ARTICLES

Three Kinds of Objection to Discretionary Remedialism

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This paper seeks first to pin down the novel doctrine of discretionary remedialism, exposing on the way five meanings of 'remedy' and 'remedial'. It then advances three kinds of objection, one from authority and two from policy. The policy objections arise from the practicalities of litigation and from the necessity of preventing any erosion of our commitment to the rule of law. The last section then asks what style of adjudication, and what kind of judge, is needed in a sophisticated, plural society. It concludes that the answer to that question which is supposed by the discretionary remedialists is gravely mistaken.

EXACTLY where discretionary remedialism came from is a question. Whatever its parentage, it is a doctrine which appears to be gaining strength. The first part of this short paper tries to say what it maintains. This task is made more difficult by the slippery nature of the word 'remedy'. Even those who support the new doctrine appear not to have taken full account of the ambiguity of the language of remedy. On the basis of the analysis of the ambiguities of the word 'remedy', the second part then assumes a particular version of the doctrine and raises a number of questions against it. If it should happen that the version which is assumed is

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repudiated by those who have advocated discretionary remedialism, so much the better. It needs to be repudiated. It threatens to undermine major achievements of our law at the very time when they are becoming more useful and necessary. A secular, sophisticated, plural society is the very last context in which to conduct experiments in intuitive justice.

THE DOCTRINE

Discretionary remedialism is a doctrine about the organisation and application of private law. It is of immense importance to judges because, so far as it concerns the application of the law, it entails a transformation of the judicial role in civil litigation. The doctrine maintains that the way private law is or ought to be organised turns on a clean separation between 'liability' and 'remedy'. In a modern law library some literature ought to give instruction in the establishment of liability, while other works should explain the nature of all the 'remedies' that courts can in their discretion apply.

In that basket of remedies will be orders of different kinds. There will be money orders calculated in all sorts of different ways. And there will be non-money orders to compel specific conduct and abstention from conduct, to effect transfers of assets, perhaps even orders varying rights retrospectively. The money orders will be distinguished according to the goal sought to be achieved, as nearly as possible, through the payment of the money. One whole family will have the goal of compensating loss. That has to be regarded as a family of orders, rather than one kind of order, because there are so many different bases from which to calculate a loss. The same might be said of orders for the giving up of a gain. These have come to be called 'restitutionary', although the language of restitution occasionally strays dangerously into the field of compensation.[1] Compensatory and restitutionary orders have to be distinguished from money orders which have the goal of punishing the defendant, to console the plaintiff or to act as a mere token of the plaintiff's victory.

These orders are familiar enough in their diversity. They already fill the books on remedies.[2] However, the discretionary remedialist maintains a novel

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1. The reason for this is that 'restitution of a person to a condition' is quite different from 'restitution of a thing to a person'. The former easily reaches into the making good of losses, but it is the latter that is used in modern works on the law of restitution: 'The law of restitution is about the award of a generic group of remedies which have one common function, namely to deprive a defendant of a gain rather than to compensate a plaintiff for a loss suffered': G Virgo *The Principles of the Law of Restitution* (Oxford: OUP, 1999) 3. *Swindle v Harrison* [1997] 4 All ER 705 exemplifies the failure of the courts to maintain this opposition between 'restitution' (of something to someone) and 'compensation'.
2. See eg M Tilbury, M Noone & B Kercher *Remedies: Commentary and Materials* 2nd edn (Sydney: Law Book Co, 1993) 9, especially the diagram.

view of the relationship between liability and remedy. The judge must behave like a doctor faced with a sick patient. The doctor exercises a clinical judgment and comes up with what he believes to be the best possible cure. Similarly, on this new view, judges must exercise a strong discretion to apply the remedy which they consider to be most appropriate in the circumstances. Here 'strong' denotes a discretion which must not be bedded down by precedent. It must be kept fresh from case to case, albeit guided by a list of criteria of appropriateness.

The simplest way to sum this up might be to say that discretionary remedialism remakes the civil law into the mould of the criminal law. In the latter the judge generally has a discretion to impose the sentence which he thinks best. In some cases, not very many, the sentence will be fixed, in the rest it will usually be only rather loosely constrained. Where the criminal judge has a discretion, there will be principles of sentencing to take into account, but the discretion remains a strong discretion. The proof of that is that the law does not set itself any goal gradually to eliminate discretion as matters become better understood. The judge's sentencing discretion is a permanent feature of the criminal landscape. Attempts by politicians to fix sentences are generally greeted with howls of dismay. Meanwhile, the question whether the accused is guilty or not guilty — the equivalent of 'liability' on the civil side — remains closely defined by the law. The relevant maxim is 'nulla poena sine lege': no punishment save for offences defined by law. The judge tells the jury the conditions upon which a verdict of guilty shall be given. Once the accused is found guilty, he is at the mercy of the judge's sentencing discretion.

1. The many senses of 'remedy'

The new doctrine means different things according to the different meanings of 'remedy'. At the most extreme, if 'remedies' were discretionary the whole law would be dissolved in the discretion of the judge. At the other extreme, the new doctrine would make almost no impact on traditional orthodoxy. The reason why the word 'remedy' is ambiguous in the law is that it relies on the metaphorical invocation of the relationship between illness and medicine. The conditions for the use of the metaphor can be satisfied in all sorts of different situations. To remedy is to cure, heal or alleviate an illness or some other troublesome condition.[3] Anything can be described as a remedy if it can be represented as making some bad condition better.

Quite how many senses of 'remedy' there are within the law is almost impossible to say. No two people will agree on the point at which shades of difference should

3. The *OED* derives the noun 'remedy' from the prefix 're-' and the root of 'medeor', 'mederi', Latin for 'to heal', and draws the comparison with 'medicine'.

count as separate meanings. However, my count produces six meanings. One of these can be taken out at once. In some circumstances the law allows self-help. One sense of 'remedy' is action which you are permitted to take yourself to realise your rights, such as recaption of chattels where the taking back can be done without trespass. The doctrine under consideration has nothing whatever to do with self-help. That leaves five.

(i) 'Remedy' as the law's conceptualisation of actionability

A lawyer who has heard a client's story may say, 'Conversion is your remedy.' Conversion is a tort, and like all torts it is an event which happens in the world, but it is also the law's conceptualisation of the actionability of certain facts. Translated into law, a story can be actionable as conversion. In the same sentence, for 'conversion' we might substitute 'money had and received' or 'constructive trust' or any number of other examples of legal jargon, so long as they somehow expressed the notion of the actionability of given facts.[4]

This sense of 'remedy' may go back to the days when an action, or a form of action, was essentially a winning proposition in a list of propositions. 'Assumpsit is your remedy' then meant something more concrete than abstract actionability. It meant: 'We have a form of words which you can use' or, more accurately, ' We have a form of words which your facts will substantiate.' The list of actions was the law's medicine box. Since the abolition of the forms of action we have gone on using 'remedy' in the same sense, not of forms of words called actions, but of words which unlock, or identify, actionability. In this sense 'remedy' can frequently substitute for 'cause of action'.

(ii) Remedy as the right born of a wrong

John Austin conceived of wrongs as infringements of primary rights which then gave birth to secondary or remedial rights.[5] Lord Diplock kept us in mind of this two-tier structure in contract.[6] The contract was the event which created the primary rights and duties, the breach of contract the wrong which gave rise to the remedial rights. 'Remedial right' is a good phrase. It reminds us of the dual nature of the law's response to wrongs. If, in breach of your duty of care, you run over my

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4. Even contract and tort can be 'remedies' in this sense, witness the statement of Her Honour Justice B McLachlin: 'If the law of civil remedies is divided into contract, tort and restitution....' See McLachlin 'Restitution in Canada' in WR Cornish, RC Nolan, J O'Sullivan & G Virgo (eds) *Restitution: Past, Present and Future* (Oxford: Hart Publishing, 1998) 275, 278.
5. J Austin *Lectures in Jurisprudence* 3rd edn (London, 1869) Lecture XLV and the notes which follow it, 787-800.
6. *Moschi v LEP Air Sevices Ltd* [1973] AC 331, 350; *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 848-849.

foot, the law gives me a right against you, an entitlement that you pay me damages. That right is also a remedy. It is the law's medicine for the wrong.

(iii) Remedy as the right born of a not-wrong

Not all rights arise from wrongs, but even a primary right can be presented as a remedy if it can be represented as the cure for a trouble or grievance. Primary rights generated by consent of parties usually cannot be. My primary right arising from a contract is not a remedy because there is, as yet, no grievance to make better. My fee simple acquired through your conveyance is in the same case. There is no grievance. Hence the right is not a remedy. But the right to recover a mistaken payment, which does not arise from a wrong, can be represented as the remedy for the trouble and anxiety that the payer suffers.[7] The same can be said of the seller's action for the price of goods sold. It arises from the contract of sale, not from the wrong of breach of contract, but the worry arising from non-payment lurks nearby and can support the metaphor. Again, the accountability of a trustee arises from his being a trustee, not from breach of trust, but the beneficiary's right to an account can be similarly related to the fear of being let down or taken advantage of and, in that relation, presents itself as a remedy. Some medicines are, after all, preventive.

(iv) Remedy as the order of the court

Blackstone saved the word 'remedy' exclusively for the order of the court. He took the view that the order should be seen as uttered by the court but ordained by the law.[8] He did not use the word 'right' in this context, but it perfectly represents his meaning if we say that he saw the 'remedy' as the court's realisation of the plaintiff's right and further that the plaintiff had a right to that realisation. We therefore have to separate this fifth sense from a sixth, in which the order of the court is strongly discretionary.

(v) Remedy as the strongly discretionary order of the court

This is quite different from the previous sense because here 'remedy' is used in contrast with 'right'. The plaintiff is no longer conceived as having any right to the order, which is in the court's gift. A plaintiff who sues for tortious interference with chattels bases his claim on a right to damages — a remedial right, sense (ii) above, arising from trespass to goods or conversion — but the court has a discretion to order instead the specific delivery of the chattel.[9] There is no right to delivery

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7. K Barker 'Rescuing Remedialism in Unjust Enrichment Law: Why Remedies are Right' [1998] CLJ 301, 321.
8. W Blackstone *Commentaries on the Laws of England* 1st edn (London, 1768) vol 3, 396.
9. Torts (Interference with Goods) Act 1977 (Eng) s 3(2), with s 3(3)(b).

up: it is a matter for the court's discretion. The use of 'remedy' of this order for specific delivery is an affirmation of that contrast.

Again, a constructive trust can be regarded as a remedy in all the previous senses, but people who talk of the *remedial* constructive trust probably mean to use 'remedial' to emphasise that this species of constructive trust, which does not exist in English law,[10] entails no rights born of any facts which have happened outside the court, but is solely in the court's gift. A remedial constructive trust is the product of a strong discretion as to the existence of the trust, the quantum of the beneficial interest and the date from which the interest shall be regarded as having arisen.[11]

2. Discretionary remedialism as an option for the fifth sense

It is clear that discretionary remedialism is an option for the fifth sense. Judges on this view must be allowed to regard their orders as strongly discretionary. They must be allowed to prescribe the medicine which they think best. The crucial question is at what point this discretion is supposed to cut in.

Nobody has suggested that discretionary remedialists want to render discretionary all remedies in the first sense, where 'remedy' is used of any term which indicates actionability. That would be to render discretionary the very exercise of establishing liability. It follows that we can leave the first sense of 'remedy' out of account. The crucial question is whether discretionary remedialism leaves the second and third senses intact. In other words, does it leave intact the rights — 'remedial rights' — which arise from wrongs and from not-wrongs such as mistaken payments? To put it another way, does this novel doctrine cut in at position (ii), eliminating the notion of rights to compensation, restitution and so on, or does it cut in only at position (iv), merely reserving to the courts a discretion as to the manner in which the plaintiff's right shall be realised.

All that follows assumes the more extreme of these alternatives. There are two reasons for this. First, a discretionary remedialism which recognises and respects rights which arise from events which happen in the world has almost no room for manoeuvre and is not worth turning into an '-ism'. Let it be supposed that the victim of a given breach of contract does in the particular case have the routine right to damages measured from the expectation base. Or let it be supposed that a mistaken payer does on the particular facts have the routine right to repayment of an equivalent sum. A version of discretionary remedialism which claimed to respect these rights and cut in only after their ascertainment would be a discretionary remedialism with almost nothing for the discretion to bite on. Secondly, although

10. *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, Lord Browne-Wilkinson 716.
11. Ibid, 714-716.

the number of cases in which the new doctrine can be said to have swung into action seems to be extremely small, and although it is not easy to be sure which ones really are examples of it, it seems fairly clear that it does not envisage for itself this very limited role. On the contrary, it seems to suppose the elimination of all remedial rights and to assert that from the moment of 'liability', the law's responses are entirely in the gift of the court. At all events, the discretionary remedialism at which my objections are aimed is a discretionary remedialism which sees remedies beginning as soon as facts happen which can be said to create a 'liability'. Remedies in sense (ii), (iii), and (iv) cease to exist. Senses (ii) and (iii) go because the notion of a remedial right merges and is lost in the strong judicial discretion as to the appropriate response. Sense (iv) goes because there cease to be orders ordained by the law as opposed to orders chosen by the judges. Some might argue that if you render discretionary (ii), (iii) and (iv), you must in effect render discretionary (i) as well, in that there is no point in conceptualising actionability if the outcome of finding liability is uniform and invariable — a discretion to remedy. We need not re-open that. We must accept that discretionary remedialists intend to maintain the law's definition of the frontiers of 'liability' and the composite events which trigger liability.

It is important, though difficult, to distinguish discretionary remedialism from phenomena associated with areas of the law in temporary instability. The latter can be looked on as volcanoes. A volcano in the law is a volatile area which has been destabilised and which is seeking a new stability. The crucial differences between the new doctrine and a volcano is that a volcano is local, whereas the new doctrine is not confined to particular areas of the law, and secondly, a volcano, though it may seem to be feeding on discretion, can be understood as trying to settle down, trying, that is, to build up a rational structure of rules to displace discretion. By contrast the new doctrine is not intended to settle down. The discretion to choose the appropriate remedy is to remain strong, from case to case, guided by no more than the criteria of appropriateness. Among the volcanoes we might count, most obviously, the transformation over some 30 years of the property rights of cohabitants,[12] and, rather more contentiously, the development, under the name 'estoppel', of a third test for identifying a binding undertaking — a deed, good consideration, and, at length, detrimental reliance.[13]

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12. Counting from *Pettitt v Pettitt* [1969] 2 WLR 966 and *Gissing v Gissing* [1969] 2 WLR 525.
13. Gardner's study of discretion in relation to proprietary estoppel does not unequivocally reject the hypothesis of out-and-out discretionary remedialism (his fourth hypothesis is that 'the approach is for the court to adopt whatever style and measure of relief it thinks fit'). However, he clearly believes that the law is more likely to be moving towards a more stable, rule-based position: S Gardner 'Remedial Discretion in Proprietary Estoppel' (1999) 115 LQR 438, 461 et seq. It is not clear that the latest case from the High Court of Australia in this field justifies optimism in this regard: *Giumelli v Giumelli* (1999) 161 ALR 473.

3. The advocates

I do not claim to have found the ultimate source of this new and important doctrine. Probably it is a river fed from a number of springs. It may be a generalisation of the ideas long advocated in relation to remedial constructive trusts by Professor Donovan Waters.[14] In England, its chief advocate is JD Davies.[15] In Canada, it appears to be more advanced in its progress than elsewhere. Binnie J has recently given a clear account of it from the Bench.[16] In Australia, Finn J supports it, as does Ipp J, and Mr Wright of the University of Adelaide is strongly committed to it.[17] In New Zealand, Thomas and Hammond JJ have nailed their colours to the same mast.[18] In some jurisdictions statutes have already implemented it, albeit in specific areas.[19]

THREE KINDS OF OBJECTION

The first and most immediate of the three families of objection is that discretionary remedialism can only be introduced by statute. It is beyond the

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14. DWM Waters *The Constructive Trust: The Case for a New Approach in English Law* (London: Athlone Press, 1964); cf 30 years later, Waters 'The Nature of the Remedial Constructive Trust' in PBH Birks (ed) *The Frontiers of Liability* (Oxford: OUP, 1994) 165, especially 'Liability and Remedy' 167-176.
15. JD Davies 'Restitution and Equitable Wrongs' in FD Rose (ed) *Consensus ad Idem: Essays on Contract in Honour of Guenter Treitel* (London: Sweet & Maxwell, 1996) 158; Davies 'Duties of Confidence and Loyalty'[1990] LMCLQ 4. See also K Barker 'Rescuing Remedialism in Unjust Enrichment Law: Why Remedies are Right' [1998] CLJ 301.
16. *Cadbury Schweppes Inc v FBI Foods* (1998) 167 DLR (4th) 577 (SCC), which builds on earlier cases, notably *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574, 61 DLR (4th) 14. Both concerned the abuse of confidential information.
17. P Finn 'Equitable Doctrine and Discretion in Remedies' in Cornish et al supra n 4, 251, especially 273-274. D Ipp 'Introduction' in R Carroll (ed) *Civil Remedies: Issues and Developments* (Sydney: Federation Press, 1996) xxxi-xxxiv; DM Wright *The Remedial Constructive Trust* (Sydney: Butterworths, 1998). That book is essentially an attempt to deconstruct the remedial constructive trust into a world dominated by discretionary remedialism.
18. G Hammond 'Rethinking Remedies: The Changing Conception of the Relationship Between Legal and Equitable Remedies' in J Berryman (ed) *Remedies: Issues and Perspectives* (Ontario: Carswell, 1991) 87; G Hammond 'The Place of Damages in the Scheme of Remedies' in PD Finn (ed) *Essays on Damages* (Sydney: Law Book Co, 1992) 192; also, from the Bench, *Butler v Countrywide Finance Ltd* [1993] 3 NZLR 623, 631; *Tabley Estates Ltd v Hamilton City Council* [1996] 1 NZLR 159, 162. The views of Hammond J were supported by Thomas J 'An Endorsement of a More Flexible Law of Civil Remedies' *New Zealand Judicial Law Conference* (7 Apr 1999), which includes an emphatic rejection of my own position.
19. Eg the New Zealand contract legislation goes some distance down this track. The Illegal Contracts Act 1970 (NZ) s 7(1)(c) allows the court to give 'such relief by way of restitution, compensation, variation of the contract, validation of the contract in whole or part or for any particular purpose, or otherwise howsoever as the court in its discretion thinks just.' Cf Contractual Mistakes Act 1977 (NZ) s 7; Contractual Remedies Act 1979 (NZ) s 9.

range of interpretative creativity. This is an argument chiefly from authority. As an interpreter a judge must limit his creativity to what can be said to be already the case, according to arguments consonant with the rules of recognition operative in the jurisdiction in question. It is impossible to reach the conclusion that discretionary remedialism is the law without throwing away that essential discipline. The other two families of objection are essentially policy arguments. They go to utility and desirability, about which reasonable people can differ. But they have weight, and they tip the scales heavily against the new doctrine.

1. No historical legitimacy

One might agree with the discretionary remedialists that where conduct amounts to a legal wrong (but not where it is a not-wrong as in sense (iii), above) a choice does initially have to be made between a variety of responses. There is no naturally correct response to a civil wrong. Choices have to be made. However, it has not in the past been for the judges to choose. It has been for the law to make the choice and, where the law makes no final selection, for the plaintiff. For example, a question arises whether the wrongdoer shall pay punitive damages. The law makes the choice, not the judge. Again, shall the wrongdoer give up his gain? Once more, the law makes the choice. As the choice is made, the law confers on victim-plaintiffs a defined remedial right.

The law's choice is never quite final. Later interpreters may find it to have been incorrectly made. But the choice is none the less conceived as being made by the law, not by judges on a discretionary basis. One example is provided by profitable breaches of contract. In the important Australian case of *Hospital Products Ltd v US Surgical Corporation,*[20] an executive of the American company whose job it was to promote that company's products in Australia broke his contract by promoting instead his own competing products, the manufacture of which was made possible by his having found a gap in his employer's patent protection in Australia. A majority of the High Court found that he and his companies were not accountable for his profits. This case, and, in particular, the judgment of Deane J, has accelerated a long-running re-examination of the question whether in at least some cases the victim of a breach of contract should be allowed such a right. In most Commonwealth countries the law seemed to have made the contrary choice. But the English Court of Appeal has recently shown itself willing to contemplate a review of that orthodoxy.[21] An upheaval is thus under way. But the premise is constant, namely that the question is whether the law, properly understood, recognises a right to the profits of breach, not whether judges might from time to

20. (1984) 156 CLR 41.
21. *Attorney-General (Eng) v Blake* [1998] 2 WLR 805.

time be moved to exercise a discretion to allow a particular victim a profit-based measure of recovery.

Again, it was long thought that a fiduciary who took a bribe or, as it is more politely called, a secret commission, was personally accountable for the sum received, but that the person relying on the fiduciary acquired no proprietary right in the money so received or its traceable proceeds.[22] In a case from New Zealand the Privy Council reviewed that orthodoxy. It decided that the fiduciary becomes a trustee of the bribe at the moment that it is received.[23] These interpretative reviews of the effects of facts are not only very different from, but also incompatible with, the notion of a strong discretion operating to select the appropriate response to the particular wrong. The question which such reviews suppose is: 'What is the law as to the plaintiff's rights in this kind of situation?' The question for the discretionary remedialist is: 'What would it be best to do on these particular facts?'

More dramatic, perhaps, is the fact that, where the law has left the plaintiff with a plurality of remedial rights, it has always left the plaintiff to make his own choice between them, so far as they are inconsistent one with another. If they are not inconsistent he can of course realise both or all of them. This very recently came before the Privy Council in an appeal from Hong Kong. In *Tang Man Sit v Capacious Investments Ltd*,[24] a trustee for the plaintiff had let out trust property in circumstances in which he both received money through his breach of trust and caused loss to the property. He received the rent, and his bad choice of tenants seriously damaged the premises. The plaintiff had managed to get judgment for both the gain and the loss. But the Privy Council held that the plaintiff ought to have elected between the two remedial rights, one to restitution and one to compensation, before judgment was entered.

This was an equity case, but plaintiffs are routinely put to the same choice in disputes about intellectual property, where the wrong which is complained of is a tort.[25] Indeed, in the *Tang Man Sit* case the Privy Council took the same principle to apply on both sides of the old jurisdictional line. During the War, in 1941, the House of Lords had taken exactly the same view in *United Australia Ltd v Barclays Bank Ltd*.[26] The tort of conversion gave rise to different remedial rights, one to the tortfeasor's gain, the other to the victim's loss. It was for the victim to choose which to pursue. The Privy Council in *Tang Man Sit* relied directly on that common law case.

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22. *Lister v Stubbs* (1890) 45 Ch D 1.
23. *Attorney-General (HK) v Reid* [1994] 1 AC 324.
24. [1996] AC 514.
25. *Island Records Ltd v Tring International Plc* [1996] 1 WLR 1256, where the practice in intellectual property cases is reviewed by Lightman J. Cf *Dr Martens Aust Pty Ltd v Bata Shoe Co Aust Ltd* (1997) 75 FCR 230, Goldberg J.
26. [1941] AC 1.

Following the path of discretionary remedialism, Canadian judges have come to the conclusion that they can take this decision into their own hands.[27] An English court could not do that. The right of the plaintiff to choose is deeply entrenched, which is as much as to say that the law is against the proposition that it is for the judge to make the choice between remedial rights. No interpreter could reach the contrary conclusion. It is difficult for an outsider to see where an Australian court could find materials to destabilise so long-established an orthodoxy. In New Zealand, Hammond J has said that the plaintiff's choice of remedy has to be factored into the court's consideration of the appropriate remedy.[28] However, it is difficult to see how the court's discretion and the plaintiff's right can be reconciled. One or other must have to make the choice, and in Hammond J's world the court makes the final choice.

Wrongs do in principle require a choice of response. The question is who should do the choosing. Not-wrongs have to be treated separately precisely because they do not give the same range of choice. A mistaken payment, for example, creates no prima facie entitlement to consequential loss. This is not a matter of remedial discretion. Suppose a plaintiff who said: 'Because I paid you £10 000 by mistake you ought to make good the loss I suffered by not having that money available for such and such an investment opportunity.' It does not require authority to show that he would be talking nonsense. The facts make no prima facie case for a right to compensation in respect of consequential loss. We put such cases in a category other than wrongs precisely to make sure that we never fail to notice their limited potential for creating remedial rights. Much weaker facts will engender a right to restitution than will serve to trigger a right to compensation. That is why restitution of unjust enrichment cannot be allowed to merge in the law of tort.

All the same, within that limited potential there are some choices to be made. *Chase Manhattan Bank v Israel-British Bank*[29] shows, if it is correctly decided, that a mistaken payer has two rights. One is in personam — that the recipient repay the sum. The other is in rem — equitable ownership of the specific money and then of its traceable proceeds. In that case it was for the plaintiff bank to choose which right to realise. It chose the right in rem, because the recipient was insolvent. Rights in rem, proprietary rights, allow the right-holder to pull his 'res' out of the fire, while all the creditors with merely personal rights are held back.

There is a huge difference between denying that the facts have had the effect of creating such a right and denying that it was for the plaintiff to choose to realise

27. *Cadbury Schweppes Inc v FBI Foods* supra n 16, elaborating the approach used in *Lac Minerals v International Corona Resources Ltd* supra n 16.
28. *Butler v Countrywide Finance Ltd* supra n 18, 632.
29. [1981] Ch 105. This case is now coming under pressure, but the criticisms made of it do not touch the principle for which the case is used in the text above.

a right that had been so created. If the bank had a right in rem it was entitled to the priority which such rights enjoy in an insolvency. Discretionary remedialism would start from a different point. It would say that the mistaken payment created 'liability'. Once sure of the recipient's liability, it would then entrust to the judge the question what to do about that particular liability in the context of that particular insolvency. In order to operate an insolvency scheme, it would therefore have to act on its view of the merits of each claimant. This is an impossible task. Every now and again we have a Royal Commission to consider whether the insolvency regime could be improved. It just cannot be done on the hoof, from case to case. The insolvency legislation settles beyond argument the merits of the innocent victims of the disaster which is an insolvency. To assess merits from case to case would undo the work of the statute and would, inevitably, lead to erratic decision-making as one kind of hard case succeeded another. Hence it is not and cannot be the judge who decides.[30] The law decides what rights the mistaken payer has, and, as between those rights and so far as they might lead to double recovery, the mistaken payer must choose.

Even deeply rooted orthodoxies can be shaken if they can be shown up resting on or causing profound contradictions. There are two areas of the law which might be said to set up such a contradiction, from which the historical illegitimacy of discretionary remedialism might then be denied, though the denial would do nothing to ease the practical difficulties just noticed. One is the criminal law, the other the Chancery. It might be said that discretionary remedialism has a good root in each of these. But on examination the argument falls to pieces.

Discretionary remedialism does indeed have a model in the criminal law, where liability, guilt, is followed by a generally discretionary remedy — sentence. Many lawyers resist the notion of fixed sentences.[31] They say that the judge must be allowed to match the sentence to the particular case. That is more or less what the discretionary remedialist says should happen in the civil law. Criteria of appropriateness replace the principles of sentencing. I confess that I number myself amongst those who think fixed sentences in criminal law are dangerous or, in other words, who think that the judge ought to have a discretion. Can a supporter of discretionary sentencing coherently oppose decretionary remedialism in the civil law? Does not the criminal model provide the missing historical endorsement of a parallel proposition for the civil law?

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30. *Re Polly Peck (No2)* [1998] 3 All ER 812. Cf *Fortex Group Ltd v MacIntosh* [1998] 3 NZLR 171.
31. A Bill currently before the WA Parliament will severely curtail the trial judge's discretion in sentencing offenders: see the critical commentary by N Morgan 'Accountability, Transparency and Justice: Do We Need a Sentencing Matrix?' (1999) 28 UWAL Rev 259.

There are crucial differences between the civil and the criminal law. First, in the criminal law the offender is being punished by the state. Secondly, it is a matter between the state and that one person. The offender can be said to have fallen to the mercy of the court. In the civil law the state provides the court but the court has to deal with two people, a plaintiff and a defendant. The defendant may frequently be a wrongdoer, but he may very well not have committed any wrong at all. More importantly the system cannot treat the defendant as having fallen into the mercy of the court without treating the plaintiff as having done so too. Even if the defendant is a wrongdoer, which he may not be, the plaintiff is not a wrongdoer and has not in any sense forfeited his rights. Yet discretionary remedialism cannot allow the plaintiff to have rights. To make room for the discretion it has to reduce the plaintiff to a supplicant seeking the exercise of a discretion in his favour. He cannot be heard to demand rights. Discretionary remedialists who say that this is a travesty of their position have not faced the logic of their doctrine. It is impossible to deal discretionarily with the defendant without dealing discretionarily with the plaintiff. The civil law has been about citizens exacting their own rights, and in a discretionary remedialist world they can have no rights. The criminal model simply cannot be transferred to the civil law.

If we lay the criminal law aside, there remains the practice of the Chancery. Equitable remedies have always been described as being discretionary. However, the modern law of equitable remedies shows that they are not strongly discretionary in the manner that the discretionary remedialists would like. That is to say, people nowadays have rights to specific performance, injunctions, accounts and so on, and the court's order reflects those rights. The books tell us when the courts will and will not order specific performance. The 'discretion' from which these orders were born has withered and become weak. The right to specific performance is qualified, but the qualifications are nowadays no different from the defences which qualify all rights. The whole point about discretionary remedialism is that it does not purport to be on its way to a weak, rule-based discretion; rather it purports to be a strong discretion which must be kept fresh for each exercise. That kind of strong discretion cannot be justified from equitable discretion without going back to the very earliest days, to the era well before Lord Nottingham. The law relating to equitable remedies provides no warrant whatever for the claim that judges must be able to choose remedies as appropriate to the particular facts.

Beginnings have characteristics of their own. Interpretative change depends on continuity. It cannot ignore the intervening centuries. The common law was in its early days no less open and unstable. It put very large questions to juries and, through the jury, the community would decide how the quarrel should be settled. Before the hegemony of the jury, the common law was even more unlike its modern descendant, because it put most matters to God, and left God to decide, speaking through oaths, battles and ordeals. The law was essentially a procedural mechanism

for getting an answer from outside the law, from God or from the community. We cannot go back and restart our interpretative effort from that remote base. No more can we revivify the old discretion surrounding injunctions and specific performance, which has long since withered away. For hundreds of years it has been the constant aim of the Court of Chancery to promote the value of legal certainty, so that property could be kept safe through all the vicissitudes of human life. That was what Chancery practice was all about. Only by assiduous myth-building can Chancery 'remedies' be made to give birth to the modern doctrine of discretionary remedialism.

2. Managing dispute settlement

At this point we move to a different level, to matters which go to the utility and desirability of discretionary remedialism. The first set of such objections concern the impact of discretionary remedialism on suing, settling and pleading. Here the new view of the judges' role seems to portend a number of practical difficulties.

The decision to sue entails a calculation of risks. At the centre of that calculation is the value in issue and the value likely to be recovered. The same calculation has to be made when a decision is taken whether to settle. The difference between the value recoverable through one remedial right and another can be vast. This is graphically illustrated in *Lac Minerals Ltd v International Corona Resources Ltd.*[32] That was a case in which abuse of confidential information had led to the wrongful purchase by the defendants of mining rights over gold-bearing land. The plaintiffs had discovered the gold, only to see the prize snatched from them. Many millions of dollars separated the value of compensatory damages and the restitutionary constructive trust which the majority was willing to recognise. Entrusting the choice to the judge cannot but make impossible difficulties for advisors and clients alike. Uncertainty as to the sum winnable will undermine important decisions all along the line. Settlements are generally looked on as a good thing:' interest rei publicae ut sit finis litium' (it is in the public interest that there should be an end to quarrels). They are not a good thing, but a simple engine of injustice when the uncertainty of the law leads to a despairing splitting of differences.

The pleader faces special problems. Pleading problems might be overcome by a practice direction, though what the direction should say is a question. The new doctrine makes the whole basket of possible orders available to the court. Perhaps the pleader has only to ask, quite generally, for 'a remedy', since the basket is in the court's keeping. One suspects that the courts would not be happy

32. Supra n 16.

with that. If they are not, what would the pleader have to do? It would be pointless to list the whole contents of the basket every time. On the other hand, the strong discretion seems to mean that the plaintiff cannot be confined to those remedies which he asks for. None of the discretionary remedialist literature appears to have addressed this problem.

3. Losing faith in the rule of law

The most precious values of our civilisation can come to be taken for granted, just as the value of peace is less keenly felt as memories of war recede. The third set of objections to discretionary remedialism arise from the need to reinforce our commitment to the rule of law. The suggestion that judges should be free to apply whatever remedy they think best for the trouble in hand emanates from our taking the rule of law for granted. Benevolent power is in one sense more dangerous than malevolent power. It undermines vigilance. We easily drop our guard.

Coke's objection to James I, and thus to benevolent but unrestrained power, was that the King should be under God and the law, 'sub deo et lege'.[33] James was very happy to be under God. Coke's emphasis will have been on the last two words, 'et lege'. The whole point of the rule of law is to ensure that power which cannot be put under the law should be accountable to the electorate and that, for the rest, we all live under the law, not under the wills and whims of a person or a group of people. The blessings of this commitment have been overlooked by the discretionary remedialists, who suddenly suppose that the judges should be the one group answerable only to God.

The inevitable retort will be that this doctrine is only about remedies, for liability will still depend on the law. But a huge amount of law has hitherto gone into remedial rights, not only into their availability on particular facts but also into their content and operation. To take just one instance, the law relating to remedial rights to compensation for loss includes, not only the differentiation of the several bases from which the calculation of loss should begin, but also the very difficult subjects of causation and remoteness. The law stabilises answers to such difficult questions. The law is stabilised analysis of difficult socio-moral questions.

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33. '[T]he King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the judges: to which it was answered by me, that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes ... are not to be decided by natural reason but by the artificial reason and judgment of the law, which law is an art which requires long study and experience, before that a man can attain to the cognizance of it: that the law was the golden metwand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, "quod Rex non debet esse sub homine sed sub Deo et lege"': *Prohibitions del Roy* (1607) 12 Co Rep 65, 77 ER 1343.

Without it, it will be impossible to decide like cases alike. So here chaos is likely to ensue, for the very difficult questions inherent in issues of this kind, such as causation, will receive quite different answers from different exercises of discretion.

'Liability' tells only a fraction of the story. 'Liability' invites a question, 'Liability to what, to what consequences?' Until that question is answered we know very little. So, turning that question over to the discretion of the judges is to abandon huge tracts of the civil law, much as very large questions were primitively thrown to civil juries. The burden of the judge will become much heavier. It is one thing to apply the law, quite another to do direct personal justice. This new doctrine not only removes the restraints of law from that part of decision-making which comes after the finding of liability, but it also requires the judge to be a paragon of wisdom and virtue. It exposes the judge to criticism which has traditionally been directed, not at the person applying the law, but at the law itself.

The timing is remarkable. Just when one would have expected the rule of law to be held in especial reverence we find, quite to the contrary, that its values of reasoned impartiality and detachment require to be defended. We have barely accustomed ourselves to the necessity of taking seriously the plurality of our society. We are learning to value the sub-cultures of its different ethnic and religious groups and its different socio-economic groups. Society is plural, and its interlocking sub-cultures are well-informed and articulate. In such a society law which is demonstrably a rational system of rules striving to reach determinate results can be acceptable to all. Reason legitimates. Reason communicates. Judicial discretion is by contrast dangerous. Discretionary remedialism requires all the very different sub-cultures to accept the judges' instinct for the just result. If discretionary remedialism will work anywhere, it will work in a monolithic society. In a plural society judges should regard it as political dynamite. The judge as expert in applying the law is entitled to respect. The judge as a fountain of intuitive justice is not.

A NEW CONCEPT OF LAW?

One justification for breaking with the past, difficult as it might be to do it on an interpretative basis, might be that the old notion of the rule of law has proved itself formalistic and remote. It has been kept in the hands of professional legal reasoners who are insulated by their very reasoning processes from the community's sense of justice. If we supposed that there was something in that, which I am inclined to doubt, it would nevertheless require, before it was acted upon, some confidence in an alternative and, in particular, in a less structured community justice.

History does not allow us that confidence. It is all too evident that the community's sense of justice is prone to pathological lapses. Communities are error-prone. Like individuals, they can lose their grip on right and wrong. During

the days in which I have been writing this paper, we have seen young people in East Timor in the grip of group madness, day after day beating, burning and killing with enthusiasm. Other communities decide to lock away all females, to expropriate the property of citizens of a given colour, to liquidate all those of a given race or religion, and so on. Even here in Australia it is not long since conscience dictated that Aboriginal children should be taken away from their mothers and their culture; and now conscience dictates the expiation of guilt on the very same account.

Reasoned law does not provide guaranteed protection. If it could, the holocaust would never have happened. Yet ghastly failures do not make a good argument against trying to reduce the risk of a repetition. Nor for assuming that mega-oppressions are the only oppressions of which the community is capable. Precautions can be taken. It is possible to steer away from a style of law which has no in-built protection against communal mood-swings. Law schools have a hugely important role in this. And judges should encourage them in it. Given that the conscience of all the different social groups is volatile, the only hope for peace and moderation in society is a legal system which insists on rationality, and law which, while capable of change even in the absence of legislative reform, is obstinately committed to the restraining discipline of analytical interpretation.

It is surprising to find judges among the advocates of discretionary remedialism. They mostly owe their appointment to their being masters of that complex rationality which is the law. Their authority is legitimated by their expertise. A rational rule of law has to have its experts. Community justice does not. Discretionary remedialism takes one long step away from the rationality of the rule of law and towards direct access to the community's sense of justice. Those who would identify their intuitions with the community's sense of justice will need political legitimation. Those judges will need to be elected or, as a half-way house, to undergo those political hearings which lay before the people all the views, habits and preferences of their future judge. Why should it be believed that the very same people who earned their appointment as experts in a difficult science should also be the right people to do discretionary justice? One might think that they were very much the wrong people.

It comes down to this. Discretionary remedialism is a move towards more intuitive law-finding. It empowers the judge. It frees the judge from the shackles of traditional legal rationality. It eliminates the notion of remedial rights. But those who have advocated it have completely misread the nature of modern pluralism or have failed to notice it. Law is the one hope of the survival of plural societies. Law, not intuitive justice. Intuition divides. The many different sub-cultures can only be bound together by law which is carefully analysed and commands the assent of reason. The great experiment in secular pluralism needs rational law. It needs law schools committed to that ideal and a senior judiciary legitimated by its expertise in applying it. Discretionary remedialism is a step backwards, a step towards dissatisfaction, dissent and fission.