

THE CASE FOR RESTITUTIONARY DAMAGES OVER PUNITIVE DAMAGES: TEACHING THE WRONGDOER THAT TORT DOES NOT PAY

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Canadian common law courts are increasingly relying on punitive damages in a diverse range of areas, but particularly, trespass to property, to ensure that a wrongdoer does not profit from committing a wrong. The awarding of punitive damages is both familiar to courts as well as being viewed as an accepted extension of compensatory damages. In this article, the author argues for greater attention being placed on restitutionary damages as a more accurate way of ensuring that a wrongdoer does not profit from committing a wrong. Further, adoption of restitutionary principles brings a number of procedural advantages, all of which are discussed.

Les cours canadiennes de droit commun comptent de plus en plus sur les dommages-intérêts punitifs dans divers domaines, mais en particulier, les violations de propriété, pour s'assurer que l'auteur d'une faute ne profite pas de son geste. Les tribunaux sont habitués à l'attribution de dommages-intérêts punitifs; ceux-ci sont vus comme une extension acceptée des dommages-intérêts compensatoires. Dans cet article, l'auteur plaide pour qu'une plus grande attention soit portée au recours pour enrichissement sans cause, un moyen plus précis pour s'assurer que l'auteur d'une faute ne profite pas de son geste. De plus, l'adoption des principes d'enrichissement sans cause comporte plusieurs avantages au plan de la procédure.

Recently, several Canadian courts, particularly in British Columbia, have awarded punitive damages in an attempt to disgorge profits made from the commission of a tort. In this way, they have attempted to signal to the tortfeasor that tort does not pay.¹ By and large, these cases have arisen in the area of trespass to property. Although the awarding of punitive damages is appropriate, it is not the only pecuniary remedy available in these circumstances. The restitutionary remedy of waiver of tort is also available, and yet, like other restitutionary remedies, is seldom used in this context in Canada.

With respect to the tort of conspiracy, the Ontario Court of Appeal has approved the use of punitive damages to eliminate the possibility of a defendant appearing to benefit from a tortious breach. But in this example it appears that the punitive damage award was excessive and did more than eliminate the wrongdoer's profit.

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I hope to demonstrate that the restitutionary remedy has much to offer in lieu of, or in addition to, an award of punitive damages. In fact, the restitutionary remedy may allow more accurate quantification of punitive damages and thereby both clarify and enhance the retributive and deterrent roles of that award.

In Part A, I will describe some circumstances in which punitive damages have been awarded in situations where, arguably, a restitutionary remedy would have lain. I will focus on those cases in which awards of punitive damages have been totally or partially justified to prevent an unjust enrichment. In Part B, I will articulate the characteristics of a restitutionary response and how restitutionary damages are quantified. In Part C, I will illustrate the restitutionary response to the types of cases identified in part A and how that remedy would more effectively attain the avowed goal of punitive damages.

Part A

Canadian courts, like their English counterparts, have been quick to assert the principle that a person should not profit from the commission of a wrong.² Yet when it comes to the implementation of such a principle, through the vehicle of a damages award, there is a strange reticence to follow through. Generally, compensatory damages are not designed to disgorge unlawful gains, although that may be as an unintended result. Rather, they are intended to compensate the plaintiff for injury to his or her person, property, or economic interest. Courts have been quick to eschew the suggestion that there is a relationship between a plaintiff's compensation and the economic advantage gained by a defendant through breach of contract or commission of a tort.³ When courts have thought it appropriate to attack the unlawful gains made by a tortfeasor or wrongdoer, they have resorted to punitive damages as the instrument of choice. I maintain that this is a particularly blunt instrument to effect such a policy.

² *Starkman v. Delhi Court Ltd.* (1961), 28 D.L.R. (2d) 269 (Ont. C.A.) at 274 *per* McGillivray J.A.. See *Wasson v. California Standard Cop.* (1964), 47 D.L.R. (2d) 71 (Alta C.A.); *Fletcher v. Norcen Energy Resources Ltd.* (1985), 41 Alta L.R. 213 (Q.B.); *Pretu v. Donald Tidey Co. Ltd.*, [1966] 1 O.R. 191 (H.C.) (Upheld on appeal. Leave to appeal to S.C.C. refused, see page 197); *Mayo v. Hefferton* (1972), 3 Nfld & P.E.I.R. 236 (Nfld. S.C.); *Townsvlew Properties Ltd. v. Sun Construction & Equipment Co. Ltd.* (1973), 42 D.L.R. (3d) 353 (Ont. H.C.); *Horseshoe Bay Retirement Society v. S.I.F. Development Corp.* (1990), 66 D.L.R. (4th) 42 (B.C.S.C.); *Austin v. Rescon Construction* (1984) Ltd. (1989), 57 D.L.R. (4th) 591 (B.C.C.A.); *Epstein v. Cressey Development Corp.* (1990), 48 B.C.L.R. (2d) 311 (B.C.S.C.).

³ Karl Dore and Edward Veitch have recently explored this issue in the context of determining when to award cost of restoration or diminution in value. Their analysis highlights the need for greater scrutiny of the role of undertakings so as to prevent compensatory windfalls by a plaintiff who no longer values the contracted promise or restoration. See their article "Guarding Against Over-Compensation When Measuring Damages by the Cost of Repair, Replacement or Performance: The Role of Undertakings" (1994), 23 Can. Bus. L.J. 432; and see *Tito v. Waddell*, [1977] Ch. 106 at 332.

An award of punitive damages may be justified principally for reasons of retribution and deterrence.⁴ Retribution is backward looking and seeks to express society's condemnation of the defendant's actions which have departed from acceptable norms. For retribution to be effective, punitive damages should be awarded only where the punishable conduct is deliberate and egregious. The damages awarded should approximate the gravity of the act. These requirements have been endorsed by the Supreme Court of Canada.⁵

Deterrence, both specific and general, is forward looking. Specific deterrence is concerned only with deterring the individual defendant from any recidivist tendencies. General deterrence warns other would be tortfeasors that comparable conduct carries the risk of punishment. Deterrence requires the assessment of punitive damages reflect the probability of successful prosecution. Where that probability is low, that is, it is unlikely that all individuals guilty of the proscribed behaviour will be prosecuted, an enlarged award of punitive damages is justified. Where the probability is high, punitive damages may not be warranted and compensatory damages may carry sufficient general deterrence.

Canadian courts appear to support retribution as the principal justification for an award of punitive damages.⁶ The insistence that the plaintiff must be the victim of the punishable behaviour focuses the damages quantification on the gravity of the plaintiff's injury as exacerbated by the defendant's behaviour. This can be contrasted with large punitive damage awards in the United States, favouring a deterrence rationale, in which an individual plaintiff's suit becomes the vehicle to express condemnation against the defendant's actions which may have placed the interests of others at risk.⁷

On either retribution or deterrence grounds, a minimalist position supports the disgorgement of any profits made by the defendant through infringing the plaintiff's interests. On deterrence grounds, quantifying punitive damages at anything less than the profits gained by the defendant would reward the infringement and thus fall below even the highest probability of being prosecuted. Simply put, punitive damages assessed at less than the value of the profit made through commission of a wrong will not deter a defendant from further similar

⁴ See B. Feldthusen "Recent Developments in the Canadian Law of Punitive Damages" (1990) 16 Can. J. Bus. L. 241, and G. Schwartz, "Deterrence and Punishment in the Common Law of Punitive Damages: A Comment" (1982) 56 S. Cal. L. Rev. 133.

⁵ *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085 *per* McIntyre J. at 1108 on the first point, and Wilson J. (dissenting) at 1131 on both points.

⁶ This is the apparent conclusion of the Ontario Law Reform Commission in their *Report on Exemplary Damages* (Toronto: Ontario Law Reform Commission, 1991) c. VI *et seq.* But see *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 where in the judgments of La Forest at 268 and McLachlin J. at 300, in the context of a breach of a 'power dependency relationship', or, one of 'fiducial obligation', between a doctor accused of sexual assault on a women patient, tended towards supporting punitive damages on general deterrence ground.

⁷ See R. Ausness, "Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation" (1985-86) 74 Ky. L.J. 1.

wrongful conduct. On retributive grounds, our sense of moral outrage is not assuaged if the defendant is able to pay the punishment from his or her ill gotten gains and still profit from the wrong.

The need to effectively make the defendant disgorge any profits derived through the commission of the wrong opens up a third justification for an award of punitive damages — the prevention of unjust enrichment. However, Canadian courts have tended to avoid discussion of quantification of the unjust enrichment component when determining the level of punitive damages as this basis. In doing so, they have confused the legitimate goals and functions of the respective heads of damages. They are not alone. The English courts are equally unclear even after significant debate on the appropriate role of punitive damages.

Canadian courts have declined to restrict punitive damages after the English model⁸ but the House of Lords' treatment of this area remains instructive. The underlying premise of *Rookes v. Barnard*⁹ is that the only legitimate function for civil damages is compensation. Thus punishment and deterrence beyond the pursuit of compensation is anomalous. Lord Devlin's second category, of three offered, encompasses "those cases in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff".¹⁰ This is advanced on the justificatory basis of existing anomalous cases and a need for deterrence "whenever it is necessary to teach the wrongdoer that tort does not pay". However, to deter effectively, a minimal position is to ensure the disgorgement of the defendant's profits. If this is to be accomplished then the additional restrictions introduced by *Rookes* on the award of punitive damages — that such awards should be moderate and that the means of the defendant should be taken into account - are inconsistent with the attainment of that goal.¹¹

Lord Diplock in *Broome v. Cassell*¹² has given the strongest recognition to restitutionary principles to ensure deterrence which he sees as the justification for Lord Devlin's formulation. As Lord Diplock states, to confine the damages recoverable to the defendant's actual gains is to leave the defendant:

... contemplating an unlawful act with the certainty that he had nothing to lose to balance against the chance that the plaintiff might never sue him or, if he did, might fail in the hazards of litigation. It is only if there is a prospect that the damages may exceed the defendant's gain that the social purpose of this category is achieved — to teach the wrong-doer that tort does not pay.¹³

⁸ See *Vorsis v. Insurance Corporation of British Columbia*, *supra* footnote 5.

⁹ [1964] A.C. 1129.

¹⁰ *Ibid.* at 1226.

¹¹ See D. Harris, *Remedies in Contract and Tort* (London: Weidenfred and Nicholson, 1988) at 231; and *per* Lord Wilberforce in *Broome v. Cassell*, [1972] A.C. 1027 at 1119.

¹² *Ibid.*

¹³ *Ibid.* at 1130. See also concurring *dicta* by Lord Kilbrandon at 1134, Lord Wilberforce at 1114, and Lord Hailsham at 1079.

While Lord Diplock's admonition seeks to clarify the deterrent function, it is ironic that the sole point of agreement in *Broome v. Cassell*¹⁴ was that, employing Lord Devlin's second category, they would have fallen below the jury award at trial. Yet, in coming to this conclusion, none of the Law Lords based their arguments on the defendant's profits.¹⁵ Thus, while embracing deterrence as the rationale for Lord Devlin's second category, English courts have spurned the most effective way of determining the minimum level of damages to ensure that result, namely, reliance upon restitutionary principles.

Canadian courts exhibit a similar ambivalence. Canadian cases falling within Lord Devlin's second category can be divided into six categories: trespass to land, contractual breach, intellectual property violation, statutory violation, defamation, and conspiracy.¹⁶ In this context, the phrase 'restitutionary damages' refers either to profits made, or expenditures saved by a defendant, and then only in a generic sense. Whether these damages could actually be recovered pursuant to a restitutionary action will be discussed in Part B.

Trespass to Land

Trespass to land has generated the largest number of cases in which punitive damages have been awarded to disgorge the defendant's profit. Several recent decisions of the British Columbia courts illustrate the issues involved.

In *Epstein v. Cressey Development Corp.*,¹⁷ the defendant tried unsuccessfully to negotiate a deal with the plaintiff to allow it to temporarily encroach on the latter's property to build the foundations for an underground parking lot and high rise development. The plaintiff refused permission. The defendant went ahead with a revised construction plan which still encroached on the plaintiff's land. The plaintiff sued for trespass. The trial judge awarded compensatory damages of \$25,000 based on the diminution in value of the plaintiff's land along with punitive damages assessed at \$45,000. The Court of Appeal dismissed the defendant's appeal, rejecting the defendant's argument that the punitive damages were not in accordance with established principles.

While the court gave little evidence on the quantification of punitive damages, the judgment does indicate that, but for the encroachment, the defendant would have had to redesign the development at considerable cost although the amount was not specified. There is reference to the fact that any future development of the plaintiff's land would require foundations to the same depth as the defendant's foundations, costing between \$35,000 and \$50,000. In

¹⁴ *Ibid.*

¹⁵ *Ibid.* per Lord Hailsham at 1095, Lord Reid at 1091, Lord Morris at 1096, Lord Dilhorne at 1106, Lord Wilberforce at 1118, Lord Diplock at 1122, and Lord Kilbrandon at 1135.

¹⁶ A possible seventh category would focus upon equitable wrongdoing as in the callous breach of fiducial obligations. Because these actions lie within equitable jurisdiction without a competing common law remedy they are not discussed in this paper. See in particular, the judgment of McLachlin J. in *Norberg v. Wynrib*, *supra* footnote 6.

¹⁷ *Supra* footnote 2.

such circumstance, one cannot determine whether the defendant profited but one suspects that it did. The cost to revise development plans necessitating a set back of twenty feet from the plaintiff's property would in all likelihood exceed \$70,000 — compensatory and punitive damages combined. Despite Lambert J.A.'s. assertion that if such a damage combination does not "deprive the defendant of all the benefit from the wrongful act then all the damages would be a cost of doing business in carrying out the wrongful act", this may be the effect of the decision.

*Austin v. Rescon Construction Ltd.*¹⁸ and *Epstein v. Cressey Development*¹⁹ reveal similar fact patterns. In *Austin*, the trial court assessed general damages at \$500 and punitive damages at \$7,500. Evidence indicated that by committing the trespass the defendant had saved about \$30,000 by avoiding a shoring system in aid of excavating foundations for its development. Prowse J. rejected calculating punitive damages by the cost savings to the defendant on the questionable basis that such an approach would "encourage the calling of experts to determine the very issue which is in the sole discretion of the courts".²⁰ The Court of Appeal raised the award to \$30,000 arguing that only such an award would eliminate the defendant's profit. Obviously, such an assessment can be justified on restitutionary grounds however that assessment contains no element of punishment or deterrence above that contained in a normal restitutionary award.

In *City of Prince Rupert v. Pederson*,²¹ the defendant deliberately destroyed trees on the plaintiff's parkland to gain a view of the ocean for a house he was building. The defendant had acted callously despite repeated warnings as to his wilful trespass. The trial Judge gave \$63,365 as the costs of restoration, \$10,000 as loss of public amenity, and \$58,500 as punitive damages. The last was calculated on the basis of \$14,000 representing the increase in value of the defendant's property in having access to the view, and \$500 per tree, eighty-nine in all, cut down by the defendant. On restitutionary principles, the punitive damages appear excessive but the evidence suggested that the accretion in value to the defendant's property was under-valued. The defendant, in his own submission, had suggested punitive damages of \$28,000.

There is one reported trespass action where the punitive award has been clearly in excess of the defendant's profits and where the court awarded damages to make the defendant disgorge profits. In *Horseshoe Bay Retirement Society v. S.I.F. Development Corp.*,²² the defendant developer had cut down trees on the plaintiff's property solely to gain an ocean view. The enhancement was estimated to have raised the selling prices of the defendant's houses by 10%. The defendant's houses had been sold for \$685,000. The court assessed

¹⁸ *Supra* footnote 2.

¹⁹ *Supra* footnote 17.

²⁰ (1987), 18 B.C.L.R. (2d) 328 (S.C.) at 339.

²¹ (1992), 32 A.C.W.S. (3d) 330 (B.C.S.C.).

²² *Supra* footnote 2.

punitive damages at \$100,000 for the principal reason that to award anything less would preserve the defendant's profit.

In *City of North Vancouver v. Apex Tire Co.*,²³ the defendant had intentionally trespassed on the plaintiff municipality's land for many years to provide vehicular access to its business operations. On the issue of damages the plaintiff made two submissions: measure the damages based on the market value of the land, and add punitive damages to ensure that the defendant did not profit from his wrong; or, measure the benefit obtained by the defendant through his trespass. As Hood J. remarked:

The law of damages in this area has not always been clear. The question to be determined is what is the actual loss suffered by the plaintiff, but some courts seem to be more concerned with the benefits which the defendant has recovered as a result of his wrongful act than with the actual loss suffered by the plaintiff. It seems to me, but I need not decide, that the benefits to the defendants are only relevant in cases where punitive damages are recoverable, or perhaps where the case falls squarely within the still-developing principle against unjust enrichment. I do not need to embark further into this vast, and in some areas uncertain, field.

Hood J. clearly recognized the relationship between the two approaches suggested by the plaintiff. As he stated:

If the second approach, the profit (restitution) approach, is followed then the punitive damages can be fairly nominal, if the first approach (compensatory) is taken, then they must be substantial. The amount of punitive damages must reflect the approach taken.

But, he was also troubled by the implications which would follow if a restitutionary approach was adopted. Again:

A number of questions arise in relation to what I have called the second approach. For example, are the lease payments in fact profit or gain on the part of the defendants. If so, were they caused or created solely by the trespass. Do they reflect reasonable compensation for the use of the property and a loss suffered by the plaintiff. Setting aside the question of punitive damages for a moment, are these sums, or a portion of them, recoverable by the plaintiff, particularly where the value of the trespasser of the use of the property, the letting value, can be ascertained.

There are some legal questions as well: In law can the plaintiff recover the monies simply on the basis that a trespasser should not be entitled to recover or gain, or be better off, as a result of his wrongful act, or on some fictional basis that they reflect an actual loss suffered by the plaintiff; or do they fall within the principle against unjust enrichment.

Any hesitancy in reaching for restitution to disgorge profits for the trespass must be considered against the alternative. On what basis does the award of \$15,000 punitive damages have greater legitimacy? What rational connection does it have to the unknown profits of the defendant if the intent is to ensure that the tortfeasor does not benefit from it's wrong?

In other provinces, there are awards of punitive damages which are less than the profits made from the trespass. In *Townsville Properties Ltd. v. Sun*

²³ [1992] B.C.J. No. 1234, (B.C.S.C.) (QL).

Construction and Equipment Co. Ltd.,²⁴ punitive damages of \$5,500 were awarded where the calculated savings to the defendant were in the vicinity of \$7,000 - \$11,000. In *Fletcher v. Norcen Energy Resources Ltd.*,²⁵ punitive damages of \$15,000, together with compensatory damages of \$5,000 were awarded where the savings to the defendant were calculated to be in excess of \$100,000. In *Nantel v. Parisien*,²⁶ the plaintiff recovered \$35,000 punitive damages. The court noted that the savings made by the defendant through the preemptory termination of the plaintiff's lease, and subsequent trespass, must have been considerable given the magnitude of the bridging finance for the development, although there was no quantification of the defendant's gain.²⁷

In all of the cases above there were degrees of uncertainty on the measure of punitive damages even though the avowed aim was to disgorge the profits made by defendants.

Intellectual Property Violation

The separation of compensatory, restitutionary and punitive damages is a feature of copyright, trademark and patent infringement law.²⁸ Because the *Copyright Act* has undergone the most radical revisions, it is apposite to review this particular regime.

Under the *Copyright Act*, the plaintiff has a claim for compensatory damages for conversion, a restitutionary remedy in the form of an accounting of profits for infringement, and punitive damages. While the respective damages under each head are cumulative and not alternative, the court will seek to avoid overlap or double recovery.²⁹ The goal of the remedial provisions under

²⁴ (1975), 7 O.R. (2d) 666 (C.A.).

²⁵ *Supra* footnote 2.

²⁶ (1981), 18 C.C.L.T. 79 (Ont. H.C.).

²⁷ The defendant had apparently been guilty of the same conduct against another plaintiff who had been awarded \$16,000 exemplary damages. *Marcoe Realty Ltd. v. Parisien* (6 November 1980), (Ont. S.C.) [unreported], and noted by Cherniak and Morse, "Aggravated, Punitive, and Exemplary Damages in Canada" in *Law Society of Upper Canada Special Lectures - Torts in the 80's* (Toronto: Law Society of Upper Canada, 1983) 151.

See also *Starkman v. Delhi Court Ltd.*, *supra* footnote 2; *Wasson v. California Standard Co.*, *supra* footnote 2; *Pretu v. Donald Tidey Co. Ltd.*, *supra* footnote 2; and *Carr-Harris v. Schacter and Seaton*, [1956] O.R. 994 (S.C.), and *Patterson v. Municipal Contracting Ltd.* (1989), 98 N.S.R. (2d) 259 (N.S.T.D.). In all these cases the evidential record available in the case report does not allow one to assert categorically that the punitive damages for trespass was in fact less than the 'profit' to the defendant, although there is a strong indication in all of them that was in fact the case.

²⁸ See D. Cairns, *The Remedies for Trademark Infringement* (Toronto: Carswell, 1988) at 151. See D. Vaver, "Infringing Copyright in a Competitor's Advertising: 'At Large' Damages Can Be Large Damages" (1984-85) 1 I.P.J. 186; and C. Best, "Damages Against the Innocent Infringer in Passing Off and Trade Mark Infringement (1984-85) 1 I.P.J. 201.

²⁹ See J. Berryman, "Damages for Conversion Under the Copyright Act" (1987) 3 I.P.J. 10; G. Zimmerman, "Exemplary Damages and Copyright In Canada" (1980) 57 C.P.R. (2d) 65.

the *Copyright Act* is to ensure that the defendant will not receive any material advantage if successfully sued by the copyright holder. The nature of the conversion action in copyright can lead to a windfall to the plaintiff who, through a statutory legal fiction, is deemed owner of any material incorporating their copyright regardless of the labour or materials supplied by the infringer.

An example of the interplay of these heads of damage is provided by *Pro Arts, Inc. v. Campus Crafts Holdings Ltd.*³⁰ The defendant had infringed the plaintiff's copyright by counterfeiting a best selling poster. Labrosse J. assessed the plaintiff damages for the loss of its own sales of posters, forecast as 400,000, on the actual net profits made by the defendant on sales of 82,255 counterfeit posters along with \$35,000 punitive damages. The order for punitive damages was made both because the defendant had deliberately flouted an injunction preventing it from further distributing the poster and because anything less would be "tantamount to a licence fee for having sold the counterfeits". While the latter reason suggests that the punitive damages were awarded to minimize the material advantage to be gained from the wrong this was not, in fact, how they were calculated. All benefits associated with the infringement had been compensated through the assessment of compensatory damages.

The cumulative effect of damage heads in intellectual property violation is supported by the statutory regime. It is ironic that while the legislature has recognized the distinctive nature of the respective heads of damage assessment and how that assists in determining appropriate monetary punishment for violation the courts charged with the responsibility of articulating the common law have failed to make the same distinctions.

*Statutory Violations*³¹

An example of a statutory violation justifying punitive damages with a linkage to restitutionary aspects appears in *Canadian Ironworkers Union No. 1 v. International Association of Bridge Structural and Ornamental Ironworkers Union Local No. 97*.³² The plaintiff was awarded punitive damages against the defendant who, in violation of British Columbia's labour legislation, had undertaken a deliberate effort to destroy the plaintiff union. As a result of the defendant's activities the plaintiff had lost its complete membership and commensurate union dues. The court admitted that the punitive damages fell short of the "enormous financial gains by way of initiation fees and monthly

³⁰ (1980), 28 O.R. (2d) 422 (H.C.).

³¹ An example of a statutory scheme which resorts to restitutionary principles to quantify the extent of the fine an accused may be ordered to pay is provided in the *Ontario Environmental Protection Act*, R.S.O.C.E.19 s. 189. This section authorises a fine equal to the convicted party's benefit in addition to any other penalty.

³² (1972), 31 D.L.R. (3d) 750 (B.C.S.C.). The substantive cause of action in this case was based on a statutory provision which made the defendant civilly liable for any damage caused to another as a result from failing to observe the provisions of the *Trade Unions Act*. On the substantive cause of action see the decision of the British Columbia Court of Appeal reported at (1970), 13 D.L.R. (3d) 559, aff'd (1971), 21 D.L.R. (3d) 469 (S.C.C.).

dues paid" to the defendant by the ironworkers but the award was designed to send a signal to the trade union movement that membership drives had to be carried out in accordance with the law.

Defamation

Although *Broome v. Cassell*³³ provides a context in which Lord Devlin's second category, tort for profit, is illustrated, it will be recalled that at no time did the plaintiff quantify the profits made by the defendant through defaming the character of the plaintiff, Commander Broome. In Canada, there are no reported defamation cases in which the plaintiff has attempted to quantify the profits made by the defendant from the defamatory remarks. While one can describe circumstances which suggest that the defendant's motive was to profit from the defamation, Canadian courts have not identified that factor as a determinant in assessing punitive damages. That may be explained by the fact that defamation suits are one of the few remaining areas where a jury is normally used to determine both liability and damages in the absence of justification.

Contractual Breach

Prior to *Vorvis*,³⁴ wrongful dismissal actions supported most of the claims for punitive damages in contract. Following American jurisprudence it has been held that punitive damages are available for failure to pay out on a lawful obligation under an insurance contract.³⁵ The *Vorvis* decision has foreclosed punitive damages in the former cases and certainly restricted the possibility of awards in the latter.³⁶ The majority's opinion in *Vorvis*, that punitive damages can only be awarded in contract if there is an independent actionable wrong has limited the availability of punitive damages in contract. The minority's position would retain a place for expressing societal condemnation at particularly egregious conduct while breaching a contract. Thus, the distinguishing feature is the manner in which the contract is breached, rather than the act of breach, itself which justifies the award of punitive damages.

Conspiracy

The decision of the Ontario Court of Appeal in *Claiborne Industries Ltd. v. National Bank of Canada*³⁷ illustrates the difficulties in using punitive damages to disgorge supposedly wrongful gains. The case focused upon the fraudulent dealings of one Black who was a personal customer of the National

³³ *Supra* footnote 11.

³⁴ *Supra* footnote 5.

³⁵ See M. Lerner, "Bad Faith and Punitive Damages", (1986) 54 *Assurances* 255.

³⁶ The fact that a statutory obligation exists to pay first party benefits has been used to distinguish this type of claim from other contractual breaches. See *Jennett v. Federal Insurance Co.* (1976), 13 O.R. (2d) 617 (Ont. H.C.).

³⁷ (1989), 69 O.R. (2d) 65 (C.A.).

Bank. Black brought the business of Claiborne Industries, a public company he effectively controlled to the bank. Through a series of dealings, Black was able to siphon \$3.5 million from Claiborne into his own personal accounts. Claiborne's position changed from a positive credit to an indebtedness of \$1 million. As security for personal debts of Black, the National Bank held 169,000 Claiborne shares. To protect its position, the bank had loaned money to Black for further purchases by him so that he would get overall control of Claiborne. An additional 540,399 shares were acquired which increased the security of the debt to the National Bank to 710,199 shares or 56.6% of the shares issued. The auditors later discovered the improper transfers by Black. After Black was arrested, the National Bank enforced its security interest and took over the Claiborne shares. The National Bank then managed Claiborne together with a minority shareholder.

After investigations instigated by the minority shareholder, Claiborne commenced proceedings alleging conspiracy between Black and the National Bank to injure Claiborne. The Court of Appeal upheld a finding of conspiracy. Both Black and the National Bank were held liable to pay damages with interest albeit Black had no assets.

In quantifying the damages, the court was confronted by a dilemma. If the bank was required to pay damages to Claiborne, it would recover most of the damages as the principal shareholder. In this sense, the majority of the Court of Appeal viewed the bank as profiting from its own wrongs. For this reason, the majority wished to award punitive damages to deny any profit to the bank.

The court evaluated the 56% shareholding as able to secure 70% of the company's share value - that is, the bank was selling a majority interest.

Carthy J.A. said:

If the shares of the company are worth \$10 million without the judgment in this action then the 56% holding would sell for \$7 million. If the judgment adds \$4 million to the value of the company the 56% interest would sell for \$9.8 million (70% of \$14 million). The bank would therefore recover back \$2.8 million of the \$4 million judgment. Further, of the \$9.8 million sale price approximately \$2 million would be a premium for control.³⁸

The court sought to use punitive damages to ensure that the bank did not profit from its wrong. It was trying to prevent the bank from receiving back its own damage obligation as a consequence of the 40% holding in Claiborne. The court achieved this by adding a premium on to the damages awarded which equalled the profit the bank would have made from the damage award. Carthy J.A. commented:

To eliminate the potential for gain from the wrong it would be necessary to add a damage award of 100% of all other awards arising from the specific allegations in the claim. To explain, if the actual specific damage is \$1 and \$1 is added for punitive damages, the bank sells its 40% as part of the control block and recovers a 25%

³⁸ *Ibid.* at 96. Incidentally, the bank was required to sell the shares at the end of the proceeding to comply with the *Bank Act*.

premium (as the added value of the control that is 56% represents 70% of the share value) or 50% of the added value. Thus, the bank pays \$2 damages and recovers \$1 in added value on the sale. This puts the bank in the net position of paying the specific damages of \$1.³⁹

Because the court was uncertain as to the value of the control premium it adjusted the 100% to 70% of the total specific damages awarded. That amounted to \$4.8 million punitive damages, the highest award of its kind in Canada.

The court's quantification of the punitive damages to disgorge wrongful gains by the defendant can be criticised on two grounds. The supposed benefit to the bank was not made at the plaintiff's expense. The real losers were the other shareholders who sold their stock to Black when the appearance of the company was worse, because of Black's defalcations, than it really was. Presumably these shareholders may have a cause of action against the bank on the basis of insider-trading. The winners are the minority shareholders, beneficiaries of the punitive award while retaining their own shares enhanced by the compensatory award. Secondly, the evidence suggests that the bank did not acquire the shares in its own right for nothing. The bank had acquired the shares as security for indebtedness owed by Black. The security when realised apparently will not cover indebtedness. In fact, even after the acquisition of the shares by Black at the defendant's request, further acts by Black devalued the defendant's share value to their detriment. Thus the bank did not 'profit' from its 'wrong'.⁴⁰

In the cases above, the plaintiff proved that the defendant's wrong was malicious, outrageous, contemptuous, callous or high handed. It is this deliberate disregard of the plaintiff's rights which triggers punitive damages and either justifies retribution or demands deterrence. Thus punitive damages are defendant-centred. The plaintiff is often said to be the beneficiary of a 'windfall', receiving punitive damages which should go to the state. But, there is neither retribution nor deterrence where the defendant keeps the fruits of the wrong. Quantifying a restitutionary response which is plaintiff-centred, focusing upon what has unjustly been expropriated from the plaintiff, would ensure that defendants do not profit from their wrongdoing. It would also provide a sound basis for assessing punitive damages to effect punishment.⁴¹

³⁹ *Ibid.* at 98.

⁴⁰ In a partial dissent McKinlay J.A. observed that the bank did not profit from the conspiracy. *Ibid.* at 113. See B. Feldthusen, *supra* footnote 4 at 248.

⁴¹ See *Huff v. Price* (1990), 76 D.L.R. (4th) 138 at 154 (B.C.C.A.), leave to appeal to S.C.C. refused 56 B.C.L.R. (2d) xxxviii, where the B.C. Court of Appeal commented upon the need to distinguish between punishment and restitution.

Part B

A restitutionary response to the above cases requires identification of the elements of a restitutionary claim. The elements of an unjust enrichment claim are: one, receipt by the defendant of a benefit; two, a benefit at the plaintiff's expense; and three, circumstances where it would be unjust to allow the defendant to retain the benefit.⁴²

Receipt by the Defendant of a Benefit

The traditional approach in determining whether restitution provides a remedy against the unjustly enriched wrongdoer has been by reliance on the forms of action, and most notably that of "waiver of tort".⁴³ Although a misnomer,⁴⁴ waiver of tort is the principal remedy used to recover a wrongdoer's ill gotten gains. The plaintiff's damages are not restricted to actual losses but are measured by the enrichment of the defendant at the plaintiff's expense. Although potentially broad in ambit, an historical anachronism concerning the interpretation of benefit may impede the availability of this remedy. In *Phillips v. Homfray*,⁴⁵ Bowen L.J., delivering the opinion of the majority, indicated that before any action would lie, the plaintiff had the burden of showing that there had been a positive accretion to the defendant's actual property. A negative benefit, as when the defendant had saved expenditure by committing the wrong, could not support a restitutionary action.⁴⁶

⁴² See *B.P. Exploration Co. (Libya) Ltd. v. Hunt (No. 2)*, [1979] 1 W.L.R. 783 at 839 per Goff J. (Q.B.) rev'd. on appeal [1981] 1 W.L.R. 232 (C.A.); G. Klippert *Unjust Enrichment* (Toronto: Butterworths, 1983) at 37; P. Birks, *An Introduction to the Law of Restitution* (Toronto: Oxford University, 1985) chap. 1; Goff & Jones, *The Law of Restitution* at 12; Peter Maddaugh and John McCamus, *The Law of Restitution* (Aurora Ont.: Canada Law Book, 1990) chap. 2; but see G. Fridman and J. McLeod, *Restitution* (Toronto: Carswell, 1982) chap. 2.

⁴³ Apart from waiver of tort, other circumstances giving rise to restitutionary remedies for benefits derived from a wrong are breach of fiduciary obligation, breach of confidence, and benefits accruing from a crime. But see S. Hedley, "The Myth of 'Waiver of Tort'" (1984) 100 L.Q.R. 653 who argues that the whole doctrine of waiver of tort is a myth, and that victims of tort have no restitutionary rules entitling them to more generous remedies.

⁴⁴ The plaintiff does not in fact waive the tort in the sense that the tortious action is extinguished; rather the plaintiff is given an alternative to either sue in tort or to bring a restitution action for the unjust gains made by the defendant. The modern foundational statement on waiver of tort is attributed to Lord Mansfield's judgment in *Hambly v. Trott* (1776), 1 Cowp. 372 at 376, 98 E.R. 1136, 1139 where he said:

If it is the sort of injury by which the offender acquired no gain to himself at the expense of the sufferer, as beating or imprisoning a man, etc., there the person injured has only a reparation for the delictum in damages to be assessed by a jury. But, where besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor.

⁴⁵ (1883), 24 Ch. D. 439 (C.A.).

⁴⁶ In *Phillips v. Homfray*, *ibid.* the plaintiff owned land under which the defendant had mined coal. Upon becoming aware of this fact, the plaintiff brought suit claiming a royalty for the coal taken and wayleave for using the plaintiff's land to remove the minerals. The

The decision in *Phillips v. Homfray* has been the subject of considerable criticism for its technical interpretation of benefit so it is unlikely that the decision would now be followed even in England.⁴⁷ The court's definition of benefit has been rejected in the United States⁴⁸ in favour of one which allows both positive accretions to the defendant's wealth as well as savings of expenditures to constitute benefit. In Canada, there are stronger grounds for suggesting that *Phillips v. Homfray* will not be followed. Canadian courts have, since *Degelman v. Guarantee Trust Co.*,⁴⁹ been potentially receptive to the development of restitution. In other words a principle which has been universally condemned is unlikely to find adherents.⁵⁰ Therefore, Canadian courts would likely conclude that the receipt of a benefit by the defendant can be both an accretion to the defendant's property, as well as a negative benefit, such as some saving of expenditure. Without the conferment of any benefit, however, no restitutionary claim will arise.

Acquired at the Plaintiff's Expense

The second constituent element in waiver of tort cases requires that the benefit be acquired at 'the plaintiff's expense'. This will be established when the plaintiff can show that the benefit has been obtained by the defendant through the perpetration of some wrong to the plaintiff. To state the issue this way is merely to focus attention on the nature of the wrong. Do all wrongs which result in a pecuniary advantage to the defendant give rise to a restitutionary claim?

plaintiff was initially successful and obtained a decree ordering an inquiry into the amount claimed. The inquiry had not been completed when one of the defendants died. The plaintiff sought to enforce the order against the estate. The executrix replied relying upon the maxim *actio personalis moritur cum persona* (A personal action dies with the person). At trial the plaintiff was successful. On appeal, the majority held for the executrix to the extent that no wayleave could be assessed against the estate. While the appropriation of the coal and its subsequent sale brought positive accretions to the defendant's estate, the same could not be said of the expense saved in using passages under the plaintiff's land. There was nothing directly traceable to the defendant's estate which flowed from that part of the defendant's wrongful action.

⁴⁷ The criticisms are comprehensively detailed in J. Beatson, "The Nature of Waiver of Tort" (1979) 17 U.W.O. L. Rev. 1. See Birks, *supra* footnote 42 at 321; and Goff and Jones, *supra* footnote 42 at 608 who suggest that if still followed, it will be confined to its facts as relating only to a 'claim for the use and occupation of land during a period of adverse possession' at 611. See G. Jones, "A Topography of the Law of Restitution" in P.D. Finn, *Essays on Restitution* (Sydney: Law Book Co., 1990) at 3 *et seq.*, and, R. Sharpe and S. Waddams, "Damages for Lost Opportunity to Bargain" (1982) 2 Oxford J. of Legal Studies 290.

⁴⁸ G. Palmer, *The Law of Restitution* (Sydney: Law Book Co., 1990), Vol. 1 (Toronto: Little, Brown, 1978).

⁴⁹ [1954] S.C.R. 725. Other examples are *Pettkus v. Becker*, [1980] 2 S.C.R. 834 and *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534.

⁵⁰ See Fridman and McLeod *supra* footnote 42 at 553; Maddaugh and McCamus, *supra* footnote 42 at 520, and Klipfert, *supra* footnote 42 at 265.

A traditional answer to this question would focus on determining which torts are subject to waiver of tort. Indeed, it can be said that the *sine qua non* of waiver of tort is a tort has been established.⁵¹ Beatson,⁵² however, has argued convincingly that the restitutionary action in waiver of tort does not 'lean' on a tortious action.⁵³ Goff and Jones, while finding this position "jurisprudentially ... attractive", doubt "whether English law is sufficiently mature to escape from enquiring what torts can be waived today".⁵⁴ The authors then proceed to outline the torts which will support a waiver of tort action. In their opinion, conversion, detainee, trespass to land and chattels,⁵⁵ and passing off the defendant's goods as those of another,⁵⁶ will support the action. With regard to nuisance, libel, and inducing breach of contract, where there are no English authorities, the authors suggest that waiver of tort is available provided the benefit derived by the defendant is attributable to the commission of the tort and at the plaintiff's expense.⁵⁷

Canadian authors do not support the above approach. All agree that in light of the independence Canadian courts have given to restitutionary actions, the focus in Canada will be more on the nature of the benefit arising from the wrong than on whether the wrong is tortious.⁵⁸ In effect, courts should look for some property, belonging to the plaintiff which has been wrongfully appropriated by the defendant as some related right which has been impinged.

The traditional approach to restitution is based on property theory. Such an approach to restitution requires that liability for unjust enrichment can only be

⁵¹ See *Oughton v. Seppings* (1830), 1 B & Ad. 241, 109 E.R. 776; *Commercial Banking Co. of Sydney v. Mann*, [1961] A.C. 1 (P.C.).

⁵² *Supra* footnote 47.

⁵³ Beatson's argument has basically three aspects to it. First he demonstrates how the restitutionary action lay in spite of procedural barriers which would have barred the tortious action proceeding. Such action appears inconsistent with the parasitic nature of the waiver of tort action. Second, he illustrates a number of cases where the restitutionary action appears to have arisen independently. Third, he reviews a number of modern cases involving the violation of an equitable duty which have given rise to restitutionary relief. These cases, where clearly no tortious conduct has arisen could be better explained under a broad category dealing with the restitution of unjust gains arising from a wrong than pushing them into breach of fiducial obligations as is presently done.

⁵⁴ *Supra* footnote 42 at 606. But see discussion *infra*.

⁵⁵ This would require a court to overcome problems in *Phillips v. Homfray*, *supra* footnote 45.

⁵⁶ *Supra* footnote 42 at 612.

⁵⁷ Libel is given as an example to illustrate the issue. Profits made from a book in which the plaintiff is incidentally libelled could not be said to be made from the defendant's wrong. Whereas a defendant who has published an entire work which libels the plaintiff would be amenable to an action for waiver of tort because the gains is solely attributable to the tort. It is perhaps interesting to note that current United States decisions go against giving restitutionary damages in defamation cases, but that they will be available where the defendant has commercially exploited a person's identity. See Palmer, *supra* footnote 48 sect. 2.9.

⁵⁸ See Fridman and McLeod, *supra* footnote 42 at 554 who suggest that such accommodation will be made within existing notions of what constitutes a waiver of tort, Maddaugh and McCamus, *supra* footnote 42 at 517, and Klippert, *supra* footnote 42 at 259.

imposed when the wrongdoer has misappropriated property and not merely by commission of a breach of a duty.⁵⁹ The essence of property lies in the capacity to exclude others. As long as a property theory adheres to traditional notions of what constitutes property, it does limit the availability of a restitutionary remedy when defendants are enriched by their wrongs. However, as notions of property expand, the restrictions evaporate. On the continuum between exclusivity (absolute property) and non-exclusivity (quasi-property) the decision to recognize a restitutionary remedy becomes amorphous.⁶⁰

There are two criticisms of permitting a property theory approach to govern the propriety of a restitutionary action. It requires some sophistry to fit in all of the so-called property cases where restitutionary relief has been held available.⁶¹ Further, it cannot adequately explain cases in which the restitutionary remedy has clearly exceeded that needed to protect the plaintiff's property rights.⁶²

A more radical and encompassing theory underpinning restitution is Peter Birks'.⁶³ His approach focuses attention on the nature of the wrong defined in terms of a breach of duty. It transcends mere tortious obligations and includes breaches of contracts and breaches of equitable and statutory duties. Not all wrongs give rise to restitutionary relief.⁶⁴ Birks suggests three tests to explain the incidence of restitution for wrongs. The first is the deliberate exploitation of wrongdoing. The "defendant has deliberately set out to enrich himself by committing the wrong against the plaintiff". Birks admits, however, that it is

⁵⁹ See D. Friedmann, "Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong" (1980) 80 Columbia L. Rev. 504 at 506. Klippert, *supra* footnote 42 at 261, notes that argument over property and what constitutes appropriation are arguments over what actions amount to wrongdoing.

⁶⁰ For example, the right to performance under a contract can easily be regarded as proprietary, yet, few would argue for the extension of restitutionary remedies in this area. See R. Posner, *Economic Analysis of Law*, 3rd ed. (Boston: Little, Brown, 1986) at 106; E.A. Farnsworth, "Your loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract" (1985), 94 Yale L.J. 1339. Friedmann, *ibid.* at 514-26 argues for the extension of the availability of restitutionary relief in contract actions. However, the restitutionary remedy will often be 'subordinated to other social and economic considerations'. Presumably these concerns would be met in the context of the third constituent element of a restitutionary claim, namely that the benefit has been acquired in circumstances where it would be unjust to retain.

⁶¹ See *Boardman v. Phipps*, [1967] 2 A.C. 46 (H.L.); *Reading v. A.G.*, [1951] A.C. 507 (H.L.). See also Friedmann, *ibid.* at 552.

⁶² For example, the disgorgement of profits in *Boardman v. Phipps*, *ibid.* greatly exceeded the value of the property to the trust. Most of the gains had been acquired through the diligence and ingenuity of the fiduciaries. See Friedmann, *ibid.* at 553. There are many examples in the area of fiducial obligations. Wherever the law pursues a prophylactic goal the remedy will probably exceed the value of the property to the plaintiff. See E.J. Weinrib, "The Fiduciary Obligation" (1975) 25 U.T.L.J. 1 and his comments on corporate opportunities and secret commissions.

⁶³ P. Birks, *supra* footnote 42 c. X.

⁶⁴ To identify those wrongs which do give rise to restitutionary damages Birks suggests that a distinction between three ways of obtaining restitution from a wrongdoer must be drawn. The first category he terms alternative analysis. Simply put, the restitutionary right derives from a unjust enrichment which is not dependent upon the wrong itself although a wrong has

difficult to prove that the test is accepted as part of the law of restitution. He draws support from *Rookes v. Barnard*⁶⁵ and *Broome v. Cassell*⁶⁶ albeit punitive damages at common law are a blunt instrument as restitutionary damages. Birks suggests that because punitive damages often exceed the wrongdoer's actual gain, the common law has required proof of a high degree of wickedness on the part of the defendant. With restitutionary damages restricted to the defendant's actual gains, "a slightly wider range of cases entailing a less extreme degree of wickedness" could be permitted.⁶⁷

The second test is 'anti-enrichment wrongs'.

The test proposed under this head supposes that some wrongs are, and some wrongs are not, recognized by the law for the purpose of preventing disapproved modes of enrichment. More accurately this means the primary duties, of which the wrongs are breaches, either are or are not designed to prevent enrichment. If an anti-enrichment duty is broken, so that the preventive mechanism has failed, the policy behind the duty can be redeemed by ordering restitution from the wrongdoer. On the other hand, if the duty which has been broken is not aimed against enrichment, restitution cannot be congruently related to the policy behind it and should not be allowed.⁶⁸

On this basis, Birks distinguishes between restitutionary claims which arise from the torts of conversion and trespass, or anti-enrichment wrongs, nuisance, negligence, and defamation (unless committed deliberately and therefore, within the first test), or anti-harm wrongs.⁶⁹

The third test is prophylactic. The purpose in awarding restitutionary damages pursuant to this test is to prevent enrichment in circumstances where no compensatory damages would arise, or where such loss is difficult to prove. Since the compensatory damages are only available on proof of loss, to wait until the loss causing event had arisen would be to abandon the prophylactic approach.⁷⁰

been committed. Restitutionary relief arises because there has been a non-consensual taking of the innocent party's property. Second, extinctive ratification, where the wrong is extinguished. An example is where the innocent party adopts the sale of his property to another, and in the process extinguishes the wrongdoers appropriation. Finally, restitution for the wrong qua wrong. In this analysis actions which may have the appearance of being in the last category may actually fall into the first and thereby justify restitutionary relief independently of any wrong. Thus the category of restitution for wrong is smaller than originally thought.

⁶⁵ *Supra* footnote 9.

⁶⁶ *Supra* footnote 11.

⁶⁷ *Ibid.* at 327.

⁶⁸ *Ibid.* at 328.

⁶⁹ Palmer, *supra* footnote 48 sect. 2.10, makes a similar if not somewhat more pragmatic distinction. He distinguishes between the interests protected by a restitutionary remedy by asking whether they are of a type for which it is normal to acquire a right of use by purchase. It is only these types of interests which can be said to be wrongfully appropriated *at the plaintiff's expense*.

⁷⁰ Breach of fiducial obligations will fall into this test, although they may equally be anti-enrichment wrongs as well. *Ibid.* at 332.

Deficiencies in a strict property theory approach have led Friedmann, *supra* footnote 59 at 551 to advance a deterrence basis for restitution in a subsidiary and supportive capacity. As he states:

Based on the above critique, on the most conservative interpretation of a property based theory of unjust enrichment, an appropriate restitutionary action presently exists for the trespass to land or chattel cases. Adoption of Birks' approach comes closest to sustaining a restitutionary response in all six categories identified in Part A. Even in the area of breach of contract or wrongful interference of contractual relations, Birks would see some role for restitutionary damages.⁷¹

Quantifying the Restitutionary Response

Recognition of the right of action is the first step to quantifying a restitutionary award, while reassuring the extent of recovery is the second. The nature of a restitutionary response will divide according to whether the order for an accounting for profits is available, where there has been a positive accretion to the defendant's wealth, or merely restitutionary damages quantifying the defendant's savings in expenditures. The former has many historical precedents, the latter is dependent upon Canadian courts adopting a liberal interpretation of what constitutes a benefit.

A plaintiff wishing to bring an action against a trespasser to land will have alternate remedies to sue in tort for compensation or in restitution for the wrong.⁷² Compensatory damages have fluctuated from nominal through to an assessment based on reasonable rental for the use and occupation of the plaintiff's land or what a reasonable plaintiff would have accepted as payment for the property infringed. A reasonable rental rate has been awarded despite the fact that the plaintiff would not itself have used the premises for the purposes

In general whenever the forfeiture of the defendant's gains is unwarranted by the property theory or exceeds that required under the property theory, recovery will result in a windfall to the plaintiff. Such forfeiture is the counterpart in the law of restitution of punitive damages in torts. In both cases, the award aims at punishing the wrongdoer and protecting the plaintiff's right.

⁷¹ With respect to breach of contract, see Birks, *supra* footnote 42 at 334. See also Friedmann, *supra* footnote 59 at 101; G. Jones, "The Recovery of Benefits Gained from a Breach of Contract" (1983) 99 L.Q.R. 443. E.A. Farnsworth, *supra* footnote 60, suggests that the only time disgorgement of a defendant's gains following breach of contract is justified is where there is significant risk of under compensation. He gives two instances where this is found. One, is where a defendant is contracted to build premises and substitutes cheaper materials for those specified in the contract. Where the plaintiff's diminution in value is less than the defendant's gains an abuse of contract has occurred. The second situation arises where the defendant agrees to restore land he has used to its original condition. If it subsequently turns out that the cost to restore the land is in excess of the market value the defendant will wish to breach. Had the defendant been aware of the ability to take advantage of the disparity of costs and value of the land he would have been prepared to pay for the release. This saving of the cost of modification of the contract is seen as the gains made by the defendant and should be disgorged.

⁷² As mentioned above the plaintiff has an election which will be final when judgment is satisfied. See *United Australia Limited v. Barclay's Bank*, [1941] A.C. 1 (H.L.). Implicit in the comments accompanying this section is that Canadian courts will not feel obliged to follow *Phillips v. Homfray*, *supra* footnote 45.

of renting.⁷³ It is the vagueness and uncertainty of the assessment of compensatory damages which should drive the plaintiff to a restitutionary response. Unfortunately, beyond intellectual property cases, examples are few.⁷⁴

In his decision in *Strand Electric and Engineering Co. Ltd. v. Brisford Entertainments Ltd.*,⁷⁵ a case involving trespass to chattels, Lord Denning suggested that damages could be awarded as the market fee which could be commanded for the use of the plaintiff's property though there was no evidence to indicate that the plaintiff would have made such use of the property during its detention.⁷⁶ He admitted that the damages resembled a restitutionary award, although the other two judges clearly saw the damages as being purely compensatory.

There is additional support for assessments made on a reasonable market value of the property appropriated when the amount assessed represents either a portion of the profits made or the expenses the defendant saved by the wrong. For example, misappropriation of confidential information,⁷⁷ of customer lists,⁷⁸ of a sports celebrity's personality,⁷⁹ and unlawful use of a plaintiff's sewer system.⁸⁰ In addition, a continuing trespass will support an injunction and some courts have given equitable damages in lieu of an injunction assessed on a restitutionary basis.⁸¹

There is at least one case in which an order for an accounting has been made in the context of a trespass to land. In *Hill Estate v. Chevron Standard Ltd.*,⁸²

⁷³ The cases are collected in Waddams, *The Law of Damages*, 2nd ed. (Toronto: Canada Law Book, 1991) paras. 9.30-9.130; Burrows, *Remedies for Torts and Breach of Contract* (London: Butterworths, 1987) 260; and McGregor, *Damages* paras. 1421-22. 15th ed. (London: Sweet and Maxwell, 1988).

⁷⁴ McGregor argues that many of the cases are wrongly classified as compensatory and should be thought of as restitutionary. See *ibid.* para. 18. There is no doubt that restitutionary damages are available in these circumstances in the United States. See Palmer, *supra* footnote 48, sect. 2.10.

⁷⁵ [1952] 2 Q.B. 246 (C.A.); see Palmer, *supra* footnote 48, sect. 2.2.

⁷⁶ The plaintiff let out for hire electrical lighting equipment which the defendant had failed to return. The defendant had argued that the plaintiff could not recover damages representing a reasonable hiring rate because the plaintiff at any one time had 25% of his equipment not on hire.

⁷⁷ *Seager v. Copydex (No. 2)*, [1969] 1 W.L.R. 809 (C.A.).

⁷⁸ *Borden Chemical Co. (Can.) Ltd. v. J.G. Beukers Ltd.* (1972), 29 D.L.R. (3d) 337 (B.C.S.C.).

⁷⁹ *Athans v. Canadian Adventure Camps Ltd.* (1977), 17 O.R. (2d) 425 (H.C.). See also the extensive coverage given to the appropriation of a person's personality interests in Palmer, *supra* footnote 48, sect. 2.9.

⁸⁰ *Daniel v. O'Leary* (1976), 14 N.B.R. (2d) 564 (S.C.).

⁸¹ A restitutionary basis would suggest that the plaintiff receive the savings or part thereof which the defendant has made by the trespass. See for example *Bracewell v. Appleby* [1975] Ch. 408. Also note in *Lewvest Ltd. v. Scotia Towers Ltd.* (1981), 126 D.L.R. (3d) 239 (Nfld. S.C.), the fact that the defendant was going to make considerable savings from the trespass in terms of their ability to construct a building was one of the grounds why the court gave an injunction over damages.

⁸² [1993] 2 W.W.R. 545 (Man. C.A.).

the defendant had entered into a lease of mineral rights from William Hill. The lease was void because William Hill, before his demise, lacked the mental capacity to execute a power of attorney in favour of his widow, Fern Hill. It was she who had, acting on the advice of her agents, entered into the lease with the defendants. Mrs. Hill later died and the estate brought this action to recover the mineral rights and the profits taken from their exploitation. At the time of the hearing, Chevron was successfully operating one oil well. They had begun drilling and operating the well after they had been advised of the potential defect in the power of attorney.

The Manitoba Court of Appeal found the power of attorney void and, therefore, any lease created pursuant to its exercise was a nullity. On the issue of remedy, Chevron had maintained that it should be entitled to a constructive trust imposed on the estate requiring Chevron to continue paying the royalty it had paid under the now void lease. To deny this trust, it was contended, would be to enrich the estate with the benefits Chevron had expended to put the oil well into operation. The plaintiff maintained that it was entitled to accounting of profits made by Chevron from the oil.

The court awarded the plaintiff an accounting of profits. Had the judgment stopped there this award would seem uncontroversial. However, the Justices further stipulated the accounting was for all revenues generated by Chevron, without allowance for its costs or expenses. As will be explained, this is known as a gross profit approach and is clearly penal in nature. While this may be justified, it was clearly not the intent of the court. In a convoluted judgement, the court apparently saw the plaintiff as the party who was enriched but decided that the defendant's trespass was a 'juristic reason' that justified the plaintiff's enrichment.

Clearly, the court wanted to give the plaintiff more than the equivalent of a royalty payment which would be tantamount to enforcing the void lease against the wishes of the plaintiff. Had the court allowed an accounting for profit based upon a net profit test the sum paid to the plaintiff would have been considerably higher. Adoption of the gross profit approach imposes a penalty upon the defendant which clearly was not intended because the court agreed with the trial judge that this was not a case for an award of punitive damages. Chevron may not be without recourse since, as the court observed, it may be able to maintain an action against Fern Hill's estate for her breach of implied warranty of authority to act under the void power of attorney.

Recently, Professors Sharpe and Waddams have argued cogently that many of the above cases are to be explained as attempts to compensate plaintiffs for their lost opportunity to bargain for the price for which they would be willing to sell the right misappropriated.⁸³ The authors advocate this position not in

⁸³ *Supra* footnote 47. Sharpe and Waddams suggest that where there is a market for the property taken then the plaintiff's lost opportunity to bargain should be measured as the market price. That being the price for which the defendant would have paid to properly acquire the property. Where not market exists the damages should be assessed as the defendant's net gains.

derogation of restitutionary principles but in the belief that these cases are simply applications of the compensatory principle operating at common law. The latter is preferred over other disparate approaches such as punitive damages, restitution, accounting, awards in lieu of equitable relief, and the wayleave cases.⁸⁴

I would argue that because recognition of a compensatory award for lost opportunity to bargain competes with more orthodox methods of assessing compensatory damages, acceptance of Sharpe and Waddams' arguments may prove more awkward than relying upon a restitutionary response. The fact that a new explanatory theory is forthcoming suggests the tenuous hold these cases have within orthodox principles. On the other hand, if these cases are re-classified, following MacGregor,⁸⁵ as applying restitutionary principles, no new theory or liberty with existing principles, need be taken. In fact, the frequency of these cases might reveal how comfortable courts are with applying restitutionary principles to damage assessment. In addition, because the restitutionary point starts by quantifying the expenditures saved, or profits made, they are inherently capable of greater accuracy in quantification than a court's attempt at creating an artificial market to measure lost opportunity to bargain.⁸⁶

The decision in *Re Simms*,⁸⁷ which held that a plaintiff can not recover profits following a conversion of chattels, is an obstacle to widespread availability of an accounting for profits. The plaintiff, the trustee in bankruptcy, had purported to waive the tort committed by a receiver who had converted the bankrupt's name, chattels and building contracts to his own use. While the receiver did not dispute liability for conversion, he did dispute that the plaintiff was entitled to the profits arising from the building contracts. The Court of Appeal agreed with the receiver. Because the trustee in bankruptcy had elected to treat the receiver as a tortfeasor, rather than agent, the court was not prepared to imply a contract, then regarded as the basis of a restitutionary claim (quasi-contract) for money had and received. This would allow the plaintiff to blow hot and cold, the implied promise being inconsistent with treating the defendant as a tortfeasor.

Re Simms has been criticised in both England⁸⁸ and Canada⁸⁹ on three grounds. First, the need to base the restitutionary action on an implied contract is no longer necessary. Second, the decision was based on a view of election between common law and restitutionary relief which is no longer applicable

⁸⁴ Their approach is criticised by Burrows, *supra* footnote 73 at 253 but without reasons. See also J. Hodder, "Profiting from Tortious Use of Property: A Reply to the Lost Bargain Theory" (1984) 42 U. of T. Fac. L. Rev. 105.

⁸⁵ *Supra* footnote 73.

⁸⁶ *Radio Corp. Pty Ltd. v. Henderson*, [1960] N.S.W.R. 279. (S.C. Full Court).

⁸⁷ [1934] Ch. 1 (C.A.).

⁸⁸ See Goff and Jones, *supra* footnote 42 at 617.

⁸⁹ Fridman and McLeod, *supra* footnote 42 at 556 and Maddaugh and McCamus, *supra* footnote 42 at 524.

today. Third, the defendant's gains were also partially attributable to his own skill and capital which could not be quantifiably separated from the plaintiff's property.

Assuming a more widespread role for restitutionary damages, the remedy itself is capable of further refinement. Klippert⁹⁰ has divided the quantification of an accounting for profits into three distinct approaches: a net profit test; the comparison test; and, the gross profit test.

The net profit test has arisen as the primary approach to intellectual property infringements. This approach allows the defendant to prove its expenses in reduction of the overall profits payable to the plaintiff. The courts have used two rules to assess the defendant's contributions: one is based on apportionment, the other is based on deductibility of expenses. Under the former rule, the court treats the plaintiff and defendant as parties who have commingled property. The profits attributable to the exploitation of this property are then apportioned according to the court's view of the contribution each has made. In the deductibility of expenses rule, the defendant must prove each of his or her expenses, i.e. the cost of doing business.

The comparison test is utilized when the defendant has saved expenses by wrongfully appropriating the property. Again, in the intellectual property field, the defendant may make considerable savings through reliance on trade secrets as to processes or designs owned by the plaintiff. The comparison test measures the difference in profit made by using the plaintiff's property and what would have been made had the next most likely means of manufacturing been adopted.⁹¹

A gross profit test is penal in nature as it does not allow the defendant to prove any of its expenses or contributions in reduction of the profits which must be paid to the plaintiff. Klippert suggests that such an award cannot be justified on restitutionary grounds and is nothing more than an attempt to introduce punitive damages into an accounting of profits. However, Klippert suggests that this should not preclude an award of punitive damages in addition to any accounting in their own right if additional deterrence or punishment is warranted.⁹²

A restitutionary response, either through use of an account for profits, or measuring the extent of the expenditures saved, often closely resembles compensatory damages when an artificial market is recreated to determine the 'objective value' that a reasonable plaintiff would have charged the defendant for using the plaintiff's property rights. However, confusion has arisen because these expressions of compensatory damages compete with other ways of measuring the plaintiff's compensatory losses. Embracing a restitutionary

⁹⁰ *Supra* footnote 42 at 219 ff. See also Burrows, *supra* footnote 73 at 266. See also F. Patfield, "The Modern Remedy of Account" (1987) 11 *Adelaide L. Rev.* 1; C. Kirby, "To Account or Not to Account? An Account" (1991) 10 *E.I.P.R.* 367.

⁹¹ See *Collette v. Lasnier* (1886), 13 S.C.R. 563 at 576 and *Siddell v. Vickers* (1892), 9 R.P.C. 152 (C.A.).

⁹² *Supra* footnote 42 at 230-31.

response eliminates that confusion. The *prima facie* starting point for assessing the plaintiff's losses is to quantify the defendant's savings in expenditure or the actual profits gained through the wrongful appropriation of the plaintiff's rights. There is no juristic reason to allow those windfall profits (savings) to stay in the hands of the defendant. The restitutionary action preserves the notion that the only way the plaintiff can forfeit its property rights is through consensual exchange.

Part C

How would the restitutionary principles be applied to the six categories identified in Part A, and what implications follow?

Trespass to Land

In the trespass to land cases, a restitutionary action, waiver of tort, would quantify the damages as the expenditures saved by the defendant through the trespass. The British Columbia Court of Appeal's decision in *Austin v. Rescon Construction*⁹³ epitomises this approach although that result was attained under the heading of punitive damages. Both *Townsvlew Properties Ltd. v. Sun Construction*,⁹⁴ and *Fletcher v. Norcen Energy Resources Ltd.*⁹⁵ undercompensate the plaintiff from a restitutionary approach. The net effect is that the defendant ultimately profits from the wrong in spite of the awarding of punitive damages. Given insufficient information on the extent of the savings made by the defendant in *Epstein v. Cressey Developments*,⁹⁶ it is difficult to say categorically that the plaintiff has been undercompensated from a restitutionary point of view, although, the evidence available, together with intuition on the costs of development, would suggest that is arguably the result. *Horseshoe Bay Retirement Society v. S.I.F. Development Corp.*⁹⁷ and *City of Prince Rupert v. Pederson*⁹⁸ clearly overcompensate the plaintiffs from a restitutionary point of view, although these results are defensible on the grounds that punishment for the defendants' high handed actions should have been exacted. In *City of North Vancouver v. Apex*,⁹⁹ the plaintiff would be entitled to the profits made by the defendant through having the additional land as part of the premises the defendant leased. Depending upon the importance of the trespassed land to the defendant's business operation, these damages may or may not have amounted to the punitive damages ultimately imposed.

⁹³ *Supra* footnote 18.

⁹⁴ *Supra* footnote 24.

⁹⁵ *Supra* footnote 25.

⁹⁶ *Supra* footnote 17.

⁹⁷ *Supra* footnote 22.

⁹⁸ *Supra* footnote 21.

⁹⁹ *Supra* footnote 23.

Intellectual Property Violation and Statutory Violation

In the area of intellectual property violations, the existing legislative regimes already recognize the restitutionary approach by allowing, in a cumulative fashion, both compensatory, restitutionary, and punitive damage claims.

With respect to the statutory violation present in the decision in *Canadian Ironworkers Union No. 1*,¹⁰⁰ this would probably support a restitutionary award. The statutory tort created could probably be waived. The legislation did not confine awards to compensatory damages as indicated in the actual award by the addition of punitive damages. Certainly, the defendant had profited through wrongful means at the plaintiff's expense. The action created by the legislation in this case was very similar to an action for wrongful interference with contractual relations.

However, it would be incorrect to conclude that all statutory torts can lead to restitutionary remedies. Linden¹⁰¹ states that, in the absence of an express provision in a statute conferring an action for damages, statutory breach is only evidence of negligence and civil liability is dependent upon the common law of negligence. A statute may be used by the court to provide a useful standard of reasonable conduct. Negligence actions are not usually thought of as being subject to waiver of tort. However, one would have to ask whether the specific tort creates an interest in the plaintiff which is; one, of a type for which it is normal to acquire a use by purchase; or two, amounts to an anti-enrichment harm; or three, reflects a gain by the defendant at the plaintiff's expense and solely attributable to the commission of the tort; or four, creates a form of property in the plaintiff.

Defamation

Defamation law in Canada approximates that of the United Kingdom. All commentators agree that in the context of *Broome v. Cassell*,¹⁰² the tort of defamation could be waived and a restitutionary remedy result. Despite the paucity of cases directly on point, there is no reason to doubt that a similar outcome could result in Canada.

Contractual Breach

In the context of breach of contract, the wholesale extension of restitutionary remedies to make those who profit by a breach of contract would substantially undermine much of the basis of modern contract law. It would, in effect, penalize those who seek to escape economically inefficient contracts. The presence of a consensual exchange in contract law brings these cases within the third constituent element of restitution, i.e., 'circumstances where it would be unjust to allow the defendant to retain the benefit'. The presence of the contract

¹⁰⁰ *Supra* footnote 32.

¹⁰¹ *Canadian Tort Law*, 5th ed. (Toronto: Butterworths, 1993) ch. VII.

¹⁰² *Supra* footnote 11.

subordinates any restitutionary objectives to other social and economic considerations, namely, the importance of honouring consensual bargains. An enrichment derived from contract is not unjust. However, some authors have suggested that a place does exist for restitutionary damages where the defendant has been guilty of an opportunistic breach¹⁰³ for example, the bad faith denial of an insurer to pay out an uncontested first party claim, thereby exposing the insured to personal liability. The minority's decision in *Vorvis*¹⁰⁴ would admit to this possibility where the focus is upon the manner in which breach is affected, rather than the breach itself. If this form of liability were accepted, restitutionary principles could be relied upon to quantify the defendant's profit in breaching and, therefore, provide the measure necessary to ensure punishment.¹⁰⁵

A restitutionary remedy would be available in *Nantel v. Parisien*¹⁰⁶ based on the trespass and extinguishment of the plaintiff's rights as lessor.

Conspiracy

In *Claiborne*,¹⁰⁷ a restitutionary response would support the decision of MacKinlay J.A., dissenting on the imposition of punitive damages. The National Bank would be able to show that it did not profit from the acquisition of the Claiborne shares firstly, because the shares themselves were acquired in execution of a security for the bank's loan to a host of other failed Black companies, and secondly, because the Claiborne shares, when realised, even with the control premium, will fall greatly in satisfying the outstanding indebtedness of the Black companies. In addition, there is no evidence that the

¹⁰³ See Friedmann, *supra* footnote 59 at 516; Birks, *supra* footnote 42 at 334; G. Jones, "The Recovery of Benefits Gained from a Breach of Contract" (1983) 99 L.Q.R. 443; Posner, *supra* footnote 60; and Palmer, *supra* footnote 48, sect. 4.9.

E.A. Farnsworth, *supra* footnote 60 suggests that the only time disgorgement of a defendant's gains following breach of contract is justified is where there is a significant risk of undercompensation. He gives two instances where this is found. One, where a defendant is contracted to build premises and substitutes cheaper materials for those specified in the contract. Where the plaintiff's diminution in value is less than the defendant's gains an abuse of contract has occurred. The second situation arises where the defendant agrees to restore land he has used to its original condition. If it subsequently turns out that the cost to restore the land is in excess of the market value the defendant will wish to breach. Had the defendant been aware of the ability to take advantage of the disparity of costs and value of the land he would have been prepared to pay for the release. This saving of the cost of modification of the contract is seen as the gains made by the defendant and should be disgorged.

¹⁰⁴ *Supra* footnote 5.

¹⁰⁵ See Leon Trakman, "Breach, Compensation and the Magic Carpet" in J. Berryman (ed) *Remedies: Issues and Perspectives* (Scarborough, Ont.: Thompson Professional Publishing Canada, 1993) at 373; B. Feldsthusen, "Punitive Damages in Contract and Tort" (1990) 16 Can. Bus. L.J. 241 at 258, who both argue for the retention of exemplary damages in contractual actions.

¹⁰⁶ *Supra* footnote 26.

¹⁰⁷ *Supra* footnote 37.

plaintiff suffered any detriment, thus violating the second tenet supporting an unjust enrichment action.

So far I have attempted to illustrate that the restitutionary response in the context of profiting from a wrong may, in fact, prove more generous than coupling a claim for punitive damages onto a claim for the usual compensatory damages. However, the pursuit of restitution is not without its own risks. A plaintiff will have to run the gauntlet of impediments put up by *Phillips v. Homfray*¹⁰⁸ and *Re Simms*.¹⁰⁹ These obstacles should be easily overcome and, are offset by the possible procedural advantages in pursuing restitutionary relief over punitive damages. In passing, it is important to note that a claim for restitutionary relief based on waiver of tort can be pleaded concurrently with an action for damages based upon commission of the tort. Only when the plaintiff applies for judgment will an election have to be made.¹¹⁰

There are several advantages in bringing a restitutionary action. Foremost is the evidential advantage in not having to prove that the defendant acted in either a high handed, callous, malicious, or contemptuous manner. As mentioned earlier, the essence of punitive damages is to punish. Distinguishing between the innocent and the wilful wrongdoer is a normal prerequisite for punishment to be morally and legally justified. This is not the case in restitution. The aim of restitution is to restore to the plaintiffs what is rightfully theirs. It is not dependent upon finding the defendant guilty of any moral obloquy. Both the innocent and the advertent wrongdoer are equally liable in restitution. Thus, there is wider utility in the restitutionary remedy.

The second advantage is that restitutionary damages can be quantified with some precision. The plaintiff's restitutionary damages are limited to the extent of the defendant's gains, either through savings of expenditures or actual profits. The plaintiff need only show the extent of those amounts, leaving it to the defendant to prove how they should be reduced. For example, the plaintiff can prove gross profits, leaving it to the defendant to justify expenditures made to generate those profits over and above the value of the wrong perpetrated at the plaintiff's expense.

A third advantage, at least from the point of judicial administration, is that the restitutionary award can crystallize the point at which the imposition of additional damages becomes genuine punishment. The corollary of this point is that restitutionary principles may indicate when the imposition of punitive damages is truly excessive punishment and or deterrence. This assumes that punitive damages can be added to an otherwise equitable award. The decisions of the Supreme Court of Canada in *Canson Enterprises Ltd. v. Broughton &*

¹⁰⁸ *Supra* footnote 45.

¹⁰⁹ *Supra* footnote 86.

¹¹⁰ See *United Australia Ltd. v. Barclay's Bank*, *supra* footnote 72; Maddaugh and McCamus, *supra* footnote 42 at 510 ff.

¹¹¹ *Supra* footnote 49.

Co.,¹¹¹ *M. (K.) v. M. (H.)*,¹¹² and *Norberg v. Wynrib*¹¹³ go a long way to promote remedial flexibility, allowing the intermingling of equitable and common law remedies, and in particular, the combining of punitive damages with equitable awards.¹¹⁴

Lastly, in bringing an action based on restitutionary principles, the plaintiff may be able to escape a limitations obstacle. For example, in *Peace Portal Properties Ltd. v. Corporation of the District of Surrey*,¹¹⁵ the plaintiff was able to escape a two year limitation period, which would have applied to his action against the defendant municipality in tort, by claiming for unjust enrichment and thereby benefiting from a six year limitation period.

Conclusion

The compensatory principle dominates remedial selection. In cases in which the defendant has profited from the commission of a wrong, but there is no obvious commensurate compensatory loss experienced by the plaintiff, it is principled for courts to seek some way to register society's condemnation and to expatiate that a person should not benefit from a wrong.¹¹⁶ In the compensatory scheme, punitive damages are seen as the appropriate vehicle.

I contend that our compensatory myopia has caused us to overlook the utility of restitutionary remedies which more closely align themselves to the desirable policy that people should not profit from a wrong, nor should they be unjustly enriched at the expense of another.

¹¹² [1992] 3 S.C.R. 6.

¹¹³ *Supra* footnote 6.

¹¹⁴ This conclusion is also supported by the Ontario Law Reform Commission, see their *Report on Exemplary Damages* (Toronto: Ontario Law Reform Commission, 1991) at 71, but note the statement of dissent by Commissioner Cherniack on this point at p. 74. See *Aquaculture Corp. v. New Zealand Green Mussels Co.*, [1990] 3 N.Z.L.R. 299 (N.Z.C.A.); and P. Michalik, "The Availability of Compensatory and Exemplary Damages in Equity: A note on the Aquaculture Decision" (1991), 21 V.U.W.L.Rev. 391.

¹¹⁵ (1990), 70 D.L.R. (4th) 525 (B.C.C.A.).

¹¹⁶ Dore and Veitch, *supra* footnote 3, in a persuasive comment, have shown the corollary argument to that presented in this paper. Namely, that a strict application of the compensatory principle in the context of tortious compensation for cost of repairs or reinstatement, can lead to a 'windfall', or over compensation of the plaintiff. They argue that such an unjust enrichment can only be prevented if courts enforce undertakings given by the plaintiff on how the compensation will be used.