action. It is undoubtedly true that one practical barrier standing in the way of such an action is difficulty in proving in any detail what profit was in fact made. There is though, it must be admitted, a residual class of case where no profit, even on a broad view, can be presumed to be made, though not everyone would agree that a system should have exemplary damages in it to deal just with that. Given, though, that English law has exemplary damages, the author convincingly suggests how the idea can be developed in the light of his rules for disgorgement damages.

There are many other matters in this book, such as consideration of remoteness and causation, which are, likewise, dealt with the subtlety and depth of the rest of the work. It is a book that one will return to many times, even if one's background is in another sort of analysis altogether.

JOHN BLACKIE