Part One Introduction, 1 General

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(p. 3) 1 General

1. Judicial remedies

The concept of a remedy has rarely been subjected to rigorous analysis.[1] Views may differ as to precisely what one is talking about. In this book, a remedy is used to denote the relief that a person can seek from a court.[2] The focus is therefore entirely on judicial remedies; and not on what are sometimes termed 'self-help' remedies, which are available without coming to court, such as out of court settlements, termination of a contract, and the ejection of trespassers.[3] Put another way, this book examines what a person can obtain from (p. 4) a court to counter an infringement (or threatened infringement) of his or her rights by a tort or breach of contract (or, in chapter 26, by an equitable wrong); but it is not concerned with any other legally permissible options open to a person to counter such an infringement.

A judicial remedy may be either coercive or non-coercive:[4] that is, it may be either a court order to do or not to do something, backed up by enforcement procedures[5] or a court pronouncement indicating or altering what the parties' rights or duties are or were. Examples of the former are damages, specific performance, injunctions, and the award of an agreed sum, while the declaration is the most obvious example of the latter.

This book follows the conventional practice of treating damages as a remedy. In the context of torts and breach of contract, the law of (judicial) remedies looks at the (judicial) relief available for a tort or breach of contract, and damages is one such remedy. There is another view, advocated by Zakrzewski,[6] which defines the law of remedies in terms of the judgment awards and orders made by the courts,[7] and their enforcement, and which treats the law of damages as being essentially concerned with secondary rights which, alongside primary rights, belong outside the law of remedies. While it may be analytically possible to treat the law of damages in that way, it seems unhelpful to do so. On the contrary, this book is based on the view that it is illuminating and practically useful to analyse the relief that a party

may seek from a court for a tort or breach of contract. To see the law of remedies as including the law on injunctions and specific performance but not the law on damages cuts across that useful and illuminating approach.

2. Procedure

Our concern will be with the substantive law governing judicial remedies and not with the adjectival law dictating the procedure by which those remedies are obtained. For that, reference should be made to the Civil Procedure Rules and accompanying Practice Directions. It will also be assumed throughout that a court in England or Wales has jurisdiction in respect of the claim[8] and that the claimant is proceeding within the appropriate civil court.[9]

(p. 5) 3. Enforcement

There is a distinction between the coercive remedies granted by the courts for a tort or breach of contract, and the enforcement or execution of those remedies which may require further court orders. This book is not concerned with the latter secondary realm of judicial involvement. Suffice it to say that for some non-monetary remedies, such as injunctions and specific performance, enforcement is by proceedings for contempt of court, with the ultimate sanction being imprisonment; whereas for monetary remedies, such as damages and the award of an agreed sum, there are several methods of enforcing payment, examples being a writ of *fieri facias* (or, in the county court, a warrant of execution), an attachment of earnings order, a third party debt order, or a charging order.

To give some general perspective to the role of the judicial remedies, two further points on enforcement are worth emphasising. First, enforcement of judicial remedies is at the claimant's discretion. This means that, even after it has been granted a judicial remedy, a claimant has the choice of settling for a different resolution of the dispute.[10] Secondly, even judicial methods may not succeed in enforcing the remedy. For example, a defendant who has insufficient assets cannot comply with a monetary remedy;[11] and imprisoning or fining a defendant for failing to carry out an order of specific performance does not guarantee performance.

4. Orders made to assist the claimant in collecting evidence to establish its case

Although the case that the claimant is trying to establish involves a tort or breach of contract, orders made to assist the claimant in collecting evidence, like specific disclosure and inspection,[12] cannot realistically be described as remedies for a tort or breach of contract; rather, in so far as it is at all sensible to describe such orders as remedies, they are remedies to help the claimant in its attempt to show that a tort or breach of contract has been committed. Or, to put it another way, on the assumption that a tort or breach of contract has been committed or is threatened, such orders are not the relief that the claimant seeks but rather are means towards obtaining that relief. They are therefore not considered in this book.

5. Torts and breach of contract

Tortious and contractual obligations are the two main types of obligations recognised in English law. A contractual obligation arises where one person makes an agreement with another under which one or both make(s) a promise to the other, provided generally that the agreement is supported by consideration or is made by deed, and is not invalidated on grounds such as mistake, misrepresentation, or frustration. The promisor is under an (p. 6) obligation to perform the promise she has made and, should she fail to do so, the promisee has a cause of action against her for breach of contract. A tortious obligation, on the other hand, is an obligation not to wrong another by conduct that the different torts specify to be

wrongful. Should a person break such an obligation, the person wronged has a cause of action against her for the tort.[13]

This book will, generally, not be concerned with the claimant's establishing such causes of action, ie it will not in general be concerned with how the claimant establishes the defendant's tort or breach of contract. Rather it will focus on the judicial remedies available to a claimant assuming that it can establish a tort or breach of contract or, more rarely, a threatened tort or breach of contract.

There are two major qualifications to this. The first is that in relation to torts actionable only on proof of damage, like negligence, nuisance, and deceit (as opposed to breach of contract and torts actionable per se),[14] some of the principles that are concerned with establishing relevant damage, and hence generally[15] with establishing the tort, are principles of compensatory damages for an established liability in relation to torts actionable per se and breach of contract. Examples are factual causation, intervening cause, remoteness, and the restrictions on recovery for mental distress. So as to provide a rounded picture of such principles, this book includes cases dealing with them, even where they concern the establishment of a tort actionable only on proof of damage.

Secondly, for reasons there explained, liquidated damages and similar clauses are discussed in chapter 21 on the award of an agreed sum, even though the essential question is whether the clause is valid, and hence whether the defendant is contractually liable to pay the agreed sum.

6. Concurrent liability between the tort of negligence and breach of contract[16]

On the same facts and in relation to the same loss, the claimant may be able to show not only that the defendant has broken its contract but also that it has committed the tort of negligence. For example, where a carrier contracts to carry goods for the owner, it will usually be a term of the contract that the carrier takes reasonable care of the goods in transit. If the carrier then negligently damages the goods, it is not only in breach of contract but is also liable to the owner for the tort of negligence. The number of potential overlaps between breach of contract and the tort of negligence has increased in recent times. This is particularly so since the tort of negligence has been expanded to allow the recovery in (p. 7) some situations of pure economic loss (that is economic loss not consequent on physical damage).[17]

Clearly what the claimant cannot here do is to recover damages both for the breach of contract and for the tort of negligence, for this would be to recover double damages for the same loss. Moreover it would generally seem unacceptable, as being inconsistent with what the parties have themselves agreed, for the tort of negligence to impose a standard of liability that is more onerous than that laid down by the express or implied terms of the contract.[18] But provided it is consistent with the terms of the contract, there is in principle no objection to the claimant choosing to obtain judgment either for the breach of contract or for the tort of negligence, depending on which is more favourable to him. This was traditionally accepted where the defendant was exercising a 'common calling', for example if he were a carrier, innkeeper, bailee, or farrier; and, after a period of some uncertainty,[19] the House of Lords in *Henderson v Merrett Syndicates Ltd*[20] fully accepted concurrent consistent liability for breach of contract and the tort of negligence. The case dealt with the liability of Lloyd's underwriting agents to Names at Lloyd's. Giving the leading speech Lord Goff said the following:

> ‘My own belief is that, in the present context, the common law is not antipathetic to concurrent liability, and that there is no sound basis for a rule which automatically restricts the claimant to either a tortious or a contractual remedy. The result may be untidy; but, given that the tortious duty is imposed by the general law, and the contractual duty is attributable to the will of the parties, I do not find it objectionable that the claimant may be entitled to take advantage of the remedy which is most advantageous to him, subject only to ascertaining whether the tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded.’[21]

Why might a claimant, who can establish a breach of contract and tortious negligence (or, conceivably, a different tort), wish to frame its cause of action in tort rather than contract, or vice versa? Leaving aside matters of procedure and conflict of laws, the most significant reasons are twofold.

First, the claimant may be entitled to a higher quantum of damages in contract than in tort or vice versa.[22] This may be because the aim of the compensatory damages differs. (p. 8) In contract, the aim is to put the claimant into as good a position as if the contract had been performed. In contrast, the aim of the damages for, for example, the tort of misrepresentation is to put the claimant into as good a position as if no contract had been made. The former will yield a higher measure than the latter if the claimant made a good bargain but a lower measure if the claimant made a bad bargain.[23] Again, some of the principles limiting compensatory damages are not applied in the same way to claims for breach of contract as they are to claims in tort.[24] For example, the rules on remoteness are traditionally more favourable to claimants in tort than in contract. And contributory negligence does not apply to reduce damages for many claims in contract, whereas it nearly always applies as a possible defence in tort. There may also be greater restrictions on the recoverability of certain types of loss, such as mental distress and loss of reputation, in contract than in tort.[25] It may also be that certain types of damages, for example, punitive damages,[26] are available for torts but not for breach of contract.

Secondly, the claimant may be entitled to a longer limitation period for commencing one cause of action rather than another. This may be because the statutory time period is longer. Or it may be because the different causes of action accrue at different dates so that the statutory time period starts running at different dates. Or it may be because of the application of the discoverability test for latent damage (other than personal injury) in the Limitation Act 1980 s 14A, which applies to the tort of negligence but not to breach of contract.[27]

7. Should one continue to distinguish torts and breach of contract?

The acceptance of concurrent liability and the expansion of the tort of negligence to allow the recovery of pure economic loss in some situations raise the question whether the traditional division between torts and breach of contract (ie tort and contract) can be sensibly maintained. In particular, one interpretation of some of the cases allowing the recovery of pure economic loss in the tort of negligence[28] is that the courts are recognising that a negligent breach of promise is a tort, enabling the recovery of damages, even by a third party, to fulfil expectations engendered by the promisor.[29] If this is so, the rationale of the division between torts and breach of contract is largely undermined. That rationale is that contract alone deals with liability for breach of a binding promise; and that such separate treatment is sensible because liability for breach of a binding promise rests on what, by convention, is treated as a voluntarily undertaken obligation whereas liability for all other wrongs (primarily comprising the different torts) has no such voluntary basis and

is simply imposed. Promissory liability therefore rests on, and respects and upholds, the parties' private intentions and arrangements; in this sense it may be thought to be more directly in line with 'laissez-faire' thinking than are tortious liabilities.

However, despite these developments in tort, this book continues to use the distinction between torts and breach of contract for a number of reasons:

(i) The judges continue to think and talk in terms of distinct actions for torts and breach of contract.

(p. 9) (ii) As regards remedies, while there are clearly many similarities between remedies for torts and breach of contract—for example, damages and injunctions are both available for torts and breach of contract, and most of the principles governing their grant are common to both causes of action—there remain significant differences. For example, remedies such as specific performance and the award of an agreed sum are available only for breach of contract. And, as has been referred to above, some principles of compensatory damages, such as remoteness and contributory negligence, and some types of loss, like mental distress and loss of reputation, are dealt with differently for torts than for breach of contract. Furthermore, punitive damages can sometimes be awarded for torts but not for breach of contract.

(iii) The view that some tort cases rest on recognising that a negligent breach of promise is a tort may not be their only possible explanation. Certainly where the defendant is liable to the claimant for breach of contract it may be thought odd to recognise a concurrent tortious liability resting on what is, on this view, essentially the same basis, ie breach of promise.

(iv) Even if the 'negligent breach of promise as a tort' interpretation is correct, an action for breach of contract still formally differs from the tort action for negligence in that it accrues before 'damage', making it less favourable for the claimant as regards limitation periods. Furthermore a non-negligent breach of promise can still only be sued on by an action for breach of contract. In particular, this means that it will still only be for breach of contract that one can recover pure economic loss for non-negligent breach of an obligation, at least where that obligation is a positive one. Indeed strict liability, breach of a positive obligation, and pure economic loss are the standard features of most actions for breach of contract.

(v) Even if the courts are treating a negligent breach of promise as a tort, one can of course argue that it is unsatisfactory for them to do so. Indeed, one can strongly argue that the reason why the courts may have done so is to evade some of the unsatisfactory differences between contract and tort (in particular, as a means of allowing the claimant the more favourable limitation regime operating in tort and as a means of avoiding the traditional privity doctrine in contract). In other words, to treat a negligent breach of promise as a tort is a pragmatic, rather than a logical or principled, development.[30] The strictly logical development would be to effect reforms (eg to the law on limitation periods) so as to eliminate any unwarranted distinctions between contract and tort, thereby removing the incentive to use tort to overcome the deficiencies of contract.

8. The primary functions of judicial remedies for torts and breach of contract

The primary functions of the judicial remedies for torts and breach of contract can be expressed as follows: compensation, restitution (sometimes referred to as disgorgement), punishment, compelling performance of positive obligations, preventing a wrong, compelling the undoing of a wrong, declaring rights. A table (see below) is helpful to indicate which remedies correspond to which function.

These functions underpin the structure of this book and will be referred to throughout. This is not meant to suggest that there is no other way of expressing the primary (p. 10) functions; eg, one can equally well regard most of the remedies for breach of contract as having the common function of fulfilling expectations engendered by the contractual promise. But taking into account all judicial remedies for torts and breach of contract, the scheme below is considered the most helpful for understanding the role of and links between the remedies.

Remedies for Torts and Breach of Contract

Primary Function	**Remedies**
Compensation	Compensatory damages.
Restitution	Account of profits. Award of money had and received.
Punishment	Punitive damages.
Compelling performance (of positive obligations)	Specific performance. Award of an agreed sum. Mandatory enforcing injunction. Appointment of a receiver.
Preventing a wrong	Prohibitory injunction. Delivery up for destruction or destruction on oath.
Compelling the undoing of a wrong	Mandatory restorative injunction. Delivery up of goods.
Declaring rights	Declaration. Nominal damages. Contemptuous damages.

Zakrzewski has argued that this classification, which he terms ‘goal-based’, is inadequate.[31] This is because one would need to unpack the goals of the rights triggering, for example, ‘compelling performance’ or ‘preventing a wrong’ and to do this would make the goals too diverse. With respect, this depends on the level of detail one uses to define the goals and there is nothing analytically impure in a classification of function that combines, for example, ‘compensation’ with ‘preventing a wrong’. Even if there were an analytical impurity, it is submitted that this type of classification remains the most practically useful and illuminating one to adopt in understanding judicial remedies (for civil wrongs). In particular, as has been indicated above,[32] judges and practitioners are unlikely to find helpful Zakrzewski’s view that the details of the law on specific performance and injunctions are within the law of remedies but the details of the law on damages are not.

9. Legal and equitable remedies

References will be made throughout to remedies being either legal or equitable. This is historical labelling indicating that the remedy was developed in the common law courts or in the Court of Chancery prior to the fusion of the courts by the 1873–75 Judicature Acts. It should be noted that, as a legacy of history, legal remedies, in contrast to equitable remedies, are almost all monetary.

Does it now matter whether the remedy for a tort or breach of contract is common law or equitable? For those who resist the fusion of common law and equity, the answer is ‘yes’. (p. 11) They would seek to emphasise and retain the historical differences between common law and equitable remedies. In particular, they would point to equitable remedies being discretionary, and being subject to discretionary defences (such as ‘clean hands’, hardship, and laches) in contrast to common law remedies being subject to clear rules and being available as of right. It is submitted that that approach is misleading. Both common law and equitable remedies are granted or refused in accordance with clearly established rules and principles. Some of the principles, including at common law, allow considerable discretion to the courts (eg the principles limiting compensatory damages and the availability of punitive damages) so that it is false to equate common law remedies with ‘no discretion’.[33] True it is that there are some differences; for example, common law damages, in contrast to equitable damages awarded as a substitute for an injunction, cannot yet be awarded for an anticipated, rather than an accrued, wrong; and where a breach of contract or tort has been established, it appears that a court, if asked to do so, must at least award nominal damages whereas a claimant seeking an equitable remedy may simply be refused it. But it is submitted that the similarities far outweigh the differences; that the differences are relatively minor; that rationally there is no good reason for the differences; and that nothing would be lost, and some simplicity and rationality would be gained, if one took the small steps necessary to move to a fully fused system of remedies where it would be unnecessary to use the labels common law or equitable.[34]

Certainly it is a grave error of some books and courses to perpetuate the historical division by treating equitable remedies separately from legal remedies as if they have no connection with each other. One of the purposes of this book is to emphasise that both legal and equitable remedies may be available to a claimant for a legal wrong, whether a tort or breach of contract. Indeed, in certain situations, the legal and equitable remedies perform the same or similar functions, eg an account of profits and the award of money had and received effect restitution (sometimes referred to as disgorgement), and specific performance and the award of an agreed sum compel performance of positive contractual obligations.

10. Equitable wrongs

A useful classification within the civil law, articulated particularly by Peter Birks, is between causes of action that are wrongs and causes of action that are not wrongs.[35] Birks argued that a (civil) wrong means ‘conduct … whose effect in creating legal consequences is attributable to its being characterised as a breach of duty’.[36] Moreover, it appears that, with the conceivable exception of some statutory duties, a sure test for whether that definition is satisfied (ie whether the law is characterising particular conduct as constituting a breach of duty) is that compensation must be an available remedial measure for the conduct in question if loss is caused to the claimant by that conduct. Applying that test, torts and breach of contract are civil wrongs. In contrast, unjust enrichment triggering the restitution of money (p. 12) (or non-money benefits) rendered by mistake or for a failed consideration or under duress is a cause of action that is not a wrong. Restitution of the value of the enrichment conferred by the claimant is the only available remedial measure; compensation for loss is not available for the unjust enrichment.

It also then becomes clear that, alongside torts and breach of contract, which are common law wrongs (because they were developed in the common law courts), there are equitable wrongs (developed in the Court of Chancery). Applying the above test, the equitable civil wrongs are breach of fiduciary duty, breach of confidence, dishonestly procuring or

assisting a breach of fiduciary duty, and those forms of estoppel that constitute causes of action, in particular proprietary estoppel.[37]

It further follows from this analysis that the primary focus in this book on remedies for torts and breach of contract is on the common law wrongs. On the face of it, one is putting to one side the analogous equitable wrongs merely because of their historical roots and not for rational reasons. Moreover, while it is still essentially true, as those wishing to perpetuate the historical divisions between common law and equity tend to stress, that only equitable remedies are available for equitable wrongs, it is also true that the same, or similar, functions are performed by the remedies for equitable wrongs as by the remedies for torts and breach of contract. In other words, there is a coherence in remedial function for civil wrongs that transcends the common law/equity divide.

In the first two editions of this book, the importance of seeing that the functions of the remedies for equitable and common law wrongs are coherent was emphasised in the introductory chapter;[38] and the equitable wrong of breach of confidence (because so close to being treated as a tort) was dealt with throughout the book.

Developments since then—and, in particular, the increased number of cases of 'professional negligence' against, for example, solicitors, in which claimants have sought equitable compensation for breach of fiduciary duty as an alternative to damages for the tort of negligence or breach of contract—suggest that a more detailed treatment of remedies for equitable wrongs is required. One way forward would have been to examine remedies for equitable wrongs alongside torts and breach of contract under each of the four parts of this book devoted to different remedial functions. The possible disadvantage of that approach is in making the issues less accessible, and the text less easy to use, not least because our understanding of equitable wrongs, and the basic law on the central remedy of equitable compensation, is still developing. It was therefore decided for the last edition of this book, and this is retained in this edition, that the better approach is to devote the last part and chapter to remedies for equitable wrongs where the parallels—and contrasts—with remedies for torts and breach of contract can conveniently be explored. One should add that the inclusion of a chapter on remedies for equitable wrongs means that the coverage of this book comes close to dealing with remedies for all civil wrongs.[39]

However, it is important to add that a significant development since the last edition of this book has been the recognition that, out of the equitable wrong of breach of confidence and catalysed by Article 8 of the European Convention on Human Rights (given effect to in the UK by the Human Rights Act 1998), there has emerged a modern tort of misuse of (p. 13) private information. This can alternatively be referred to as a tort of privacy. This tort is seen as closely linked to, but now distinct from, the equitable wrong of breach of confidence. In other words, there are two different causes of action protecting two different interests: the equitable cause of action for breach of confidence, protecting confidential information, and the common law cause of action for misuse of private information, protecting privacy. The leading case on this is *Vidal-Hall v Google Inc*.[40] The main question at issue was whether there could be service out of the jurisdiction[41] for the cause of action for misuse of private information. That would be possible if that cause of action were a tort but would apparently not be possible if it were an equitable cause of action. In their joint judgment, Lord Dyson MR and Sharp LJ said the following:[42]

> '[T]here are problems with an analysis which fails to distinguish between a breach of confidentiality and an infringement of privacy rights protected by art 8, not least because the concepts of confidence and privacy are not the same and protect different interests. … [T]here are now two separate and distinct causes of action: an action for breach of confidence; and one for misuse of private information. … [T]he

action for misuse of private information has been referred to as a tort by the courts.'

They clarified that the speeches of Lord Nicholls in *Campbell v Mirror Group Newspapers Ltd*[43] and *OBG Ltd v Allan*[44] supported this bifurcation; and they distinguished the earlier case of *Kitetechnology BV v Unicor GmbH Plastmaschinen*[45] in which the Court of Appeal had decided that there could be no service out of the jurisdiction, under the tort gateway, in an action for breach of confidence because that was an equitable cause of action not a tort. Lord Dyson MR and Sharp LJ accepted that that decision was binding on them but clarified that it was dealing with an action for breach of confidence and not one for misuse of private information. They concluded that 'misuse of private information should now be recognised as a tort for the purposes of service out of the jurisdiction.'[46]

Of course, in line with the long-standing debate as to whether breach of confidence should be differentiated from tort, one can argue that it makes no sense in policy terms to differentiate, for the purposes of service out, between an equitable wrong and a tort. And subsequent to the *Vidal* case the Civil Procedure Rules have been amended so that there can be service out for breach of confidence. But for the present, our law continues to regard breach of confidence as an equitable wrong that is not a tort. In contrast, misuse of private information has been carved out of breach of confidence and is now a tort.

It follows that, within this book, breach of confidence falls within Part Six dealing with equitable wrongs, while misuse of private information falls within Parts Two to Five as a tort.

11. Combining remedies

The question of the extent to which a claimant can combine judicial remedies for the same, or more than one, cause of action is a very difficult one. It has escaped the attention of commentators that it deserves.[47]

(p. 14) One should initially put to one side situations where a claimant invokes a self-help remedy and an inconsistent judicial remedy. For example, one cannot rescind ab initio a contract at the same time as claiming damages for breach of contract;[48] nor can one terminate a contract for breach of contract and seek specific performance of it.[49] The effect of the claimant's election to invoke the self-help remedy in these situations is akin to a claimant being barred from a remedy for an infringement of his or her rights because the claimant has affirmed, waived, or acquiesced in the infringement. All rest on the justifiable policy that, where the defendant has relied on the claimant taking one course of action, it would unfairly upset the defendant's expectations for the claimant to change his or her mind.

But where judicial remedies are being sought the concerns about combining remedies are rather different. One is barely concerned, if at all, about the other party's expectations being disappointed. Rather it is the avoidance of the claimant having 'double recovery' or otherwise excessive recovery that is in mind. Labelling judicial remedies as inconsistent, and requiring the claimant to elect between them, is designed to avoid such double (or excessive) recovery.[50] Where there is no such problem, the claimant has a free choice to combine remedies.

So, for example, an injunction to prevent the continuation of a tort can be combined with compensatory damages for the tort that has already been committed. There is no double recovery problem.

In contrast, one cannot combine damages protecting the expectation interest for breach of contract with damages protecting the reliance interest for a tortious misrepresentation inducing that contract. Where the bargain was a good one, the former swallows up the latter and, where the bargain was a bad one, the latter swallows up the former. To allow both would give double recovery. As alternatively expressed, it would be inconsistent: one cannot at the same time put the claimant into as good a position as if the contract had been performed and into as good a position as if no contract had been made. Again, it is clear law that a claimant cannot combine compensatory damages and an account of profits for, for example, an intellectual property tort. So, for example, if D, by committing a wrong to C, has made a net gain of £1,000 and by the same wrong has caused loss to C of £2,000, the effect of requiring D to pay C £3,000 would be that C is neither *just* compensated for its loss (but instead receives a windfall of £1,000) nor is D *just* stripped of its wrongly acquired gain (but rather has an extra £2,000 stripped away). An award of £3,000 would therefore be inconsistent with either of the remedial purposes being pursued and would constitute double recovery.

Where the law requires a claimant to make a choice, or election, of judicial remedy, the choice need not be made until judgment; and, even then, it can be changed if the defendant fails to comply with the judgment.[51]

One may question, however, whether the fear of double recovery necessitates the claimant making an election between judicial remedies. Provided one takes account of the other, double recovery can be avoided without requiring an election. In Watterson's words, (p. 15) 'English law's election orthodoxy is not a logical necessity.'[52] In the above examples, what is objectionable is *full* protection of the expectation interest and *full* protection of the reliance interest; or *full* compensation and *full* restitution. But there would be no objection to combining damages for the expectation interest and damages for the reliance interest if one modified the award protecting the expectation interest to take account of what one is awarding to protect the reliance interest. Similarly, the correct award of £2,000 in the second example above could be justified as restitution (£1,000) plus partial compensation (£1,000).

Viewed in this way, it can be seen that the great merit of requiring an election between judicial remedies is that, in a clear and straightforward way, it avoids double (or excessive) recovery. It avoids the courts having to decide, in assessing quantum, whether, and the extent to which, a particular combination of remedies gives double recovery. The disadvantage of requiring an election is that it is conceivable that a claimant may be deprived of its full entitlement by making an inappropriate election.

12. Breach of European Union law

Subject to the impact of Britain (at the time of writing, almost certainly) leaving the European Union,[53] there are two situations where an individual has a cause of action for damages for breach of EU law. The first is 'state liability' as established in the leading case of *Francovich and Bonifaci v Italy*.[54] 'State liability' is concerned to impose liability for harm directly caused to individuals by a 'sufficiently serious' breach of EU law by the state where the relevant provision is best interpreted as conferring rights on individuals. 'State liability' extends from non-implementation of a directive to misimplementation, legislative acts and omissions, judicial decisions, and administrative decisions.[55] The second situation is where there has been breach of a 'directly effective'[56] provision of EU law, which operates horizontally to give a person rights against other individuals.[57]

English law has characterised the cause of action for damages for breach of EU law as a tort. It has usually been straightforwardly treated as an example of the tort of breach of statutory duty[58] although, perhaps because the link to an English statute (European

Communities Act 1972, s 2(1)) is rather indirect, it has sometimes also been labelled a 'eurotort'.[59] As a tort, it falls within the scope of this book.

(p. 16) In terms of remedies, it has been established that the basic EU law principle is one of national 'procedural autonomy'.[60] This means that the remedies available, and the rules and principles applicable to them, are a matter for the national legal system. However, this is qualified by two additional important EU principles.[61] First, the remedies must be effective for the breach in question (the 'principle of effectiveness').[62] They must not render virtually impossible or excessively difficult the exercise of the EU rights: in so far as they do, the domestic remedies must be modified or new remedies must be created. Secondly, the remedies must not be applied less favourably than those applying to similar domestic causes of action (the 'principle of equivalence').

In practice, the remedies for a 'eurotort', and the principles governing those remedies, have been no different from those applicable to domestic torts. One possible exception (although there is some difficulty in reconciling this with the general principle of equivalence) is that punitive damages may not be available (even if the case falls within the categories where they would be available for domestic torts).[63]

13. Economic analysis, bargaining around non-monetary remedies, and the consumer surplus

Over the past 50 years or so, there has been widespread interest by academic lawyers, especially in the US, in the economic analysis of law, which examines how far the law promotes economic efficiency. Indeed a good deal of economic analysis writing has focused on the civil law remedies considered in this book. Some commentators even seem to come close to using efficiency as the only important criterion for critically assessing the law, but this surely overplays its importance. The common law is best regarded as a complex system of principles, based on 'moral rights' reasoning, modified and tempered by the desire to pursue certain long-term policies. One important policy is efficiency; but its place is alongside, not as a replacement for, moral rights reasoning, and this is how it is used in this book.

On a more detailed level, several other criticisms can be levelled at traditional economic analysis. To understand these, it is as well to set out very briefly how economists have tended to look at tort and contract.[64] There can be said to be three important steps in the reasoning. The first is that a system is efficient where those who place the highest value on resources have the use of those resources. Free-market voluntary exchanges, by which resources are moved to successively more valued uses, are therefore the necessary means for efficiency. The second step is the Coase Theorem,[65] stating that in the absence of transaction costs it does not matter what legal rights and remedies there are because the parties as rational maximisers of value will negotiate round them to produce the most efficient result. Say, for example, A's factory produces smoke ruining B's enjoyment of her land. If the value of the factory to A as it is (that is, the value attributable to the smoke) is £100,000 and the enjoyment of B's land is worth £70,000 to her, the efficient allocation of resources is to allow A to (p. 17) continue polluting. According to the Coase Theorem, even if A is legally ordered to stop the factory emitting such smoke, A will carry on as before, by paying B £70,000, or indeed up to £99,999. If we reverse the figures, then by the same reasoning the smoke will be stopped even if B is given no injunction because, according to Coase, B will pay A between £70,000 and £99,999 to stop the smoke. The final step is then economic analysis confronting the fact that in the real world there are transaction costs. Hence the allocation of legal rights and remedies can be expected to affect efficiency. Free bargaining will not necessarily take place to correct 'errors' and, even if it does, transaction costs will be incurred. The courts should therefore strive to promote efficiency by deciding on legal rights and remedies that on a general level promote voluntary exchanges, and

more specifically mimic the voluntary exchanges that the parties as rational maximisers of value would make.

This economic approach is troubling in several respects. First, the methodology being used is most unappealing to lawyers, who are used to dealing at a specific level with concrete facts and issues. In particular, lawyers are likely to be unhappy with individuals being portrayed as solely concerned to maximise value, when this does not correspond to the reality of human motivation. Secondly, it can be argued that efficiency is not a value-free notion, and that the approach outlined above rests on nothing more than right-wing, free-market ideology. Thirdly, even though applying the same general approach, economists differ as to whether particular legal rules are efficient or not. To give an example from the law in this book, it has been argued that it is efficient for specific performance to remain a secondary remedy to damages, but the opposing view has also been fervently put forward. It should not be thought, therefore, that the law can always turn to clearly agreed conclusions as to what is and what is not efficient. Finally, many of the arguments turn on the extent of transaction or other costs and yet there is little empirical data to support the views expressed.

For reasons such as these it is arguable that there is little to be gained from detailed economic analysis.[66] Moreover it should be reiterated that even where used at a general and relatively uncontroversial level, efficiency should in no sense be regarded as the sole criterion for assessing the law. Indeed it can be argued that, in the remedies field, the most significant contribution of the economic analysis movement lies not in showing that particular legal principles do or do not promote efficiency but rather in highlighting two legally important notions that might otherwise not have received the attention they deserve.

One is what economists term the ‘consumer surplus’, namely the subjective value that a consumer places on particular property or services, over and above the objective market value.[67] This is a useful way of explaining, for example, why a person having a wall built for privacy is, in the event of breach, unlikely to be put into as good a position as if the contract had been performed if she is simply awarded damages reflecting the difference in market value of her land with and without the wall; or why it is essential for the courts to award mental distress damages to compensate fully for a ruined holiday; or why specific performance is a preferable remedy to damages for someone buying a particular home.

The other notion is that the parties may well bargain around non-monetary remedies, like injunctions and specific performance, whether pre- or post-judgment.[68] Two views can be suggested as to the effect this should have on the remedies awarded. (p. 18) First, there is the view that the possibility of post-judgment bargaining should have no effect on a court’s reasoning. The court should rather reach a decision according to what it thinks is just, and should regard it as entirely a matter for the parties if they then prefer a different solution. After all, the court cannot know in advance whether the parties will embark on post-judgment bargaining. Alternatively, it can be argued that the courts should be wary of granting non-monetary remedies, precisely because the claimant, who has been or will be awarded an injunction or specific performance, is placed in too strong a position in pre- or post-judgment bargaining; for to the extent that the defendant’s gains from the wrong will exceed the claimant’s loss, it will be in each party’s interest to negotiate a deal whereby the claimant takes a share in the defendant’s gains in return for the defendant being free to commit the ‘wrong’. Moreover, there will be every incentive for the claimant to demand a huge share of those gains, going far beyond the compensation needed to cover the value to him of the right infringed. Both the consumer surplus and bargaining around the remedies are ideas that will be returned to at various stages in this book.

14. Corrective justice, civil recourse, and rights

Perhaps as a reaction against the economic analysis of law, the last 30 years have seen attempts by scholars to explain private law, especially tort law, by high-level 'rights' theories.[69] Among the best known are Ernest Weinrib's version of 'corrective justice',[70] John Goldberg and Ben Zipursky's theory of 'civil recourse',[71] and Robert Stevens' 'rights-based' theory of tort.[72] There are close links between all three accounts and all purport to be primarily concerned with explaining private law as it is and not as it ought to be.[73]

Taking first Weinrib's corrective justice approach, this attempts to explain a number of central features of the private law of civil wrongs.

First, private law is concerned to restore parties to the position they were in, in relation to rights held, prior to the infringement of those rights. Private law corrects an injustice and is not concerned to redistribute rights afresh. In Aristotle's terminology, one is concerned with corrective, not distributive, justice.

Secondly, there is 'correlativity' between the parties in private law. The claimant and defendant are inseparably linked in the sense that infringement of the claimant's right by the defendant constitutes the breach of a duty owed by the defendant to the claimant. The claimant's right and the defendant's duty are two sides of the same coin. Furthermore, the (p. 19) defendant is bound to pay damages to the claimant (not to the state) and the claimant can proceed only against the defendant and no one else. It is this correlativity that gives private law its structural coherence.

Thirdly, the law is concerned only with matters that concern the parties as between themselves and not matters that affect third parties or the legal system generally. In other words, policy goals, such as encouraging efficiency or deterrence or punishment or avoiding the floodgates of litigation or encouraging insurance, are irrelevant to private law.

Fourthly, and most importantly for this book, there is a principle of 'continuity' between right and remedy.[74] By this, the remedies for civil wrongs flow on naturally as a continuum from the breach of duty in question. The law does not set up remedies that can be chosen by the parties or the court as a 'smorgsmabord' irrespective of the particular wrong in question. The remedy and the right infringed are inextricably linked and the idea is that the remedy should as closely as possible replicate, or substitute for, or be the 'next best thing to', the right infringed.

While of great interest, this theory is problematic. Even if accurate, it operates at such a high level of generality that it is hard to translate it into distinctive arguments that can be run before the courts: law is a practical discipline and, if its theories are set at such a high level that they cannot answer the practical questions addressed by courts, they are of marginal help.[75] The theory also contradicts vast swaths of private law in so far as it indicates that policy concerns ought to be irrelevant. Private law is best understood as a mix of principle and policy. So, for example, it is hard to see how the theory can explain properly the law on remoteness or mitigation or the general non-recovery of mental distress in contract law where the courts rightly invoke policy concerns external to the parties in developing and explaining the law. Corrective justice similarly cannot explain any of the law on punitive damages. The principle of continuity is appealing—and indeed at one level is in line with a basic tenet of this book, namely that it is misleading to look at remedies without the context of the particular wrong in question—but, stated at such a high level of generality, it leaves open all the difficult questions that the law has to answer. For example, on the face of it, the best remedy for breach of contract should be specific performance, as the next best to performance, but that is clearly not the law (and this is for reasons of policy such as avoiding waste and respecting individual autonomy by avoiding forcing a party to do something for someone else on pain of contempt). Even cost of cure damages are not readily available unless reasonable (ie not wasteful) and the claimant intends to effect the

cure. In short, the law on remedies, including the relationship between specific remedies and monetary remedies, cannot be explained simply by reference to the range of possible remedies: there are other policy factors that come into play and without reference to them the law cannot be properly understood.

Goldberg and Zipursky's theory of civil recourse is similar to corrective justice but emphasises that the primary importance of the infringement of the claimant's right is that it gives the claimant standing to sue and thereby the power to invoke the machinery of the state in providing recourse against the defendant. In contrast to criminal law, it is the person whose right has been infringed who can insist on bringing the wrongdoer to court (p. 20) both to establish that the wrong occurred and to invoke judicial remedies. It would appear that, unlike corrective justice, those advocating 'civil recourse' are not against policy reasoning in determining rights and remedies so that, for example, punitive damages are regarded as acceptable. Given that the emphasis is on the infringement of a right, the theory is principally focused on tort law and it is not clear, for example, how it is seen as applying to other areas of private law, such as unjust enrichment where there is no infringement of a right in play.

It would appear that another significant difference between civil recourse and corrective justice, which is directly relevant to this book, is that civil recourse takes the view that the remedies given are not controlled by the right in question but cover a range of options which it is for the claimant and/or the court to choose from as they consider appropriate. In other words, civil recourse appears to reject the principle of continuity. The issue of whether there is a right of action is distinct from the issue of what the remedy should be. As Weinrib has explained it, 'For corrective justice, the plaintiff's remedy is continuous with the right that the defendant infringed. For civil recourse, the wrong and remedy are distinct.'[76] Hence Zipursky argues that, after the infringement of its right, the claimant has a power (not a right) to choose a particular remedy and the defendant has a liability in relation to that remedy. Civil recourse is therefore a distinctive power in private law that a claimant has, consequent on infringement of its right which gives the claimant standing, to choose a judicial remedy. However, this is open to the criticism that, as a description of the law, it is clear that remedies are not simply matters for the courts' discretion, or the claimant's choice, but rest on established principles which severely confine that discretion or choice. Moreover, it is not entirely clear why the idea of civil recourse is thought to be a distinctive aspect of private law as opposed to public law. Judicial review of administrative action has standing rules that give a party the power to invoke the machinery of the state in providing recourse against the state.

Stevens' 'rights-based' analysis of torts is very much more practically orientated than the above two theories and painstakingly analyses almost the whole of the English law of torts through the lens of the infringement of a right, which is contrasted with loss-based analyses of tort focused on accidents. The theory seeks to draw a sharp line between principle and policy and, with respect, unrealistically—for the reasons that have been set out above in relation to Weinrib's views—regards policy as a matter solely for the elected Legislature and not the courts. Nevertheless there are many useful insights to be derived from Stevens' account. We analyse in depth in chapter 3 his fascinating, albeit flawed, approach to remedies, especially damages.

15. Approach and methodology

The approach to the law adopted in this book is avowedly doctrinal. This rests on the belief that practical legal scholarship and reasoning are of central importance in understanding the law; and, without wishing to deny the importance of other more theoretical approaches,

it can be powerfully argued that, not least because law is a practical discipline, doctrine should lie at the core of legal research and training.[77]

(p. 21) A valid criticism of many doctrinal scholars—although this is a charge that can be levelled at other types of academic lawyer as well—is that the methodology being applied is sometimes not thought through let alone articulated. Very few history students would now study history without serious consideration of historiography. Yet we rarely find doctrinal scholars analysing the precise methodological approach that they are adopting.

It is therefore worthwhile explaining, albeit briefly, that this book adopts an interpretative methodology which seeks to set out the best interpretation of the content of the law on remedies. The criteria that are being applied in determining whether one interpretation is better than another include fit, coherence, accessibility, practical workability, and normative validity. Perhaps most importantly, one's model should fit the vast bulk of the rules and principles (one cannot simply say that a significant proportion of the rules and principles cannot be explained and must be ignored); it should do so in a way that is coherent or rational by treating like cases alike and unlike cases differently; the interpretation should be as simple to understand—as accessible—as possible; the account of the law must be one that works in practice because law is pre-eminently a practical discipline; and the interpretation should be one that can be morally justified even if that moral justification goes no deeper than relying on what are perceived to be widely shared moral values. It should be added that a useful technique for testing some of these criteria is to look not only at existing legal rules and principles but also at hypothetical examples that have not yet come before the courts.

16. The layout of the book

This book is primarily structured according to, first, the functions of the remedies for torts and breach of contract and, secondly, the particular remedies concerned to effect those functions. So, after the Introduction (with the next chapter looking at the impact of the Human Rights Act 1998), there are four parts corresponding to the remedial functions set out above[78] (compensation; restitution and punishment; compelling performance or preventing (or compelling the undoing of) a wrong; and declaring rights). Within each part, the particular remedy or remedies for torts and breach of contract concerned to effect those functions are examined. A final part and chapter, for reasons set out above,[79] looks at remedies for equitable wrongs.

Footnotes:

1 Notable exceptions are K Barker, 'Rescuing Remedialism in Unjust Enrichment Law: Why Remedies are Right' [1998] CLJ 301; P Birks, 'Rights, Wrongs, and Remedies' (2000) 20 OJLS 1; R Zakrzewski, *Remedies Reclassified* (OUP 2005); S Smith, 'Rights, Remedies and Causes of Action' in *Structure and Justification in Private Law* (eds C Rickett and R Grantham, Hart Publishing 2008) 405; S Smith'Duties, Liabilities and Damages' (2012) 125 Harvard LR 1727.

2 Or from an equivalent body (where appeals can be made to the courts), such as an arbitrator or employment tribunal.

3 For introductory examinations of some self-help remedies, see, eg, D Harris, D Campbell, and R Halson, *Remedies in Contract and Tort* (2nd edn, Butterworths 2002) chs 2, 3, and 21; FH Lawson, *Remedies of English Law* (2nd edn, Butterworths 1980) chs 1–2. Note also that this book does not discuss judicial remedies available in a claim for judicial review (a quashing order, a prohibiting order, and a mandatory order) even though, arguably, they can be awarded for a tort or breach of contract committed by a public authority: see, eg, *Ex p Napier* (1852) 18 QB 692, at 695. Such remedies are better considered in books on

administrative law. See P Craig, *Administrative Law* (8th edn, Sweet & Maxwell 2016) ch 26.

4 FH Lawson, *Remedies of English Law* (2nd edn, Butterworths 1980) 12–14.

5 Damages and the award of an agreed sum take the form of an award by the court which constitutes a judgment debt owed by one party to the other. That is, a court gives judgment for the claimant for £1,000 rather than saying that 'the defendant shall pay the claimant £1,000'. Such awards can still be regarded, loosely, as 'court orders' and they are certainly coercive because they are backed up by enforcement procedures. Indeed the same enforcement procedures apply to an award of damages as to an award of costs where the standard wording is in the form of a direct order to pay ('The claimant shall pay the defendant its costs of £1,000'). Note that an undertaking given by a defendant to the court and accepted in place of an injunction is enforceable and hence coercive even though, plainly, it does not comprise a court order.

6 R Zakrzewski, *Remedies Reclassified* (OUP 2005).

7 For Zakrzewski there is a fundamental division of judgment awards and orders between what he terms 'replicative' and 'transformative' remedies. The former merely replicate the claimant's substantive rights, while the latter confer rights that are different from the claimant's substantive rights.

8 AV Dicey, JHC Morris, and LA Collins, *Dicey, Morris and Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell 2012) chs 11–12.

9 Eg, a personal injury action worth less than £50,000 must he brought in a county court: see High Court and County Courts Jurisdiction Order 1991, SI 1991/724. All the remedies covered in this book can be awarded by both the High Court and the county courts: County Courts Act 1984, s 38. But note that by the County Court Remedies Regulations 2014 (SI 2014/982) the county court generally has no jurisdiction to grant a search (*Anton Piller*) order).

10 The possibility of bargaining round non-monetary remedies has attracted much academic interest—see below, pp 17–18.

11 The Green Paper, *Towards Effective Enforcement*: *A Single Piece of Bailiff Law and a Regulatory Structure for Enforcement* (Cmnd 5096, Lord Chancellor's Department, 2001) para 1.31 stated that only 35% of all warrants of execution issued (which account for about 85% of all enforcement effort) are paid and that the estimated value of unpaid post-judgment debt is more than £600 million per year. See, generally, J Baldwin and R Cunnington, 'The Crisis of Enforcement of Civil Judgments in England and Wales' [2004] PL 305.

12 CPR 31.12.

13 P Birks, 'Rights, Wrongs and Remedies' (2000) 20 OJLS 1, 22, criticised this paragraph because it cuts across a taxonomy which distinguishes events from rights. But it is hard to see what is incorrect or unhelpful about lining up alongside each other (primary) rights engendered by a contract and (primary) rights protected by torts. Crucially the breach of those (primary) rights (which is the wrong constituting the cause of action) then triggers judicial remedies. Birks' approach appears to produce the odd consequence that a (*quia timet*) injunction to restrain an anticipated tort is not concerned with a 'tortious right' because a tortious right cannot be anterior to the tort.

14 Most torts are actionable only on proof of damage. But libel and trespass to the person, land, or goods are torts actionable per se.

15 Sometimes the damage and hence the tort is clearly established and the dispute concerns further damage. One is then concerned only with compensatory damages.

16 See, eg, F Reynolds, 'Tort Actions in Contractual Situations' (1985) 11 NZULR 215; B Markesinis, 'An Expanding Tort Law – The Price of a Rigid Contract Law' (1987) 103 LQR 354; K Barker, 'Are we up to Expectations? Solicitors, Beneficiaries and the Tort/Contract Divide' (1994) 14 OJLS 137; P Cane, *Tort Law and Economic Interests* (2nd edn, Clarendon Press 1996) 129–149, 307–334; A Burrows, *Understanding the Law of Obligations* (Hart Publishing 1998) 16–44; *Chitty on Contracts* (33rd edn, Sweet & Maxwell 2018) paras 1-152–1-210.

17 See, eg, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; *Midland Bank Trust Co Ltd v Hett, Stubbs and Kemp* [1979] Ch 384; *Smith v Eric Bush* [1990] 1 AC 605; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145; *White v Jones* [1995] 2 AC 207; *Merrett v Babb* [2001] EWCA Civ 214, [2001] QB 1174; *Lejonvarn v Burgess* [2017] EWCA Civ 254, [2017] PNLR 25. But the recovery of pure economic loss for tortious negligence is still very restricted: see, eg, *Spartan Steel & Alloys Ltd v Martin & Co* (*Contractors*) *Ltd* [1973] QB 27; *Candlewood Navigation Corpn Ltd v Mitsui OSK Lines Ltd* [1986] AC 1; *Muirhead v Industrial Tank Specialities Ltd* [1986] QB 507; *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785; *Caparo Industries Plc v Dickman* [1990] 2 AC 605; *Murphy v Brentwood District Council* [1991] 1 AC 398; *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830; *Commissioner for Customs & Excise v Barclays Bank* [2006] UKHL 28, [2007] 1 AC 181.

18 *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80, at 107; *National Bank of Greece SA v Pinios Shipping Co No 1, The Maira* [1989] 3 WLR 185 (rvsd on a different point [1990] 1 AC 637, HL); *Greater Nottingham Co-op Soc Ltd v Cementation Piling & Foundations Ltd* [1989] QB 71; *Reid v Rush & Tomkins Group plc* [1990] 1 WLR 212; *Johnstone v Bloomsbury HA* [1992] QB 333; *Scally v Southern Health & Social Services Board* [1992] 1 AC 294; *Robinson v PE Jones (Contractors) Ltd* [2011] EWCA Civ 9, [2012] QB 44; *Euroption Strategic Fund Ltd v Skandinaviska Enskilda Banken AB* [2012] EWHC 584 (Comm), [2013] 1 BCLC 125, at [132].

19 This was particularly caused by influential obiter dicta of Lord Scarman giving the judgment of the Privy Council in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank* [1986] AC 80, at 107. He said, 'Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship.'

20 [1995] 2 AC 145.

21 ibid, at 193–194.

22 See, generally, A Burrows, 'Comparing Compensatory Damages in Contract and Tort: Some Problematic Issues' in *Torts in Commercial Law* (eds S Degeling, J Edelman, and J Goudkamp, Thomson Reuters 2011) 367.

23 See below, p 39.

24 See below, ch 7.

25 See below, chs 13 and 14.

26 See below, ch 20.

27 *Iron Trade Mutual Ins Co Ltd v JK Buckenham Ltd* [1990] 1 All ER 808; *Islander Trucking Ltd & Hogg Robinson v Gardner Mountain* (*Marine*) *Ltd* [1990] 1 All ER 826. See below, ch 16.

28 Eg, *Midland Bank Trust Co Ltd v Hett, Stubbs and Kemp* [1979] Ch 384; *White v Jones* [1995] 2 AC 207.

29 A Burrows, *Understanding the Law of Obligations* (Hart Publishing 1998) 26–40. See similarly S Whittaker, 'The Application of the "Broad Principle of Hedley Byrne" as between Parties to a Contract' (1997) 17 Legal Studies 169.

30 A Burrows, *Understanding the Law of Obligations* (Hart Publishing 1998) 26–34.

31 R Zakrzewski, *Remedies Reclassified* (OUP 2005).

32 Above, p 4.

33 The sort of discretion in play has been called 'weak' rather than 'strong', which goes back to a distinction drawn by R Dworkin, *Taking Rights Seriously* (rev edn, Duckworth 1978) 31–39. There is a school of thought that remedies should be decided by a strong discretion, which would allow the judge to choose the most appropriate remedy on the particular facts. For powerful criticism of this 'discretionary remedialism', see P Birks, 'Rights, Wrongs and Remedies' (2000) 20 OJLS 1, 22–24; P Birks, 'Three Kinds of Objection to Discretionary Remedialism' (2000) 29 UWALR 1.

34 A Burrows, 'We Do This at Common Law but That in Equity' (2002) 22 OJLS 1; A Burrows, *Fusing Common Law and Equity*: *Remedies, Restitution and Reform*, Hochelaga Lecture 2001 (Sweet & Maxwell 2002).

35 Eg, P Birks, 'Misnomer' in *Restitution*: *Past, Present and Future* (eds W Cornish, R Nolan, J O'Sullivan, and G Virgo, Hart Publishing 1998) 1, 8–9; P Birks, 'Rights, Wrongs and Remedies' (2000) 20 OJLS 1, 25–36.

36 P Birks, *An Introduction to the Law of Restitution* (Clarendon Press 1989) 313.

37 Undue influence (as the equitable creation of the judges and therefore putting to one side statutory undue influence under Part 4A of the Consumer Protection from Unfair Trading Regulations 2008) is not an equitable wrong because it does not trigger compensation: see P Birks, 'Unjust Factors and Wrongs: Pecuniary Rescission for Undue Influence' [1997] RLR 72 which discusses *Mahoney v Purnell* [1996] 3 All ER 61.

38 (2nd edn, Butterworths 1994) 9–11.

39 But this book does not purport to cover any specialised remedies for particular statutory wrongs (eg, the remedies that may be awarded by an employment tribunal for unfair dismissal).

40 [2015] EWCA Civ 311, [2016] QB 1003.

41 Under Civil Procedure Rules PD 6B, para 3.1(9).

42 [2015] EWCA Civ 311, [2016] QB 1003, at [21].

43 [2004] UKHL 22, [2004] 2 AC 457, at [13]–[17].

44 [2007] UKHL 21, [2008] 1 AC 1, at [255].

45 [1995] FSR 765.

46 [2015] EWCA Civ 311, [2016] QB 1003, at [51].

47 An exception is the excellent article by S Watterson, 'Alternative and Cumulative Remedies: What is the Difference?' [2003] RLR 7. See also S Watterson, 'An Account of Profits or Damages? The History of Orthodoxy' (2004) 24 OJLS 471.

48 E Peel, *Treitel on The Law of Contract* (14th edn, Sweet & Maxwell 2015) para 9-087.

49 *Johnson v Agnew* [1980] AC 367, at 392. Lord Wilberforce said, '[I]f the vendor treats the purchaser as having repudiated the contract and accepts the repudiation, he cannot thereafter seek specific performance. This follows from the fact that, the purchaser having repudiated the contract and his repudiation having been accepted, both parties are discharged from further performance.'

50 S Watterson, 'Alternative and Cumulative Remedies: What is the Difference?' [2003] RLR 7, esp 18–21, argues that the most appropriate label to describe the objection is neither 'inconsistency' nor 'double recovery' but rather 'excessive remedial cumulation'.

51 See, generally, *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, 19, 21, 30. See also below, p 439 (specific performance).

52 S Watterson, 'Alternative and Cumulative Remedies: What is the Difference?' [2003] RLR 7, 21.

53 Eg, under Schedule 1, para 4, of the European Union Withdrawal Act 2018, 'There is no right in domestic law on or after exit day to damages in accordance with the rule in *Francovich*'. The rule in *Francovich* is explained below.

54 Case C-6&9/90, [1991] ECR I-5357. See also, eg, *Brasserie du Pêcheur SA v Germany, R v Secretary of State for Transport, ex p Factortame Ltd* Case C-46 & 48/93, [1996] QB 404; *R v HM Treasury, ex p British Telecommunications plc* Case C-392/93, [1996] QB 615; *Dillenkofer v Germany* Case C-178–9/94, 188–190/194, [1996] ECR I-4845; *Denkavit International v Bundesamt für Finanzen* Case C-283, 291, and 292/94, [1996] ECR I-5063; *R v Secretary of State for Transport, ex p Factortame Ltd (No 5)* [2000] 1 AC 524 (HL); *EnergySolutions EU Ltd v Nuclear Decommissioning Authority* [2017] UKSC 34, [2017] 1 WLR 1373.

55 Eg, *Köbler v Austria* Case C-224/01, [2004] QB 848, ECJ (dealing with judicial decisions).

56 See, eg, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* Case 26/62, [1963] ECR 1; *Defrenne v Société Anonyme Belge de Navigation Aérienne* Case 43/75, [1976] ECR 455.

57 See, eg, *Courage v Crehan* Case C-453/99, [2001] ECR I-6297.

58 *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130; *R v Secretary of State for Transport, ex p Factortame Ltd* (*No 6*) [2001] 1 WLR 942 (for the purposes of the Limitation Act 1980); *Phonographic Performance Ltd v Department of Trade and Industry* [2004] EWHC 1795 (Ch), [2004] 1 WLR 2893. An earlier view that the tort in question was best viewed as misfeasance in public office (see, eg, *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716) was rejected in the *Brasserie du Pêcheur* case [1996] QB 404.

59 *Clerk and Lindsell on Torts* (22nd edn, Sweet & Maxwell 2018) para 1–09; M Lunney, D Nolan, and K Oliphant, *Tort Law*: *Text and Materials* (6th edn, OUP 2017) 627. See, generally, P Giliker, *The Europeanisation of English Tort Law* (Hart Publishing 2014) ch 4.

60 *Rewe-Zentralfinanz and Rewe-Zentral v Landwirtschaftskammer für das Saarland* Case 33/76, [1976] ECR 1989.

61 See, eg, *Amministrazione delle Finanze dello Stato SpA San Giorgio* Case 199/82, [1983] ECR 3595.

62 For an example of EU law requiring a 'remedy', which has been rationalised in English law as restitution of an unjust enrichment, see *Metallgesellschaft Ltd v IRC, Hoescht AG v IRC* Cases C-397–410/98, [2001] Ch 620. There have been many subsequent English unjust

enrichment tax cases applying *Hoescht*: see, eg, *Test Claimants in the FII Group Litigation v HMRC* [2012] UKSC 19, [2012] 2 AC 337.

63 See below, pp 369–370.

64 See also D Harris, *Remedies in Contract and Tort* (1st edn, Weidenfeld & Nicolson 1988) 6–14 (that introductory section was deleted in the 2nd edn, Butterworths 2002).

65 R Coase, 'The Problem of Social Cost' (1960) 3 J Law & Econ 1.

66 For a different view see, eg, S Bray, 'Remedies, Meet Economics; Economics, Meet Remedies' (2018) 38 OJLS 71.

67 D Harris, A Ogus, and J Phillips, 'Contract Remedies and the Consumer Surplus' (1979) 95 LQR 581; S Mullen, 'Damages for Breach of Contract: Quantifying the Lost Consumer Surplus' (2016) 36 OJLS 83.

68 R Sharpe, *Injunctions and Specific Performance* (5th edn, Thomson Reuters 2017) paras 1.150–1.180; B Thompson, 'Injunction Negotiations: An Economic, Moral and Legal Analysis' (1975) 27 Stan LR 1563.

69 For a very different philosophical account of private law, which sees it as helpfully understood as mirroring central issues in our personal lives, see J Gardner, *From Personal Life to Private Law* (OUP 2018).

70 Although there are many articles by Weinrib on this theme, I have found most helpful the short article 'Corrective Justice in a Nutshell' (2002) 52 U Toronto LJ 349. An earlier full version of the theory, albeit modified since, was set out in *The Idea of Private Law* (Harvard UP 1995). See further E Weinrib, *Corrective Justice* (OUP 2012).

71 B Zipursky, 'Rights, Wrongs and Recourse in the Law of Torts' (1998) 51 Vanderbilt LR 1; J Goldberg and B Zipursky, 'Unrealized Torts' (2002) 88 Virginia LR 1625, 1641–1649; B Zipursky, 'Civil Recourse, Not Corrective Justice' (2003) 91 Georgia LJ 695; J Goldberg and B Zipursky, 'Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties' (2006) 75 Fordham LR 1563; J Goldberg and B Zipursky, 'Torts as Wrongs' (2010) 88 Texas LR 917, esp 960–963, 971–978.

72 R Stevens, *Torts and Rights* (OUP 2007). See also A Beever, *Rediscovering the Law of Negligence* (Hart Publishing 2007).

73 J Goudkamp and J Murphy, 'The Failure of Universal Theories of Tort Law' (2015) 21 Legal Theory' 47 argue that Posner's economic analysis, Weinrib's corrective justice approach, and Stevens' 'torts and rights' thesis fail because they purport to be 'universal theories of tort law' and yet they cannot explain several central aspects of tort in the common law world.

74 J Gardner, 'What is Tort Law For? Part 1: The Place of Corrective Justice' (2011) 30 Law and Philosophy 1, at 33 first coined the phrase the 'continuity thesis'. See also J Gardner, *From Personal Life to Private Law* (OUP 2018) esp 98–124. For Weinrib's clear adoption of it, see E Weinrib, 'Civil Recourse and Corrective Justice' (2011) 39 Florida State University LR 273.

75 See J Stapleton, 'Comparative Economic Loss: Lessons from Case-Law Focused "Middle Theory" ' (2002-3) 50 UCLA Rev 531. Stapleton, in my view correctly, criticises 'high theorists of tort law' for not providing practical answers to the issues faced by courts.

76 E Weinrib, 'Civil Recourse and Corrective Justice' (2011) 39 Florida State University LR 273, 275.

77 See, generally, A Burrows, ‘Challenges for Private Law in the Twenty-First Century’ in *Private Law in the 21st Century* (eds K Barker, K Fairweather, and R Grantham, Hart Publishing 2017) 29, 34–40.

78 Above, pp 9–10.

79 Above, p 12.