



Gains Based Remedies: the misguided search for a doctrine

by Tom Stafford

Abstract

This article examines the phenomenon of “Gains Based Remedies”. These are awards that, unlike classical damage awards which are calculated by reference to the loss suffered by the claimant, correlate to the gain made by the defendant. A couple of common examples include an account of profits for breach of trust claims, or the “disgorgement” damages that were awarded in *AG v Blake*. These awards are however available for a spectrum of varied wrongs. Their seeming lack of unity has often baffled commentators who have tried to search for an underpinning doctrine. One particularly renowned commentary is that of Professor Edelman’s, who suggests that these wrongs can be understood by being broken down into one of two categories: awards which seek to deter wrongdoing, and awards which reverse a wrongful transfer of value. The purpose of this article is to discuss the flaws of this view of the law, and to suggest that in fact, any search for a doctrinal underpinning to Gains Based Remedies is misguided. The cases in which these awards are granted have only one feature common to all: the claimant’s loss is, for whatever reason, difficult or impossible to assess. For that reason, the courts use the only other measure of the wrong available: the defendant’s gain.

Introduction

Gains based remedies are both an interesting and irregular feature of British law. The general position is that a remedy should restore the Claimant to the position they would have been in if the tort, breach of contract, breach of trust etc had not been committed. As such, the remedy will almost always correspond to the loss suffered by the Claimant. However, in some cases the remedy will instead reflect, partially or fully, the gain made by the defendant.

There have been a number of attempts to rationalise and explain the basis of these awards. Perhaps the fullest and most renowned explanation was that given by Dr Edelman in his work *Gains Based Damages*¹. In this work, Edelman puts forward a thesis which, if correct would indeed provide a coherent academic rationale for this previously elusive area of the law.

Edelman essentially states that a lot of the confusion surrounding gains based remedies can be overcome when one divides them into two categories:

- i) “Disgorgement Damages” and
- ii) “Restitutionary Damages”²

According to Edelman, this division into two categories will dispel a lot of confusion, as there is in fact a different rationale for each category. He argues that the rationale behind “Disgorgement damages”

¹ Edelman, *Gain-Based Damages* (Hart Publishing, Oxford 2002)

² *Gain-Based Damages* (n1) Chap 3

is to *deter* wrongdoing; therefore they focus on the profit actually made by a Defendant, and prevent him from profiting from his own wrongdoing. By contrast, the basis of “Restitutionary Damages” is to reverse a wrongful transfer of value between the Defendant and the claimant.

In this article, it will be argued that neither of these bases provides an adequate explanation for either type of gains based remedy.

Edelman’s deterrence rationale fails to convince because:

- 1) The disparate development of profit-stripping awards at Common law, Equity and Statute, and the wide disparities in their availability at each make it highly unlikely they were the product of an overarching rationale and this analysis does not accord with a lot of the case law;
- 2) It is questionable whether or not profit-stripping awards even *would* provide an effective deterrent;
- 3) If one of the key purposes of the law is to deter wrongdoing generally, then why are profit-stripping awards available only for a very limited number of wrongs, and not all?

Equally, Edelman’s restitutionary analysis of the reasonable/license³ fee cases is equally unconvincing because:

- 1) It is often highly artificial to say that there has been any transfer at all in the reasonable fee cases;
- 2) This remedy has been limited to only some common law wrongs rather than being available as a matter of course as Edelman suggests.

So far, everything proposed here has already been argued in one form or another and a good part of this article will simply be summarising responses to Edelman’s thesis that have already been put forward, drawing in particular on a great deal of *Rotherham’s* work.

However, the proposition put forward here, one which has yet to be seen in the literature surrounding controversial area, is that *any* search for an underlying rationale of gains based Remedies is fundamentally misguided. At least at Common law, there is only one thing the cases on this topic have in common and that is that in each case where the court makes an award based on the Defendant’s gain rather than the claimant’s loss, it is difficult or impossible to tangibly assess the loss to the claimant.

In other words, any award which is framed in terms of the gain made by the Defendant as opposed to the loss suffered by the claimant is simply a pragmatic response by the court to a situation where the Court cannot credibly put a number on the claimant’s loss because it is simply too intangible. Instead, the court attaches a value to the gain made by the Defendant simply because it is easier to quantify. This is subject to the one caveat that at Equity for breach of fiduciary duty, and in some of examples of gains based remedies awarded by statute, their award can be explained by ad hoc policy considerations, yet cannot be unified by some coherent academic rationale.

The Inadequacy of deterrence as an explanation for the disgorgement of profits cases

There are numerous reasons why Edelman’s deterrence analysis of the “disgorgement” is not as plausible as claimed. Firstly, the law on disgorgement has developed too spasmodically at common law, equity and statute, and is available in such varying circumstances in each for it to have been the result of the same underlying rationale; Secondly, as was argued by Rotherham⁴ the

³ The terms are used interchangeably in the cases and literature and will be so in this article

⁴ Rotherham, “*Deterrence as a Justification for Awarding Accounts of Profits*” [2012] 32 OJLS 537

imposition of disgorgement penalties may not even effectively deter a prospective Defendant from wrongdoing; And finally, if this was truly the rationale behind disgorgement damages, then disgorgement should be available in all the cases where the court currently grants a license fee, as in these cases there has also been an infringement of the claimant's rights which the law should properly deter.

a) The Disparate Development and Availability of “Disgorgement Damages” at Common Law, Equity and Statute

One of the key issues with any attempt to explain disgorgement remedies by deterrence is that their development at Equity, Common law and Statute has been incredibly fragmented. Further, they are far more widely available in some contexts than others, which points away from there being a unifying rationale.

One area in which it is untypically easy to claim disgorgement damages is for Breach of Trust or Breach of Fiduciary duty at Equity. A notorious example of the stringent liability of Fiduciaries, and the general availability of an account of profits in equity is *Boardman v Phipps*⁵. In this case, Boardman was a solicitor to a Trust, and as such owed that Trust fiduciary obligations. Consequently he was not entitled to profit from Trust property. However, in a joint venture with one of the Beneficiaries, they bought shares in the Trust property in order to gain control of the board, and ultimately made the Trust more profitable. This led to a profit for all the beneficiaries, but also for Boardman himself. Despite the overall gain for everyone, and the good faith of Boardman, he was sued by one of the beneficiaries. Because of the stringent nature of his fiduciary obligations, he was stripped of his profits, which were paid back into the trust.

So, in this case, we have an example of an account of profits being awarded automatically by the court. *Conaglen*⁶ has strongly argued that the nature of fiduciary obligations, and the account of profits remedy used to enforce them serve a “prophylactic” function. In other words, they exist to deter Fiduciaries to act in their own interests rather than the interests of those to whom they owe duties.

This seems to have been echoed in the case law, and in *Murad v Al-Saraj*⁷ Arden LJ explicitly said that the law imposes such stringent liability:

“...as a deterrent... [and] in the interests of efficiency ... to provide an incentive to resist the temptation to misconduct themselves, the law imposes exacting standards on fiduciaries and an extensive liability to account.”⁸

So, it would seem that the availability of disgorgement in the fiduciary cases *may* be explicable by deterrence. This is largely due to the fact that people who owe fiduciary obligations are in a position of trust and confidence, and in these exceptional cases, the law imposes incredibly exacting standards to prevent them being tempted to abuse their position. The strict imposition of the penalty, as we saw in *Boardman v Phipps* could even be likened to strict liability crimes such as driving offences, whose purpose is to deter.

However, once we examine the availability of disgorgement at both statute and common law, it becomes harder and harder to see how deterrence provides an adequate justification. As such Edelman may have been mistaken in suggesting that deterrence can provide a uniform explanation.

At statute, disgorgement remedies are available for some intellectual property wrongs. For example, the Copyright, Designs and Patents Act 1988, s 96(2) allows for disgorgement of profits for

⁵ *Boardman v Phipps* [1967] 2 AC 46

⁶ Conaglen, “*The Nature and Function of Fiduciary Loyalty*” (2005) 121 LQR 452

⁷ *Murad v Al-Saraj* [2005] EWCA Civ 959

⁸ *Murad* (n7) Arden LJ at para [74]

breach of a Copyright. However, s 97(1) allows for a defence of innocent infringement; if the Defendant did not know or had no reason to suspect that there was a copyright, then they will have a defence to the charge. Similarly, in the context of Trademarks, the Trade Marks Act 1994, s 14(2) allows for an account of profits as one of the possible remedies. However, it was made clear in *Hollister Inc v Medico Ostomy Supplies Ltd*⁹ that:

“This is an equitable remedy and the court has a discretion whether to order it. It may be refused if, for example, the infringer was entirely innocent”¹⁰

This does not really sit well with the deterrence rationale. Surely, if the law is to deter then it would make more sense to have a remedy which encourages potential defendants to be constantly vigilant, and to make enquiries into the existence of any rights that they may be breaching. Admittedly the Acts do cover Defendants that *should* have known of the existence of the rights, but this still only deters wilful blindness as opposed to actual infringement. It could even be argued that in this context, the availability of disgorgement has more in common with limb ii) of *Rookes v Barnard*- to punish a D and show him that illegality doesn't pay.

At common law, the courts are *very* reluctant to grant profit-stripping awards, and there are many examples of cases in which claimants have unsuccessfully pleaded disgorgement and been sent away with a reasonable fee award.

The most notable common law case in which the courts saw fit to award a disgorgement of profits was *Attorney General v Blake*¹¹. In this case, Blake was a British agent who had signed a contract under the *Official Secrets Act 1911* not to disclose information about his work. This also applied once the work had ceased. However, he became a double agent and fled to the Soviet Union where, after his retirement, he wrote a book about his work. This was incredibly profitable, and the British Crown brought an action for a disgorgement of those profits. Nicholls LJ held that in “exceptional cases” where the normal remedy is inadequate to compensate for breach, the court has jurisdiction award an account of profits instead.

Interestingly, *Attorney General v Blake* was a breach of contract case but because of its context claimants have also tried to secure a parallel account of profits in breach of confidence cases.

In *Vercoe v Rutland Fund Management*¹² in which a Venture Capital company had breached a confidentiality agreement and used confidential proposals about a buy-in agreement without consulting the parties who had proposed the opportunity, Sales J considered the submission that the applicants would be entitled to an account of profits. He ultimately rejected the suggestion that in breach of confidence cases, the claimant could elect between an account of profits and damages. After going over the relevant case law and in considering the state of the law after *Blake*, Sales J said that:

“In some situations, where the rights of the claimant are of a particularly powerful kind and his interest in full performance is recognised as being particularly strong, there may well be a tendency to recognise that the claimant should be entitled to a choice of remedy”¹³

In particular, he spoke about where the right is “proprietary”, especially

“where the right in question is of a kind where it would never be reasonable to expect that it could be bought out for some reasonable fee”¹⁴

⁹ *Hollister Inc v Medik Ostomy Supplies Ltd* [2012] EWCA Civ 1419

¹⁰ *Hollister* (n9) At para [55]

¹¹ *Attorney General v Blake* [2000] [UKHL 45](#)

¹² *Vercoe v Rutland Fund Management* [2010] EWHC 424

¹³ *Vercoe* (n12) Para 340

¹⁴ *Vercoe* (n12) Para 340

Sales J's analysis in *Vercoe v Rutland* does present some difficulties for Edelman's assertion that deterrence is the rationale underlying an account of profits. The main focus of Sales J's enquiry in this case was on the *claimant* and the *nature of the right* that had been infringed. He stated quite clearly that an account of profits may be available where the claimant's rights are "particularly powerful" and his interest in full performance is "particularly strong", for example in the case of a proprietary right. If deterrence truly was the basis for an account of profits, then the focus of enquiry would be on the *Defendant* and her conduct rather than the claimant and the nature of his right. The claimant-orientated analysis in *Vercoe v Rutland* does suggest that an account of profits is actually concerned with ensuring that the claimant is adequately compensated for the infringement of his right, rather than deterring potential Defendants from potential misfeasance. Therefore, it would appear at least that at Common law, unlike Equity, the analysis is claimant rather than Defendant orientated, and thus cannot be accounted for by deterrence.

b) Would Disgorgement Ever Deter?

Another reason to seriously question the adequacy of deterrence as an explanation for the disgorgement cases is that having one's profits stripped if one gets caught may not actually deter prospective wrongdoers. Rotherham¹⁵ has convincingly argued that we should not accept without question Edelman's assertion that just because a remedy is assessed at the defendant's gain rather than the claimant's loss, this has more of a deterrent effect than if it were the other way around.

Firstly, as Rotherham points out it is unclear why we actually need a remedy that is gains-based in order to deter. In the case of most torts, the fact that a defendant will potentially have to pay a great sum in damages is usually enough of a deterrent to prevent any potential defendants from committing torts. For those exceptional cases where a Defendant cynically calculates that they can still profit from a tort after subtracting the amount they will have to pay in damages we can allow the claimant exemplary damages under the second limb in *Rookes v Barnard*¹⁶. Here, the purpose is clearly to deter cynical wrongdoing. However, Edelman actually distinguishes exemplary damages from his two categories of gains based remedies, because the loss is not actually capped at the Defendant's gain. Therefore, it is still unclear whether disgorgement has any more of a deterrent effect than compensatory damages in tort or contract cases.

Secondly, a point also pointed out by Rotherham, there is a great body of research from the context of criminal law that shows that it is the certainty of a penalty rather than the nature of a penalty that has the more deterrent effect. Therefore, regardless of the nature of the remedy, if a prospective Defendant thinks that they will be able to get away their envisaged wrong, then the fact they may lose their profits if discovered may not weigh that heavily on them.

Finally, and a point which has been previously overlooked, the remedy in disgorgement cases is capped at the Defendant's gain. When one considers the ramifications of this, the significance of this becomes clear. If a Defendant will not have to pay more than they have gained in the course of their wrongdoing then even if they get caught, they will be no worse off than they would have been if they had not committed the wrong. A rather crude analogy would be a game of roulette in which the player puts a £500 stake on red, and either doubles his money or walks away with every penny of the £500. One could of course argue that they will have lost the time and labour that went into committing the wrong, but this in reality may amount to very little. By contrast, in a tort case a Defendant may be faced with damages that far exceed anything she herself has made from committing the tort. It therefore follows that tortious damages actually provide a far more effective deterrent than any disgorgement could.

c) Why Only Deter Some Wrongs But Not Others?

Finally, if the purpose of disgorgement really is to deter wrongdoing, then why have the courts been so coy about granting disgorgement?

¹⁵ Rotherham, "Deterrence as a Justification for Awarding Accounts of Profits"(2012) 32 OJLS 537

¹⁶ *Rookes v Barnard* [1964] AC 1129

For example, in a number of the cases of interference with someone's rights in land or chattels, where a right clearly has been infringed, the courts gone to great lengths to refuse the claimant a disgorgement remedy, allowing only license fee damages.

Edelman¹⁷ has suggested that in the case of common law property wrongs, a disgorgement remedy may not be needed, as the claimant can instead claim the gains made by the Defendant through "restitutionary damages" by "tracing into the higher value of the goods wrongfully [interfered with]". However, this does not sit well with the case law, and the courts have been extremely reluctant to grant an account of profits in the property cases. Denning LJ in *Strand Electric v Brisford*¹⁸ stated by Denning LJ that:

"The plaintiffs are entitled to a hiring charge for the period of detention, and that is all that matters. I can imagine cases where an owner might be entitled to the profits made by a wrongdoer by the use of a chattel, but I do not think this is such a case."¹⁹

Similarly, in *Enfield LBC v Outdoor Plus Ltd*²⁰ the Court of Appeal held that:

"[This is not] a suitable case for an award of restitutionary damages consisting of, or akin to, an account of profits. Although the circumstances of the case are unusual, it has no exceptional features which could justify going beyond the usual measure of damage in cases of this type, as elucidated by the *Attorney General v Blake*"²¹

In both cases the court did allude to the possibility of an account of profits yet did not award one. In *Enfield*, the Court of Appeal, echoing *Attorney General v Blake* even said that there must be some "exceptional circumstances" present before the court will grant such a remedy. Clearly, these special circumstances cannot be the need for deterrence. Should the law not seek to deter *any* wrongdoing and prohibit *any* illegal infringement of a claimant's rights? It does not make sense that the law would strictly prohibit any breaches of fiduciary obligations, even if the person to whom those obligations were owed profited as a result, but encourage Defendant's to usurp property without permission, by only requiring that Defendant to pay the price they would have if they'd legally hired the claimant's property.

If deterrence really were the rationale underlying an account of profits, then this remedy should in theory be widely available for most common law torts. If disgorgement really is the best means of doing so, then it is extremely odd that we only see this remedy in a few isolated areas, and more often than not, granted very sparingly by the courts.

d) Edelman's Fallacy

By taking every example of disgorgement in private law and trying to unify them under the single banner of deterrence, Edelman has made two fundamental mistakes.

Firstly, he has drawn an analogy with exemplary damages under the second limb of *Rookes v Barnard* which does not exist. The purpose of these exemplary damages, which are *not* capped at the Defendant's gain, is both to deter and to punish. It would be seem intuitively logical that a gains-based remedy which requires disgorgement of profits, but which *is* capped at the Defendant's profit, is to deter but not to punish. This at first glance does seem to make sense. However, when one examines this proposition closely, it becomes clear that this is simply not the case. Fundamentally, if a wrongdoer is only required to give up the gains made by the actual wrongdoing, then it is not an

¹⁷ *Gain-Based Damages* (n1) p 140

¹⁸ *Strand Electric & Engineering Co v Brisford Entertainments Ltd* [1952] 2 QB 246

¹⁹ *Strand* (n18) at 255

²⁰ *Enfield LBC v Outdoor Plus Ltd* [2012] EWCA Civ 618

²¹ *Enfield* (n20) at para [53]

effective deterrent at all. From a risk-theory perspective, these are excellent odds! Any aspiring entrepreneur will tell you that a business strategy in which you either profit or break even is well worth the risk, and therefore any savvy Defendant is more likely than not to simply commit the wrong then wait to see if they are caught.

Secondly, Edelman tries to extrapolate the rationale for breaches of fiduciary duties in equity, and apply it across the board. Though the subject is not uncontested, there is a fairly large body of academic opinion that will agree that the purpose of an account of profits in Equity is to deter Fiduciaries and Trustees from breaching their obligations. However, we are very far from having fusion of Common law and Equity. Just because deterrence may provide the rationale for an account of profits in Equity, it does not follow that this is also the correct rationale when we find disgorgement being awarded at Common law. If Edelman is going to maintain that this is in fact the rationale behind a disgorgement at common law, then he needs to point to a great deal more evidence in the case law.

The Inadequacy of Edelman's Restitutionary Analysis of the Reasonable Fee Cases

In what I have dubbed the "reasonable fee cases" and Edelman has described as cases where "Restitutionary damages" are awarded, the court will typically make an award of what they deem to be a reasonable fee for the Defendant's usurpation of the claimant's right. These are gains based remedies because they are assessed by reference to the *gain the Defendant has made by not paying* for the use of the right, rather than by reference to the loss to the claimant caused by the Defendant usurping their right, which will often be impossible to quantify or may seem non-existent.

There are two primary reasons why Edelman's restitutionary account of the reasonable fee cases is significantly flawed. Firstly, as Rotherham²² has noted, in many of these cases, it is hard to see how there has actually been any transfer of value from the claimant to the Defendant. To describe it as such is thus misleading and factually inaccurate. Secondly Edelman states in gains based damages that:

"...restitutionary damages should in theory always be available for wrongs."²³

However, this can clearly be shown not to be the case, and in reality the courts have been quite selective about which wrongs will give rise to reasonable fee damages.

a) The lack of any Transfer in the Reasonable Fee Cases

For a while, the leading analysis of the reasonable fee cases was that they were loss-based, and based on the fact that the claimant had lost an opportunity to bargain. However, in recent years this analysis has been superseded and one of the leading theories is Edelman's.

Edelman's explanation is that every case in which the court makes a reasonable fee award can be explained in restitutionary terms, as what has really happened is that there has been a transfer of value from the claimant to the Defendant.

At first this seems a rather neat and attractive solution. However, on closer analysis it becomes inadequate. It has been pointed out by Rotherham that this rationale is "fundamentally misconceived"²⁴ As Rotherham puts quite forcefully in "The Conceptual Structure of Restitution for Wrongs", Edelman's thesis misses a crucial distinction between "subtractive transfers" (takings) and "non-appropriative interferences" with rights.

This soon becomes clear once we take a closer look at the case law.

²² Rotherham, "The Conceptual Structure of Restitution for Wrongs" (2007) 66 CLJ 172

²³ *Gain-Based Damages* (n1) Chap 3

²⁴ *The Conceptual Structure of Restitution for Wrongs* (n22)

License fee awards have long been available for breaches of a nuisance. Let us for example *Forsyth-Grant v Allen*²⁵. In this case a hotel owner complained of a nuisance caused by interference to her right to light. She originally applied for an account of profits, but the court instead granted a reasonable fee award. As put by Pattern J, a nuisance does not involve the same misappropriation of the claimant's rights as a copyright infringement, or even a trespass. The essence of the tort is that the claimant's rights to the enjoyment of their land have been infringed by the Defendant's activity. On the face of it, this should not entitle a Defendant to more than the loss they have suffered. However, on the basis of the authorities:

"...the claimant can, in appropriate cases, obtain an award calculated by reference to the price, which the defendant might reasonably be required to pay for a relaxation of the claimant's rights so as to avoid an injunction."²⁶

In the case of a nuisance, it is very hard to see how there has been any transfer of value between the Defendant and the claimant. What actually happens is that the Defendant does something on his own land that interferes with the claimant's peaceful enjoyment of her own. It is quite impossible to say that any value has been transferred from the claimant to the Defendant, any more so than one could in a negligence case. What has happened is simply that the Defendant has infringed a right that the claimant had, and rather than awarding a remedy based on what the loss of that right has cost the claimant, the courts make an award based on what the Defendant has saved in not having to pay for the relaxation of said right.

Furthermore, as well as not accounting for a great swathe of wrongs for which the courts grant a license fee award, the Restitutionary analysis does not even explain some of the cases that it prima facie appears to.

For example, the courts will often make a reasonable fee award in response to property torts, such as Conversion or Trespass to Goods. For example, in *Strand Electric & Engineering Co v Brisford Entertainments Ltd*²⁷ the Defendants wrongfully detained the claimant's switchboards. This was both a Conversion and a Trespass to the goods. As a result, the claimants were entitled to recover the objective market rate that the Defendants would have had to pay for the hire of the switchboards for the period of their detention.

The Restitutionary analysis seems to provide an enlightening rationale, as these wrongs appear to be what Rotherham describes as "subtractive transfers". However, as he goes on to point out in his article, even though there has been a transfer of physical possession from the claimant to the Defendant, it is hard to see how there has been a transfer of value. The Defendant's enrichment in these cases is purely negative; because of their wrong they have saved the cost of hiring the claimant's property. However, it does *not* follow from this that there has been a transfer in value from the claimant to the Defendant. Rather, it is the *lack* of a transfer (the price of hire) from the *claimant* to the *Defendant* which is the issue.

Therefore, Edelman's transfer of value explanation fails even to account for those cases it appears to.

b) The Reasonable Fee Award is Not Available for all Wrongs

Edelman argues in his book that Restitutionary Damages should be available for all wrongs.

One only has to look at the case law to quickly establish that this is not the case. In *Stoke on Trent City Council v W & J Wass Ltd*²⁸ the claimant council held the exclusive rights to operate a market.

²⁵ *Forsyth-Grant v Allen* [2008] EWCA Civ 505

²⁶ *Forsyth* (n25) para 32

²⁷ *Strand* (n18)

²⁸ *Stoke on Trent City Council v W & J Wass Ltd* [1988] 1 WLR 1406

This was infringed by the Defendants, who ran their own market on Thursday (when the Council did not operate one) without the Council's permission. In the Court of Appeal, it was held that the Council were entitled to nominal damages only.

Of course, the fact that the Reasonable Fee award is not available for all wrongs does not strictly undermine Edelman's analysis as the remedy as Restitutionary. However, the fact that his contention that it is available for all wrongs is incorrect does highlight a willingness to overlook the rather fundamental issues, such as the current state of the law. One could be forgiven, therefore for suggesting that Edelman's thesis is merely prescriptive, illustrating what the law *ought* to look like, rather than accurately describing the law as it stands.

Conclusion: Any Search for a Coherent Academic Rationale is Misguided

So, apart from demonstrating that Edelman's thesis doesn't hold water, what has the object of the above discussion been? The unavoidable conclusion is that not only does Edelman's thesis itself not work, but that *any* attempt to explain gains based remedies by reference to an underlying and coherent academic rationale will fail. This is because when the courts make an award that corresponds to the Defendant's gain rather than the claimant's loss, they do not do so in furtherance of abstract principles such as deterrence of wrongdoing, or to reverse unjust enrichment. Rather, they do so because it is extremely difficult to calculate the loss to the claimant.

This is the only coherent thread running through the cases in which the courts have awarded a gains based remedy: that it is far easier to calculate the gain made by the Defendant than the loss suffered by the claimant. Thus, in order to uphold the rule of law, and see that wrongs are remedied, rather sending the claimant away empty handed, or making an arbitrary and imprecise estimate of the claimant's loss, they use the Defendant's gain as the appropriate measure. Once this is understood, it becomes clear that the only coherent basis of these awards is cold legal pragmatism.

This becomes clear if we take another look at some of the cases examined above.

In *Attorney General v Blake*²⁹, there was no tangible *financial* damage to the Crown, or if there was, it was too remote to quantify. The contract Blake made with the Civil Service was not so they could economically benefit, but to uphold national security. Therefore, when he broke his contract, the damage caused was to the national interest. Because of the sensitive and important nature of the case, it would hardly have been appropriate for the courts to have declared that the Crown had suffered no financial loss, or that it was too remote, and sent them away without a remedy. Instead, they calculated the award on the only tangible financial sum that could be said to directly result from the breach of Contract: Blake's profits.

Equally, in *Strand Electric & Engineering Co v Brisford*³⁰, where the Defendants had wrongfully usurped the claimant's switchboards it could be argued that the *loss* to claimants was zero, as they themselves were not using the switchboards at the time and consequently were not made any worse off by the Defendants use of them. However, to send them away empty-handed would have seemed highly improper, so the court made an award based on how much the Defendants have gained by not having to pay for their hire.

Finally, let us consider *Forsyth-Grant v Allen*³¹, the nuisance case. Here, the loss caused to the claimant is also almost impossible to quantify. One could argue that the loss could be calculated by the reduction in value of the claimant's land. However, the nature of the complainant in the tort of nuisance is not the Defendant has depreciated the *value* of the claimant's land, but rather that by

²⁹ *Blake* (n11)

³⁰ *Strand* (n18)

³¹ *Forsyth-Grant* (n25)

doing something on their own land they have disturbed the claimant's peaceful enjoyment of theirs. Again, it is very hard to put a concrete value on this, so it is far more convenient for the courts to estimate what the Defendant has gained in not having to pay the claimant for the relaxation of their right.

In summary, the continued search for a doctrine underpinning gains based remedies cannot lead anywhere productive. The sooner we accept that gains-based remedies are simply a pragmatic response to situations where it is not possible to make awards in the ordinary way, which correspond to the claimants loss, we will save ourselves a great deal of time and argument.

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