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WRONGS AND REMEDIES IN THE TWENTY-FIRST CENTURY

Edited by Peter Birks

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Wrongs and Remedies in the Twenty-First Century is a collection of papers from three seminars in a series on "Pressing Problems in the Law" given in Oxford during 1995 and 1996. One seminar was devoted exclusively to Atiyah's paper on "Personal Injuries in the Twenty-First Century", another to four papers on professional negligence and the third to six papers on exceptional measures of damages. The volume also includes commentaries on each set of papers given at the two latter seminars and a general introduction by the editor.

Atiyah's paper is subtitled "Thinking the Unthinkable". Its major proposal is essentially that the common law of negligence be abolished with respect to liability for personal injuries. Provision for compensation should then be left to the social security system (which he sees as shrinking and likely to continue to shrink) and to private markets for first party insurance. There are some minor qualifications to this: the paper excludes consideration of intentionally inflicted injuries, contemplates the existence of a moderate form of tort liability with a very restricted ceiling on claims (perhaps $500-$750) and regards as inevitable (as distinct from desirable) the existence of a no-fault scheme for motor vehicle accidents. The latter is described conventionally as a first party insurance system because it is capable of covering a case where the accident involved nobody other than the claimant, though in practice the claimant need not have contributed any premium to the scheme and many claimants who may have paid premiums are disqualified from benefits through specific provisions. Since this is an English paper it must be remembered that the proposals are made in a context in which there is no separate workers' compensation scheme, and industrial injuries are covered by a specific social security benefit pitched at comparable levels to other social security provisions and by the common law of negligence. Atiyah envisages that unions will bargain with employers for employer-funded group disability insurance to replace common law claims. The context against which the proposal is based is explicitly one in which governments are seeking to reduce the range of public responsibilities and increase the matters left to private cost and provision, in which the contraction of the welfare state is an important element in pursuing

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this general objective and in which the looming crisis of an aging population will place ever increasing demands on what can be spared for it. And this gives rise to the distinctive feature of the proposal: that it does not include any public sector scheme such as the New Zealand accident compensation legislation to replace the common law rights that have been abolished and, unlike the proposals that Atiyah put forward in the early editions of *Accidents, Compensation and the Law*,[1] does not incorporate any improvements to social security provision through the short-lived experiments with earnings-related benefits. Instead, Atiyah speculates optimistically that, given new opportunities, the insurance market will produce new products that will enable those who wish to make further provision for themselves to do so.

The case against the common law of torts and damages is a familiar one. Atiyah dismisses any claims that the common law can be justified according to theories of corrective justice on the ground that few tortfeasors in fact pay the costs of the injuries they cause: the costs are paid by third party insurers or by employers through the medium of vicarious liability. While this imposes most costs on companies, Atiyah thrusts aside the corporate veil in arguing that in many cases, including high cost mass tort litigation, damages are really paid by people who may well have become shareholders and employees or directors long after the tort was committed while those whose behaviour attracted liability may well suffer no financial detriment at all. Since the practical operation of the law of torts cannot be justified on the basis of corrective justice it must be seen as a medium for distributive justice, and in this role it fails even more miserably given its unpredictable, arbitrary and inadequate performance in reaching people who have suffered personal injury and the absence of any attention to distribution from rich to poor. It remains as an outrageously expensive and ineffective institution, and one which is characterised by unpredictable and uncontrollable cost increases that lead to untenable claims on resources which could be employed infinitely more productively elsewhere. So it has to go.

The unthinkable element in this is scarcely the proposal to abolish the law of torts but to abolish it without formal replacement other than a no-fault motor vehicle accident compensation scheme. A significant point in this is that the proposal is aimed at a UK audience so that (subject to the outcome of union negotiations) its most obvious beneficiaries would be employers, whose liability for the costs of employment-related sickness and injury would be reduced to their share of National Insurance contributions. So, at a time when much of the economic theory which restricts the scope of social security provision also supports the notion of providing incentives to industrial safety by imposing the costs of accident prevention and of accidents on employers and management theory generally sees quality control matters (including work safety) as a matter of organisational responsibility rather than individual carelessness, it transfers the costs of accidents to individual workers and the social security system. Australia's Industry Commission's

1 Atiyah, *Accidents, Compensation and the Law* (Weidenfeld & Nicolson, London 1970).

report on workers' compensation[2] may have been unsophisticated in dealing with the practical problems of running an industrial injuries compensation scheme, but it had no doubts about the need to place substantial responsibility for the costs of work accidents on employers. Placing faith in union bargaining to improve provisions for disability in a world of declining union power and patchy coverage among different sectors of the workforce shows little if any concern for the issues of comprehensive coverage or equity of financial treatment for workers to which the relative increases in casual and part-time employment have drawn attention, especially in a country which has never had any centralised mechanisms for settling disputes. Much of the debate on industrial injuries in Britain has been focussed on the disadvantages of the law of torts and the justifications for an industrial preference within the social security system for so long that it is no longer noticed that this is one field in which there are serious grounds for replacing the law of torts with a proper compulsory no-fault scheme, whether it is administered through the private or the public sector. There is certainly no need for Australian thought and policy to be so confined. The practical difficulties which attach to running the compensation side of any scheme dealing with personal injury or disability, and the political difficulties which attach to the desire of the States to give themselves a competitive employment advantage by reducing the costs of workers' compensation to employers by reducing benefits, are no justification for considering abandoning (as distinct from improving) any of the schemes presently in operation in Australia.

Atiyah reluctantly accepts that the common law would have to be replaced by a no-fault scheme covering motor vehicle accidents. This he sees as simply a matter of practical politics, and there can be no other reason for supporting the removal of an industrial preference while advocating the retention of a motor vehicle preference. In this he is probably right; even in jurisdictions where common law actions against employers remain available the commonest tort claims are motor vehicle claims, and their abolition without any replacement could easily be made the subject of acrimonious political debate. The arguments that there is nothing special about people disabled through motor vehicle accidents as against those disabled in other ways, and that the usual criticisms of the law of torts with respect to concepts of fault, deterrence and corrective justice have particular force with respect to motor vehicle accidents, are valid. But few, if any, commentators have to my knowledge advocated abolishing the law of torts in this field without advocating either a no-fault scheme or a more comprehensive accident or disability compensation scheme. In Britain and most Australian States it has not yet been possible to achieve the replacement of the common law by a no-fault scheme, and it may be that the reasons for that failure need some further consideration. It can hardly be that the power of any vested interests of the legal profession is so strong in this area, where it has not been in many others in recent years nor in Australia, that the strength of the interests of private insurance companies, which have generally voluntarily withdrawn from the field, dominates the political process. What seems to have happened in Australia is that the

2 Aust, Industry Commission, *Workers Compensation in Australia* (Report No 36, 1994).

statutory restrictions on damages, especially those for non-economic losses and the voluntary provision of services, and the imposition of statutory discount rates, have reduced the dangers to third party insurance funds and controlled premium increases, thus removing a good deal of political pressure for other change. At the same time the experience of the more comprehensive workers' compensation schemes in Victoria and South Australia, where the perceived desirability of keeping levies low has made them political footballs, contributed to Commonwealth-State financial tensions and led to both reduced benefits and distorted forms of benefits for lost earning capacity, has not instilled confidence in their operation. Perhaps the experience of the no-fault motor vehicle schemes in Victoria and the Northern Territory could be used to offset much of this, but in other States the prospects for radical change have probably diminished rather than improved in recent years.

In a State such as Victoria, where access to the common law in motor vehicle and industrial injury claims has been dramatically reduced in the last decade, the practical scope of the law of torts must be very tiny: products, builders', occupiers' and professional liability cases must surely cover a minuscule fraction of the small proportion of injured and disabled people who recover tort damages. Should it be unthinkable to abolish the rest of the law of torts with respect to personal injuries there? If the arguments favouring a no-fault workers' industrial injuries scheme are valid and if a no-fault motor vehicle scheme is inevitable, then the case for equality of treatment for the disabled is impaired. Apart from this fact, though, all the arguments about the cost and delays of the legal process relative to the numbers who recover, and the absence of justification for treating those disabled through injury differently from those disabled by sickness, must surely be overwhelming once the only areas which generate substantial numbers of successful plaintiffs are removed from its operation.

The case for the retention of a compulsory community response for those disabled through avoidable injury, as distinct from preferring voluntary and market responses, rests on two separate bases. The first is the likelihood that the private sector will not provide anything like an equitable distribution of provision: despite the disadvantages and ineffectiveness of the common law and the levels of social security benefits, private disability insurance is uncommon, patchily distributed and not available at economic rates to those who are obviously poor risks. The market aims to provide allocative efficiency, not to satisfy the distributional needs of the indigent and disadvantaged. The second is often put in terms of the symbolic value of a social recognition that those who have caused avoidable injuries to others should have a responsibility for meeting the financial consequences of those accidents or ensuring that they are met. This argument can be based on ideas of moral responsibility, the provision of economic incentives to safe practice, and the avoidance of the temptations of freeloading on safety issues, or the aversion of governments (particularly evident in Australia) to accept final responsibility for the costs of the medical and hospital treatment and income maintenance of those disabled by another. These objectives can be met outside the law of torts, of course; no-fault motor vehicle schemes

give the insurer/administrator rights of recovery against drivers who have committed particular offences and deny such drivers' claims in respect of their own injuries, and workers' compensation schemes incorporate reward systems and penalty levies on bases that can scarcely reflect actuarial assessments of risk but satisfy demands that employers with good accident records should pay less than comparable employers with worse records. But the very existence of such mechanisms, as well as such others as subrogation and social security recovery of compensation benefits, indicates the strength of the demand that those who are seen as causing accidents should have some substantial responsibility for them, regardless of issues of deterrence, the overall efficiency of cost-recovery mechanisms or the impact on individual responsibilities of the grant of juristic personality to corporations.

Atiyah's proposals may not be unthinkable, and the general context against which he puts them forward suggests that they should be considered. But they unquestionably constitute the bleakest of the visions for the future of personal injury law, provision for the disabled and even accident prevention that have been put forward in recent years. That bleakness stems from the absence of any analysis of what the role of social security or other public sector provision should be, what the market can be expected to provide and to whom, and what relationships between public and private sector provision we should aim for, remembering that each can come in different forms and that where the market fails the private sector often means family support. It is perhaps ironic that at this general level of thinking about public policy the essay should (apart from the determination to do away with the common law) have an essentially ad hoc appearance. The great virtue of *Accidents, Compensation and The Law* remains that it was (and is) the only work on personal injury law which described not only the operation of the law of torts but also that of the social security system and of private sector accident insurance. But the depth of the theoretical exposition of tort law and theory (and in this I include the analysis of general deterrence theory) was not matched by any equivalent attempt to provide a critical basis for the role of either social security or the private sector, nor analysis of the relationship between the roles of the public and private sectors in a mixed economy. The preference for the reform of personal injury law through the public sector and social security appeared as a matter of pragmatism: it would be the most effective and probably the most cost-effective way of attaining the equitable and distributional (if not necessarily egalitarian) goals that a scheme of provision for the disabled should aim for. But now, in "Personal Injuries in the Twenty-First Century", Atiyah abandons the practicability of using the public sector as a medium of reform, again apparently as a matter of pragmatism: within the present thrust of the philosophy of small government and low taxation there is no desire for wider welfare systems for the disabled or for anyone else, and the wider systems cannot be afforded even if they are desired. All that is left then is the private sector and especially the market, and expressions of hope that it will fill some gaps left by the removal of the common law. Even where alternative provision such as workers' compensation is sensible, generally supported by economic theory and there is evidence that it does help to reduce accidents its possibility is ignored. The abolition of the common

law as a means of dealing with personal injury and disability thus removes one form of public intervention, and the possibilities associated with it of certain forms of public regulation and private backing for them, without offering any grounds for assessing either the purposes or the effects of what is left to deal with the real problems. If one contemplates the extension of this general approach to meeting other forms of welfare needs it becomes apparent that this form of thinking the unthinkable is not simply a question of assessing the utility of a particular mechanism for dealing with a technical problem but is one aspect of the kind of society we should be aiming for. Here Atiyah declares himself in favour of the free market and the expansion of choice that he sees as associated with it. But his proposals envisage a market which subsidises injurers, socialises part of the cost of the harm they cause and then offers the free market as a means of spreading the rest in a field in which it is not equipped to work.

The role of the common law as a method of public regulation of individual activity is also an underlying theme of the essays on professional liability, though the authors approach from very different perspectives. Ian Kennedy's essay is primarily concerned to deny the utility of the fiduciary relationship as a tool for dealing with the liability of the medical profession for iatrogenic injuries, largely on the ground that the courts, especially in Britain, are too likely to allow doctors to determine which interests of their patients they should be concerned to further. He would no doubt approve the approach of the High Court in *Breen v Williams* [3] (which had not been decided when he wrote) to the use of the fiduciary relationship, though perhaps with reservations as to the result of the case. The essence of his argument, though, focuses much more on the inability of any common law technique to achieve, let alone guarantee, a framework for the development of the doctor-patient relationship in a way which meets the needs of both, bearing in mind the intrinsic imbalance in power between them. His basic argument seems overstated in the terms in which it is put in jurisdictions which have rejected the *Bolam* principle,[4] but Kennedy's preference - he calls it his "impossible dream"- is for a regulatory regime based on wider considerations as to the utility of different kinds of machinery for regulating professional behaviour. Such a dream would incorporate financial support for the victims of medical accidents on the basis of need, paid for out of general revenue and perhaps a levy on the private health sector; codes of practice developed by the various Royal Colleges setting out what can be expected of doctors who will be made accountable through positive programs of audit, inspection and monitoring performance indicators; review and regulation of doctors who fail to meet the specified standards by a body with medical and lay members; and a limited role for the courts in dealing with new or hard cases, especially those concerning the criminal law and human rights.

John Powell, Keith Stanton and Tony Dugdale seem to have no doubts about the capacity of the judicial system to deal with professional liability for economic losses, though they

3 (1996) 186 CLR 71.
4 *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118.

do have their different concerns with the operation of the common law. Powell argues that the difficulty is with the operation of the law of tort and the existence of simultaneous liabilities in contract and tort, and that where there is a contractual relationship between the parties there should be no place for a coexisting liability in tort. The practical consequences that he sees as stemming from this is that it would become easier to accept that, as a practical matter, professionals are strictly liable for the success of at any rate routine services, and that should be recognised, and that contractual rules as to limitation of actions would apply. It is not at all clear that the first point is valid. In Australia it is implicit in *Bryan v Maloney*[5] that a warranty of merchantability can co-exist with a contractual and tortious obligation to exercise care. But, whether the mechanisms employed are seen as contractual or tortious, the proposal would require the development of a criterion of distinction between services subject to strict liability and those where the implied contractual undertaking is one to exercise due care. This process might bring transparency to a field which at present is obscured by the ability of the courts to adjust the levels of care required and the evidence needed to support a claim behind the general rubric of the standard of reasonable care for professionals, and made unnecessarily costly to administer by the use of expert witnesses as to what are usual and appropriate procedures. He does not offer any suggestion as to where such a line might be drawn, nor any reasons as to why the tortious rules as to limitation of actions are unfair or inappropriate in cases where the client is only likely to discover the breach of the contractual undertaking when loss or damage occurs.

Keith Stanton's concern is not with the intrusion of the law of torts into professional liability; on the contrary he sees the recent reaffirmation by the English courts of tortious liability coexisting with contractual liability as a welcome affirmation of the public interest in professional standards and accountability for them. His doubts are rather as to the effectiveness of the conceptual devices - voluntary undertaking, reliance and proximity - used by the law of torts to assess the existence of a duty of care in cases involving professional services or professional advice. Australian lawyers will be well acquainted with these doubts, especially since the retreat from Deane J's conception of proximity by several Justices in *Hill v Van Erp*,[6] though the English scepticism about the concept of reliance has not yet been fully explored in the High Court (but "general reliance" has met mortal blows in *Pyrenees Shire Council v Day*[7]). Stanton's conclusion is that no general formula encompassing the situations giving rise to a duty of care is likely to be satisfactory and that the main helpfulness of the concept of proximity should be in encouraging a close scrutiny of the facts, the nature of the relationship between the parties in the different kinds of situation in which claims for professional liability can arise and a careful consideration of the purposes for which professional advice and services are provided in them, a conclusion that essentially applies a traditional pre-*Anns* interpretation of how the neighbour principle is best used in the specific field of professional negligence.

5 (1995) 182 CLR 609.
6 (1997) 188 CLR 159.
7 [1998] HCA 3.

Tony Dugdale does not seem to question the respective roles of contract and tort in professional liability cases at all. He is rather concerned with two specific matters. First he thinks it unfair that valuers who have negligently overvalued property so that lenders who have lent on the basis of the valuation when, had the valuation been careful, they would not have lent at all should be liable for all the losses suffered by the lender when the borrower defaults, including losses arising from general falls in property values. His concern stemmed from the decision of the UK Court of Appeal in *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd*,[8] which has since been reversed by the House of Lords,[9] and which has in turn been rejected by the Federal Court of Australia in *Kenny and Good Pty Ltd v MGICA (1992) Ltd*.[10] He convincingly analyses the difficulties in trying to approach the issue as one of causation or remoteness, regardless of its categorisation as contract or tort, and persuasively argues that because the purpose of a valuation is to provide the lender with a basis on which it can make adequate security provision at the date of the loan, and not to predict future market trends nor persuade the lender to make the loan, it is fair that the valuer should be liable for the amount of the overvaluation because it deprives the lender of that amount of security but unfair that there should be any greater liability. A substantially similar argument is persuasively made by Stephen Waddams in the terms that the valuer's liability should be restricted to the anticipated security margin and that the lender should have to accept any losses going beyond that.[11] Dugdale's fear that use of the conventional language in which causation and remoteness issues are expressed make it difficult to address this point is amply and dismally borne out by the judgments at all levels in both these cases, none of which manage to address it at all. Secondly he is concerned that it is unfair that professionals should have to be liable for all the losses that are suffered when they fail to protect their client against the wrongdoing or negligence of a third person who cannot be found or is bankrupt, and that it is often difficult to establish contributory negligence against a client. Acknowledging the commercial pressures on professionals not to make use of clauses limiting their liability, he canvasses the possibility of the courts having a discretion to limit damages to prevent disproportionate liability where it is fair to do so in preference to establishing schemes of proportionate liability. But the argument here is brief and not fully worked through.

In his comments on this group of papers, Joshua Getzler focuses on the broad issue of the role of the common law, as distinct from self-regulation and the individual autonomy of the professional and the client, in ensuring the maintenance of professional standards. (Since none of the papers argued for increased external regulation he does not consider that possibility.) He recognises that when self-regulation is effective it should leave very little scope for common law principles to operate, but argues that the incentives to the

8 [1995] 2 All ER 769.

9 [1997] AC 191.

10 (1997) 147 ALR 568.

11 Waddams, "Liability of Valuers: *Kenny & Good Pty Ltd v MGICA (1992) Ltd*" (1997) 5 *Torts LJ* 218.

furtherance of professional self-interest are too strong for self-regulation to be a reliably effective means of securing the accountability of professionals to their clients, especially as the range of activities for which professional status is claimed increases. Nor does he see confining professional liability to contractual undertakings as satisfactory in a field in which many clients (though not all) have inadequate information for bargaining to be effective, so that market failure is to be expected. Ultimately he views the common law as providing a means through which the best practices of individual professions are identified and used to reinforce the standards according to which they are practised, and in performing this role the formal classifications of tort, contract, restitution, fiduciary relationships and so on are subsidiary to the achievement of the overall objective. This is an interesting and constructive approach to the role of the common law, and the rejection of the formalism implicit in the use of the formal categories of tort and contract as a solvent to difficult substantive issues, reinforced as it has been by recent law and economics theory, is to be welcomed. But it is perhaps more easily seen to be pursued in jurisdictions like Australia which have modified or abandoned the *Bolam* principle, which in terms refers to standards adopted by "a responsible body" of professional opinion[12] and does not seem to require adherence to "best practice" principles, and does not address the question raised by Atiyah and Kennedy that in the sphere of personal injury law the practical operation of the common law causes so much harm that any minor good it may bring about is inadequate to justify its existence.

The papers from the third conference are on the subject of exceptional measures of damages. While the individual topics brought within this rubric are interesting, the title covers a less than coherent miscellany. Some of the papers derive from Lord Devlin's judgment in *Rookes v Barnard*,[13] which sought to restrict the scope of exemplary or punitive damages to cases of oppressive or arbitrary action by government, cases in which the defendant's actions are calculated to gain a profit exceeding the plaintiff's loss and cases in which they are authorised by statute. To this has been added two essays on the treatment of contractual penalty clauses.

Andrew Burrows canvasses the arguments for and against exemplary damages once damages are allowed to compensate for humiliation and hurt feelings, and finds that as a matter of principle a clean distinction between the criminal law, the business of which is punishment, and civil law, which is less well suited to it in terms of the range of penalties available, and the need to find in many cases that harm has resulted from conduct which should be punishable because it is intrinsically objectionable, is desirable. But he also finds that there is a pragmatic case for the retention of exemplary damages, though he does not seem sure what it is except in cases where official law enforcement mechanisms may be compromised and inefficient, as in the case of actions against the police. He is puzzled at the relative lack of importance attached to exemplary damages in Australia, where they

12 *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 at 122.
13 [1964] AC 1129 at 1225-1226.

are accepted as being available in cases in which the defendant's conduct has been wanton and in contumelious disregard of the plaintiff.

Nicholas McBride finds sufficient justification for the award of exemplary damages in cases where the defendant has knowingly breached a common law obligation, provided that the defendant has not already been punished by the criminal law and certain procedural safeguards are satisfied, because of the practical failings of criminal enforcement. This is a broader view than the common law encompasses: in particular it includes deliberate breaches of contract, though this is in general not a crime. Peter Birks and Peter Cane in their more general introduction and commentary respectively see no reason why the sphere of the civil law and the law of torts in particular should be defined in such a way as to exclude the condemnation of deliberate wrongdoing through exemplary damages. Perhaps behind Brennan J's statement in *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd*[14] that the social purpose of exemplary damages is "to teach a wrong-doer that tort does not pay" lie not only the historical connections between deliberate torts and deliberate crimes and the equally old objective of appeasement of a plaintiff who might otherwise resort to self-help, retaliation or duelling, but the idea that the courts should not ignore the deliberate flouting of the basic norms protecting personal and property interests for the defendant's own purposes where it has not been directly addressed through the criminal law. Most of the Australian law on exemplary damages, including the exhortations to keep them moderate and in proportion to the offence, are consistent with this, though their extension to cases of negligence where the defendant has knowingly exposed the plaintiff to a risk of injury stretches the point.

Harvey McGregor QC begins by excoriating his assigned topic of "restitutionary damages" on the ground that damages compensate for loss while restitution compels the restoration of gains won by the defendant. Even within this restitutionary framework lies the distinction between cases where the plaintiff has suffered a loss equivalent to the defendant's gain and those where the defendant's gain has been won by exploiting the plaintiff, the plaintiff's property or the relationship between the parties in a way that the plaintiff would not have done. But McGregor has no doubt that the defendant should be compelled to surrender both kinds of gain in tort cases, especially where the tort has been intentionally committed. McGregor notes the availability of equitable remedies compelling the disgorgement of the gains from equitable wrongs and argues that defendants who deliberately break contracts in order to make greater profits for themselves should also be compelled to disgorge them.

None of the authors who address the topic question that restitutionary remedies should be available in the cases where the plaintiff has suffered a loss, nor that they should be available where the defendant's gain arises from an intentional tort. Nor is there any substantial disagreement that a remedy is appropriate where there has been a breach of

14 (1985) 155 CLR 448 at 471, quoting Lord Diplock in *Broome v Cassell & Co* [1972] AC 1027 at 1130.

contract and the defendant has provided less than was promised and paid for. (The illustrative cases involve a security firm providing fewer personnel and resources for the protection of premises than specified in the contract though the plaintiff suffered no consequential loss thereby, and cases in which purchasers build more houses on a site than a restrictive covenant imposed by the seller allows, both cases in which a remedy has been denied on the basis that the plaintiff has suffered no loss.) Hugh Beale would justify the conclusion on the basis that the defendant had received something for nothing, in that the plaintiff had not received full value for the consideration paid and had in a sense been cheated, but would prefer to approach the issue of recovery by an extended concept of "loss" including the consumer surplus expected by the plaintiff from the contract. But he opposes the award of damages in a case such as the Israeli one of *Adras Ltd v Harlow & Jones GmbH*,[15] where a defendant who had sold oil to the plaintiff at an agreed price resold it to a third person at a much higher price when the price of oil rose dramatically but temporarily, and the plaintiff was subsequently able to replace the oil that had been bought in the market place at the original price. On the facts of the case the plaintiffs had obtained oil at the price they had initially agreed to pay, and, while Beale is willing to give a wide ambit to the determination of their recoverable losses, he can see no compelling reason for adopting a rule that would give them more than the difference between the position the contract would have put them in and the position they ended up in. In effect the difference between his position and McGregor's (and Birks's) is that he does not accept that there should be a rule which, in some cases, would act as an incentive to keeping contracts by (to adapt Brennan J) seeking to ensure that deliberate breach of contract does not pay. The decision in the *Adras* case that the gain should be disgorged is not accepted in England or Australia, which in this respect remain closer to Oliver Wendell Holmes's idea that a party to a contract has an option as to whether to keep it or to break it and put the other party in the financial position they would have been in had it been kept.

Lastly there are two papers on contractual penalty clauses by Tony Downes and Mindy Chen-Wishart. Both criticise the conventional rules based on *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd*[16] and prefer a more general approach based on unconscionability. This will come as no surprise to Australian readers, as unconscionability principles invade the Trade Practices Act, even if astute commentators including my colleague David Wright have noticed a withdrawal by the High Court from the use of the concept of unconscionability as a general solvent since the retirements of Mason CJ and Deane J.

It is evident that the papers come from a provocative and stimulating series of seminars. A good deal of the provocation and stimulation comes from the overt discussion of general issues that underlie large fields of law. Peter Birks's introduction makes specific reference to the influence of economic analysis on law generally through the economic rationalism

15 (1988) 42(1) PD, noted by Friedmann in (1988) 104 *LQR* 383.
16 [1915] AC 79.

which argues for as small a role as possible for the state and the never-ending pursuit of efficiency goals, defined in a way which effectively removes equity from national agendas. While Patrick Atiyah's paper is the clearest example of the effects of debate at this general level on our conceptions of private law, the papers on professional liability are all concerned to justify intervention by the legal system in some form, even though most professional liability cases raise agency cost issues which invite a measure of intervention to ensure some level of accountability. Law and economics seems also to have stimulated a hardening of classificatory criteria and functions: one detects the idea that one should use a single instrument to achieve a single purpose behind the view of Burrows and Beale that civil remedies should have solely compensatory purposes. Similarly, one detects the libertarian underpinning of economic analysis in Powell's plea that contract should have primacy over tort in the regulation of relationships. But Beale's approach to determining losses is more beneficially influenced by economic writing, and many of his ideas concerning a broader analysis of recoverable losses seem influenced by taking a firmer grip on recovery for lost opportunity costs. We in Australia are very fortunate in this respect to have *Hungerfords v Walker*[17] rather than *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*[18] to apply. Against this stands a more traditional approach championed by Peter Birks and Peter Cane: that the law should not lose sight of its moral foundations and should be willing to identify them and use them as the basis of its future development. (It must be said, though, that this does not diminish Peter Birks's inclination to adopt and use quite rigid technical classifications, particularly with respect to restitution; he often gives the distressing feeling that classifications define the legal landscape, rather than being provisional descriptions of it.) It is hard to say which side presents its case more persuasively. But what the volume does show is a willingness to engage in and identify with the larger issues that will decide not merely the technical limits of legal principles but the nature of the society that they will both reflect and help to constitute. And that engagement is both important and at the heart of the interest of the seminars.

17 (1989) 171 CLR 125.
18 [1996] AC 669.