

The Law Commission Report on Aggravated, Exemplary and Restitutionary

Damages

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The Law Commission has published its final report on aggravated, exemplary and restitutionary damages, the most important recommendation of which is an expansion of the availability of exemplary damages.¹ The Report was preceded by two consultation papers, and this is no doubt indicative of the range of views held on the subject and the problems of reconciling them. Aggravated and exemplary damages have been a perennial source of controversy, since before the famous case of *Rookes v Barnard*.² They raise not only problems of terminology, but also more fundamental problems concerning the relation between civil and criminal procedure, and the rationale for punishment and civil remedies. One source of difficulty may be that the issues tend to span different areas of practical expertise and research. Another may be that theoretical issues are lost in what appear to be matters of practice and procedure. Restitutionary damages are no less controversial. Under this name they are not a traditional remedy; the expression has emerged from the academic development of the law of restitution. Despite the academic attention they have received, it remains

¹ *Aggravated, Exemplary and Restitutionary Damages*, Law Com no 247, 16 December 1997.

² [1964] AC 1129.

controversial to what extent they are found in the common law, how they are to be justified, and when they should be available.

Aggravated damages

The Report is about the appropriate legal response to a wrong to the plaintiff. A “wrong” means a breach of duty owed to the plaintiff, however arising; “legal response” is intended as a general term to include (amongst other things) compensation, an injunction or punishment.³ The usual response in civil proceedings is a remedy, in the sense that the response seeks to remedy or rectify the wrong through an injunction to secure the fulfilment of the duty, or compensation to simulate the performance of the duty by giving the plaintiff the pecuniary value of the performance of the duty owed to him.⁴ Punishment is a different form of response, which is not a remedy at all in this sense. It is an important feature of the Report that it upholds the distinction now recognised in the case law between aggravated damages, which are remedial, and exemplary damages, which are punitive.⁵ Aggravated damages, the Report considers, are intended to compensate for a particular form of harm, namely mental distress, or at least a certain form of mental distress. It takes the view there is no need for a distinct law of aggravated damages concerned with one type of mental distress. The law of aggravated damages should in due course be assimilated with the rest of the law concerning damages for mental distress.

³ These expressions are not defined in these terms in the Report.

⁴ See Daniel Friedmann, “The Performance Interest in Contract Damages” (1995) 111 LQR 628.

⁵ *Rookes v Barnard* [1964] AC 1129; Report, paras 2.2, 2.40-2.43

It is surely right to distinguish firmly between compensation and punishment. But the Report's analysis of aggravated damages is a little hasty. Aggravated damages are traditionally awarded in cases where the mental distress in question is outrage or indignation resulting from the cynical, flagrant or insulting nature of the defendant's wrong.⁶ In other words the "mental distress" in issue is really the emotional concomitant of a moral attitude of condemnation. This is why aggravated damages have traditionally been associated with exemplary damages, because in such cases punishment of the defendant may well also be called for (assuming that the outrage and indignation are justified). The only feasible way to assuage feelings of outrage or indignation is through punishment duly administered. Punishment is, after all, at least partly explained as the public expression of the indignation and outrage of the community as a whole, in sympathy with and on behalf of the victim.⁷ An attempt to compensate the victim by a money payment for such feelings without condemnation of the wrongdoer is misguided and is any case unlikely to be satisfactory to the victim. It would be better to abandon the idea of compensating for this form of "mental distress" and concentrate on ensuring that the means are always available for imposing punishment where it is appropriate, by exemplary damages if necessary.⁸ This is not of course to deny the legitimacy or the importance of compensating for

⁶ Paras 2.1-2.3, 2.18.

⁷ See below, at nn9-10.

⁸ The Report casts doubt on the decision of the Court of Appeal in *AB v South West Water Services* [1993] QB 507 not to award aggravated damages for indignation: paras 2.32, 2.36.

other forms of mental distress in appropriate cases.⁹ Neither does it mean that punishment should be tailored to satisfy the demands of the victim.

Exemplary damages

Punishment in civil proceedings

The Report accepts that exemplary damages are punitive, but there is surprisingly little discussion of what punishment is, or how it is to be distinguished from other legal responses, or how punishment is related to crime or to the fundamental division between civil and criminal law; and yet it is surely clear that these issues must be relevant to the law on exemplary or punitive damages. Punishment consists of a constraint or harm imposed by the authority of the state in consequence of a breach of a duty imposed by law. But, furthermore, what distinguishes punishment from a remedy like compensation or an injunction arising from a breach of duty (which also involves the imposition of a constraint or harm on the defendant) is the purpose and intended effect of the imposition. For punishment, it is (to put it in general terms) to uphold the community interest in compliance with the duty in question,¹⁰ whereas for a remedy it is the protection of the private interest of the particular plaintiff in the performance of the duty owed to him.¹¹

The purpose for which the response is made determines the circumstances in which it is justified and the procedure that should be required as a prerequisite. In the case of a

⁹ eg fear, frustration or anxiety.

¹⁰ This definition is apt whether punishment is conceived of as being for the purpose of deterrence or retribution or vindication.

¹¹ Cf N Lacey, *State Punishment* (Routledge, 1988), 100.

claim for a remedy, the procedural and evidential rules should reflect the fact that the plaintiff and defendant are on a more or less equal footing, the plaintiff's interest in a remedy (if his claim is right) competing with the defendant's comparable interest in being free from liability for the remedy (if the plaintiff's claim is unjustified). By contrast, in the case of punishment the proceedings are not a contest between two parties on an equal footing but a trial of the defendant in which his guilt and the community's interest in punishment are at issue. The injustice to the defendant of mistaken punishment greatly exceeds the injustice of a mistaken acquittal. Thus there is every reason to adopt a procedure and evidential rules weighted in the defendant's favour which give him additional safeguards against an unjust outcome.¹² In addition the imposition of punishment is generally taken (at least for less minor cases) to require that the defendant have committed the breach of duty intentionally (in the sense this is given under the doctrine of *mens rea*).

It follows from this approach that what distinguishes criminal and civil law is not the nature of the duty breached but the nature of the response to the breach (and the requirement that the breach be intentional in the case of a punitive response). Thus in principle one should not speak, say, of two duties not to assault, one in criminal law and one in civil law, but one duty not to assault, the breach of which gives rise to two different types of legal response, according to whether it is the victim who is seeking a remedy or the community seeking to punish. The duty itself is a prescription for action (or inaction) - it is defined in terms of its content, not the consequences of

¹² See Peter Jaffey "Restitutionary Damages and Disgorgement" [1995] RLR 30, 39, and articles cited there.

breach. Traditionally punishment and remedies have been administered in different sets of proceedings, civil and criminal, because of the different procedural and evidential requirements associated with them, and because in one case the action is instigated by the victim for his own benefit and in the other case by the state in the public interest. It follows that “crime” cannot be distinguished from other wrongdoing in terms of a general definition of conduct. A crime is simply a wrong punishable through criminal proceedings. This definition does not of course define the various duties to which people are subject, and has accordingly seemed inadequate to some, but it distinguishes criminal from civil law.¹³

The strict segregation of punishment and remedy into different proceedings creates a danger of an inadequate legal response. In principle, every breach of duty should attract a “full legal response”, which means a sufficient remedy (where the duty is owed to another person) in the form of an injunction if possible and otherwise compensation, and punishment if the breach was committed deliberately. However not every deliberate breach of duty is recognised as a crime, although it is fair to say that this is true in most cases. Where it is not, punishment may be unnecessary, even where the wrong is deliberate, if the measure of the liability for compensation exceeds what would be apt by way of punishment.¹⁴ The issue of punitive damages arises where the defendant has committed a deliberate breach of duty giving rise to civil proceedings that is not punishable through criminal proceedings and for which the

¹³ See JC Smith, *Smith & Hogan Criminal Law* (Butterworths, 8th ed, 1996), 20-23.

¹⁴ Although it may obviate the need for punishment, it is still best to say that the payment is compensation and not punishment, because its purpose and justification are as a remedy and not a punishment, as the nature of civil procedure shows.

measure of compensation falls short of what would be apt as punishment. If there is a civil cause of action for which this is commonly the case, the obvious answer is to recognise the conduct in question as a crime, or if it already is recognised as a crime to make sure that criminal proceedings are taken. But there may be breaches of duty where it is appropriate instead to have punishment by way of punitive damages in civil proceedings. This might be the case where the victim is likely to have resources to take proceedings, and where the duty is not so important as to require the more severe forms of punishment available in criminal proceedings. This might be an efficient way of achieving the full legal response, since it saves public resources and avoids two sets of proceedings.

This is only acceptable, however, if it is possible to install appropriate safeguards for the defendant in respect of the punishment. It may not be necessary for him to have the same degree of protection as he would have in the case of serious offences leading to imprisonment, but it is surely inconceivable that the defendant's interest in not being wrongly punished could ever be thought so unimportant that the balance of probabilities would be appropriate as the standard of proof. There are other problems with punishment in civil proceedings. If the punishment is in the form of money paid to the plaintiff, the plaintiff will receive a supra-compensatory payment or windfall. Furthermore the wrong may have a number of victims, so that the difficulty arises of who is to receive the windfall payment and how it is to be allocated. And if the punishment is made through civil proceedings controlled by the plaintiff, it is open to the parties to compromise the proceedings, whereas criminal proceedings are as a rule

not open to compromise.¹⁵ Since punishment is imposed in the public interest, compromise of proceedings with the victim, although it may be in the interests of the victim, may not always be in the public interest and may mean that the law is inadequately enforced. The same objection does not apply to negotiation and settlement or waiver over a remedy, whose purpose is only to protect the private interest of the plaintiff.¹⁶ Also there is the need to ensure co-ordination with criminal proceedings for the same wrong to avoid double punishment or double jeopardy. These difficulties suggest that punitive damages should be an exceptional response, or at least that they should not be the normal form of punishment for serious wrongs and possibly wrongs that cause harm to several parties.

The Report's approach to punitive damages

The Report points out that the common law world seems to have divided into two approaches on punitive damages.¹⁷ The first approach, which underlies the current English law, is that punitive damages are never appropriate in civil proceedings. This was the view of the majority in the House of Lords in *Rookes v Barnard*. However, out of deference to existing case law, the House accepted that punitive damages should continue to be available in certain cases. This left the law in an awkward state; in particular the House seems to have adopted the extraordinary “cause of action rule” according to which the availability of punitive damages depends on whether punitive

¹⁵ See eg MP Furmston, *Cheshire, Fifoot & Furmston's Law of Contract* (Butterworths, 13th ed, 1996), 381.

¹⁶ Subject to the problem of unequal resources to litigate and bear risk, and possibly the public interest in having the law declared authoritatively.

¹⁷ Para 4.5.

damages had been imposed in respect of such a cause of action before *Rookes v Barnard* was decided.¹⁸ The underlying view that punitive damages are never appropriate in civil proceedings reflects the recognition of the desirability of segregating punishment and remedies, for the reasons considered above, in particular the need for special safeguards that are available only in criminal proceedings, even at the expense of accepting that there will be an inadequate legal response in some circumstances. The second approach is that a deliberate breach of duty that comes before a court in civil proceedings should as a rule be punished by way of punitive damages. This approach seems to have prevailed in the other common law jurisdictions, including Australia, New Zealand and the United States.¹⁹ It reflects the desirability of the full legal response at the expense of a strict segregation of remedies and punishment. The problem with this approach is that it may fail to address the difficulties mentioned above that have led to segregation, including the need for additional safeguards in the case of punishment.

The Report is broadly in favour of English law moving to the second approach, according to which punitive damages should be generally available in civil proceedings.²⁰ However, there is some confusion over the reasons for this. The Report takes the view that civil punishment is a different thing from criminal punishment, either in nature, or possibly in degree, or maybe because it is concerned with what is

¹⁸ The rule is criticised in the Report at paras 5.2-5.3.

¹⁹ The Report does not consider the position in the US where this approach seems to have been taken furthest: see for example John G. Fleming *The American Tort Process* (Clarendon, Oxford, 1998) 214ff.

²⁰ Paras 5.29, 5.38.

in principle a different category of breach of duty. It concludes that the objection to punishment in civil proceedings on the ground that punishment is the prerogative of criminal proceedings is misconceived. But it is very difficult to understand what could be meant by the idea that civil punishment is different from criminal punishment. Is civil punishment not really punishment at all? Is there a type of punishment to which the arguments above that tend to support segregation, including the argument for weighting the procedure in the defendant's favour, do not apply? Does the Report mean that there is really only one concept of punishment but that civil and criminal procedures apply it to different types of wrong? No satisfactory explanation is offered, although these points lie at the very heart of the Report. However, having asserted that punishment is acceptable in civil proceedings because it is a different thing from criminal punishment, the Report then goes on quite inconsistently (but correctly in the light of the analysis above) to insist that punitive damages should be imposed only where the defendant acted deliberately, and to consider carefully the precautions that are called for to ensure that there is no double punishment or double jeopardy if punitive damages are generally available in civil proceedings for conduct that is also a crime.²¹

Thus the Report considers briefly the issue of a higher standard of proof.²² It seems to take the view that a higher standard of proof is required in relation to punishment, and considers that this requirement is satisfactorily met by the practice of weighting the

²¹ But the Report is surely wrong to say (para 5.113) that a civil court should have a residual discretion to punish where a criminal court has already pronounced on the matter.

²² Paras 4.99-4.101.

normal civil standard of proof in the defendant's favour in the case of serious allegations. But if the test is weighted in the defendant's favour, there is nothing to be gained from pretending that it is still the "balance of probabilities".²³ It may be that for less severe forms of punishment connoting a lesser degree of culpability it would be apt to adopt an intermediate standard lying between the balance of probabilities and proof beyond reasonable doubt, for example the standard of "clear and convincing" evidence used for certain purposes in the United States.²⁴ The Report also considers the objection that the plaintiff receives a windfall.²⁵ It is undesirable that a windfall should be received through the operation of the law, but it is no doubt less objectionable than a failure to punish where punishment is due. There are particular difficulties where there are multiple victims of a wrong, and the Report's "first past the post" proposal for giving all the punitive damages to the first successful plaintiff is likely to make the law look capricious. The problem of compromise is not considered in the Report at all, although punitive damages clearly raise the issue because civil proceedings can be settled. The Report assumes that such compromise over punitive damages is to be encouraged, but as mentioned above this is at least open to argument.²⁶

²³ Also, at least on the argument above, the issue is not strictly the gravity of the allegations but the nature of the response, although it may be fair to say that if the allegations are serious there is a stigma in the decision that might be tantamount to punishment.

²⁴ See Colin Tapper, *Cross & Tapper on Evidence* (Butterworths, 8th ed 1995), 171-172.

²⁵ Paras 5.14, 5.31ff.

²⁶ Para 5.22.

It is important that the legal system should be able to offer the full legal response as defined above, and it is also important that the procedure to which the parties are subject should be adapted to the response in question. The segregation of punishment and remedy through the division between criminal and civil proceedings is for most purposes the best way to achieve this. But there is room for other arrangements. A limited role for compensation orders in criminal trials is well established.²⁷ Punitive damages in civil proceedings can play a part also but they suffer the disadvantages mentioned above. Maybe there is room for developing other arrangements, like co-operative proceedings involving the Crown and a civil plaintiff, or powers of the Crown to take punitive action through the civil courts,²⁸ in relation to matters that the civil courts are expert in, and subject to appropriate safeguards. But for the moment the Report may be right that punitive damages should be generally available, although in my view it gives insufficient weight to the need for appropriate safeguards for the defendant.

Breach of contract

Breach of contract needs special consideration. In the United States, where punitive damages are generally available for a deliberate or “bad faith” tort, there is nevertheless controversy over whether they should be available for a deliberate breach of contract.²⁹ The Report concludes that punitive damages should not

²⁷ Under the Powers of Criminal Courts Act 1973 s.35.

²⁸ As in effect happens in EC and US antitrust law.

²⁹ See for example John A. Sebert Jr., “Punitive and nonpecuniary damages in actions based upon contract: towards achieving the objective of full compensation” 33 UCLA Law Rev 1565 (1986).

generally be available for a breach of contract.³⁰ This is ostensibly anomalous. Does a breach of contract not consist of a breach of duty, and should not the full legal response, including punishment for a deliberate breach of duty, be applied accordingly? The Report advances a number of reasons for withholding punitive damages for breach of contract, none of them convincing. One is that in contract losses tend to be only pecuniary. This is no doubt generally true, but it can also be true of serious crimes. Even accepting that the breach of a duty protecting against pecuniary loss is generally of less importance, the implication is that punishment in respect of such a breach should be less severe, not that it should be possible to breach the duty with impunity. A second reason is that there is said to be a greater need for certainty in contract law than in other areas, and so less scope for punitive damages, the measure of which is arguably liable to be less predictable than compensatory damages. But it is difficult to see why there should be a greater need for certainty in contract law than in property law or other areas that may be relevant to commercial planning. Indeed, to the contrary, it is common for contracts to leave certain matters open.³¹ A third reason given is that a contract is a private arrangement, and contractual rights do not arise directly from the general law. This is true, but it is unclear what its relevance is. If it is accepted that parties have the capacity to create duties by private arrangement, why should they not be properly enforced by punishment in the same way as other duties?³² A fourth reason is the theory of

³⁰ Paras 5.70-72.

³¹ It would be closer to the truth to say that the absence of punitive damages is related to the absence of certainty in contract: this is consistent with the reliance theory explanation in the next paragraph.

³² One possible reason not discussed is that, in accordance with the harm principle, it is wrong for the law to go further than protecting against harm and so should not punish a breach of duty unless the

efficient breach, which is controversial even amongst adherents of law and economics.³³

But there is a good reason why the non-performance of a contract should not generally attract punishment. This is that contract law does not generally create duties of performance. It is usually understood to create duties of performance because an agreement is understood as an exchange of promises, and a promise creates a duty. Instead an agreement should be understood as involving the acceptance of responsibility for the other party's reliance on the assumption that the performance specified in the agreement will be carried out.³⁴ Such an interpretation implies that a contracting party does not have a duty to perform except in the special case where the payment of damages cannot reasonably compensate the other party for his reliance (consistently with the rule on specific performance, which should be available where there is a duty to perform.) Thus punitive damages should be available for breach of contract when the defendant failed to perform knowing that the plaintiff would in consequence suffer uncompensable loss. This is consistent with the approach of Mosk J in the recent Californian case of *Freeman & Mills v Belcher*.³⁵ He said that punitive damages should be available where "a party intentionally breaches a contractual

duty is to avoid harm rather than to confer a benefit: see J Raz, "Promises in Morality and Law" (1982) 95 Harv LR 916.

³³ For a critique of the doctrine of efficient breach, see Daniel Friedmann, "The Efficient Breach Fallacy" (1989) 18 Journal of Legal Studies 1.

³⁴ This approach is developed in Peter Jaffey, "A New Version of the Reliance Theory" [1998] NILQ (forthcoming).

³⁵ 900 P.2d 669 (Cal 1995).

obligation with neither probable cause nor belief that the obligation does *not* exist *and* when the party intends or knows that the breach will result in severe consequential damages to the other party that are not readily subject to mitigation, and such harm in fact occurs".³⁶ This is liable to be the case where the plaintiff has become dependent on the defendant by putting himself, through entering the contract, in a position in which, in order to avoid loss on the contract, he needs performance that can only be supplied by the defendant. In such circumstances the defendant's responsibility for the plaintiff's reliance interest generates a duty to perform and the deliberate breach of the duty justifies punitive damages.

Vicarious liability

Vicarious liability is ostensibly difficult to justify even in relation to compensation, because it seems to involve liability, ostensibly in respect of a wrong, but imposed on a party who did not commit it. The best justification seems to be that it is not liability for a wrong at all, but a form of strict liability for losses caused by a business designed to ensure that the business cannot profit without also bearing responsibility for the losses involved in the profit-making activity, whether incurred by the business itself or by outsiders through the activities of the business.³⁷ The Report seems to take the view that this argument also justifies vicarious liability for punitive damages,³⁸ but this is clearly not the case, because punitive damages do not represent any loss caused by the business.

³⁶ Italics in original. The majority of the court held that punitive damages were never justified for breach of contract.

³⁷ For an argument on these lines, see Jane Stapledon, *Product Liability* (Butterworths, 1994), 185ff.

³⁸ Para 5.87ff.

It is also argued in the Report that vicarious liability for punitive damages is justified because of its deterrent effect on employers,³⁹ in the form of the measures they will be induced to take to ensure that their employees are properly selected and trained and that decisions are properly taken with due consideration of the interests of outsiders. No doubt such “vicarious punishment” can have this effect, although the effect on the conduct of the employer would be maximised if its imposition depended on the conduct of the employer, and then of course the punishment would not be vicarious at all. In any case, vicarious punishment is objectionable because of its unfairness, certainly in relation to more serious offences. The argument for vicarious punishment equally supports the general use of group punishment and the abandonment of *mens rea*. The real issue here is the general problem of corporate criminal responsibility - how to deal with dangerous practices and procedures in companies or other organisations for which it is difficult to determine individual culpability, or for which no single individual is responsible.

Restitutionary damages

By restitutionary damages, the Report means, consistently with common usage, a response consisting of a pecuniary liability measured by the defendant’s gain. Sometimes restitutionary damages are regarded as “quasi-punitive”. On this approach it is the public interest that justifies stripping the defendant of his profit according to the principle that a wrongdoer should not be permitted to profit from his wrong, whether this principle is understood as designed to remove the incentive to profit, or

³⁹ Para 5.92.

to deny the wrongdoer a benefit that it would be intrinsically wrong for him to keep. Restitutionary damages on this understanding might be more aptly described as disgorgement.⁴⁰ Disgorgement is the civil law equivalent of confiscation, just as punitive damages are the equivalent of a fine. Disgorgement (and confiscation) might appear to be unnecessary if punishment were always available, on the basis that due punishment would always negate the wrongdoer's benefit. But it may be that it is right to remove the benefit of a wrong even in circumstances in which it would not be appropriate to punish, maybe where the wrong was inadvertent. In some cases, restitutionary damages have apparently been understood as disgorgement. For example, in the recent case of *Halifax v Thomas*,⁴¹ the Court of Appeal refused a claim for restitutionary damages for fraudulent misrepresentation. The tenor of the judgment makes clear that the judges viewed the claim as quasi-punitive disgorgement; they thought it gave the plaintiff a windfall and served the same purpose as a confiscation order. The Court's hostility to the claim seems to have been due to its understanding that, like punishment, disgorgement is incongruous in civil proceedings.

There is a distinct type of claim for restitutionary damages. In this type of case the defendant has benefited from his unauthorised use of the plaintiff's property, as for example where the defendant trespassed on the plaintiff's land or infringed his patent. The defendant is liable to pay what the court assesses as a fair licence fee for his use,

⁴⁰ This usage is advocated in Lionel D. Smith, "The Province of the Law of Restitution" (1992) 71 Can Bar Rev 672, 694.

⁴¹ [1996] 2 WLR 63.

which is generally taken to be a measure of the benefit he has received through the use of the property, although it would be better to say that it is a measure of reasonable payment for the benefit.⁴² In these cases there is no suggestion that the plaintiff is receiving a windfall, or that the rationale for the defendant's liability is "quasi-punitive" in the sense above; it may not even be appropriate to say the defendant has committed a wrong. The claim is apparently based on the plaintiff's inherent entitlement to payment for the use of his property, not on the defendant's culpability. In other words the response is in the nature of a remedy rather than a punishment or quasi-punishment. It might be described as a claim for payment for unauthorised use or appropriation. The judges have not felt the discomfort in allowing such a claim that has affected them in the case of disgorgement or punitive damages.⁴³

It is crucial to distinguish between the two types of restitutionary damages, particularly in the present context. Disgorgement, like punitive damages, is a response imposed in the public interest rather than as a remedy for the plaintiff, and, as with punitive damages, it is important that it should be subject to special safeguards and to the need to ensure co-ordination with punishment and confiscation in criminal proceedings. On the other hand a claim for unauthorised use or appropriation (if it is justified at all) is properly a civil claim for a remedy, not raising any special difficulties of this sort. The distinction is also relevant to the issue of election - whether a plaintiff should have to choose between a claim for compensation and a

⁴² *Strand Electric Engineering v Brisford Entertainments* [1952] 2 QB 246, *Ministry of Defence v Ashman* [1993] 2 EGLR 102.

⁴³ Although the underlying justification of the claim is unclear.

claim for restitutionary damages, or whether they can be combined. If, for example, the defendant plaintiff suffered £1,000-worth of damage and the defendant made a £2,000 profit, should the plaintiff be able to claim both £1,000 compensation and £2,000 restitutionary damages, making a total of £3,000, or should he have to choose one or other, so that he is limited to £2,000? The Report concludes that the plaintiff must choose between the claims, although it acknowledges views to the contrary.⁴⁴ In fact the answer depends on whether the claim in question is a disgorgement claim or a use or appropriation claim. The measure of disgorgement is the excess of the defendant's profit over his liability in compensation, because this is what is necessary to ensure that he does not profit through his wrong. Thus the plaintiff should take whichever is larger, the defendant's profit or the plaintiff's loss (but there is no reason to require him to choose between them before all the facts come out in the trial, so long as he pleads both). On the other hand, a compensation claim and a use or appropriation claim are clearly independent and cumulative. If the £2,000 represents an appropriate imputed licence fee under a use or appropriation claim, there is no reason why the plaintiff should not be entitled to £3,000, the sum of the two claims.⁴⁵

It is unfortunate in my view that the Report makes no distinction between the disgorgement claim and the use or appropriation claim, although maybe unsurprising

⁴⁴ Para 3.68.

⁴⁵ Also an imputed licence fee, unlike the measure of disgorgement, would normally fall short of the benefit received.

given that the distinction finds no place in the leading books on restitution.⁴⁶ It is generally said both that the purpose of restitutionary damages is to prevent a defendant from profiting from his wrong, and also that “restitution for wrongs”, to which restitutionary damages are the response, is properly subsumed (with restitution for unjust enrichment by subtraction) under the single formula of “unjust enrichment at the expense of the plaintiff”, which is understood to generate a normal civil claim in respect of an interest of the plaintiff. Thus the Report does not consider in connection with restitutionary damages any of the procedural difficulties that it accepts are relevant to punitive damages. But, where restitutionary damages are to be equated with disgorgement as understood above, these issues do need to be considered, as *Halifax v Thomas* showed.

Conclusion

The Report distinguishes firmly between exemplary damages as a form of punishment and aggravated damages as a form of compensation. It is open to doubt, however, whether aggravated damages can be adequately dealt with by assimilating them to the law on compensation for mental distress, as the Report suggests. The most important recommendation is for the expansion of the availability of exemplary or punitive damages. The recommendation is defensible, but the Report’s analysis is unconvincing, and the issue needs to be considered as part of a wider assessment of the relation between civil and criminal law and the function of the division between

⁴⁶ It was pointed out in Peter Jaffey, above n11. See also Daniel Friedmann, “Restitution of Benefits Obtained through the Appropriation of Property or the Commission of a Wrong” 80 Colum LR 504 (1980).

the two. The Report's approach to restitutionary damages is flawed by its failure to distinguish between the quasi-punitive liability for disgorgement and the liability for reasonable payment for the unauthorised use of property. Given the longstanding controversy surrounding the area, the Report's recommendations are unlikely to attract universal approval; nevertheless, whether or not the Report leads to legislation, the Law Commission has certainly made a valuable contribution to the much-needed clarification and development of an important area of law.