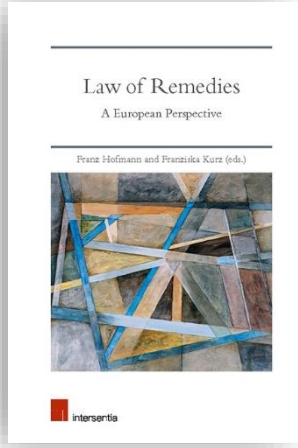
This contribution was originally published in:

Law of Remedies
ISBN 978-1-78068-785-8

Franz Hofmann and Franziska Kurz (eds.)

Published in September 2019 by Intersentia
www.intersentia.co.uk



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REMEDIES IN ENGLISH PRIVATE LAW

A 'Stand-Alone' Research Area?

Paul S. Davies

1. INTRODUCTION

Are remedies in English private law considered to constitute a 'stand-alone' research area? There is no doubt that lawyers often talk about 'remedies' as a distinct area; books are written on remedies, and university courses on remedies seem to be increasingly common. Indeed, I have taught a course on 'Commercial Remedies' at graduate level for the past five years.[1] That partly reflects the fact that students are concerned to understand what courts do, and the potential relief available in the commercial context in which they hope to practise. But it does not necessarily mean that remedies should be considered to be a 'stand-alone' research area. There are obvious problems in divorcing remedies from substantive rights and causes of action. Conversely, there is clearly a strong link between rights and remedies.

This chapter begins by considering what it means for something to be a 'stand-alone' subject or research area. It will then briefly address the vexed

[1] One of the editors of this collection, Franz Hofmann, attended some of these seminars in Oxford. Despite that, he kindly invited me to answer the question posed in the title of this chapter. I am grateful to him for that invitation, and thank all those who participated in the conference at which an earlier version of this chapter was presented for their questions and comments.

question of how the term 'remedy' should be understood. This is the cause of substantial disagreement amongst scholars. The final terminological clarification concerns the scope of 'private law' and its coherence as a subject. It will then be possible to discuss the idea of remedies as a stand-alone subject. The dangers of isolating remedies will first be outlined, before analysing the pragmatic approach that the common law has taken to remedies. Finally, it will be suggested that regardless of whether remedies is viewed as a 'stand-alone' research area, there is still much to be gained from courses and books on remedies.

2. WHAT MAKES A LEGAL SUBJECT?

It is surprisingly difficult to state how a 'legal subject' is defined.[2] In England and Wales there are currently seven foundational subjects that have to be studied at the academic stage in order to qualify as a solicitor or barrister: criminal law, contract law, tort law, constitutional and administrative law, land law, equity and trust law, and the law of the European Union.[3] These core subjects are well-defined: they each consist of a set of over-arching principles which are distinct from those of other areas, and each contains a large body of law which shows structural coherence. They are rightly regarded as the 'core' of English law, since they are the building blocks for a number of other subjects which would be hard to understand without these foundational subjects.

The core subjects are well-known and well-defined. But it is worth noting that even the integrity of these subjects has been sometimes doubted. For instance, Tony Weir once light-heartedly remarked that 'Tort is what is in the tort texts and the only thing holding it together is the binding'.[4] That was over-stating the position for comic effect,[5] but it is worth noting that setting clear boundaries of even the 'core' subjects may be difficult. Indeed, the utility of a taxonomy depends on its purpose,[6] and it is important that the law be presented in a clear and coherent way for a proper understanding to be developed.

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2 I am grateful to Tamara Hervey for sharing her (as yet largely unpublished) thoughts with me for this section of the chapter, although she bears no responsibility for what follows.

3 This is likely to change in the imminent future with the introduction of the Solicitors' Qualifying Examination: https://www.sra.org.uk/sra/policy/sqe.page.

4 T. Weir, *An Introduction to Tort Law*, 2nd ed., OUP, Oxford, 2006, p. ix.

5 N. McBride and R. Bagshaw, *Tort Law*, 6th ed., Pearson, Harlow, 2018, pp. 13–15.

6 D. Sheehan and T.T. Arvind, 'Private law theory and taxonomy: reframing the debate' [2015] LS 480.

Beyond the 'core' subjects, it can be more difficult to establish what a subject is. For instance, Judge Frank H. Easterbook famously deprecated the notion that 'cyberlaw' was a true subject, arguing:[7]

> … the best way to learn the law applicable to specialized endeavors is to study general rules. Lots of cases deal with sales of horses; others deal with people kicked by horses; still more deal with the licensing and racing of horses, or with the care veterinarians give to horses, or with prizes at horse shows. Any effort to collect these strands into a course on 'The Law of the Horse' is doomed to be shallow and to miss unifying principles.

This view has since been challenged as it applies to 'cyberlaw',[8] but even in that context remains influential. Many rules might concern a horse, but studying the law of the horse as a subject would not be very enlightening. Cyberlaw scholars continue to wrestle with this existential issue for their own subject.[9]

Some subjects have become established only more recently, and are subject to strong debates about what should be included within their scope. For instance, family law has evolved as a subject to do with families, and the scope of books on family law differ markedly.[10] Family law was previously largely broken up within the 'core' subjects, such as property, trusts, and tort law. What drove the subject forwards was the impetus provided by Bromley's seminal text,[11] which sparked greater interest and development. Similar processes may be discerned in other areas too, such as the law of unjust enrichment[12] and environmental law.[13] But in all these areas there remains debate about the nature of the subject and what should be included within its scope as particular to and definitive of that subject.

If remedies is a 'stand-alone' legal subject, that does not mean that one should expect its boundaries to be clear and uncontroversial. Its nature and

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7 F. Easterbrook, 'Cyberspace and the Law of the Horse' (1996) *Uni Chicago Legal Forum* 207, 207.

8 See, most notably, L. Lessig, 'The Law of the Horse: What Cyberlaw Might Teach' (1997) 113 Harv. L. Rev. 501.

9 E.g. A. Murray, 'Looking Back at the Law of the Horse: Why Cyberlaw and the Rule of Law are Important', (2013) 10:3 *SCRIPTed* 310. http://script-ed.org/?p=1157.

10 For critical discussion, see e.g. A. Diduck, 'What is Family Law For?' [2011] CLP 287.

11 P. Bromley, *Family Law*, Butterworths, London 1957.

12 R. Goff and G. Jones, *The Law of Restitution*, Sweet & Maxwell, London 1966; the most recent edition of which is now titled *The Law of Unjust Enrichment*, 9th edn., Sweet & Maxwell, London 2016. See similarly P. Birks, *An Introduction to the Law of Restitution*, Clarendon, 1989 and *Unjust Enrichment*, Clarendon, 2003. For recent critical discussion, see R. Stevens, 'The Unjust Enrichment Disaster' (2018) 134 LQR 574.

13 See e.g. E. Fisher, B. Lange, E. Scotford and C. Carlarne, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship', 21 *Journal of Environmental Law* (2009) 213.

content may evolve over time. Perhaps the greater attention paid to remedies by books and university courses will accelerate such developments. That will be considered once the scope of 'private law' and 'remedy' have been addressed.

3. THE SCOPE OF PRIVATE LAW

Private law is vast. It covers a huge area. The leading work, *English Private Law*,[14] covers not only contract, tort and equitable wrongs, but also families, companies, property, intellectual property, succession, agency, employment, and unjust enrichment. All these areas may be distinguished from public law, but it is difficult to draw common themes across such a range of subjects, and it is notable that *English Private Law* does not attempt such a feat. For instance, there are clearly significant differences between the law relating to families and banking contracts.

Considering remedies in English private law to be a 'stand-alone' area for research runs the risk of being so broad as not to be very helpful or illuminating. Remedies in the family law context include divorce decrees, decrees of nullity of marriage, separation orders and adoption orders. But these are clearly particular to the family context, and little is to be gained from considering them within a wider umbrella. Similar comments might be made regarding other areas, such as the appointment of an administrative receiver or liquidator and the winding up of a company, or the dissolution of a partnership.

It is suggested that if remedies is to be considered to be a 'stand-alone' area of research, the scope of the field should be narrowed to a more manageable ambit. Focusing on the core areas of contract, tort and equitable obligations may be sensible. However, even within these areas there are significant differences. For example, the law of personal injury in tort law has a large jurisprudence that is very different from more commercially-focused cases on economic loss. Similarly, within contract law, the 'standard' remedies for breach of contract have recently been displaced in the context of an action by a consumer against a trader by extensive provisions in the Consumer Rights Act 2015.[15]

For practical reasons, courses (such as the one I teach!) may choose to focus on commercial cases. Admittedly, there is no bright line between commercial and non-commercial cases, and the foundation of much of commercial law is to be found in generally-relevant cases concerning contract, tort, property and equitable obligations. Nevertheless, it is a crude way to avoid large and tricky topics such as personal injury and consumer remedies, and corresponds to the sort of areas in which many students hope to practise.

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14 A. Burrows (ed.), *English Private Law*, 3rd edn., OUP, Oxford, 2013.

15 See generally S. Whittaker, 'Distinctive Features of the New Consumer Contract Law' (2017) 133 LQR 47, esp. Part IV.

4. WHAT IS A REMEDY?

Burrows has rightly observed that '[t]he concept of a remedy has rarely been subjected to rigorous analysis. Views may differ as to precisely what one is talking about'.[16] The language of remedies is often used loosely. In a typically powerful article, Birks ultimately concluded that the term 'remedy' could usefully be excised from our analytical vocabulary, and that the focus should instead be on events and responses.[17] Although Birks realised that this attack on the term 'remedy' was unlikely to prove completely successful, he hoped that it would at least focus attention on the need to be clear about what 'remedy' means, and to cut back its definition. Birks identified five different uses of the term 'remedy': (i) as an action or cause of action (such as 'conversion is your remedy'); (ii) as a right born of a wrong (such as a right to damages following the negligent infliction of personal injury); (iii) as a right born of a grievance or injustice (such as a right to restitution of a mistaken payment); (iv) as a right born of the order or judgment of a court (the remedy being the judgment which defined the claimant's enforceable entitlement); and (v) as a right born of a court's order issued on a discretionary basis (such as might flow from a 'remedial constructive trust'). Birks considered the language of rights to be sufficient.

Subsequent scholars have sought to establish a more stable core definition of remedy. For example, in his excellent book, *Remedies Reclassified*,[18] Zakrzewski has argued that the instability surrounding the term remedy is problematic, and in order to achieve a stable meaning it is important that remedies be restricted to the rights arising from certain court orders or pronouncements. Zakrzewski distinguishes between 'replicative' remedies which replicate the claimant's substantive rights, and 'transformative remedies' which confer rights different from the claimant's substantive rights. Significantly, one consequence of this is that damages do not fall within the subject of 'remedies': damages concern secondary rights which, together with primary rights, should not be considered part of the law of remedies but rather of substantive law.

Such a narrow approach to remedies seems unhelpful and diminishes the practical utility of the subject.[19] It is somewhat odd to consider the law of remedies to include the law on injunctions and specific performance, for example, but not the law on damages. Stephen Smith is currently engaged in an

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16 A. Burrows, 'Judicial Remedies' in A. Burrows (ed.), *English Private Law* 3rd edn., OUP, London 2013, 21.01.

17 P. Birks, 'Rights, Wrongs and Remedies', (2000) 20 OJLS 1. See too P. Birks, 'Personal Property: Proprietary Rights and Remedies' [2000] KLJ 1.

18 R. Zakrzewksi, *Remedies Reclassified*, OUP, Oxford 2005.

19 See too A. Burrows, *Remedies for Torts and Breach of Contract*, 3rd edn., OUP, Oxford 2004, p. 2.

important project on explaining the law of remedies, and his forthcoming book could have a major impact on this area. Smith has already skilfully argued that there is no 'duty' to pay damages or make restitution, but rather defendants are under a 'liability' to be ordered by a court to do so.[20] This is controversial, and does not easily fit with aspects of the positive law, such as the fact that interest runs from the date of the wrong, rather than the date of the court order.[21] But Smith's approach encompasses both specific relief and damages, even if it moulds the law of remedies as based upon rules telling courts (rather than private actors) what they should do.

These theoretical differences are important. But for present purposes, the notion of a 'remedy' will be defined broadly. This matches the general use of the term by the courts and legislature. For example, in *Attorney-General v Blake*, Lord Nicholls cast the net widely in saying that '[r]emedies are the law's response to a wrong (or, more precisely, to a cause of action).'[22] The Civil Procedure Rules explicitly provide for 'interim remedies',[23] and the Oxford English Dictionary draws a comparison with 'medicine' and derives the noun 'remedy' from the prefix *re-* and the Latin root of *medior, mederi*, meaning 'to heal'. The courts speak of remedies in a broad sense, as Birks put it, as 'a cure for something nasty'.[24] Remedies may be personal or proprietary in nature, and may be obtained through court orders or self-help. On the basis of this broad conception of remedies, should remedies be considered a 'stand-alone' research area?

5. REMEDIES AS A 'STAND-ALONE' RESEARCH AREA

When approaching the issue of remedies, it is not uncommon to focus on the availability of certain remedies. But if that is the crucial question, it is difficult to justify remedies as a 'stand-alone' research area. The availability of a remedy is a question of substantive law, and dependent upon the cause of action at issue. There is little to be gained by considering the area of remedies to be distinct on this view.

In fact, the close link between the cause of action and remedies available means that it is perhaps doubtful whether remedies can ever truly 'stand-alone'. Rights and remedies are inextricably linked. This has long been

20 See e.g. S. Smith, 'Duties, Liabilities, and Damages' (2012) 125 *Harvard LR* 1727.

21 As pointed out by E. Shewin, 'Comments on Stephen Smith's Duties, Liabilities, and Damages' (2012) 125 *Harvard LR* 164, 165.

22 [2001] 1 AC 268, 284.

23 Civil Procedure Rules, Part 25.

24 P. Birks, 'Rights, Wrongs and Remedies' (2000) 20 OJLS 1, 9.

recognised. For example, in *Nocton v Lord Ashburton*, Lord Dunedin noted that:[25]

> in certain cases where common justice demanded a remedy, the common law had none forthcoming, and the common law (though there is no harder lesson for the stranger jurist to learn) began with the remedy and ended with the right.

More recently, Friedman has written that:[26]

> A discussion of the classification of legal rights and remedies may place the emphasis upon either. Much depends on the basic approach. Does one believe that the remedy is meant to protect the legal right (and the corresponding duty) and that this is, in fact, its sole purpose, or does one assume that it is the other way around? Rights and obligations were created in order to justify the granting of a remedy. In any event the idea that the choice of one leads to the abandonment of the study and analysis of the other seems to be misplaced.

In a similar vein, Golding J observed in Chase Manhattan Bank NA v Israel-British Bank (London) Ltd that:[27]

> Within the municipal confines of a single legal system, right and remedy are indissolubly connected and correlated, each contributing in historical dialogue to the development of the other, and, save in very special circumstances it is idle to ask whether the court vindicates the suitor's substantive right or gives the suitor a procedural remedy as to ask whether thought is a mental or cerebral process. In fact the court does both things by one and the same act.

Given the pragmatism of the common law, it is unsurprising to find that a piecemeal and practical approach towards remedies has been adopted. It also makes sense for remedies to be closely related to the primary rights and duties that have been breached. Stevens, for example, has strongly argued that damages are the 'next-best' thing to performance of the primary duty at issue.[28] Not only does this emphasise the link between the right and remedy, but imposes limits upon what the remedy can be. As Stevens has said:[29]

> (t)he reason that underlies the primary obligation places limits upon the form any obligation of next best compliance can take. This is just as true of obligations not to

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25 [1914] AC 932, 964.

26 D. Friedmann, 'Rights and Remedies' (1997) LQR 424, 425.

27 [1981] Ch. 105, 124.

28 R. Stevens, *Torts and Rights*, OUP, 2007, Ch 4; R. Stevens, 'Damages and the Right to Performance: A Golden Victory or Not?' in J. Neyers, R. Bronaugh & S. Pitel (eds.), *Exploring Contract Law*, Hart Publishing, Oxford 2009.

29 R. Stevens, 'Rights Restricting Remedies' in A. Robertson and M. Tilbury (eds.), *Divergences in Private Law*, Hart Publishing, Oxford 2016, p. 161.

> punch someone on the nose as it is of promissory obligations to be at a particular place at a particular time. A caterpillar may be transformed into a butterfly, which appears to be a startlingly different thing, but it cannot be transformed into a water buffalo.

It is crucial to bear in mind the nature of the rights infringed and cause of action at issue when considering remedies. The two should not be divorced. This is true throughout private law. Contract law is a particularly good example. Contractual remedies are the essence of contract law. On one view, the whole point of entering into a contract is to access the expectation measure remedies that are available when a contract is breached. What governs the remedies awarded is the law of contract. There is no distinct area of law that determines what remedy will be awarded whenever a remedy is awarded.

Treating remedies as distinct is not without influential support. Some New Zealand cases suggest that there is simply a 'basket of remedies',[30] and Finn has welcomed 'the progressive divorce between remedy and doctrine' seen in Australia.[31] But as Birks has persuasively pointed out, this bestows great discretion on the judges and can undermine certainty and predictability (which are especially important in commercial law). Birks went so far as to call it 'a nightmare trying to be a noble dream'.[32] Whilst a weak form of discretion is present in the positive law – such as regarding whether to award specific relief – a strong form entitling a judge to pick whatever remedy appears best from an unlimited range of options is definitely not.

For example, the remedial constructive trust has been firmly rejected in England and Wales, unlike the antipodean jurisdictions home to Thomas and Finn.[33] In *Westdeutsche Landesbank Girozentrale v Islington LBC*, Lord Browne-Wilkinson said:[34]

> Under an institutional constructive trust the trust arises by operation of law as from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen in the past. The consequences that flow from such a trust having arisen (including the potentially unfair consequences to third parties who in the interim have received the trust property) are also determined by rules

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30 For general analysis of this area, see the extra-judicial discussion of Thomas J, 'An Endorsement of a More Flexible Law of Civil Remedies', (1999) 7 *Waikato Law Review* 23.

31 P. Finn, 'Equitable Doctrine and Discretion in Remedies' in W. Cornish et al. (eds.), *Restitution, Past, Present and Future*, Hart Publishing, Oxford 1998, p. 260.

32 P. Birks, 'Rights, Wrongs and Remedies' (2000) 20 OJLS 1, 23.

33 *Re Polly Peck International (No. 2)* [1998] 3 All ER 812, 823 (Mummery LJ) and 830 (Nourse LJ). See also *Metall und Rohstoff AG v Donaldson, Lufkin and Jenrette Inc.* [1990] 1 QB 391, 478–80 (Slade LJ); *Halifax Building Society v Thomas* [1996] Ch 217, 229 (Peter Gibson LJ); *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45; [2015] AC 250.

34 [1996] AC 669, 714.

> of law, not under a discretion. A remedial constructive trust, as I understand it, is different. It is a judicial remedy giving rise to an enforceable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court.

Lord Neuberger has recently deprecated attempts to introduce such a strong form of discretion into English law, wryly commenting that:[35]

> There is much to be said for the notion of a remedial constructive trust displays equity at its flexible flabby worst. I will seek to show, at least arguably, that it is unprincipled, incoherent and impractical, that it renders the law unpredictable, that it is an affront to the common law view of property rights and interests, that it involves the court usurping the role of the legislature, and, as if that were not enough, that the development of the remedial constructive trust is largely unnecessary. Apart from that, it's a pretty good concept.

In any event, if the remedial constructive trust is to be recognised in English law, it must be triggered by a cause of action. What might that cause of action be? It could be equitable wrongdoing but the constructive trust that is exceptionally recognised where there is a breach of fiduciary duty is institutional in form, arising by operation of law rather than judicial discretion.[36] Similarly, unconscionable retention of property triggers an institutional, rather than a remedial, constructive trust. The remedial constructive trust might be considered to be an appropriate response to the defendant's unjust enrichment but the fact that the defendant has been unjustly enriched at the claimant's expense is not a sufficient reason to recognise an equitable proprietary interest; the claimant should instead be confined to a personal claim against the defendant. A remedy without a cause of action is meaningless and for that reason, as well as the inherent uncertainty of this unbridled judicial discretion, the remedial constructive trust should not be recognised in English law.

This last point reflects the Latin maxim *ubi remedium ibi ius* – wherever there is a remedy, there is a right. This rule is almost invariably applied.[37] But caution should be exercised about the related maxim *ubi ius ibi remedium* – wherever there is a right, there is a remedy. This is not always true. For example,

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35 Lord Neuberger, 'The remedial constructive trust – fact or fiction', delivered on 10 August 2014 to the Banking Services and Finance Law Association Conference, New Zealand: https://www.supremecourt.uk/docs/speech-140810.pdf.

36 See e.g. *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45; [2015] AC 250.

37 Cf *Cartier International AG v British Sky Broadcasting Ltd* [2018] UKSC 28; [2018] 1 W.L.R. 3259 where an injunction was granted even though not in support of substantive proceedings; see further P. Davies, 'Costs of Blocking Injunctions' [2017] IPQ 330.

a contract may be unenforceable, or a debt time-barred, but the claimant still has a right to be paid even if they cannot invoke the help of the court to assert it.

A further example of the dangers of focusing upon remedies as distinct from the underlying right may be found through analysing the recent decision of the Supreme Court in *Morris-Garner v One Step (Support) Ltd.*[38] In that case, the Supreme Court had to grapple with the remedies available for breach of contract and breach of confidence. Karen Morris-Garner set up and ran her own business, One Step At A Time, which provided support for young people leaving care. Her partner, Andrea Morris-Garner, later joined the business as its Operations and Area Manager. In 2002, the business was sold to One Step Support Ltd ('One Step'), which was owned 50% by Karen Morris-Garner and 50% by Charmaine Costelloe. The working relationship between the parties soon broke down, and in 2006 the Morris-Garners incorporated Positive Living Ltd, without anyone else at One Step being aware of this. Later that year, Mrs Costelloe purchased Karen Morris-Garner's shares in One Step for £3.15 million.

As part of the sale agreement, the Morris-Garners agreed, for a period of 36 months, not to engage in any business activity which would be in material competition with One Step, or to approach any clients of One Step. Karen Morris-Garner was also subject to provisions regarding the use of confidential information. However, in 2007 Positive Living began to offer similar services to One Step. Positive Living was very successful, and in 2010 the Morris-Garners sold their shares in the company for nearly £13 million. One Step, on the other hand, had experienced a significant downturn, and ultimately issued proceedings against the Morris-Garners. Both Phillips J at first instance[39] and the Court of Appeal[40] held that the restrictive covenants were not an unreasonable restraint of trade, and that Positive Living was in material competition with One Step. Moreover, the Morris-Garners were found to have breached the non-solicitation covenants, and Karen Morris-Garner to have breached her obligations of confidence. The sole issue for the Supreme Court was whether negotiating damages were available. Phillips J and the Court of Appeal had decided that they were. The Supreme Court disagreed.

The Supreme Court was clear that negotiating damages are compensatory. This settles the debate – as a matter of authority, at least – regarding the nature of such damages. Importantly for present purposes, the Supreme Court rejected

38 [2018] UKSC 20; [2018] 2 WLR 1353. For further discussion see P. Davies, 'One step backwards: restricting negotiating damages for breach of contract' [2018] LMCLQ 433; A. Burrows, 'One Step Forward?' (2018) 134 LQR 515.

39 [2014] EWHC 2213 (QB); [2015] IRLR 215.

40 [2016] EWCA Civ 180; [2017] QB 1.

that idea that such damages are restitutionary in nature.[41] Before *One Step* it was often suggested that there was a coherent subject of 'restitution for wrongs', and such damages could be awarded regardless of the nature of the wrong.[42] Admittedly that view looked increasingly suspect: only one appellate decision had awarded a distinctly gain-based remedy for breach of contract, and that was very much an outlier on extreme facts involving the breach of contract by a traitor,[43] whilst in tort law restitutionary damages have been limited to 'proprietary torts'.[44] *One Step* confirms that it is a mistake to start by thinking that restitution is a remedy that can be awarded as a response to wrongdoing; instead, it is crucial to start by considering the nature of the wrong.

In *One Step*, the key wrong was breach of contract.[45] The essence of contract law is to protect the parties' expectation interests, not to disgorge gain, and thus gain-based remedies were not awarded by the Supreme Court.

Commenting upon the decision in *One Step*, Day has perceptively remarked that:[46]

> Remedies should not be uniformly available across the law of obligations; their availability should reflect the nature of the cause of action. This is because a cause of action is the juridical recognition of an injustice.[47] Different causes of action are concerned with different injustices. As a remedy should undo the particular injustice recognised by the cause of action, it follows that different remedies should be available for different causes of action across private law. Put shortly, the premise should be one of coherence between causes of actions and their remedies, rather than of remedial uniformity across different causes of action.[48]

This is important, since it highlights that coherence may be found not across remedies, but between causes of action and remedies.

All the above might suggest that remedies should not be understood to be a stand-alone research area. Faced with such a stark proposition, Stephen Smith concluded that the law of remedies needs to be re-thought, and argues that

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41 Cf *Marathon Asset Management LLP v Seddon* [2017] EWHC 300 (Comm) (Leggatt J).

42 See e.g. J. Edelman, *Gain-Based Damages*, Hart Publishing, Oxford 2002.

43 *Attorney-General v Blake* [2001] 1 AC 268.

44 *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2008] EWCA Civ 1086; [2009] Ch 390; moreover, 'proprietary' has been narrowly defined: *Forsyth-Grant v Allen* [2008] EWCA Civ 505; [2008] 2 EGLR 16.

45 It is unclear why the equitable wrong of breach of confidence did not lead to negotiating damages: see further P. Davies, 'One step backwards: restricting negotiating damages for breach of contract' [2018] LMCLQ 433, 439–440.

46 W. Day, 'Restitution for wrongs: one step forward, two steps back?' [2018] RLR 60, 61.

47 Cf *Letang v Cooper* [1965] 1 QB 232, 242–243 (Diplock LJ).

48 For the avoidance of doubt, it is not denied that there is then a degree of uniformity of principle when it comes to the quantification of, for example, compensation in tort and contract or, for another example, restitution for wrongs and for unjust enrichment: see W. Day, 'An Application of *Wrotham Park* Damages' (2015) 131 LQR 218, 220–222.

remedies are exclusively about court rulings. This neatly explains why the law of remedies should be considered to be a distinct subject. But, as noted above, it is not clear how well this fits the positive law.[49]

In any event, it is suggested that it is not a waste of time to write books on remedies or to teach courses on the subject. Legal realists might argue that the only things worth studying are what the courts do in practice, and that remedies is therefore the principal topic of interest. Yet one does not have to be a legal realist to see the practical importance of remedies. When advising parties to a claim, their key interest is in the likely remedies, and scholars should be interested in this too.[50] So should students. There is, typically, insufficient time in undergraduate courses on contract, tort and trusts to deal with remedies in more than a relatively superficial manner; as a result, specialist options on remedies have developed.

Moreover, it is useful to consider aspects of remedies as they operate across private law. How loss is assessed, and how gains are quantified, should be similar regardless of the nature of the primary wrong. Looking at remedies as a stand-alone subject allows a greater range of cases to be introduced when considering how monetary remedies are quantified. For example, when considering the potential availability of an account of profits at common law or for breach of contract, it is useful to look across to the well-established jurisprudence on remedies for breach of fiduciary duty.

Treating remedies as a subject can be especially useful when considering concurrent liability.[51] The recent decision of the Court of Appeal in *Wellesley Partners LLP v Withers LLP* is instructive.[52] Wellesley Partners LLP ('Wellesley') claimed damages against its solicitors, Withers, for negligence in the drafting of a partnership agreement. Wellesley was a business specialising in head hunting in the area of investment banking. In order to expand, Wellesley entered into an agreement with a new investor, and consequently required a new partnership agreement to be drawn up. Unfortunately, Withers had negligently drafted the agreement so that an option for the investor to withdraw half its capital contribution could be exercised *within* the first 41 months of the agreement, rather than *after* 42 months, which is what had been intended. The courts found that this was a breach of Withers' duty of care. Wellesley sought to rely upon the more advantageous rules of remoteness in tort law.

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49 See above.

50 Sir G. Leggatt has recently observed, extra-judicially, that 'the common law is a collaborative enterprise and we [judges] need all the help we can get': G. Leggatt, 'Negotiation in good faith: adapting to changing circumstances in contracts and English contract law' [2019] JBL 104, 121.

51 See generally P. Davies, 'Concurrent liability: a spluttering revolution' in S. Worthington, A. Robertson and G. Virgo (eds.), *Revolution and Evolution in Private Law*, Hart Publishing, Oxford 2018. See too A. Taylor, 'Concurrent Duties' (2019) 82 MLR 17.

52 [2015] EWCA Civ 1146; [2016] Ch 529.

A major reason why the tortious rules are generally preferred by claimants is that the type of loss only has to be foreseeable at the time of the tort,[53] rather than at the time at which the contract was concluded.[54] It appears to have been accepted that the 'reasonable contemplation' test in contract[55] is more restrictive than the 'reasonable foreseeability'[56] test in tort.[57] At first instance, Nugee J felt constrained by the weight of previous authority to apply the tortious rules, since the decision of the House of Lords in *Henderson v Merrett*[58] afforded the claimant freedom to choose how to frame its claim. However, the judge did say:[59]

> It seems odd, and to my mind distinctly unsatisfactory, that the law should give two different answers to the question "for what losses is a solicitor liable if he fails to take due care in carrying out a client's instructions?" depending on how the claim is framed. A rational system of law would only give one answer to that question.

The Court of Appeal unanimously agreed with the trial judge's concerns, and went on to hold that the contractual rules of remoteness should in fact apply. Their Lordships insisted that although *Henderson v Merrett* meant that the claim could be run in both contract and tort, that did not determine what rules of remoteness should apply to the tortious claim. As Floyd LJ said:[60]

> In a case such as the present (although not in all cases) the responsibility is assumed under a contract. It would be anomalous, to say the least, if the party pursuing the remedy in tort in these circumstances were able to assert that the other party has assumed a responsibility for a wider range of damage than he would be taken to have assumed under the contract.
>
> …
>
> Nevertheless, I am persuaded that where, as in the present case, contractual and tortious duties to take care in carrying out instructions exist side by side, the test for recoverability of damage for economic loss should be the same, and should be the contractual one. The basis for the formulation of the remoteness test adopted in contract is that the parties have the opportunity to draw special circumstances to

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53 *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co (The Wagon Mound)* [1961] AC 388.

54 *Hadley v Baxendale* (1854) 9 Exch 341.

55 Ibid.

56 *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co (The Wagon Mound)* [1961] AC 388.

57 E.g. [2015] EWCA Civ 1146, [2016] Ch 529 [74]. Ultimately, though, the Court of Appeal (disagreeing with the trial judge) concluded that the loss was not too remote in contract law anyway, so the point was moot.

58 [1995] 2 AC 145.

59 [2014] EWHC 556 (Ch); [2014] PNLR 22, [212].

60 [2015] EWCA Civ 1146; [2016] Ch 529, [68], [80]. See also, Roth J, [157].

> each other's attention at the time of formation of the contract. Whether or not one calls it an implied term of the contract, there exists the opportunity for consensus between the parties, as to the type of damage (both in terms of its likelihood and type) for which it will be able to hold the other responsible. The parties are assumed to be contracting on the basis that liability will be confined to damage of the kind which is in their reasonable contemplation. It makes no sense at all for the existence of the concurrent duty in tort to upset this consensus, particularly given that the tortious duty arises out of the same assumption of responsibility as exists under the contract.

Roth J explicitly agreed that 'the rationale for maintaining a broader principle of remoteness of damage for liability in tort than in contract … does not apply to a case of parallel liability, where the duty of care in tort rests on an assumption of responsibility arising from the contract'.[61] Longmore LJ emphasised that in these sort of cases '[i]t cannot, moreover, be right that a claimant can opt to recover a contractual measure of damages but then opt to apply the tortious rules of remoteness; measure of damage and remoteness of damage must be assessed by reference to one system or the other, not by a sort of "pick and mix"'.[62] Rules relating to the measure of damages and remoteness of damages should be consistent with one another.[63]

The decision in *Wellesley* is welcome. There is no reason to depart from the contractual rules when the parties are not strangers but able to make one another aware of special risks at the time of entering into their relationship. After all, even if the claim sounds in tort alone then a party might still add a disclaimer and thereby avoid liability for known risks.[64] The careful reasoning in *Wellesley* is convincing.

Wellesley highlights that focusing on the available remedies can be helpful, and can cast greater light on the nature of the primary rights at issue. This is important. However, whilst rules relating to the measure of damages should be consistent with one another, it is important to note that a term such as 'compensation' can be used in different ways. This has been highlighted in a string of cases concerning breach of trust in conveyancing transactions. When things go wrong in property transactions, solicitors tend to make obvious and attractive defendants. They are insured and can provide substantial monetary redress. Moreover, they may well have held deposits or mortgage monies on trust. This opens up the possibility of claims for breach of trust.

'The basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust instrument, if any, and the

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61 Ibid. [151].
62 Ibid. [186].
63 Ibid. [187].
64 This was the case in *Hedley Byrne* itself: [1964] AC 465.

general law'.[65] The traditional means used to ensure the proper administration of the trust was for the beneficiary to take an account. Upon discovering a breach of trust, a beneficiary might falsify or surcharge the account. If the trustee had failed to exercise due care and skill leading to the fund's not being worth as much as would have been achieved by a reasonably prudent trustee, the account could be surcharged.[66] If the trustee misapplied trust monies in breach of trust, then the beneficiary was entitled to falsify that disbursement.[67] It is important that the two be distinguished, and to understand that the term 'breach of trust' takes in breaches of several different types of trustee duty, including the duty to comply with the terms of the trust instrument (breached when a trustee acts in an unauthorised way) and the duty of care (breached when a trust acts negligently). These are different duties from one another, and from the fiduciary duty that can be owed by trustees and other people. There is no reason to think that the same rules should necessarily govern the assessment of compensation payable for breaching them.

However, the courts appear to have failed to appreciate these differences. The most recent Supreme Court case on the matter is in *AIB Group (UK) Plc v Mark Redler & Co.*[68] Mark Redler & Co ('Redler') was a firm of solicitors which was retained to act for the Sondhi family and AIB, a Bank, on the re-mortgage of the Sondhis' family home. AIB advanced £3.3 million to Redler for this purpose. The mortgage monies were only to be released in exchange for a fully enforceable first legal charge over the property, but in breach of trust Redler advanced the monies without fully redeeming a first legal charge over the property already held by Barclays. Barclays therefore retained a first legal charge over the property of around £300,000. The Supreme Court refused to order that Redler reconstitute the trust fund to the tune of £3.3 million. AIB could only recover the loss it had suffered as a result of the breach of trust: £300,000.

The case has received a decidedly mixed reaction.[69] But it appears that the Supreme Court was focused on what it understood to be a universal remedy

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65 *Target Holdings Ltd v Redferns* [1996] AC 421, 434; see too *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58; [2015] AC 1503 [64] (Lord Toulson).

66 *Bristol & West Building Society v Mothew* [1998] Ch 1, 17; *Fry v Fry* (1859) 27 Beav 144; *Nestlé v National Westminster Bank plc* [1993] 1 WLR 1260; *Re Mulligan* [1998] 1 NZLR 481.

67 *Knott v Cottee* (1852) 16 Beav 77; *Re Massingberd's Settlement* (1890) 63 LT 296; *In re Dawson (dec'd)* [1966] NSWR 211.

68 *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58; [2015] AC 1503 [57].

69 See e.g. P. Davies, 'Compensatory Remedies for Breach of Trust' (2016) 2 *Canadian Journal of Comparative and Contemporary Law* 65; N.A. Tiverios and C. McKay, 'Orthodoxy Lost: The (Ir)relevance of Causation in Quantifying Breach of Trust Claims' (2016) 90 *Australian Law Jounral* 233; D. Wright, 'Another Wrong Step: Equitable Compensation Following a Breach of Trust' (2015) 21 *T & T* 825; M. Conaglen, 'Equitable Compensation for Breach of Trust: Off *Target*' (2016) 40 *Melbourne University Law Review* 125; J. Edelman, 'An English Misturning with Equitable Compensation' in S. Degeling and J. Varuhas (eds.), *Equitable Compensation and Disgorgement of Profits*, Hart Publishing, Oxford 2017; L. Ho, 'Causation in the Restoration of a Misapplied Trust Fund: Fundamental Norm or Red Herring?'

of compensation, without clearly distinguishing between the strict duty not to misapply trust funds and the duty to take reasonable care. The two different duties have different remedies: hence the use of language such as 'falsification' as opposed to 'surcharge', or 'substitutive damages' as opposed to 'reparative compensation'. Surprisingly, Lord Toulson concluded that 'in a practical sense both are reparative compensation'.[70] This represents a marked shift in the law, and one which emphasises the primacy of (reparative) compensation above all else. Perhaps it should be limited to the commercial context where there is a concurrent cause of action in contract, which suggests that the contractual claims 'trump' the claim for breach of trust. But it is not clear why this should be so.

For instance, imagine that, in breach of trust, a trustee purchased a second-hand car rather than a brand new car. There was a clear logic behind equity's traditional recognition of the beneficiary's ability to choose to falsify the disbursement made and treat the car as having been purchased with the trustee's own money: on that approach, the unwanted second-hand car was the trustee's problem to deal with. The hassle of selling it to realise its value, for example, lay with the wrongdoing trustee rather than the innocent beneficiary. This is admittedly different from the approach at common law, but, as Lord Millett explained,[71] this might be justified by the higher standards demanded by equity. A trustee holds particular power over a beneficiary and a beneficiary's assets, and should be held up to a higher standard. It is important that a trustee complies with the terms of the trust instrument. This provided a sound justification for the traditional, strict approach in equity. The approach favoured by the Supreme Court in *AIB Group (UK) Plc v Mark Redler & Co* alters the important link between the duty breached and remedy awarded.

6. CONCLUSION

The law on remedies does not 'stand-alone' in the sense of being isolated from primary rights or causes of action. Rather, a clear analysis of remedies helps

in S. Degeling and J.N.E. Varuhas (eds.), *Equitable Compensation and Disgorgement of Profits*, Hart Publishing, Oxford, 2017; J. Penner, 'Falsifying the Trust Account and Compensatory Equitable Compensation' in S. Degeling and J. Varuhas (eds.), *Equitable Compensation and Disgorgement of Profits*, Hart Publishing, Oxford 2017; P.G. Turner, 'Want of Causation as a Defence to Liability for Misapplication of Trust Assets' in P. Davies, S. Douglas and J. Goudkamp (eds.), *Defences in Equity*, Hart Publishing, Oxford, 2018. See too *Main v Giambrone and Law (a firm)* [2017] EWCA Civ 1193, discussed in P. Davies, 'Equitable compensation and the SAAMCO principle' (2018) 134 LQR 165.

70 *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58; [2015] AC 1503 [54].

71 P. Millett, 'Equity's Place in the Law of Commerce' (1998) 114 LQR 214.

to illuminate various matters concerning the primary rights at issue. This is useful in itself. But it is also helpful to analyse 'remedies' as a subject since doing so can highlight common principles underpinning the award of various remedies, most notably damages. This is an area of great practical importance and academic interest, and deserves to be a subject to which serious attention is given.