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NOMINAL AND PUNITIVE REMEDIES IN ENGLISH CONTRACT: THEORY AND DOCTRINE

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I. INTRODUCTION

It is assumed that legal theory can be distinguished from legal doctrine in that the former, rather than dealing with 'the salient features of a municipal legal system', addresses the underlying 'recurrent issues' about the nature of law in general or – by extension – of a particular legal issue.[1] However, the separation of theory and doctrine need not mean that the two should be insulated from each other. Rather, it would be desirable if doctrine informed theory to prevent the abstract concepts furnished from straying excessively for reality and, conversely, if theory informed the reform of doctrine, when necessary. The proper remedies for breach of contract – and, specifically, the proper role of nominal and punitive remedies – is a recurrent issue of contract theory, and therefore an opportunity to test the relationship between legal theory and doctrine.

In the realm of theory, one must first define nominal and punitive remedies, identify the differences between the two, and determine the possible forms which each may take. It is at the following stage – assessing when, if ever, nominal and punitive remedies should be available in contract – that theoretical disagreement as to the nature of contract becomes relevant, as different theories of contract assign a different scope to nominal and punitive remedies. On the proper scope of nominal damages, controversy aligns nicely with the conventional division between promissory and non-promissory theories; by contrast, the debate on the availability of punitive remedies is decidedly untidy, with similar theories diverging and radically different theories converging, ultimately introducing an additional element of complexity.

Subsequently turning to doctrine is of little use to resolving these theoretical controversies. As to nominal remedies, the common law has not yet regulated the hardest cases of breach of contract, nor has it fully removed uncertainty in easy cases, nor has it taken a conclusive view on nominal remedies other than nominal damages. Regarding punitive remedies, the traditional bar on punitive remedies may have been undermined by recent case law, presenting a two-fold challenge. First, one must assess whether the recent developments truly constitute departures from the general rule. Second, one must evaluate the merits of departing from the general bar, so that he may determine whether the departures are likely to be affirmed or undone by courts in the future. Thus, the juxtaposition of the theory and the doctrine of nominal and punitive remedies demonstrates that, whereas attention to doctrine may discipline one's theoretical investigations, doctrine is sometimes incapable of

[1] The distinction is taken from Hart, who himself did not envision it as being between 'theory' and 'doctrine', but between innominate methodologies; instead, Hart uses 'doctrine' to refer to any individual concept, from Austin's account of laws ('properly so construed') as commands to Hart's own rule of recognition. Since, 'doctrine' has also been used to mean 'legal dogmatics', comprising the legal norms in effect in a given jurisdiction, as well as the structural devices created by academic and judicial commentary: see E Pattaro, 'Legal Doctrine and Legal Theory' in C Roversi (ed), *A Treatise of Legal Philosophy and General Jurisprudence* (Springer 2005) 814-15. The latter definition is especially popular amongst contract theorists: eg, D Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Bloomsbury 2003) 136 ('contract law doctrine'). In this essay, 'doctrine' will be used in the latter sense and applied, in opposition to 'theory', to Hart's distinction. On the distinction and the merits of upholding it, HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) 3, 5-6

curing theoretical controversies; the difference between the law of nominal remedies and punitive remedies lies merely in how doctrinal systems of common law can reflect theoretical uncertainty – through silence or through dissonance.

II. THEORY

2.1 Definitions and taxonomy

The chapter on punitive damages in Lord Burrows's textbook on private law remedies opens as follows: 'Punitive or exemplary damages are damages whose purpose is to punish the defendant for his or her wrongful conduct.'[2] Although it may seem, as first glance, that Lord Burrows's definition simply re-arranges the name of the remedy, it does more than that. First, Lord Burrows implies that the defining characteristic of different types of remedies is not their effect, but their purpose, and that the purpose of punitive damages, albeit opaque, is 'punishment'. On the ancillary question of what is meant by punishment, it may suffice for the present purposes to note that punishment has an expressive, a retributive, and a deterrent component: the objectives of punishment is to express disapproval, deal out retribution proportional to the wrongfulness of the offence, and deter future offences.[3] Such objectives are visible in the various expressions employed to refer to the damages in question – 'punitive damages',[4] 'penal damages',[5] and 'exemplary damages'.[6] Second, Lord Burrows discusses only punitive damages, seemingly implying that English law has no other punitive remedies. The explanation for this choice lies in the controversial concept of 'remedy'. Birks argues that the central concept of 'remedy' is 'a cure to something nasty', and that 'the only precondition… is a state of affairs which needs making better'. However, all five possible conceptions of 'remedy' identified by Birks seem, crucially, to presuppose a claimant: the broadest conception, which sees a remedy as 'an action, cause of action, or the law's configuration of the actionability of a claimant's story', appeals to the historical forms of action, which required an aggrieved claimant; narrower conceptions must also carry the same assumption. It seems no coincidence that 'remedy' is an expression unique, in common usage, to private law, nor that all examples of remedies noted by Birks are instances of restitution, compensation, or specific performance of an obligation. It therefore seems that there is an ulterior precondition: not only must the remedy cure something nasty, but it must do so for the benefit of a claimant.[7] Returning to punitive remedies, such awards must therefore both punish and – unlike the punishment inflicted by the criminal law – benefit the wronged party. Two forms of possible punitive remedies come to mind. One form is punitive damages, which inflict a punishment analogous to that inflicted by a fine but, unlike a fine, financially benefit the claimant. One might object, as noted by Lord Burrows, that 'punishment requires a state–individual relationship rather than being for one individual to demand against another', suggesting that 'punitive remedies' is an oxymoron.[8] Nonetheless, the required state-individual relationship is not lost when punitive damages are awarded, since it is legal authorities who decide whether the wrong warrants punishment and, then, the intensity of the punishment.

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[2] A Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th edn, OUP 2019) 360.

[3] On the competition between the different purposes of punishment, ulterior 'constraining considerations', and the attempts to formulate a unified account, see, amongst countless others: HLA Hart and J Gardner, *Punishment and Responsibility: Essays in the Philosophy of Law* (2nd edn, OUP 2008); N Lacey, *State Punishment: Political Principles and Community Values* (Routledge 1988); A von Hirsch and A Ashworth, *Proportionate Sentencing: Exploring the Principles* (OUP 2005).

[4] Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (1997) Report No 247, para 5.39.

[5] *R v Secretary of State for Transport, ex p Factortame Ltd (No 5)* [1998] 1 CMLR 1353, 1414 [157].

[6] *Broome v Cassell & Co Ltd* [1972] AC 1027 (HL) 1073 and subsequent case law.

[7] P Birks, 'Rights, Wrongs, and Remedies' (2000) 1 OJLS 1.

[8] Burrows (fn 2) 375.

Another objection starts from the view – taken by law-and-economics scholars – that all remedies purse a deterrent objective, [9] and concludes that punitive damages are indistinguishable from compensatory damages. However, whereas the objective of punitive damages is exclusively to punish, the principal purpose of compensatory damages in contract may instead be to redress the claimant's disappointment by substituting performance of the primary obligation.[10] Importantly, even if a law-and-economics scholar may ultimately reject the substitution thesis, a preliminary glimpse into English doctrine demonstrates that the substitution thesis has been accepted.[11] Because retribution requires some degree of awareness on the defendant's part, and English defendants do not believe that compensation has a retributive purpose, compensation in England does not in fact deal out retribution. In England, punitive damages must hence be additional to any substitutionary remedy and be of a sufficient size to retribute and deter. Any other form of punitive remedy must take a non-pecuniary form, yet constitute a punishment and benefit the claimant. Once again, it is worth distinguishing between specific performance – which, like compensatory damages, is merely substitutionary – and a non-pecuniary obligation which goes further.[12] Hence, non-pecuniary punitive remedies are, in short, chores – clean the claimant's car, cook dinner for the claimant, and so on. Lord Burrows's decision to ignore punitive chores will be justified later on.

Finally, one can distinguish punitive remedies from nominal remedies. The purpose of nominal damages – says Lord Burrows – is 'merely to declare that the defendant has committed a wrong against the claimant and hence that the claimant's rights have been infringed'. In Smith's words, nominal remedies have an expressive function, like punitive damages, but lack the additional retributive and deterrent components.[13] In practice, the difference between punitive and nominal damages is one of magnitude: the former must be proportional to the wrongfulness of the defendant's conduct and sufficiently intense to deter it; by contrast, the latter must be symbolic but otherwise negligible. The question then turns – as with punitive remedies – to whether there are nominal remedies other than damages. Lord Burrows argues that a declaration that the defendant has committed a wrong, without any sum at all, should suffice and, further, that nominal damages are 'superfluous'.[14] This, it seems, is a misstep: nominal remedies are remedies, and must therefore benefit the claimant, even if that benefit is negligible; in some cases, the satisfaction enjoyed by the claimant and the embarrassment suffered by the defendant as a result of a declaration may satisfy the essential requirement of 'remedy'; however, in other cases, the benefit and burden deriving from the satisfaction and embarrassment may be not

[9] Eg, R Posner, 'A Theory of Negligence' (1972) 1 JLS 29.

[10] S Smith, 'Performance, Punishment, and the Nature of Contractual Obligation', (1997) 60(3) MLR 360. D Friedmann, 'The Performance Interest in Contract Damages' (1995) 111 LQR 628 esp 630. Kimel (fn 1) 93-94, 101. Whereas some argue that the categories of compensatory and substitutionary damages do not match exactly, it seems that the issue lies in differing notions of compensation; the better and more widespread view appears to be that of Kimel, for whom losses include lost expectations, such that compensation is congruent to substitution.

[11] *Robinson v Harman* (1848) 1 Exch 850, 855: 'where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed' (Parke B). *AB v South West Water Services Ltd* [1993] QB 507 (CA) 528: 'in the ordinary [compensatory] way, damages bear no resemblance to a criminal penalty' (Sir Thomas Bingham MR).

[12] See fn 10. Lord Burrows ignores any suggestion to the effect that specific performance has a punitive dimension, and may well be implying the opposite: see Burrows (fn 2) ch 22. Specific remedies are sometimes treated as separate from substitutionary remedies, and the issue there seems to be an improper adherence to the methodology of duty continuity: see S Steel, 'Compensation and Continuity' (2020) 26 Legal Theory 250. The better view seems to be that specific performance is not 'the very thing promised', and is thus a substitutionary remedy as well.

[13] Smith (fn 10) 372.

[14] Burrows (fn 2) 503, 377.

merely negligible, but entirely non-existent; in those cases, a token award of damages is necessary.[15]

2.2 The normative debate on the remedies' proper scope

Conventionally, contract theories are separated into promissory and non-promissory theories. The former posit, first, that contract is either a species or the equivalent of promise and, second, that promises – and thus contract as well – give rise to a content-independent reason for performing the promised act.[16] Agreement-based theories are assimilated to promissory theories, as both can be understood as constituents of a broader voluntaristic school of thought.[17] Voluntaristic theories accept, moreover, that promise and agreement are moral institutions, and that contract, being a legal institution, is affected by the 'transformational' features of legal systems generally – including 'legal enforceability on its own', some formulation of the rule of law and, arguably, systematicity – as well as the features of the particular legal system of which it is part – most notably, the accepted political morality.[18] By contrast, non-promissory theories reject the analogy between the morality of promise and the law of contract, either understanding contracts as evidence of pre-existing, non-voluntary obligations[19] or denying altogether the existence of contract as a body of law separate from tort.[20] Non-promissory theories, lacking the promise principle as the justification for recognising a legal obligation, must therefore appeal to non-promissory principles which may be moral or economic.[21]

Different promissory theories express different views on nominal and punitive damages. As a preliminary point on punitive remedies, one should dismiss punitive chores as a remedy, since it would be too discretionary for some conceptions of the rule of law, as well as too intrusive upon promisors' freedom for modern political moralities. As to the more agreeable remedy of punitive damages, one may compare three theories of contract. Shiffrin argues that the law in general 'should be compatible with the conditions necessary for moral agency to flourish', that the morality of promise requires punishment for intentional breaches of contract, and that the divergence of contract law from the morality of promise would be undesirable, specifically criticising the economic doctrine of efficient breach.[22] By contrast, Kimel finds the distinctive value of contract – that is, the reason for recognising a legal equivalent to promise – to lie in enhancing freedom by facilitating detachment between parties. In Kimel's paradigm of contract – the classical, arm's-length, commercial arrangement – the moral quality of breach of contract is 'entirely insensitive to fault', such that the call for punishing wrongful breach on moral grounds is much weaker. Fault does

[15] The point will be illustrated later with reference to doctrine, comparing human rights claims and ordinary claims.

[16] The classical example is C Fried, *Contract as Promise* (HUP 1982), esp ch 2. Other examples, not discussed later, include N MacCormick and J Raz, 'Voluntary Obligations and Normative Powers' (1972) 46 Proceedings of the Aristotelian Society, Supplementary Volumes 59.

[17] S Smith, *Contract Theory* (OUP 2004) 43-44. However, agreement-based theories, unless formulated as strictly as done by Fried (fn 16) ch 4, risk drifting into evidential theories such as Atiyah's.

[18] D Kimel, 'The Morality of Contract and Moral Culpability in Breach', (2010) 21(2) King's LJ 213, 220. On the different formulations of the rule of law, see P Craig, 'Formal and Substantive Conceptions of the Rule of Law: an Analytical Framework' (1997) PL 467; cf J Gardner, *Law as a Leap of Faith: Essays on Law in General* (OUP 2012) ch 7-8. On systematicity, see Hart (fn 1) ch 2-3; cf R Dworkin, *Law's Empire* (Bloomsbury 1986) ch 1, 4, 7.

[19] P Atiyah, 'The Practice of Promising' in *Promises, Morals, and Law* (OUP 1982). P Atiyah, 'The Liberal Theory of Contract' in *Essays on Contract* (OUP 1990).

[20] G Gilmore, *The Death of Contract* (Ohio UP 1974) esp ch 4.

[21] Although the legal rules for which non-promissory and promissory theorists often converge. Eg, see R Craswell, 'Promises and Prices' (2012) 3 Suffolk LR 735, 738-79, 776 and C Fried, 'The Ambitions of Contract as Promise' in G Klass, G Letsas, and P Saprai (eds), *Philosophical Foundations of Contract Law* (2014) sec II.

[22] S Shiffrin, 'The Divergence of Contract and Promise' (2007) 120 Harvard LR 708, 712, 722-24, 730-33.

have a role in Kimel's remedial regime, but a more modest one: it is one amongst multiple factors to consider when deciding whether to order specific performance rather than compensatory damages. That is not to say that political morality plays no role in Kimel's theory. Far from it, the harm principle – understood in a broad sense to account for institutional harm – features prominently in the model, and generally bars punitive damages on the grounds that, since compensation is sufficient to redress the harm suffered by the claimant, punitive damages would curtail the promisor's liberty unnecessarily. One might even add that the need to quantify punitive damages would introduce significant uncertainty in contract, undermining its commercial value. Therefore, Kimel admits punitive damages, with hesitation, only in exceptional cases in which breach would undermine the public perception of contract, giving rise to institutional harm.[23] Lastly, Smith's paradigm of contract is as an instrument to protect both material (economic) and non-material (interpersonal) interests. Unlike Shiffrin, Smith argues that protecting non-material interests – like trust between parties – means encouraging promisors not only to act properly, but to act for the proper reasons in a legal system in which it is apparent that promisors who act properly do so for the proper reasons. In more practical terms, the prospect of punitive damages would constitute a selfish reason to perform contracts, frustrating the institution's bond-creating function. Smith rushes to distinguish between punitive and compensatory damages: both have a detrimental effect on non-material interests, but compensation is both necessary and sufficient to adequately protect parties' material interests, while punitive damages are not. Smith hence joins Kimel in supporting a general bar on punitive damages; however, unlike Kimel, Smith provides for a wider exception based on fault, arguing for punitive damages whenever parties 'deliberately attempt to avoid both their primary and their secondary contractual obligations' and, more tentatively, 'where the [deliberately] broken contract is for the transfer of a priceless good, but where it is not possible to order specific performance for pragmatic reasons'.[24] Smith's theory is hence an intermediate one, which is relatively similar to Shiffrin's model yet diverges from it, moving towards Kimel's fundamentally different paradigm.

There is no shared view on punitive damages on the non-promissory front, either. The non-promissory principles employed by contract theorists can be sorted, as Smith does, as either rights-based (those which seek to give effect to individual moral rights) or utilitarian (those which seek to maximise utility, broadly defined). Smith maintains that right-based approaches to determining the proper scope of punitive damages give rise to 'a genuine puzzle', and with good reason.[25] Stevens, for example, proposes a rights-based theory of tort, according to which the damages awarded are always substitutive of the right violated by the defendant; punitive damages are available when the defendant's conduct is so 'outrageous' than the infringement of the claimant's right exceeds the losses caused, justifying a non-compensatory but nonetheless substitutive award.[26] Subscribing to the death-of-contract theory, one may treat breach of contract as a tort, and hence argue for punitive damages for outrageous breaches. However, there is much applicative uncertainty surrounding 'outrage', and the scope of punitive remedies varies considerably depending on how strictly Stevens's model is employed. Most radically, Smith suggests that 'breach of contract is simply not serious enough to attract punishment', rejecting that punitive damages may have any place at all in a rights-based non-promissory model of contract. Smith's dismissive view is consistent with Atiyah's observation – in the context of his historical account of contract doctrine – that the decline of XIX century classical moral

[23] Kimel (fn 1) ch 2-4, esp 80. Kimel (fn 18) 221, 225-29. On the broader conception of the harm principle in the context of contract theory, see J Raz, 'Review: Promises in Morality and Law' (1982) 95(4) Harvard LR 916, 918-19, 933-38.
[24] Smith (fn 10) 368-70, 372-73, 375-76.
[25] Smith (fn 17) 46-47, 418-19.
[26] R Stevens, *Torts and Rights* (OUP 2007) esp 81-85.

principles and the rise of XX century pragmatism coincided with the gradual 'whittling away' of punitive damages;[27] Atiyah's observation emphasises that punitive damages in contract depend on an outdated political morality, which can in hindsight be said to have been replaced by Kimel's. Turning to utilitarian arguments, a further distinction must be made. Some legal theories, mentioned earlier, equate all remedies on the grounds that all deter inefficient conduct. As a result, there is an argument – which comes at the cost of abandoning the labels of 'substitution' and 'compensation', as well as employing a rather broad understanding of punishment – that the scope of punitive damages is all-encompassing. Other theories of private law, more moderately, retain the conventional label and argue that punitive damages, ordinarily construed, can be justified or rejected depending on whether they promote or hinder efficiency. Traditionally, such theorists have argued that, if one party would make a net gain from breaching the contract and compensating the disappointed party, committing breach is the more efficient option for both the defaulting party and society more generally, and that punitive damages would discourage such breach and thus lead to inefficiency.[28] However, the traditional understanding of efficient breach has been criticised for making unwarranted assumptions, such as the absence of transaction costs and the ability to effortlessly detect breach. Critics argue that few, if any, breaches are efficient, and that there is therefore plenty of room for punitive damages to operate according to rights-based rules.[29] Hence, non-promissory theories of contract resemble promissory theories in lacking a consensus on the ideal scope of punitive damages.

Turning to nominal remedies, the practical differences between subscribing to promissory and non-promissory theories of contract become more noticeable. Promissory theories recognise every promise – if truly consensual and if reasonably fair – as a binding contract,[30] therefore always require a residual nominal remedy to express disapproval for breach of such promises. (The nominal remedy is residual because, if a better remedy is available, the better remedy expresses disapproval, and there is no need for a nominal remedy.) Most controversially, promissory theories require nominal remedies even for breach of certain executory contracts which do not induce the promisee in suffering losses, nor give rise to a valuable expectation for the promisee, nor benefit the promisor. Objections to such awards conceal more fundamental objections to recognising all breaches of promise as legal wrongs – Atiyah, for example, is avowedly critical of the binding character of executory promises.[31] What is more troubling is, instead, Kimel's statement, made in a discussion of punitive damages, that viewing contract as 'enforcing the morality of promise-keeping for its own sake' would 'not only be illiberal and ill-advised on its own, but would also significantly undermine the propensity of contract law to fulfil the functions more commonly attributed to it' and, hence, 'the threshold for legitimate remedial responses to a breach can only plausibly be harm'.[32] If 'enforcement' and 'response' included awarding nominal remedies, Kimel's position would be tantamount to Atiyah's: Kimel's political

[27] P Atiyah, *The Rise and Fall of Freedom of Contract* (OUP 1979) 677-79.

[28] Law Commission (fn 4) para 1.72. US Restatement (Second) of Contracts (1981) ch 16, Introductory Note. R L Birmingham, 'Breach of Contract, Damage Measures, and Economic Efficiency' (1969) Rutgers LR 273, 284-85.

[29] R Craswell, 'Contract Remedies, Renegotiation, and the Theory of Efficient Breach' (1988) 3 S Cal LR 629, 636-38. D Friedmann, 'The Efficient Breach Fallacy' (1989) JLS 1, 6-7. J Goudkamp, 'Exemplary Damages' in G Virgo and S Worthington (eds), *Commercial Remedies: Resolving Controversies* (CUP 2018) 328. R Posner, *Economic Analysis of Law* (9th edn, Wolters Kluwer 2014) 145-46. I Macneil, 'Efficient Breach of Contract: Circles in the Sky' (1968) Va LR 947.

[30] Fried (fn 16) ch 3, which is especially criticial of the doctrine of consideration.

[31] Atiyah, for example, objects to executory contracts: Atiyah (fn 27) 653-659, 755-64; Atiyah 1990 (fn 19) 126.

[32] Kimel (fn 18) 222-23, emphasis omitted.

morality, rather than complementing the morality of promise, would contradict the analogy between contract and promise entirely. Yet, there is an argument – beyond the desire to preserve the promissory character of Kimel's theory – in favour of resolving the linguistic ambiguity to the effect of generally admitting nominal remedies. Kimel follows the troublesome statement as follows: 'The imposition of remedial duties, on this view, would not be justified unless explicable as a means of preventing or redressing the harm associated with a breach.' To allow certain breaches of contract to go entirely unrecognised – with no expression of disapproval, however negligible its practical effects – would generate institutional harm; because the effects of nominal remedies, unlike those of punitive damages, are so trivial that they may not even constitute harm, it appears that Kimel's own harm principle requires nominal remedies. Ultimately, Kimel may thus be reasonably interpreted to be supporting a coherent promissory philosophy. By contrast, non-promissory theories see only some breaches of contracts as wrongs. If, as suggested by a rights-based approach, the wrong is moral, wrongful breaches must deserve the award of a residual nominal remedy. Admittedly, such breaches are likely to be those involving loss, entailing that the residual remedy would rarely operate in practice. If, as possibly suggested by an economic approach, wrongful breach is not also a moral wrong, there is no need for a nominal remedy (which, moreover, is by definition economically negligible). Therefore, nominal remedies have no place at all in utilitarian non-promissory theories, and a practically meaningful one only in some promissory theories. The implication is that, at least in relation to contract, there is no purely theoretical account which is both complete and uncontroversial, demanding – perhaps – a clarificatory intervention on the part of doctrine.[33]

III. DOCTRINE

Given the law's efforts to provide a complete regulatory framework, one expects doctrine to sometimes cure theoretical indecision: when there are multiple solutions to a case which are theoretically defensible and a legal authority finds itself regulating that case – through legislation or adjudication – the authority must somehow choose one option; the doctrinal choice may then provide an opportunity to meaningfully revise the theoretical disagreement and, perhaps, to resolve it at a theoretical level.[34] However, this doubt-resolving mechanism has two requisites. First, there must be a legal authority willing to regulate the controversial case; this requirement explains the continued uncertainty surrounding nominal damages. Second, the conduct of legal authorities must give rise to a coherent, intelligible doctrinal choice; this requirement explains the persistent doubt regarding punitive damages.

3.1 Nominal remedies in English contract

Despite the clear-cut difference between promissory and non-promissory views on nominal remedies, doctrine has not yet expressed a preference. Doubtlessly, courts sometimes award nominal damages. In *Omak Maritime Ltd v Mamola Challenger Shipping Co Ltd*, the owner of a ship elected to terminate a charterparty after the charterers committed a repudiatory breach. Because termination discharges the contractual obligations prospectively, the owner was entitled to sue the charterers for the contractual liability which had already accrued by the time the charterparty was terminated. However, the termination had allowed the owner to enter into a more profitable charterparty. Because there were no expectation losses, and

[33] On the broader thesis that no account of private law can be purely theoretical, and requires at least some reference to doctrine, as well as economic, social, and political inquiries, see G Alpa, 'About the Methods of Studying Private Law: An Italian Perspective' (2022) 23 German Law Journal 838.

[34] See Hart (fn 1) ch 5-6 and Dworkin (fn 16) ch 7.

reliance losses were unavailable to the owner, Teare J made a nominal award of damages.[35] In *Beswick v Beswick*, a businessman conveyed his business to his nephew in exchange for the nephew promising to pay, upon his uncle's death, an annuity to the uncle's wife; after the uncle died, the nephew reneged on his promise. Upholding the common law doctrine of privity, the House of Lords held that the wife, being a stranger to the contract, could not sue the nephew in her own name. Given that her husband – having died before the nephew could breach his promise – could not have suffered any loss, the House of Lords concluded that the wife could only sue in her husband's name for nominal damages.[36] Nevertheless, such judgments leave much unsaid. Foremost, the crucial point of theoretical controversy lies in whether nominal damages are available for breaches of contracts which cause no loss and no benefit – promissory theories, contrary to non-promissory theories, compel an affirmative answer. In this light, decisions such as *Omak* are immaterial: reliance losses were in fact suffered by the claimant, and the defendant hence committed both a promissory and a non-promissory wrong; it follows that Teare J's award of nominal damages is compatible with both theoretical schools of thought. An analogous argument can be made for *Beswick*, in which the nephew made a considerable gain in exchange for his promise. Indeed, the case-law-making power held by judges in systems of common law is casuistic, and can cure theoretical disagreement only if the right kind of claim is brought. For the present purposes, it is unlikely that the right kind of claim will ever be brought – both because the theoretical stalemate concerns a narrow set of cases and because, in those rare cases, the disappointed party does not have any meaningful incentive to sue – and one should expect to wait very long for the common law to cure the indecision. Nonetheless, one find comfort in the realisation that the theoretical disagreement, being still unresolved, must be negligible.

There are two further instances of doctrinal uncertainty. First, the scope of nominal damages, being that of a residual remedy, always depends on both whether nominal damages are available (that is, whether the defendant's conduct is wrongful) and, importantly, whether a better remedy is available to redress the wrong. The most obvious, in this light, is whether recoverable loss was suffered and compensation is triggered. In addition, the House of Lords in *Beswick* ultimately refused to award nominal remedies on the grounds that they would have been 'inadequate', preferring to order specific performance. Further still, certain mechanisms have also developed to circumvent or disapply the common law doctrine of privity, enabling claimants like Mrs Beswick, even if not entitled to specific performance, to have their own losses compensated. Regardless of the merits of *Beswick* and the reform of privity, these developments integrate ulterior considerations in the test for awarding nominal damages. Crucially, the new considerations which have been established judicially tend to be difficult to apply. Inadequacy is a flexible notion, and has hence required further refinement by courts in the form of particular bars to specific performance – for example, when the remedy would cause disproportionate loss to the defendants and when specific performance would be a prolonged activity, requiring constant (and expensive) judicial supervision.[37] These refinements, while useful, are both developed casuistically, undermining predictability, and themselves rely on slippery concepts like proportionality. On the privity side, the 'transferred loss' exception comes with much uncertainty: in *Alfred McAlpine Construction Ltd v Panatown Ltd*, Lords Clyde and Jauncey argued for a narrower formulation, while Lords Goff and Millett argued for a

[35] [2010] EWHC 2026 (Comm), [2011] Bus LR 212. On repudiatory breach, *Hong Kong Fir Shipping v Kawasaki* [1962] 2 QB 26 (CA). On the effects of termination, *Johnson v Agnew* [1980] AC 367 (HL) 392-93. On expectation and reliance losses, *Robinson* (fn 11); L Fuller and W Perdue, 'The Reliance Interest in Contract Damages: 1' (1936) 1 Yale Jaw Journal 52; D McLauchlan, 'The Redundant Reliance Interest in Contract Damages' (2011) 1 LQR 23.

[36] [1968] AC 58 (HL).

[37] *Co-operative Insurance Soc Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 (HL).

broader formulation, and Lord Browne-Wilkinson was open to both; because the facts of *Panatown* did not require the House of Lords to come to an agreement on the preferrable formulation, and no suitable case has since reached the House of Lords, it is still impossible to exactly know what the exception is.[38] It is no coincidence that Parliament has intervened, with sharper legislative language, in both specific performance[39] and privity.[40] A second instance of further doctrinal uncertainty concerns the role of alternative nominal remedies. Although case law has primarily focused on nominal damages, there is also evidence that Lord Burrows's argument – that mere declarations can fulfil the purpose of nominal damages – has been partially accepted by doctrine. The ECtHR has refused to award nominal damages on the grounds that a declaration already constitutes 'sufficient just satisfaction' to the injured party;[41] implementing the Law Commission's suggestion, domestic courts have adopted the same practice when issuing declarations of incompatibility under s 4 of the Human Rights Act 1998.[42] This is a reasonable application of theory: finding a person guilty of having infringed on another's human rights to such an extent to trigger the ECHR seems a sufficient embarrassment for the defendant to give the claimant some nominal satisfaction; by contrast, a mere declaration would seem insufficient on the facts of *Omak* and *Beswick*, justifying the award of damages. The question then turns on when, if ever, judgments in respect of claims made other than under the HRA manage to fulfil the expressive function of nominal remedies. Once again, case law is silent on the issue.

3.2 Punitive remedies in English contract

Before addressing punitive remedies themselves, one might note that other remedies have been recognised which resemble punitive remedies, but pursue a different purpose. On example is compensation for non-pecuniary loss, available when a major purpose of the contract is to provide pleasure, relaxation, peace of mind, or freedom from molestation, or when non-pecuniary loss has a sensory cause and is reasonably foreseeable.[43] Atiyah argues that 'the award of damages to a disappointed tourist for his "loss of happiness" appears to have been motivated by a desire to penalize the careless production of over fulsome holiday brochures, much as *Carlill v Carbolic Smoke Ball Co* may have been inspired by a desire to discourage reckless or fraudulent advertising'.[44] However, Atiyah's interpretation flies in the face, first, of the rationes of the authoritative judgments – themselves logically coherent and normatively defensible – and, second, of the analogous award of aggravated damages in tort, aimed at compensating distress and grief.[45] Atiyah's scepticism is therefore better understood as the product of Atiyah's time, when case law compensating non-pecuniary loss was still scarce. Similarly, but less controversially, loss of a chance has been historically recognised to deserve compensation.[46] Another award which should be distinguished from punitive damages is liquidated damages to which the parties agreed before breach. Although liquidated damages may exceed the compensation otherwise payable, their origin in the parties agreement – as opposed to being decided by a legal authority – seems incompatible with the notion of punishment. In fact, damages clauses are arguably no more than a

[38] [2001] AC 518 (HL).
[39] Trade Union and Labour Relations (Consolidation) Act 1992, s 263.
[40] Contracts (Rights of Third Parties) Act 1999.
[41] *Albert and Le Compte v Belgium* A 68 (1983), 13 EHRR 415.
[42] Law Commission and Scottish Law Commission, *Damages Under the Human Rights Act 1998* (2000) Report No 266/180, para 4.74. *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 39, [2003] 1 WLR 1763 [81].
[43] *Jarvis v Swan's Tours* [1973] QB 233 (CA), as developed by *Watts v Morrow* [1991] 1 All ER 937 (CA) and *Farley v Skinner* [2002] 2 AC 732 (HL).
[44] Atiyah (fn 27) 677.
[45] Kralj v McGrath [1986] 1 All ER 54 (QB).
[46] Chaplin v Hicks [1911] 2 KB 786 (CA).

conditional primary obligation, therefore not even a remedy.[47] To the contrary, Atiyah argues that damages clauses which neither party, before breach, wishes to be invoked, 'cannot be justified as part of the bargained-for contractual price'; the justification must be 'deterring future breaches'.[48] Atiyah's argument appears unconvincing. Every contractual term which imposes a duty or a liability or extinguishes a claim-right or a power is part of the consideration: a contract with a penalty clause is more valuable to the promisee than the same contract without the penalty clause. The fact that neither party wishes a penalty clause to be invoked – on which Atiyah placed much emphasis – is in reality immaterial for identifying what is part of the consideration: neither insurer or insured wishes the insurance to be paid, yet there is little doubt that the term stipulating payment of the insurance is part of the insurer's consideration. Regardless, English law accounts for Atiyah's concern through its penalty rule – that agreed remedies are effective unless they constitute a penalty in the sense of imposing a detriment to the defaulting party out of all proportion to the legitimate interest of the wronged party in the enforcement of the primary obligation.[49] Yet, precisely as Atiyah's justification is objectionable, so too does the penalty rule attract criticism for unjustifiably restricting freedom of contract.[50]

Punitive damages are a controversial element of English contract law. The case most often cited for the general proposition that 'no punitive damages can be awarded for breach of contract' is *Addis v Gramophone Co Ltd*.[51] However, *Addis* need not stand for such a strong proposition: Goudkamp notes that only Lord Atkinson and Lord Gorell discussed punitive damages directly – while the others may have been referring to the similar, but distinct, remedies mentioned earlier – and, whereas the former concluded that no breach of contract deserves punishment, the latter limited himself to barring punitive damages for outrageous breaches of an employment contract.[52] Nevertheless, subsequent case law has employed a rather expansive interpretation of *Addis* to the effect that, by 2000, there was substantial case law of the Court of Appeal in support of a general bar on punitive damages.[53]

It is difficult to make sense of *Attorney-General v Blake*. The breach of contract in question was committed by a British spy which became a double agent for the USSR and then, in breach of his original contract of employment with the British Secret Service, published an autobiography revealing confidential consideration. The House of Lords, unaffected by the Court of Appeal's unauthoritative case law, found that compensation would have been an inadequate remedy and that the claimant had a legitimate interest in preventing the defendant's profit-making activity. Ultimately, the House of Lords ordered the

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[47] S Worthington, 'Penalties' in G Virgo and S Worthington (eds), *Commercial Remedies: Resolving Controversies* (CUP 2018).

[48] P Atiyah, 'Freedom of Contract and the New Right' in *Essays on Contract* (OUP 1990) 368-70.

[49] *Cavendish Square Holding BV v El Makdessi, ParkingEye Ltd v Beavis* [2015] UKSC 67, [2016] AC 1172. An analogous rule is the equitable remedy (for the defaulting party) of relief against forfeiture: *The Scaptrade* [1983] 2 All ER 763 (HL).

[50] More forcefully, Worhtington (fn 47). More moderately, S Rowan, 'The legitimate interest in performance in the law on penalties" [2018] CLJ 148. Rowan attempts to rationalise the penalty rule as part of a doctrine of abuse of rights: S Rowan, 'Abuse of Rights in English Contract Law: Hidden in Plain Sight?' (2021) 84(5) MLR 1066. However, as noted by Rowan, such justification has not been openly recognised and, further, sits uncomfortably with the rather harsh individualism and consequentialism generally exhibited by English private law: eg, *Allen v Flood* [1895] 2 QB 21 (HL) 92 ('the existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong for which reparation is due'); *Smith v Hughes* (1871) LR 6 QB 597, 606-8; *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200; [2013] BLR 265 [77]-[92].

[51] Burrows (fn 2) 360, citing [1909] AC 488 (HL). To the same effect, Law Commission (fn 4) para 1.112.

[52] Goudkamp (fn 29) 321-22.

[53] *Perera v Vandiyar* [1953] 1 WLR 672 (CA). *Kenny v Preen* [1963] 1 QB 499 (CA). In *McMillan v Singh* (1985) 17 HLR 120 (CA) punitive damages were awarded for breach of a covenant concerning land, while in Warner v Clark (1984) 134 NLJ 763 (CA) punitive damages were awarded in a tort committed while breaching a contract; however, Burrows (fn 2) 361 is sceptical of both rationes.

disgorgement of the Mr Blake's profits.[54] *Blake* presents a taxonomical difficulty. For Lord Burrows, disgorgement is a form of restitution for wrongs – that is, a remedy which compels the defendant to 'give up' the profits made through wrongdoing (as opposed to 'giving back' benefits improperly transferred by from the claimant to him, which constituted restitution for unjust enrichment). Lord Burrows goes on to say that 'punishment is a more extreme remedial response to a wrong than restitution', conceptualising disgorgement 'as a mid-position between compensation and punishment'.[55] This conceptualisation begs a question: if remedies for wrongs are placed along a spectrum – which starts with nominal remedies, followed by compensation, then restitution, then finally punishment – how does one draw the line between one remedy and the next and, more specifically, between restitution and punishment? Indeed, it is difficult to argue that the House of Lord's treatment of Mr Blake – a treacherous tattler who committed a very public breach of contract – was not motivated by a desire to punish him. Lord Hobhouse – the only Law Lord to address the taxonomy of disgorgement – dissented precisely because he saw the remedy sought as punitive, and hence inconsistent with the nature of contract law. His Lordship's interpretation of disgorgement is buttressed by the majority's dubious application to the facts of the law laid down: a central element in the majority's reasoning was that the remedies available to the claimant were inadequate; however, the Crown had a reasonable opportunity to request and injunction and prevent the publication altogether, but for some reason failed to pursue that option; from a claimant-centric perspective, the Crown's complacency entails that 'it has to be content with a remedy in [compensatory] damages'; disgorgement can hence only be justified as a means to punish Mr Blake.[56] Kimel, who equates disgorgement to punitive damages, is only able to tentatively justify *Blake* as an exceptional instance in which the institutional harm caused by the public breach – so profound, one might add, that it could not be redressed by a nominal remedy – 'perhaps' justified judicial intervention.[57] Even Lord Burrows notes that *Blake* is 'important' for punitive damages in that it recognises that 'a substantial monetary remedy that is non-compensatory is appropriate for a breach of contract'.[58] Contrarily, there is tension between disgorgement and the rights-based justification for punitive damages: the moral character of a wrong need not depend on the profitability of the wrong, therefore the punishment should not be wholly linked to profits. This may be the reason Lord Reed rejected Lord Burrows's continuum analysis: 'the impression that… damages for breach of contract and an account of profits are similar remedies at different points along a continuum… would be mistaken'.[59] Even utilitarian approaches to punishment – which would leap at the opportunity of removing the economic incentive to commit an inefficient breach – do not match the law laid down by *Blake*, which requires the claimant to have a legitimate interest in preventing the profit-making activity: first, because the claimant's legitimate interests are hardly relevant to the broader concerns of utilitarians and, conversely, there is no provision to ensure that disgorgement is available only for inefficient breaches; second, because 'legitimate interest' is a vague concept[60] which undermines parties' ability to predict the consequences of breach of contract and thus frustrates the disincentivising effect of disgorgement. Most radically, Lord Sumption has expressed scepticism over Lord Nicholls's leading judgment in *Blake*, leading Davies to

[54] [2001] 1 AC 268 (HL).
[55] Burrows (fn 2) 336-37, 343.
[56] *Blake* (fn 54) 293-99.
[57] Kimel (fn 18) 228-29.
[58] Burrows (fn 2) 361.
[59] *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20, [2019] AC 649 [90].
[60] J O'Sullivan, 'Repudiation: Keeping the Contract Alive' in G Virgo and S Worthington (eds), *Commercial Remedies: Resolving Controversies* (CUP 2018) on 'legitimate interest' as applied in termination. Rowan 2018 (fn 50) on 'legitimate interest' throughout the law of contractual remedies. Both highlight the applicative uncertainty of the test.

argue that, beyond the narrow facts of *Blake*, 'it seems very unlikely that an English court will disgorge a defendant of the profits made from a breach of contract'.[61] Therefore, if *Blake* is an attempt at introducing punitive damages in contract, it is rather flawed.

One Step is analogous to *Blake*. In that case, the Supreme Court dealt with the role of the hypothetical fee to which the parties of a breached contract would have agreed, before the breach, to release one party from the obligation which he subsequently breached. Beyond the tortious remedy of user damages, beyond the remedy established by Lord Cairn's Act,[62] and beyond the evidential function which the hypothetical release fee may have for the purposes of quantifying ordinary compensatory damages, the Supreme Court agreed that the hypothetical release fee can constitute itself a remedy, available when the claimant suffers loss of the economic value of the right that has been breached, considered as an asset – for example, for breach of restrictive covenants over land, intellectual property agreements, non-negligible confidentiality agreements, and instances in which the defendant 'takes something for nothing'. In effect, this restricted the scope of the remedy previously labelled 'negotiating damages'.[63] Importantly, the Court presented the remedy – negotiating damages – as neither restitution nor disgorgement, but as a form of compensation, complementary to the ordinary one, concerned with the claimant's non-financial interest in the observance of his rights.[64] Nevertheless, the test proposed by the Supreme Court is at best vague and at worst circular, attracting criticism.[65] One may therefore speculate whether negotiating damages may conceal a desire to punish default parties when ordinary compensation appears insufficient. In *Experience Hendrix* – decided between *Blake* and *One Step* and involving the old 'negotiating damages' – Mance LJ suggested that *Blake* represented a 'new start in this area of the law', implying a link between disgorgement and nominal damages, possibly with a punitive theme.[66] Whether doctrine has actually departed from the conventional bar on punitive damages – as a result of *Blake*, *One Step*, or both – is controversial, as courts have still not had the opportunity to fully digest the (relatively) recent developments.

The final doctrinal issue is the likelihood of English law departing – by either developing the recent case law or establishing entirely new authorities – from the bar on punitive remedies in contract. Inevitably, the question turns to the merits of the bar on punitive remedies. Beyond the theoretical debate discussed previously, there are two compelling doctrinal arguments which, starting from the peculiar features of English law, conclude that punitive damages should not be recognised in English contract specifically. The first is a labelling concern: 'punitive damages, because their primary aim is punishment, confuse the role of the criminal and the civil law' and undermine the structure of the English legal system. The second argument is that '(as under present criminal proceedings), the defendant should have the benefit of more protective procedures, evidential rules and rights of appeal if punishment rather than, say, compensation is in issue'.[67] It follows that the desire to punish certain defaulting parties should be satisfied by creating new offences, rather than denaturing contract law. In this sense, it is both instructive and admirable that unfair commercial practices, if engaged in by a trader to a consumer's detriment, constitute

[61] P Davies, 'One Step Backwards: Restricting Negotiating Damages for Breach of Contract' (2018) 4 LMCLQ 433, 437. Although *Blake* was applied in *Esso Petroleum Co Ltd v Niad* [2001] All ER (D) 324 (Nov) (Ch), Lord Sumption's obiter dictum in *One Step*, albeit strictly unauthoritative, is very likely to be affect lower courts' application of *Blake*.

[62] Now the Senior Courts Act 1981, s 50.

[63] Eg, *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323; [2003] 1 All ER (Comm) 830.

[64] *One Step* (fn 59) esp [30], [81], [90]-[96], [111].

[65] Davies (fn 61), esp 438-39.

[66] *Experience Hendrix* (fn 63) [16].

[67] Burrows (fn 2) 375.

an offence.[68] Conversely, the central doctrinal argument against the punishment-averse convention is that punitive remedies are recognised in all torts, if (i) constituting arbitrary, oppressive, or unconstitutional behaviour on part of a public official, (ii) calculated by the defendant to make a profit for himself which may well exceed the compensation payable to the claimant, or (iii) stipulated by statute.[69] Especially in light of death-contract theories, the argumentative burden shifts to traditionalists to either justify the different remedial regime in contract and tort or argue for the abolition of punitive damages in tort as well. Lord Burrows argues that the categories established by Lord Devlin in *Rookes* for punitive damages in tort 'lack satisfactory rationale in principle or policy'.[70] Similar criticism can be found in Lord Wilberforce's dissenting judgment in *Broome v Cassel*.[71] Hence, Lord Burrows concludes that new tests should be found for tortious punitive damages and, further, that sufficient deterrence concerns may exceptionally exist to justify punitive damages for breach of contract, appealing to Canadian case law.[72] Yet, it would be unfair to say that Lord Devlin's controversial categories are completely unjustifiable: category (a) distinguishes between private persons and public officials because the latter's status as a legal authority may reasonably bind him to more virtuous moral standards;[73] category (b) deals which cases in which, from a utilitarian perspective, it is necessary to counteract an economic incentive to misbehave; category (c) defers to the supremacy of Parliament. An ulterior doctrinal argument in favour of distinguishing between tort and contract is that the measure of compensatory damages in contract is often much greater than its tortious analogue. First, contractual duties are typically positive while tortious duties are typically negative, such that compensation for breach of contract extends to lost expectations while compensation for torts is usually limited to reliance losses.[74] Second, non-economic torts – like negligence, occupiers' liability, product liability, liability for defective premises, and nuisance, as well as the relative vicarious liabilities – subject recovery of pure economic loss, if available at all, to narrow tests.[75] Although tort employs a more generous remoteness test than contract,[76] and deceit provides unusually generous compensation,[77] the contractual remedial regime remains preferable for claimants. Given that contract overcompensates claimants relative to tort, the need for punishment may therefore be lower than what it would otherwise be. An alternative open to traditionalists is to accept that tort and contract deserve identical treatment, but that the identical treatment should involve abolishing punitive remedies. The spirit of *Rookes* itself – as well as its emphatic affirmation in *Broome* – was to restrict punitive remedies; the reason the House of Lords

[68] Consumer Protection from Unfair Trading Regulations 2008, Part 3.

[69] *Rookes v Barnard* [1964] AC 1129 (HL), as interpreted by *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 AC 518 [15] and developed by *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29, [2002] 2 AC 122.

[70] Burrows (fn 2) 374.

[71] *Broome* (fn 6) esp 1114.

[72] Burrows (fn 2) 377-78, citing *Whiten v Pilot Insurance Co* (2002) 209 DLR (4th) 257 (Supreme Court of Canada), in which the punitive damages amounted to $1 million.

[73] On the two-fold proposition that law – through its officials – must claim legitimate authority, and that such claim – even if false – must be accepted, see J Raz, 'Authority, Law, and Morality' (1985) 3 The Monist, 295. See also J Raz, *The Morality of Freedom* (OUP 1988) ch 2-3.

[74] Burrows (fn 2) 38-39. The difference is illustrated in practice by liability for misrepresentations concerning a contract. Cf *Esso Petroleum v Mardon* [1976] QB 801 (CA) and *Dick Bentley v Harold Smith* [1965] 1 WLR 623 (CA). The difference shrinks when occuportunity costs are recognised as reliance losses: *East v Maurer* [1991] 1 WLR 461 (CA); Fuller and Perdue (fn 35) 60.

[75] In negligence, *Commissioner for Customs & Excise v Barclays Bank* [2006] UKHL 28, [2007] 1 AC 181. On occupiers' liability, Occupiers Liability Act 1957, s 1, and Occupiers Liability Act 1984, s 1. On product liability, Consumer Protection Act 1987, s 5(1) and *Muirhead v Industrial Tank Specialities* [1986] QB 507 (CA). On liability for defective premises, Defective Premises Act 1972, Preamble. On nuisance, *Network Rail Infrastructure v Williams* [2018] EWCA Civ 1514, [2019] QB 601.

[76] Cf *The Wagon Mound (No 1)* [1961] AC 388 (PC) and *The Heron II* [1969] 1 AC 350 (HL).

[77] *Smith New Court v Scrimgeour Vickers* [1997] AC 254 (HL).

refused to abolish them completely may be that drastically overruling case law is inconsistent with the common-law approach of incremental change.[78] Even *Kuddus*, which abolished the cause-of-action test, was primarily motivated – rather than the normative ambition of extending punitive damages – by a concern for coherence within tort, a dislike of the applicative difficulties of the cause-of-action-test, and scepticism towards the authorities presented in support of the cause-of-action test; in fact, the House of Lords was careful to implement the Law Commission's recommendations and limit punitive damages to tort.[79] Therefore, there is ultimately no consensus – theoretical or doctrinal – regarding the proper role of punitive damages.

IV. CONCLUSION

Doctrine can sometimes inform theory so as to resolve controversies, but sometimes does not. Especially in systems of common law, issues which are trivial in practice – like nominal remedies – are unlikely to attract sufficient doctrinal attention to give rise to theoretically-relevant decisions. Conversely, practically significant issues may attract excessive, unstructured attention, as in the case of punitive damages. In both cases, the theoretical stalemate remains unaffected. Is the solution, then, to abandon the common law? Admittedly, its casuistic form of law-making may leave certain issues unresolved, and its conservative approach to the law may sometimes result in volatile outbursts of reform. However, it is precisely the casuistic outlook of the common law that allocates public resources – already scarce – to real-life adjudication rather than fun but otherwise sterile theoretical puzzles. Furthermore, the organic development of the common law is slow and requires the occasional false-step, but may not look like such a bleak prospect in comparison to the risk of foolish legislation which looms above. Most likely, the ideal arrangement lies somewhat in the middle: perhaps, statute should supplement the common law when in need for quick reform, sharp clarification, or consolidation; perhaps, it should be case law which supplements statute by interpreting its language and regulating any cases ignored by the legislator. The key, it seems, is balance: first, as to the respective roles of statute and case law; second, between theoretical curiosity and practical needs.

[78] See *Caparo Industries v Dickman* [1990] 2 AC 605 (HL) 617-18, 633-34.

[79] *Kuddus* (fn 69) [26]-[27], [38], [45], [89], [117]. Law Commission (fn 4) para 1.72. Whereas Goudkamp (fn 29) 326 interprets the Law Commission's motivations to be drive by deference towards case law, he also rightly notes that the same deference was not afforded to the cause-of-action test; the suggestion is that the Law Commission is likely to have been motivated by normative reasons in excepting contract from the scope of punitive damages.