The Compensation Principle in Private Law

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THE COMPENSATION PRINCIPLE IN PRIVATE LAW

Jeffrey Berryman*

While the compensation principle has occupied a central position in modern private law, changing views of adequate compensation have worked to modify its application across jurisdictions. Further, economic instrumentalist accounts have dismissed both the compensation principle and the influence of justice accounts in remedies law. In seeking to identify a more modern notion of the compensation principle, this Article suggests ways to merge elements of corrective and distributive justice into the compensation principle, without having to embrace economic instrumental concepts. In examining Anglo-Canadian common law jurisprudence, the compensation principle appears to be grounded upon the modern judicial desire to embrace a more regulatory role over affairs governed by private law. From a distinctly remedial perspective, it is legitimate for courts to advance some goals of distributive justice, while adhering to a formalist account of corrective justice as governing judicial practices. This approach will enable courts to prevent unjust distribution of entitlements while avoiding the pitfalls of excessive judicial activism.

INTRODUCTION

Thirty years ago, it would have been highly unlikely that a female who suffered a catastrophic personal injury as a result of some tortious conduct would have received significant compensation for her loss of working capacity above poverty level income rates. Similarly, even ten years ago, it would have been highly improbable that a woman who could no longer bear children as a result of a tortious medical procedure could have raised her ethnic or cultural practices to justify a higher level of compensation because those of her ethnicity or culture place a far greater importance to child rearing than the dominant society around her. Yet, today, our tort law

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assessment principles recognize both claims and award higher levels of compensation as a result. In both examples, our substantive concept of tort law has not changed; both actions depend upon negligence in some shape and form, only the notion of what constitutes compensation has changed.

As will be developed below, current, dominant private law theorists have written little on the compensation principle; their focus being almost exclusively on substantive explanations of tort, contract, and unjust enrichment. Scholars who write about remedies obviously spend more time on the compensation principle; it being a distinctly remedial concept. These same scholars note the changes in Canadian society built upon arguments of gender equality and multiculturalism and examine how this discourse impacts damage awards. This process is seeing law through the remedial perspective; its proponents are sometimes called dualist, and its antagonists deride the practice as discretionary remedialism. The remedial perspective acts as a filter in the development of the common law. It is a way through which our private common law can correct the injustices that may result from other distributional forces. The common law is selective about which injustices it corrects and when it corrects them. In each of the examples above, over a period of years, something occurred that warranted a change in outcome. At some point in time, the recognition of equality necessitated a change in the constituent elements of the claim. For example, some courts now conceive the claim for lost income as either a claim for loss of working capacity or loss of opportunity for other remunerative work. Additionally, this recognition leads to a change in the levels of damages paid, such as using gender-neutral income tables instead of gendered ones. The remedial perspective seeks to identify the observations and evidence


necessary to justify such a change in a manner consistent with the incremental development that is a core value of our common law.³

The compensation principle was elegantly articulated by Lord Blackburn in *Livingstone v. Rawyards Coal Co.*,⁴ and that statement has since become foundational in all Commonwealth common law jurisdictions with respect to the goals of contract and tort damages. The authoritative text on damages in the United Kingdom, *McGregor on Damages*, recognizes the pre-eminent position of Lord Blackburn's passage, describing it as "a statement of the general rule from which one must always start in resolving a problem as to the measure of damages" and as one which has "been consistently referred to or cited with approval" and "stood the test of time."⁵ Similarly, the leading text in Australia describes Lord Blackburn's statement as an embodiment of the compensation principle, one that is the "fundamental principle" and the "dominant rule" and must be "uppermost in the court's mind."⁶ In New Zealand, the leading text gives similar deference to Baron Parke's and Lord Blackburn's statements.⁷ A slightly different approach prevails in Canada: a leading remedies casebook opens with Lord Blackburn's dicta under

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³ On a number of occasions, the Supreme Court of Canada has discussed transformation in the common law and its methodology in approaching such issues. See, e.g., Garland v. Consumers' Gas Co., [2004] 1 S.C.R. 629 (Can.) (using unjust enrichment to refund late fees assessed by utility company that exceeded statutory limits); Peel (Reg'l Municipality) v. Can., [1992] 3 S.C.R. 762, 785 (Can.) (denying recovery of expenses paid by municipality in providing care for delinquent children on account of a lack of benefit received by federal government).

⁴ According to Lord Blackburn:

I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

*Livingstone v. Rawyards Coal Co.*, (1880) 5 App. Cas. 25, 39 (H.L.) (appeal taken from Scot.) (U.K.) (Lord Blackburn, concurring); see also Robinson v. Harman, (1848) 154 Eng. Rep. 363, 365 (Exch. Div.) (providing another frequently cited example of the compensation principle: "where a party sustains a loss by reason of a breach of contract, he is . . . to be placed in the same situation, with respect to damages, as if the contract had been performed").

⁵ HARVEY MCGREGOR, MCGREGOR ON DAMAGES 12–13 (17th ed. 2003).


⁷ See PETER BLANCHARD ET AL., CIVIL REMEDIES IN NEW ZEALAND 91 n.29 (2003) (explaining goals of contract and tort law, respectively).
the heading of "General Principles of Damages," but other leading texts adopt a more nuanced approach. S.M. Waddams includes specific reference to Lord Blackburn and Baron Parke under his chapter on "Damage to Economic Interests."  

The place of the compensation principle in U.S. accounts on damages is altogether different. The two leading damages texts, one by Dan Dobbs and the other by James Fischer, reiterate the general thrust of the compensation principle as articulated above but note that it is tempered by other instrumental goals that courts pursue when awarding damages. Thus, these U.S. commentators (Fischer in particular) suggest reasons why under or overcompensation may be desirable: undercompensation to encourage defendants to undertake the risk-incurring behaviour or to give an incentive to plaintiffs to purchase insurance, and overcompensation to deter defendants where there is a risk of under-detection of wrongdoing.

The compensation principle has occupied a central position in modern private law. It serves both as a justification for allowing parties to commence actions before the court and granting particular remedies, as well as a control on the powers of the courts. But its justificatory and limiting roles are becoming frayed. What explains

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10. DAN B. DOBBS, LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION 277–88 (2d ed. 1993); JAMES M. FISCHER, UNDERSTANDING REMEDIES 26–27 (2d ed. 2006). Regarding the purpose of compensatory damages, Fischer explains:

To state that the purpose of compensatory damages is to place the plaintiff in the position she would have occupied but for the defendant's commission of a legal wrong is to state both a simple and a complex idea. There is intuitive appeal to the notion that the plaintiff should not bear a loss imposed on her by another in violation of plaintiff's legal right or the other's legal duty. Yet, the resolution of the issue is maddeningly difficult.

Determining the proper measure of compensation also implicates a social policy calculus. Should compensation strive to exactly measure the plaintiff's loss; should it undercompensate to encourage conduct engaged in by the defendant; or, should it overcompensate because of underdetection of wrongdoing. Should compensation be set, in situations when insurance is available, at the amount a rational person would deem prudent to insure against the loss or should compensation be based on the defendant's moral duty to make the person, whom the defendant has harmed, whole? Should compensation restore the plaintiff to her pre-injury position or should the plaintiff be rehabilitated in light of changes to the plaintiff caused or resulting from the legal wrong?

Id.
these divergent approaches across common law jurisdictions? An obvious justification is the predominant jurisprudential theory underlying an account of private law. In Part A of this Article, I sketch these theories and the role accorded the compensation principle in these accounts. In economic instrumentalist accounts, the compensation principle is dismissed. In justice accounts, although it plays a significant role, surprisingly little is said on the compensation principle. In Part B, I suggest that, at least in Anglo-Canadian common law jurisprudence, the compensation principle is becoming frayed in a number of ways and that its continued usefulness is being compromised by a judicial desire to embrace a far more regulatory role over affairs governed by private law. In Part C, I construct an attenuated instrumental account using the compensation principle to bridge the structural features of corrective justice with the socially-demanded distributive justice. I suggest that, through the distinctly remedial perspective, it is legitimate for courts to advance some goals of distributive justice, while still adhering to a formalist account of corrective justice as governing judicial practices. By doing so, the courts can avoid the pitfalls of excessive judicial activism. This argument is obviously heretical to many, akin to trying to fit square pegs into round holes, but I posit it answers the following conundrum: how can a court claim to be acting justly if it orders compensation that simply perpetuates an obviously unjust distribution of entitlements?  

A. ELOQUENT ABSTRACTIONS

Peter Cane has recently canvassed the dominant theoretical accounts of private law and divided them into three strands of theory, which I will term justice, economic instrumentalist, and consequentialist accounts. Justice accounts, of which corrective justice is the predominant strain, have in common some sense of objective norm against which justice is administered. That norm can be inspired by the divine, posited by the state, or found in some

11. This is neither a heretical nor uncommon approach for the law of remedies to adopt. Consider the role that remedies have played in crystallizing the new understanding of the performance interest in contract or the discussion about compensatory and suspended injunctions in nuisance actions that impact the exclusivity of real property. Similarly, the discussion over remedial constructive trusts has transformed our understanding of common law cohabitation.

metaphysical concept of personhood. Economic instrumentalist accounts, of which law and economics is the predominant strain, explain law as serving some other purpose (e.g., efficiency). Consequentialist accounts, such as critical theory and feminist theory, are outgrowths of the realist movement and see law as a product of other social phenomena.

**Economic Instrumentalism**

Cane asserts, with little disagreement, that the economic instrumentalist account has found its greatest support in the United States. He attributes this to a "distinctively American style of individualist ideology" and a strong instrumental strand in American legal scholarship. I suspect that it is another attempt to find overarching organizing principles in a country with fifty distinct common law jurisdictions, and it appeals in the same way that Blackstone's *Commentaries* and the great glossators that gave birth to the Restatement movement did.

There are many criticisms of economic instrumentalist approaches. Cane faults the theory on its technicality and inaccessibility to lawyers, its parochial concern with efficiency and wealth maximization as explanatory and prescriptive criteria, and its lack of an appropriate theory on the role of adjudication and the actors within the legal system. Even proponents of economic instrumentalism confirm Cane's first and second criticisms. Richard Craswell, a proponent of economic instrumentalism, unintentionally confirms Cane's first and second criticisms. In a symposium devoted to compensatory damages, Craswell suggests that the second wave of law and economics scholarship has illuminated varying goals through which efficiency may be pursued to effect deterrence. This argument is in contrast to the old view proffered by first-wave

13. *Id.* at 204.
14. *Id.* (quoting NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 418 (1995)).
15. *Id.* at 203-05.
16. See *id.*; see also STEPHEN A. SMITH, CONTRACT THEORY 132-36 (2004) (adopting the same approach in his criticizing economic instrumental accounts for their lack of transparency).
17. Richard Craswell, *Instrumental Theories of Compensation*, 40 SAN DIEGO L. REV. 1135, 1149-71 (2003). Craswell discusses the impact of different remedial schemes upon the efficiency of insurance, the efficiency of incentives for victims to modify behaviour, the efficiency of incentives for wrongdoers to take precautions prior to contract formation and to take precautions to reduce risk of a probabilistic harm, and the efficiency of enforcement costs. *Id.*
theorists who argued that pursuit of the compensation principle did amount to efficient deterrence. The fruit of Craswell’s research is that the compensation principle has no role to play in economic instrumentalism. Economic instrumentalism is indifferent to the plaintiff’s actual compensation because it is focused on determining the right incentives to deter forms of behaviour. It seeks to find the optimal outcome of incentives and insurance to produce “best effects,” a calculation that Craswell asserts is theoretically possible but “may be too complex to be humanly manageable, at least in the present state of our knowledge.”

Cane’s third criticism reflects the early work of Jules Coleman and Benjamin Zipursky. They argue that because economic instrumentalism is focused upon deterrence, it is forward-looking in its mapping of private law and civil litigation. The event triggering the action is a sunk cost. Going forward, an instrumentalist account needs to determine the best risk avoider or the best insurer at the least cost. This inquiry uses the victim and wrongdoer in a representative capacity and turns what has usually been regarded as a bilateral private action into a multilateral public action. The reason to give anything to the victim is simply to provide an incentive to bring the harm-causing loss forward, so a court may administer its optimal deterrence function. The reason for making the wrongdoer pay is that the cost of identifying other possible risk avoiders or insurers is too high. But, there is no inextricable link between victim and wrongdoer; all that is created is described by Coleman and

18. Id. at 1148.
19. See id. at 1136 (describing opposition to the theory that compensatory remedies promote efficiency).
20. Id. at 1146–47.
21. Id. at 1178.
22. Id. at 1137.
24. See generally Benjamin C. Zipursky, Philosophy of Private Law, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW (Jules L. Coleman & Scott Shapiro eds., 2002) (arguing that legal theorists should incorporate the concept of a private right of action into their studies of the traditional theories of deterrence and corrective justice).
Zipursky as a contingent relationship. Damages become a fine rather than compensation, and private law adjudication becomes public law regulation.26

Corrective Justice Models

Chief amongst justice theorists is the work of Ernest Weinrib and Jules Coleman on the role and place of corrective justice. Weinrib’s enterprise to explain all of private law is much more expansive than that of Coleman, who offers corrective justice only as a theory of tort law.27 To understand the place of the compensation principle in these accounts of private law requires a modest review of the theory’s underlying tenets.

Under a corrective justice critique, justice is either corrective or distributive. Corrective justice governs the normative relationship between one individual and another, while distributive justice governs the web of interconnected relationships of a society. Consider two parties, A and B, held together in a single relationship represented by a balance scale. If B takes something from A, the balance scale tips in favour of B. In a normative sense (and in this example, in an arithmetic sense as well), B has more rights than A. This imbalance can be corrected by either restoring to A precisely what B has taken, or by adding to A from some other source double the amount taken by B from A, so both are again equal, although both enriched. It could also be corrected by taking from B both the amount wrongfully taken from A, and another equivalent amount, so both are left equal, although both similarly impoverished when measured against their respective starting positions. The first mentioned approach is corrective justice; the engagement of some third party, either to top A up or to punish B, engages distributive justice. Proponents of corrective justice do not challenge the right of legislatures to engage in distributive justice.28 However, they do challenge the right of courts charged with administering justice between individuals according to common law standards of justice to

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do the same. Thus, Weinrib argues that the common law governing private ordering can be explained as a just and principled set of normative rights in which each individual is linked correlative to each other when they are brought together through contract or the commission of some wrongdoing. Expressed in this way, corrective justice hangs on three elements: the categorical nature of corrective and distributive justice, the correlative between victim and wrongdoer, and the necessary measurement of correction.

There is an obvious semantic explanation to the categorical nature of corrective and distributive justice: what is not correction is distribution, and what is not distribution is correction. But beyond this, why accounts of private common law must be exclusively corrective is an expression of what it means to be just. While it is open for legislatures to impose a distributive scheme of entitlements and to empower courts to administer the same, it is impermissible for courts themselves to effect the same in the guise of administering the common law and to claim they are acting justly. Legitimacy, and the justness of legislative schemes is determined on constitutional grounds. The justness of the common law as embodying a set of normative principles of behaviour must be measured against some other indicium of morality to claim that it is just. For Weinrib, that moral compass is derived from Kantian philosophy centering on the concepts of personality, equality, and the interdiction that enjoins us to treat every human being as an end, not as a means. For Coleman, the moral compass is justice as fairness.

31. Weinrib describes personality as:
Among these rights are the right to the integrity of one's body as the organ of purposive activity, the right to property in things appropriately connected to an external manifestation of the proprietor's volition, and the right to contractual performance in accordance with the mutually consensual exercises of the parties' purposiveness.

Weinrib, Corrective Justice in a Nutshell, supra note 30, at 354. Weinrib also notes that equality is of normative rights, not of property and things. Id. at 292. Furthermore, Weinrib states:
Corrective justice treats the parties as equals because all self-determining beings, regardless of rank or character, have equal moral status. The conjunction of right and duty is simply this equality of self-determining beings viewed jurisprudentially, from the standpoint of the correlative of one person's action and its effects on another.
The heavy work, more so for Weinrib than for Coleman, in corrective justice accounts is done in the concept of correlativity between victim and wrongdoer. For Weinrib, a person endowed with dignity, equality, and personality lives in a web of interconnected relationships described in terms of rights and duties. A wrongdoer creates a normative imbalance with respect to the victim when he takes from or causes harm to the victim in violation of a victim’s right and the correlative wrongdoer’s duty.

Coleman’s account of correlativity builds upon what he terms a pretheoretical distinction over the causes of life’s misfortunes, either at the hands of some human agency or no one’s agency. Justice may require that the victim of any of life’s misfortunes warrants some compensation to repair the harm, but we have traditionally looked to distributive societal practices in the case of the latter and corrective justice in the case of the former. Fairness values personal responsibility. It may require us to bear our own losses where we are authors of our own misfortune (although here again, we may look to some distributive scheme to repair our loss), but it also requires others who are responsible for our misfortune to make repair. Coleman accounts correlativity as a correction of a factual imbalance that links a duty to repair for wrongful losses to those whose actions are responsible for the loss, what Coleman calls, agent-specific (or agent-relevant) reasons for acting. Coleman’s formulation seeks to explain more of tort law and to disengage it from a need to find some moral failing in the wrongdoer. Thus, the fact that the injury is as a result of some human agency is important, but so is the fact that the duty to repair can derive from both a wrong (breach of duty) and

Weinrib, Gains and Losses, supra note 30, at 292. see also Ernest J. Weinrib, Corrective Justice, 77 IOWA L. REV. 403, 421–24 (1992) (discussing the three reasons underlying the distinctiveness of corrective justice).


33. See generally Weinrib, supra note 29 (offering corrective justice as a theory of private law (tort, contract, and unjust enrichment)). See also COLEMAN, THE PRACTICE OF PRINCIPLE, supra note 23. Coleman offers corrective justice only as a theory of tort law, and even there, only at a mid-level or pragmatic approach. His theory is both descriptive and prescriptive. If it can account for most of tort law, it serves a valuable function in giving prescriptive content to further developments.

34. Weinrib, Correlativity, supra note 30, at 122–24.

35. COLEMAN, THE PRACTICE OF PRINCIPLE, supra note 23, at 44.

wrongdoing (unjustifiable or impermissible injuring of others’ legitimate interests).\textsuperscript{37}

Both Weinrib’s and Coleman’s accounts of corrective justice require identification of the correlative rights and duties (Weinrib) or forms of wrongs and wrongdoing (Coleman), and, not unnaturally, this is where their attention has been drawn.\textsuperscript{38} Resting on a normative, rather than material or factual imbalance, Weinrib has no need to provide an account of the measures of correction.\textsuperscript{39} Even so, the subject has engaged him to the extent that he has argued that both gains-based damages and punitive damages are not consistent with a corrective justice account.\textsuperscript{40} Given Coleman’s account of corrective justice, the subject has engaged him to the extent that he has argued that both gains-based damages and punitive damages are not consistent with a corrective justice account.\textsuperscript{40} Given Coleman’s account of corrective justice Account Account Account Account Account.

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\textsuperscript{37} See COLEMAN, RISKS AND WRONGS, supra note 23, at 324, 329–60.

\textsuperscript{38} There are major issues on how to account for causation where the defendant’s responsibility is sufficient to satisfy a “but for” test but where other conditions clearly have been necessary to bring victim and wrongdoer together. Issues over strict liability and probabilistic harm also raise conceptual difficulty. See Zipursky, supra note 24, at 627–31.

\textsuperscript{39} Weinrib has commented on the measure of damages:

Finally, damages represent in monetary terms (to the extent that such a representation is possible) the injustice committed by the defendant upon the plaintiff. Through the mechanism of the damage award, a qualitatively unique moral event (the particular injustice done and suffered) receives the quantitative expression that enables it to be reversed through a monetary transfer. Since the injustice involves the infringement of a right, and the damages are a means of undoing that injustice, the damages are the notional equivalent at the remedial stage of the right that has been wrongly infringed. Accordingly, the plaintiff is entitled to damages only to the extent that they quantify the injustice that the plaintiff seeks to correct. A head of damages that does not reflect the content of the plaintiff’s substantive right is literally beyond his or her entitlement. See Ernest J. Weinrib, Restitutionary Damages as Corrective Justice, 1 THEORETICAL INQUIRIES L. 1, 4–5 (2000).

\textsuperscript{40} Id.; see Ernest J. Weinrib, Punishment and Disgorgement as Contract Remedies, 78 CHI.-KENT L. REV. 55, 93–102 (2003) [hereinafter Weinrib, Punishment and Disgorgement]. Weinrib’s treatment of the Supreme Court of Canada’s decision in Whiten v. Pilot Insurance Co., [2002] 1 S.C.R. 595, 669–73 (Can.), wherein the court expanded on the criteria in which punitive damages could be awarded for breach of contract, illustrates practical problems with putting his corrective justice account into practice. In Whiten, the plaintiff was awarded $312,000 compensatory damages and $1 million punitive damages against an insurance company that had refused to pay out on a fire insurance claim and had handled the plaintiff’s claim in an egregious way. Id. In rejecting the notion of punitive damages, Weinrib suggests that the court could have awarded higher compensatory amounts beyond the claim limits of $312,000, based upon the court’s finding that the insurance company had breached an independent obligation of good faith and disrupted the plaintiff’s peace of mind, which was a legitimate expectation held by the plaintiff when purchasing the policy. See Weinrib, Punishment and Disgorgement, supra, at 93–102. Alternatively, the court could have awarded aggravated damages. Weinrib suggests that compensatory damages for these breaches could have been assessed by the court and would have taken the plaintiff’s compensation above the policy limit. Id. Weinrib goes on to state that such damages would have been significantly less than the $1 million punitive damages and that any aggravated damages would have been less, keeping in mind the established cap on non-pecuniary losses for personal injury in Canada currently stands at around $280,000. Id. at 98 n.122.
justice as a duty to repair for wrongful losses, it is surprising to find little on the subject of the measure of correction. Like Weinrib, Coleman is clear that a gain by a wrongdoer is not the subject of corrective justice. Coleman also asserts that being under a duty to repair and how that duty is discharged are distinct inquiries. Thus, it is perfectly acceptable to have a duty to repair derived as a product of corrective justice, even though its discharge is the outcome of an insurance policy. Nevertheless, despite the centrality of measures of correction to the corrective justice critique, it is surprising that there is little discussion of exactly how damages, as the predominant form of repair (Coleman), and correction (Weinrib) achieve that task.

Arthur Ripstein, another corrective justice proponent, has elegantly argued that damages in tort law do operate to make it as if the “wrong had never happened.” Ripstein suggests that tort law offers an account of duties of conduct owed between individuals in which the duties protect a person’s entitlement to such “means” that they have against the wrongful interference of others. To have “means” is to have an ability to exercise choice over an achievable

For Weinrib to make these suggestions as to the measure of compensation in this case seems to demonstrate a certain indeterminacy in quantification, and replaces the measure of correction with a criteria of proportionality. Ironically, this is the same criteria the Supreme Court of Canada purported to create in Whiten for punitive damages. It is quite surprising that Coleman has devoted so little time to the compensation principle. Recall that Coleman offers a pragmatic account of tort law and legal theory. His account seeks to find the best fit of the observable social practices surrounding tort law—wrong, harm, responsibility, and repair. Unlike Weinrib’s normative account, Coleman’s carries the burden of showing what tort law does in meeting a claimant’s losses. If claimants are systematically under or overcompensated, this must have repercussions on any normative account of tort law that seeks to explain current practices.


Id. at 1967–69.
set of "ends." Ripstein’s argument is that damages, as a legal concept, are the embodiment of the commensurate duty to repair and act to restore equivalent means to the victim of wrongdoing. This is an argument that conflates damages and a duty to repair at one end, and a commensurate duty governing conduct at the other. Yet it is still a normative account that simply masks the important issue of how the measure of damages (correction), the pith and substance of the compensation principle, is to be affected.

Part of a purposive life is the right to determine the point at which one converts their individual "means" into a monetary equivalent. That time is when the subjective value accorded a person’s means is made objective in a market price. Presumably, at that time and absent any coercion, subjective and objective values are commensurate. Wrongdoing eliminates the exercise of this choice and forces the victim and wrongdoer to accept what a court assesses as damages to restore the victim’s means. There can be, and often is, a wide disparity in the valuation of these damages that are based not on differing evidential foundations, but on the conceptualization of what has actually been lost.

Consider the valuation of the loss experienced by an injured homemaker. Canadian courts have at various times quantified these losses under very different conceptions of a homemaker’s value: as being equivalent to a subsistence level of income, the homemaker not being part of the paid workforce; as being the equivalent to what it would take to employ substitute homemaking services; or as being measured by the lost opportunity to utilize victim’s talents in paid employment. Indeed, these valuations seem at odds with other economic models that value homemakers at considerably higher levels. The choice between these competing measures reflects
instrumental thinking on how the law values homemakers and the services they provide, coincidentally, services that fall disproportionately on women.

To say then, that damages "serve to make it as if a wrong had never happened"\(^5\) rings hollow if all it can do is address assessment in normative terms and is incapable of identifying a singularly just measure of correction to restore the victim’s means. Tort law has to deal with the fact that by and large, the victim’s means that form the subject of tort law are incommensurable and do not engage a consensual surrendering by victim to wrongdoer.

Peter Cane and Ken Cooper-Stephenson have written critically of corrective justice accounts of tort law.\(^6\) Simply put, their objection is as to the categorical nature of corrective justice.\(^7\) How can a theory claim to be just when it operates in total ignorance of injustice in initial distributional allocation of resources?\(^8\) Cooper-Stephenson sees this as the product of an obsession with formal rights over substantive rights.\(^9\) Cane offers a bifurcated model in which courts engage in a distributive justice analysis of the allocation of "risks of harm and obligations to repair harm"\(^6\) within society before determining whether the doer and sufferer are correlatively linked.\(^10\)

Cane admits that this explicitly takes courts into new methods of reasoning, particularly on how to engage theories of distributive justice, but he suggests this is the only way forward if courts are to play a role in shaping the direction of tort law.\(^11\) For Cooper-

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\(^5\) Id. at 1961.
\(^7\) Cane, supra note 56; Cooper-Stephenson, supra note 56.
\(^8\) Cane, supra note 56, at 405–06 n.18.
\(^10\) Cane, supra note 56, at 407.
\(^11\) Id. at 406–07, 413.
Stephenson, for any explanatory account of tort law to be useful it must both account for and continue to accommodate two powerful social influences: first, the fact of insurance and second, the progressive recognition given substantive equality rights. The fact that the vast majority of torts are now covered by insurance has emboldened courts and juries to locate their role in a loss shifting enterprise still largely governed by attribution of fault, but not fixated on moralistic overtones of individual responsibility. In terms of substantive equality rights, Cooper-Stephenson includes formal individual human rights found in domestic legislation, international treaties, and the Canadian Charter of Rights and Freedoms, as well as the more general principle of recognition of individual and group difference, i.e., that to attain true equality, one must go beyond like treatment of all (formal equality).

Consequentialist Models

Consequentialist theories, of which feminism, critical race theories, and modernism/postmodernism are some of the most recent manifestations, have as a common ethos an explanation of why the haves always come out ahead. Consequentialist theorists then divide into those who believe in keeping the structural elements of adjudication but wish to transform law so as to encapsulate some more encompassing and egalitarian notion of justice, and those who believe that the whole law project is a flawed enterprise, a duplicitous project in which the powerless have been duped by the powerful. The former provide description but then look to justice theories for prescription. The latter conceive of law as politics, only written in a different language. Consequential accounts of private law have been influential in illuminating injustices, particularly where it comes to providing evidence of systemic

64. See Cooper-Stephenson, supra note 56, at 60.
66. See Bauman, supra note 65; Kennedy, supra note at 65, at 1–20.
67. See sources cited supra note 65.
68. See sources cited supra note 65.
discrimination in current compensation principles. In doing so, this work has fuelled the demand to have better theories of private law that are more inclusive and which provide a better account of the social practices of the have-nots.

Revenge Model

Emily Sherwin illustrates the discordance between the compensation principle in tort law as it is practiced and as it is preached in corrective justice accounts. She identifies several common areas where tort practices invariably under or overcompensate tort victims and thus deviate from some theorized compensation principle. Drawing from these observations, Sherwin suggests that the desire for revenge may provide an ancillary account to supplement the loss adjustment performed under the compensation principle. Indeed, Sherwin suggests that revenge and the desire to satiate vindictive impulses may supplement the justificatory processes of restitution and awards of punitive damages. Sherwin’s account accepts the notion of correlativity; revenge must be against someone for something, but it does not need to account for the measure of compensation. The quantification of damages to exact revenge is more idiosyncratic, depending upon the victim’s psychology, and is only contingently connected to the victim’s actual losses.

The Law of Court Orders Account

Benjamin Zipursky suggests that because neither right nor remedy is self applying, any account of the rights-remedy axis needs

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70. See generally sources cited supra note 65.


72. Id. at 1395.

73. Id. at 1397.

74. Id. at 1399–401.

75. Id. at 1401.

76. Id. at 1403.
to accommodate the role played by courts and adjudication. 77 Zipursky triangulates the rights-remedy axis, placing a right of action at the third point. 78 Thus, a right to an action mediates the relationship between right and remedy. 79 Zipursky suggests this structure can be derived from the Lockean social contract. 80 A civil society prohibits the private use of coercion and non-consensual exchanges of property. 81 The right to exercise these functions and thereby change the legal relationship between individuals is held exclusively by the state. 82 The state exercises these functions through criminal and public law. It gives access to individuals through a right to an action (a right to state assistance in changing the legal relationship between plaintiff and defendant) in order to exercise these functions in what we commonly understand is private law.

In a similar vein, Rafal Zakrzewski has also suggested that the law of remedies can be made stable by thinking of it in terms of a substantive right to a court order. 83 Zakrzewski’s project is one of descriptive taxonomy. 84 The law of remedies is to be classified as either replicating or transforming primary or secondary rights. 85 Under this taxonomy, the compensation principle is part of the law of damages, and the law of damages is a secondary right (e.g., a right to damages for negligence or breach of contract) that has nothing to do with the law of remedies so classified. 86 Zakrzewski approaches his subject from the monist point of view. 87 Treating the law of remedies (in essence, the law of court orders) as a separate substantive right, he is able to suggest a disciplined, doctrinal structure to explain how injunctions, equitable compensation,

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77. Zipursky, supra note 24, at 633.
78. Id. at 635–36.
79. Id.
80. Id. at 637–40.
81. See id. at 636–38.
82. Id.
84. Id. at 43–61.
85. Id. at 63–84.
86. Id. at 172.
87. Id. at 43–61.
damages, specific performance, judicial discretion, etc. are applied.\textsuperscript{8}\textsuperscript{8} Whether this is an advance of dualist approaches remains to be seen. It certainly casts out much of what has traditionally been thought to form the substantive content of the law of remedies.

Conceptualizing the law of court orders as a free-standing substantive right, as Zipursky and Zakrzewski do, has the advantage of allowing the development of a distinct jurisprudence focused upon court adjudication. This preserves the role and legitimacy of other formalist accounts of substantive rights. It allows the law of court orders to develop to accommodate other interests other than rights-balancing accounts without disturbing accounts of pure substantive rights. Of course, Zakrzewski would refute this as a function of replicating existing primary or secondary rights, but it would clearly fall within his category of transformative remedies.\textsuperscript{8}\textsuperscript{9} Zipursky also reluctantly concedes that a right of action in private law may act instrumentally in engaging choices about what is a public good.\textsuperscript{8}\textsuperscript{0}

To summarize, economic instrumental accounts ignore the compensation principle and the need for correlativity. Coleman's corrective justice account necessitates treatment of the compensation principle but at present provides little narrative other than what is not encompassed within the concept, i.e., gain and punishment.\textsuperscript{8}\textsuperscript{1} Weinrib reinterprets the compensation principle to give it only a normative content, although similarly exploring its parameters by excluding disgorging gain and punishment as normative goals.\textsuperscript{8}\textsuperscript{2} Both corrective justice theorists see correlativity as an essential characteristic of private law. Likewise, Ripstein accords the concept

\textsuperscript{8}\textsuperscript{8} \textit{Id. passim.}

\textsuperscript{8}\textsuperscript{9} \textit{Id. at 79, 203–17.}

\textsuperscript{8}\textsuperscript{0} Zipursky, supra note 24, at 653. Dualists, like Ken Cooper-Stephenson, \textit{Principle and Pragmatism in the Law of Remedies, in REMEDIES: ISSUES AND PERSPECTIVES} 1–47 (Jeffrey Berryman ed., 1991); Paul Gewirtz, \textit{Remedies and Resistance}, 92 \textit{YALE L.J.} 585 (1983); and PETER H. SCHUCK, \textit{SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS} (Yale Univ. Press 1983), would presumably refute the need to create an account of right, remedy, and court orders as adding anything to their initial analysis of the right-remedy axis.

\textsuperscript{8}\textsuperscript{1} See COLEMAN, RISKS AND WRONGS, supra note 23, at 374; COLEMAN, THE PRACTICE OF PRINCIPLE, supra note 24, at 625.

\textsuperscript{8}\textsuperscript{2} See, e.g., WEINRIB, THE IDEA OF PRIVATE LAW, supra note 29, at 114–44; Weinrib, Corrective Justice, supra note 30; Weinrib, Gains and Losses, supra note 30.
of paying damages a normative function, but ignores what is engaged in their actual quantification.\textsuperscript{93}

Consequentialist theories address the compensation principle only in descriptive accounts. Sherwin's revenge account accepts correlativity but sees only a contingent attachment to the compensation principle. Zipursky does not directly address the compensation principle, and Zakrzewski treats it as clearly within the domain of a secondary substantive right and not part for the law of remedies. However, both Zipursky and Zakrzewski, although probably unintentionally, would legitimate instrumental thinking (i.e., distributive justice) in evaluating what courts may do when adjudicating on private law rights to award a court order based on interests.\textsuperscript{94} Both accept the principle of correlativity in that a court order is necessary to change the legal relationship between individuals.

B. \textsc{Practical Realities}

The compensation principle does not have long historical roots in common law. It was introduced as a way to provide guidance and controls over juries, which, prior to its imposition, were likely more swayed by motives of punishment, deterrence, and consolation.\textsuperscript{95} However, once introduced, it assumed a pre-eminence, as attested by the comments accorded by treatise writers outlined earlier, above most other damages assessment concepts.\textsuperscript{96} In Anglo-Canadian law, the compensation principle is now being undermined, not in any systemic way, but in a piecemeal approach. In other words, its centrality to private law is threatened by a thousand cuts.

\textit{Punitive Damages}

To illustrate how the compensation principle is being undermined, note that the rate of punitive damages claims in both contract and tort disputes\textsuperscript{97} increased so dramatically that it led to the

\textsuperscript{93} Ripstein, \textit{supra} note 46, at 1961–62.

\textsuperscript{94} See, Zipursky, \textit{supra} note 24; ZAKREWSKI, \textit{supra} note 83.

\textsuperscript{95} MICHAEL TILBURY ET AL., REMEDIES: COMMENTARY AND MATERIALS 76 (3d ed. 2000).

\textsuperscript{96} See infra Part A.

Supreme Court of Canada's decision in *Whiten v. Pilot Insurance Co.* The Supreme Court imposed criteria to guide the award of punitive damages to insure that they amounted to a proportionate response to the defendant's conduct. One of the essential criteria is a rationality test in which punitive damages can only be awarded if the compensatory award is insufficient. Thus, an implicit, if not explicit, function of the compensatory award is to effect punishment and deterrence.

**Damages for Wrongful Dismissal**

Additionally, in the area of assessing damages for wrongful dismissal, the Supreme Court of Canada has allowed the period of notice for which damages are to be compensated to be extended where the employer is guilty of breach of an implied term of good faith dismissal. The extension of the notice period is unconnected to any increase in time for which the wrongfully dismissed employee may have experienced in securing new employment, a quite foreseeable consequence where an employer exacerbates the psychological well being of a wrongfully dismissed employee, but is only connected to the particular egregious conduct of the employer. The Supreme Court adopted this reasoning to maintain the dubious distinction between losses that flow from the *fact* of dismissal, which are unrecoverable, and losses that flow from the *manner* of dismissal, which are recoverable to the extent they are reflected in the increased length of the reasonable notice period.

Damages related to the manner of dismissal would be outside the demands of any mitigation concept. Whereas, if the employer's

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100. *Id.* ¶ 123.

101. *See id.* ¶¶ 111–26; *see also* Royal Bank of Can. v. W. Got & Assoc. Elec. Ltd., [1999] 3 S.C.R. 408, ¶ 29 (Can.) (awarding punitive damages against a company that failed to provide adequate notice when exercising a right to appoint a receiver, after it had misled the court by tendering misleading affidavits).


103. Interestingly, Justice McLachlin (now Chief Justice McLachlin) favored the alternative approach, viewing any loss recoverable for the manner of dismissal as only being awarded where it was foreseeable and adversely impacted the employee's ability to secure replacement employment. Chief Justice McLachlin is the lone champion of the compensation principle on the Supreme Court of Canada.
breach of good faith dismissal foreseeably harms the employee's ability to secure alternative employment, the compensatory damages would be subject to mitigation, which could either lessen or increase the award depending upon the reasonableness of the dismissed employee's response. *Wallace* damages, as they are now known, have been described as evidence of the court's ideological movement towards a "rights" paradigm and away from an "efficiency" paradigm in labor law.104

**Collateral Damages**

The compensation principle applied to collateral benefits should operate to avoid double recovery. This result can be attained by either favouring a reimbursement approach (subrogation) or a deductibility approach. Another approach is to simply allow accumulation and ignore any double recovery.105 Reimbursement through exercise of a right of subrogation appears to be an optimal and principled way to reconcile competing aims of compensation and deterrence. Nevertheless, reimbursement has been universally criticized as an ineffective policy choice, because few subrogees actually exercise the right of subrogation.106 This leaves deductibility as the preferred approach. Chief Justice McLachlin has consistently

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104. See generally Brian Etherington, *Supreme Court of Canada Decisions and the Common Law of Employment in the 1990s: Shifting the Balance Between Rights and Efficiency Concerns*, 78 CAN. B. REV. 200 (1999); Janice Payne & Ted Murphy, *Recent Developments Relating to the Awarding of Damages within an Employment Law Context: A Unifying Theory*, in THE LAW SOCIETY OF UPPER CANADA SPECIAL LECTURES 2005: THE MODERN LAW OF DAMAGES 465 (2005). Here, the rights paradigm addresses the influx of progressive labor legislation, such as employment equity, extension of human rights codes, and employment standards, and considers whether those same progressive notions should also be applied in the context of personal employment. In contrast, the efficiency paradigm treats labor as simply another commodity subject to the economic imperatives of supply and demand.

105. See Law Comm'n for Eng. & Wales, *Damages for Personal Injury: Medical, Nursing and Other Expenses: Collateral Benefits*, Law Com. No. 262, § 11.27, at 134 (1999), available at http://www.lawcom.gov.uk/docs/lc262(1).pdf. An argument in support of this approach is that it provides additional compensation in a system that may grant insufficient or imperfect compensation when the victim is left exclusively to his or her court award. The U.K. Law Commission termed this argument the "counsel of despair." *Id.*

held to the deductibility approach,\textsuperscript{107} and this persistence appears to have now won some converts among her colleagues,\textsuperscript{108} although there is an equally strong line of support for the reimbursement approach and expansion of the beneficence and insurance exceptions to the collateral benefit rule.\textsuperscript{109}

\textbf{Fiduciary Duties}

Canadian courts have been quick to advance the concept of fact-based fiduciaries into new situations.\textsuperscript{110} The fiduciary concept shifts the content of the duty owed to the fiduciary along the spectrum running from selfish (caveat emptor) to selfless (utmost good faith) behaviour.\textsuperscript{111} The extension of the fiduciary concept into situations that often mirror tortious negligence has been described as creating a form of equitable tort jurisdiction.\textsuperscript{112}

This expansion of the duty has also brought with it equity’s methods toward the quantification of equitable compensation. Although the difference between common law and equitable compensation is still a matter of debate, there is a general consensus that the concept of causation and remoteness are more generously applied in equity.\textsuperscript{113} The rationale for doing so is not altogether clear,

\begin{itemize}
  \item \textsuperscript{108} See M.B. v. B.C., [2003] 2 S.C.R. 477 (Can.).
  \item \textsuperscript{110} See Jeffrey Berryman, \textit{Equitable Compensation for Breach by Fact-Based Fiduciaries: Tentative Thoughts on Clarifying Remedial Goals}, 37 ALTA. L. REV. 95 (1999).
  \item \textsuperscript{111} Canadian courts have accepted Paul Finn’s fiduciary analysis. See Paul Finn, \textit{The Fiduciary Principle}, in \textit{EQUITY, FIDUCIARIES AND TRUSTS} 1 (Timothy G. Youdan ed., 1989); 978011 Ont. Ltd. v. Cornell Eng’g Co., [2001] 53 O.R. (3d) 783 (Can.).
  \item \textsuperscript{112} But see John McCamus, \textit{Prometheus Unbound: Fiduciary Obligation in the Supreme Court of Canada}, 28 CAN. BUS. L.J. 107, 131–36 (1997) (arguing for a much less expansionist interpretation of the Supreme Court of Canada’s cases).
  \item \textsuperscript{113} For example, in \textit{Hodgkinson v. Simms}, [1994] 3 S.C.R. 377 (Can.), an accountant advised his client to minimize taxes by investing in a development company, but failed to disclose his financial interest in the company. Although the tax advice was sound, the client lost substantially all of his investment as a result of a general deterioration in the economy and the residential property market. A divided Supreme Court allowed the client to shift these losses to the defendant accountant. \textit{Id.} ¶ 82–83.
\end{itemize}
particularly where the contents of the duties are similar, but it appears to be largely related to a desire to punish and deter.\textsuperscript{114}

\textit{Disgorgement Remedies}

Actions seeking to disgorge gains made through wrongdoing have increased in frequency before English and Canadian courts.\textsuperscript{115} Thus far, this form of assessment has been common for breach of fiduciary duty and breach of confidence and, to a lesser extent, the action of waiver of tort. In the former category, disgorging gains is justified to discipline the errant fiduciary or fiduciary-like holder. In the latter category, courts have been stuck with the apparent incongruous result of allowing a defendant to keep a profit from wrongdoing where it has been obtained without a commensurate compensatory loss by the plaintiff.\textsuperscript{116} However, in the majority of all these cases in both categories, the gain has been through the appropriation of a property right in situations where the property owner did not, because of the factual circumstance, or through lack of desire, have the opportunity to make a commensurate gain.\textsuperscript{117} Recently, the disgorgement assessment approach has been applied to the contract field in \textit{Blake}, a much publicized decision of the English House of Lords.\textsuperscript{118} In \textit{Blake}, even though the availability of disgorgement was limited to those occasions where the plaintiff had a "legitimate interest in preventing the defendant's profit-making activity,"\textsuperscript{119} the court's holding amounts to a frontal assault on the

\textsuperscript{114} In \textit{Hodgkinson}, the majority applied the standard of causation and remoteness which would apply if the accountant had committed fraud, despite the fact that there was no evidence of fraud and the advice provided the desired tax benefit. Id.


\textsuperscript{117} See \textit{Blake}, (2001) 1 A.C. at 278–82 (providing an overview of the treatment of the disgorgement as a remedy by British common law and equity courts and noting that in many decisions where disgorgement was awarded "the reality is that the injured person's rights were invaded but, in financial terms, he suffered no loss").

\textsuperscript{118} \textit{Blake}, (2001) 1 A.C. 268. Blake planned to author a book detailing his experience as a counterspy for the Soviet Union while employed by British Intelligence. The Crown sought to recover from Blake the commission he was to be paid by his publisher. For various reasons, the only action the Crown had against Blake was breach of employment contract, which did not result in compensatory loss to the Crown. See John McCamus, \textit{Disgorgement for Breach of Contract: A Comparative Perspective}, 36 LOY. L.A. L. REV. 943 (2003), for an in-depth analysis of the decision.

\textsuperscript{119} \textit{Blake}, (2001) 1 A.C. at 285.
efficiency theory of contract law and the supremacy of the compensation principle. Blake is also a case where a disgorgement approach cannot be explained on property grounds. The court specifically held that the breach of contract did not amount to a breach of fiduciary duty or breach of confidence.120

If based on the wrongful appropriation of a property right, disgorgement actions can also be supported on compensatory grounds, namely as being compensation for violation of an important incidence of property ownership, the right to exclusive use including the opportunity for gain. However, an alternative compensatory justification can be argued, based on the property holder's lost opportunity to bargain the consensual release of the property entitlement. This argument was offered in a most persuasive account by Stephen Waddams and Robert Sharpe.121 However, once freed from its property orientation, the Waddams-Sharpe approach can be applied to any act of wrongdoing or breach of contract to justify disgorgement damages under the guise of compensation. Any plaintiff can argue that the defendant's wrong has deprived them of the opportunity to negotiate a consensual release of the right infringed. To place this in the terms of Calabresi and Melamed,122 it translates all rights protected by liability rules into ones protected by property rules. This is the very argument accepted by Lord Scott in an ex curia address to explain the result in Blake as really constituting a compensatory claim.123 Such an approach would amount to a huge expansion of so-called disgorgement damages.

Underlying these developments is a renewed interest in the morality of breach of contract and tortious wrongdoing. The compensation principle is largely amoral toward breach of contract

120. Id. at 291–93.

121. See Stephen Waddams & Robert Sharpe, Lost Opportunity to Bargain, 2 O.J.L.S. 290 (1982), which provides an account consistent with the compensatory principle for cases like Wrotham Park Estates Co. v. Parkside Homes Ltd., (1974) 1 W.L.R. 798 (Ch. 1973) (Eng.). In Wrotham Park Estates, the court awarded damages for the defendant's breach of a restrictive covenant, which imposed limits on the development of the property. Id. Although the plaintiffs did not experience an actual decline in their property value, the court awarded the plaintiff a percentage of the profit made by the defendant, which amounted to the cost of a release from the restrictive covenant. Id.


and tortious wrongdoing. Disgorgement on the basis that a wrongdoer should not profit from his or her own wrongdoing expresses a certain moral preference.

Class Action Litigation

Many provinces in Canada have now enacted class action legislation. Ontario has one of the most plaintiff favourable acts, the Class Proceedings Act.\textsuperscript{124}

The guiding principle for certification of a class action is whether the certification will advance the proceedings in accordance with the goals of judicial economy, access to justice, and modification of the behaviour of wrongdoers.\textsuperscript{125} As long as "common issues" can be found that move the proceeding on, certification will be granted.\textsuperscript{126} Distinctions between common issues of liability and individual issues of damage quantification are recognized by the Act.\textsuperscript{127}

The Act also provides a mechanism that allows damage assessment to be made a common issue and permits statistical and sampling methods to determine the amount. In addition, provision is made for an aggregate assessment of monetary relief. Finally, the Act empowers a court to create expedited processes—use of referees, simplified methods of proof—to assess and distribute any damage award. A significant number of class action cases have been brought where the alleged compensatory damages to any class member would be negligible and where it would be unlikely that the claimants would come forward.\textsuperscript{128} In these cases, the courts have been happy to invoke their \textit{cy pres} jurisdiction and have applied the

\textsuperscript{124} Class Proceedings Act, S.O., ch. 6 (1992).
\textsuperscript{126} Under the Class Proceedings Act, "common issues" are defined as "(a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts . . . ." Class Proceedings Act, S.O., ch. 6, ¶ 1.
\textsuperscript{127} Section 6 of the Class Proceedings Act specifically states that a court should not refuse certification simply on the ground that relief claimed includes a claim for damages that would require individual assessment after determination of the common issues. \textit{id.} ¶ 6.
damages to a diverse range of recipients. These cases emphasise the goal of behavioural modification.

Public Law

There is increasing ambiguity over the division of public and private law. Canadian courts have demonstrated some willingness to give the victim of a constitutional and quasi administrative violation a damages remedy to vindicate the rights transgressed.

Sharpe has offered similar evidence as that just mentioned in his discussion of a tension apparent in Canadian commercial law over the continued place of the classic market efficiency model and judicial desire to impose a "code of good commercial conduct." In a similar vein, John McCamus has discussed disgorgement remedies as engaging the extent to which behavioural modification to prevent a wrongdoer from profiting from wrong is to play a more significant role in private law. Both authors' accounts are descriptive rather than prescriptive. They see these developments as consistent with

129. See Ford, 74 O.R.(3d) 758; Tesluk O.J. No. 1326; Alfresh, O.J. No. 79.

130. A most glaring example of this phenomenon is the outcome revolving around the class action suit brought by Gordon Garland against Consumers' Gas. Garland v. Consumers' Gas Co., [2004] 1 S.C.R. 629 (Can.). At issue in this suit was the legality of a late payment fee authorized by the Ontario Energy Board ("OEB") on consumer's gas bills but which operated in such a way that it offended the criminal interest rate provisions of the Criminal Code. Id. The result of the litigation was a $22 million settlement by Consumers' Gas. Jeffrey Berryman, Class Actions (Representative Proceedings) and the Exercise of the Cy-pres Doctrine: Time for Improved Scrutiny, in THE LAW OF REMEDIES: NEW DIRECTIONS IN THE COMMON LAW (Jeffrey Berryman & Rick Bigwood eds.) (forthcoming 2008). Of that amount, the law firm handling the class action received $10 million, Gordon Garland $95,000, the Ontario Class Action fund $2 million, and the Winter Warmth Fund $9 million on a cy-pres distribution. Id. The Winter Warmth Fund is run by the United Way and provides lump sum grants to people, who because of poverty, cannot pay their home heating bills. Id. The OEB subsequently allowed Consumers' Gas to pass the $22 million damages judgment on to its consumers in an approved rate increase. Id. The net impact of this action is that the victims, those who actually paid the offending late payment fee, received nothing directly. Id. In fact, they had to pay twice. They paid the fee initially and then again, in the rate increase authorized by the OEB to be passed onto consumers. Id. The class action fee paid to the law firm, which absorbed nearly half the total award, seems a heavy price to pay to vindicate the harm caused from the criminal violation.


the common law's incremental methodology. Nevertheless, it would appear that instrumentalist accounts of private law are on the ascendance.

C. THE REMEDIAL PERSPECTIVE AND THE COMPENSATION PRINCIPLE

The evidence of current Anglo-Canadian practices outlined in Part B suggests that there are at least five ways in which the term compensation is loosely interpreted as conveying substantive content.

First, there is the compensation of a victim's real losses that flow from an action for which the wrongdoer is legally held responsible. This is the paradigmatic breach of contract or tort case.

Second, there is the compensation for a victim's real loss that flows from an action of the wrongdoer but for which the wrongdoer is not held legally responsible. Because of other rules relating to causation, remoteness, limits on the type of loss recoverable, or a lack of substantive liability foundation (e.g. absence of fault); there is no liability in law. This is a problematic category. The victim incurs a real loss, but the causative link to the defendant is weak or too remote. Adjustment to establish doctrine has often occurred here. The reason to change causation and remoteness principles may reflect a different level of moral obliquity, as in the laws governing fraudulent misrepresentation. They may be altered because of problems concerning the ability of a claimant to establish liability to meet evidential proof levels where the evidential science lacks the ability to go beyond probability. But the primary objective remains compensation.

Third, there is the compensation for a victim's real loss that flows from a distributional imbalance in the relationship between proto-victim and proto-wrongdoer. This covers losses of a systemic kind for which the wrongdoer is not directly causally responsible but

134. Sharpe, supra note 132, at 328–33; McCamus, supra note 133, at 136.
135. Cane, supra note 12, at 204.
137. For example, see the contrasting positions in Cook v. Lewis, [1951] S.C.R. 830 (Can.), and Fairchild v. Glenhaven Funeral Serv. Ltd., (2003) 1 A.C. 32 (H.L.) (appeal taken from Eng.) (U.K.), which both deal with the situation where there is more than one potential tortfeasor, for which only one can have caused the harm, but for which it is impossible to prove which one.
indirectly has enjoyed a benefit. This kind of compensation commonly occurs in personal injury assessments based on a variety of contested systemic discriminatory practices and is a much contested category.

For example, consider the arguments surrounding the use of gendered income tables to assess compensation for loss of working capacity. These tables replicate current income levels that in turn reflect the product of systemic gender discrimination. A number of commentators have called for the use of either male specific or gender-neutral income tables; however, such an approach would not be in accordance with the principles of corrective justice. Because there is no causal connection between that particular aspect of the harm suffered and the tortfeasor's wrong, the use of gender-neutral tables lacks the corrective justice requirement of correlativeity. To mount such a claim would require the sufferer to demonstrate a normative right to gender equality that imposes a commensurate duty to oblige on the individual tortfeasor. But if such a right did exist, then there is no reason to make its recognition parasitic on the occurrence of a tortious accident, for such a right would then exist to support a claim brought by any woman against any man to compensate for the effects of gender discrimination.

Fourth, as traditionally found in unjust enrichment, compensation for a victim can be measured by the real gains made by the wrongdoer at the expense of violating the victim's rights. If the wrongdoer's gain is commensurate to the victim's loss, or what has been termed by some autonomous restitution, the

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139. See McInnes, supra note 138, at 171.

140. Canadian courts are currently experimenting with a number of approaches to deal with gender discrimination and its effect on damages for lost working capacity. Some use male income tables but then apply a negative contingency deduction to reflect that full pay parity is still to emerge. Others have moved toward blended income tables, while other courts continue to use female income tables but then allow a positive contingency to be added to an award reflecting a change in societal treatment toward pay parity. See MacCabe v. Westlock Roman Catholic Separate Sch. Dist. No. 110, [2001] 293 A.R. 41, ¶¶ 87–89 (Can.). Also note where male earning tables have been used, the court has then deducted a negative contingency to reflect that pay parity is still to be attained. In MacCabe, the Alberta Court of Appeal found that the difference between using female and male income tables amounted to $158,733 on a total claim in excess of $4 million. Id. ¶ 93.

141. See Peter Birks, The Law of Restitution at the End of an Epoch, 28 W. AUSTL. L. REV.,
compensation is, in effect, like the first type of compensation described above. If there is no commensurate loss by the victim, what has been termed disgorgement for wrongdoing occurs, and the award is being imposed to effect a policy different from that underlying compensation.\textsuperscript{142} If the gain is made from dealings with the victim’s property, that also is like the first type of compensation. The gain resembles the first type of compensation not because it falls within the Waddams and Sharpe “lost opportunity to negotiate” line of reasoning but because it is commensurate with the incidentals of what constitutes property, namely, the right to exclusive enjoyment, including the possibility of gain.\textsuperscript{143}

Finally, compensation for a victim can be measured by the need to regulate the wrongdoer’s conduct by imposing punishment, deterrence, or retribution. Here, compensation is a contingent interest, interacting with the desire to effect punishment, deterrence, or retribution, only to the extent of what is the quantifiably necessary amount to achieve the instrumental goal. For clarity, I will refer to the different methods of compensation as 1, 2, 3, 4, and 5, respectively.

How do the theories of private law outlined in Part A align with these characterizations of compensation? Economic instrumentalism and revenge accounts focus only on 4 (disgorgement for wrongdoing) and 5. Corrective justice accounts focus on the 1, 2, and 4 (autonomous restitution, and property misappropriation). Consequential accounts identify how the normative principles that are implicit in 1, 2, and 4 exacerbate the distributional imbalance revealed in 3. The law of court orders either removes the compensation principle entirely from discussion, it being a substantive secondary right, or neutralizes the compensatory principle as a defining characteristic of private law.

Apart from economic instrumentalism, the majority of other accounts accept the concept of correlativity as locating one boundary of private law, and as described above, this is a constitutive feature of corrective justice accounts. Disagreement exists with respect to


\textsuperscript{143} See Waddams & Sharpe, \textit{supra} note 121; Weinrib, \textit{supra} note 39.
the categorical nature of corrective justice. Corrective justice does much to inform on the content of a duty between victim and wrongdoer, but it does little to identify when and where such a duty should be created.144 Economic instrumentalist accounts are much clearer on the ability to offer prescription here because they are united around a singular concept of efficiency.145 This is not to level a particular attack at corrective justice, as it is a common feature of most jurisprudential accounts; they provide description rather than prescription, at least not at any level that can give hortatory guidance to shape when a new emerging cause of action should be initiated or doctrinal principle changed.146

As the primary competitor to economic instrumental accounts, I now focus on corrective justice. I accept the criticism that both Peter Cane and Ken Cooper-Stephenson have levelled at corrective justice and their suggestions that in order to be useful, any prescriptive theory of private law must make allowance to redress some distributional imbalances and not simply give a narrative account of distributive justice. A modified theory of private law is crucial to resolve the content of 2, 3 and part of 4 (autonomous restitution) with respect to the role that the compensation principle plays. Engagement of the compensation principle marks the point of demarcation between the violation of legal rights that engage compensation, and the violation of rights that warrant vindication, namely part of 4 (disgorgement for wrongdoing) and 5. Incidentally, the division suggested here is one alluded to by Lord Scott when defining the only legitimate purposes for an award of damages in a civil suit: “one is compensation for loss or damage caused by wrongful conduct; the other is vindication of a right that has been violated by wrongful conduct.”147

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144. This is more of a problem for Weinrib than Coleman, the latter only offering an account of tort law.


147. Lord Scott, supra note 123, at 1.
Mapping the contours of the intersection of corrective and distributive justice is a work in progress. The scope of this engagement is at a highly abstract and metaphysical level and usually extends to offer explanatory accounts of various aspects of private law. At this level, it provides little pragmatically for courts to use, and yet Canadian and English courts have explicitly signalled that this is a project that they are already engaged in.

A pragmatic approach to private law and distributive justice must first determine the range of its concerns. Litigation, correlativity, and compensation tend to coalesce around the distribution of benefits and burdens of economic activity among individuals within society.

In contrast, litigation, correlativity, and damages vindicating rights of citizenship coalesce around the distribution of participatory rights in the polity. For example, do prisoners have voting rights? What are the constitutional rights accorded immigrants and refugees? And, even here, more often remedies are characterized by their declaratory or mandatory form, as in injunctions, than being substitutional, as in damages. Even in the limited range ascribed here that engages compensation, distributive justice means to exercise choice over the allocation of benefit and burdens of economic activity. For a court, there must be legitimacy to this exercise, so it can maintain the claim that it is acting justly, and to differentiate the project of law from politics. Unlike legislatures that, up to the limits of constitutionality and parliamentary procedure, can exercise any distributive justice choice, courts require some markers.


to denote when a political value has crossed the divide into the firmament of common law consciousness.

Cooper-Stephenson makes the claim that equality, more specifically gender equality, has made that leap.\textsuperscript{151} It is the value that has fuelled Canadian courts into recognizing the need to adjust the calculation of prospective income loss for personal injury to ameliorate the impact of systemic gender inequality.\textsuperscript{152} It has similarly worked to transform the treatment of women in common law cohabitation dissolution, giving them compensation at least equivalent to their contribution and thus defeating the presumption that such work performed during the relationship was done out of natural love and affection.\textsuperscript{153} I have argued elsewhere that the value accorded multiculturalism may also have made this leap.\textsuperscript{154} A nascent value accorded dignity may also be at work in explaining the somewhat idiosyncratic treatment of compensatory damages for wrongful dismissal in Canada.\textsuperscript{155}

To say that equality, multiculturalism, and dignity have, or may have entered, common law consciousness, is not to answer why or how. The why is simply because it appeals to the fulfillment of a court’s sense of justice. This is better left to the metaphysical arguments, but at a pragmatic level, it is a response to an overwhelming sense of individual injustice. The hallmark of the common law is that its doctrine is derived from case-by-case


\textsuperscript{153} See Pettkus, 2 S.C.R., ¶ 40–41. Note that this case was decided before Canada enacted its Charter of Rights and Freedoms; see also Peter v. Beblow, [1993] 1 S.C.R. 980, ¶ 19 (Can.) (describing the argument that labeling a woman’s contribution as gratuitous should be rejected because it “systematically devalues” the contributions women tend to make to the family economy and has contributed to the s “feminization of poverty”). This is distributive justice writ large. Commenting upon this case, one of Canada’s foremost family law academics described the Supreme Court’s approach as engaging in social engineering and wondered whether this is best done through private law or better left to legislative reform as a part of public law. Jay McLeod [1993] 44 R.F.L.3d 396 (Can.).

\textsuperscript{154} Berryman, \textit{supra} note 152, at 25–27.

\textsuperscript{155} True dignity is either held or not held. As such, it is not capable of a monetary equivalent. The assessment of damages is either as an emolument for the loss, similar to other non-pecuniary damages, and can thus be spoken of as compensation, or it is a payment to vindicate the loss of dignity as an absolute right held by all individuals and should be treated as damages for vindication. See Berryman, \textit{supra} note 45, at 1547–48.
methodology. Meticulous attention to facts comes before legal argument. Disputes arise from an individual’s perception of facts and a sense of injustice and grievance. Lawyers transform these into evidence and legal arguments. They choose whatever legal tools are available. Judges determine facts and transform legal tools into doctrine. Where there is a widespread disconnect between individual perceptions of injustice and doctrine, the common law is brought into disrepute. The avoidance of disrepute is a powerful motivator for adopting equality, dignity, or whatever else makes law work to be just.¹⁵⁶

The how is easier to answer and indirectly contributes to the why. The distributive value of equality was not just plucked from thin air. It commenced with the subjective expectation of injustice felt by a client. It was framed in the doctrinal argumentation of law by a lawyer. Where that was found wanting, a different conception of law was drawn, buttressed from other public documents—legislation and the Charter of Rights and Freedoms. In addition, evidence drawn from other disciplines was tendered that demonstrated the current distributive state of similarly placed victims. All of this material was commented upon and formed the courts’ judgments that effected the transformation in the cohabitation and the gendered income cases.¹⁵⁷ The courts rendered the clients’ subjective expectations ‘legitimate’ and reasonable.¹⁵⁸ A pragmatic distributive justice account in fact makes a better explanatory account of these cases and has the potential to offer useful prescription of private law.¹⁵⁹

¹⁵⁶. This would also appear to be the conclusion of some corrective justice proponents who seek to avoid the task of explaining how, as a matter of private law on corrective justice grounds, it can be just to order the poorest to compensate the richest for a particular harm done and so support a manifestly unjust distributional scheme. See Cane, supra note 12, at 216 (describing the problem for corrective justice proponents).

¹⁵⁷. See Peter v. Beblow, [1993] 101 D.L.R. 621 (S.C.C.) (Can.). Why else would a court comment upon how the current state of the law in a particular field had contributed to the feminization of poverty?

¹⁵⁸. I have commented elsewhere on this process. See Jeff Berryman, Legitimizing ‘Legitimate Expectations’: A Case Study on Filial Responsibility; Can Parents Recover for Supporting Their Children at University?, in UNDERSTANDING UNJUST ENRICHMENT 383 (Jason Neyers et al. eds., 2004).

¹⁵⁹. The gulf between what law claims to do and what in fact it does do in practice has been the subject of my colleague W.A. Bogart’s work for some time. His conclusions suggest that the eloquent models outlined in Part A in fact perform very badly even at a descriptive level of the outcomes of litigation. See particularly his analysis of tort law in chapter four. W.A. BOGART, CONSEQUENCES: THE IMPACT OF LAW AND ITS COMPLEXITY 111–55 (2002).
The values of equality, multiculturalism, and dignity are not distinctly distributive. In fact, arguably they define the relationship between citizen *qua* citizen and when violated warrant correction. However, in such cases the defendant is not guilty of violating the claimant’s rights based on equality, multiculturalism; or dignity; nevertheless, they are being required to compensate the claimant for their loss. The locale of a private suit is being used to correct a systemic loss. The court would be acting instrumentally. In my example of the use of gendered income tables, what prevents any woman from suing any man for compensation based on the systemic wrong of gender discrimination? How can this be right? And, of course it is not.

But recall, the immediate challenge by critics of corrective justice is only as to its categorical position. There is no desire to jettison all of corrective justice. In particular, the requirements of correlativity, as an explanatory account of private law, should not be used to replace corrective justice exclusively with distributive justice. One must still look to legislatures for rampant distributive justice. This means that the opportunity to practice distributive justice through compensation is parasitic on a claim that can otherwise be justified as meeting the procedural linkages of corrective justice.

This view bears a remarkable similarity to the current rules operating in Canada governing an award of punitive damages, a truly distributive exercise. The claimant must be the victim of the punishable conduct and punitive damages are only warranted if, and only if, the compensatory damages are insufficient to effect deterrence, punishment, or denunciation. This formulation in effect does much to avoid the spectre of large-scale punitive damage awards for negligence or product liability in Canada and incidentally appears to be the direction the U.S. Supreme Court wishes to take.

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The instrumentality being practiced here is of a limited scope. The claimant is required by the compensatory principle to concretize his or her distributive losses in a very real way, and in a way quite different from an economic instrumentalist account. The claimant and the court are unconcerned with determining an amount which will signal the right behavioural correction. The justification for a court to act instrumentally on occasion in the fashion suggested here, is that the universality of the values being compensated simply warrant it. It would be wrong for the court to be party to perpetuating this particular and obvious distributive injustice. The court cannot ignore the fact that its judgment speaks beyond the litigants and addresses deeply held societal values.

A remedial perspective linked to the compensation principle creates clearer demarcations of the tasks at hand. Consider the development of what has become known as the Wallace factors in wrongful dismissal disputes.\(^{163}\) The substantive law being addressed was a breach of contract.\(^{164}\) The particular plaintiff’s loss was the expected employment income for a reasonable termination notice period and the non-pecuniary damages suffered as a result of a number of actions by the employer when dismissing the plaintiff.\(^{165}\) Justice McLachlin, speaking for the minority, would have only extended the damages recoverable where the manner of dismissal impacted upon the employee’s abilities to secure subsequent employment.\(^{166}\) McLachlin is approaching the damage quantification from a remedial perspective and elevates the centrality of the compensation principle. It gives value to an employee’s expectations about how they should be treated when being dismissed but only to the extent that it actually has caused the employee a real loss. The minority’s approach is nuanced in how it indirectly leads to behavioural modification of employers because it remains plaintiff centric in determining a real loss.\(^{167}\)

In contrast, Justice Iacobucci, speaking for the majority, extended the reasonable notice period in recognition of an employee’s right to expect good faith and fair dealing in the manner

\(^{163}\) Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701 (Can.).
\(^{164}\) Id.
\(^{165}\) Id.
\(^{166}\) Id. ¶ 110 (McLachlin, J., dissenting).
\(^{167}\) Id. ¶¶ 118–19.
of dismissal and then identified a number of factors that primarily focus upon the employer's conduct, rather than the impact this conduct has on the employee.\(^\text{168}\) Thus, as the majority's response was explicitly directed at effecting behavioural modification of employers, it is defendant-centric. Such decisions are characterized by the language of defining rights, and the damages awarded are as much to do with vindication of those new rights as with compensating for real loss.\(^\text{169}\)

The compensation principle plays an important controlling role because it conditions any claim by requiring an actual provable loss. It also clearly defines the difference between compensation (1, 2, 3, and the part of 4 involving autonomous restitution) and vindication (the part of 4 involving disgorgement for wrongdoing and 5). Wrongs that justify disgorgement, deterrence, and punishment are clearly instrumental and potentially distributive in effect. They use the plaintiff as a windfall recipient of a profit or gain to affect some other societal objective. The rationale for why private law needs to attend to greater regulation of conduct needs articulation. Rather than simply concluding that such goals are at odds with a corrective justice account of private law, explicit recognition of the instrumental function of these remedies will directly focus the task at hand.\(^\text{170}\)

The effect of weakening the prescriptive ability of corrective justice as a unified theory of private law by questioning its categorical foundation is a trade-off to make it a better explanatory account of what courts actually do. It preserves most of the structural elements of corrective justice but raises serious issues about institutional competence and the reach of courts. Courts are not legislatures, yet they are entrusted with the care of the common law that provides background rights for much of society's private...

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168. Id. ¶¶ 107–09.
169. Id. ¶ 110.
behaviour and actions. There are limits to what courts should do, and mistakes will be made along the way.\footnote{Cane, \textit{supra} note 12, at 217.}

**CONCLUSION**

Economic instrumental accounts give only a contingent role to the compensation principle. They are more preoccupied with sending appropriate market signals. The corrective justice critique of private law does accord the compensation principle a pivotal role, but is found deficient as an explanatory account partly because of its rigid categorical structure. Anglo-Canadian cases increasingly appear to be engaged in making awards that are more instrumental of other behavioural modifying goals, yet still framing these within the terminology of compensation.

In the \textit{Anatomy of Private Law Theory}, Peter Cane commented that “debates about the relationship between corrective and distributive justice will need to continue for some time to come if an equilibrium of scholarly opinion is to be reached.”\footnote{Cane, \textit{supra} note 56, at 415-16.} Elsewhere, Cane has suggested that this debate should commence from looking at the substance of tort law.\footnote{Cane, \textit{supra} note 12, at 217.} Whereas, I suggest that this debate can

\footnote{171. For example, consider the reasoning of the majority of the Supreme Court of Canada in \textit{Hodgkinson v. Simms}, [1994] 3 S.C.R. 377 (Can.), where the court held that an accountant who had given advice on how to minimize taxes was responsible for all the client’s losses when the accountant failed to disclose to the client that he was similarly acting for a development company, in which he suggested the client invest to reduce his taxes. The tax advice was in fact sound. The client’s losses flowed from deterioration in the economy and the residential property market. The majority in effect treated the accountant as if he was guilty of fraudulent conduct and applied a more generous causation rule, but without any evidence of fraud being present. \textit{Id.} The ostensible reason for doing so was to keep the fiduciary up to the mark. However, no evidence was offered to suggest that similarly placed accountants were seriously engaged in advantage-taking of this type. In other words, the court acted on its own preconceptions about risks of those who render financial advice. I believe this was an error. See Berryman, \textit{supra} note 110. Contrast this with the decision of the majority in \textit{LAC Minerals Ltd. v. International Corona Resources Ltd.}, [1989] 2 S.C.R. 574 (Can.). The court awarded a constructive trust over gold bearing property that the defendant had acquired after entering into negotiations with the claimant who had suggested a joint venture. The claimant had completed survey work that demonstrated a real prospect of gold being found, and had shared this information with the defendant while attempting to negotiate the joint venture. The defendant utilized this information and acquired the property for itself. Upon an action for breach of confidence and fiduciary duty, the majority carefully analyzed the parties relationship, including a review of the industry practice associated with sharing information between geologists of competing mining companies, and the degree to which one party shared confidence with the other and why particular legal vehicles were not employed to ensure the maintenance of those confidences. The court’s order reinforced the industry practice, for which there was a good reason to encourage, that information shared between geologists was to be kept confidential.}{172. Cane, \textit{supra} note 12, at 217.}
also be engaged from a remedial perspective, determining what is experienced as a loss and how it is to be measured. A remedial perspective adopts the dualist acceptance that rights and remedies are inextricably linked, each informing the other. To suggest, as I do, that a wrongdoer could be held liable to pay compensation for a distributive loss he has not caused but that is parasitic to a loss he has caused, will appear to many as highly radical. But other theories of private law, apart from corrective justice, already tolerate this form of outcome. Economic instrumental accounts positively embrace the notion, while court order accounts of remedies law would potentially legitimate all court practices provided they operated within some internal doctrinal coherence.

I have not sought to argue what normative principles will be derived from a particular theory of distributive justice nor how they will be coherently reconciled with what is institutionally legitimate for courts to do, although I do believe that one source of fruitful inquiry will be on what makes individual expectations reasonable and legitimate. The likely conditions where my attenuated approach will initially operate are where the judgment debtor's (defendant) loss is being born by insurance and where the plaintiff's parasitic claim is the product of some form of systemic discriminatory practice, i.e., what is already emerging in the gender income cases.174

174. Another potential candidate is in the area of collateral benefits. In B.(M.) v. British Columbia, [2003] 2 S.C.R. 477 (Can.), the plaintiff had been the victim of sexual abuse while in the care of foster parents that she had been placed into after being removed from her birth parents by her social worker. In a suit against both the foster parents and the social services agency for failing to supervise the foster parents, the plaintiff sought damages for the adverse impact the injury had on her ability to earn income. At the time of the suit the plaintiff was in receipt of social assistance. One of the issues before the court was whether the social assistance should be regarded as a collateral benefit, to be deducted from any damages award for lost opportunity to earning capacity. The case was decided on the liability question. However, the court addressed the collateral benefit issue, holding that social welfare payments should be deducted. This result seems fair from a policy point of view that encourages the lowering of personal injury damages. However, it seems distinctly unfair in that a welfare recipient is required to account for the receipt of social assistance, but had the person been in the fortunate situation of providing through insurance or from charity for the adverse impact the abuse had on employment, they would have benefited from the insurance or charity exception to the collateral benefit rule. Since the more fortunate in society are likely to have employment and thus have some form of replacement income insurance, they will benefit from expanded exceptions to the collateral benefit rule. Whereas, the least fortunate, who are unlikely to have employment or carry insurance, bear the full brunt of the collateral source rule. I am not arguing the result in this case is wrong; however, the application of the collateral source rule does raise significant issues for progressives, who mostly argue in favor of a deductibility rule against a backdrop of increasing withdrawal by the state. The dilemma is expressed in Richard Lewis, Deducting Collateral Benefits from Damages: Principle and Policy, 18 LEGAL STUD. 15, 39-40 (1998):
Here, I suggest that the compensation principle still has an important constitutive part to play in a theory that draws on the structural elements of corrective justice, combining these elements with some elements of distributive justice, without necessarily having to embrace economic instrumental accounts of private law. At a minimum, my attenuated approach reinforces the demarcation between gains-based and loss-based awards, and it still limits the extent that a court can order a defendant to pay damages to a claimant. A claimant still has to prove in concrete ways the damages she has suffered and that they are causatively attributed to a now illegitimate social practice derived from the common law. Reasserting the centrality of the compensation principle will curb excessive judicial zeal, which seeks to embrace a more instrumentalist goal for the common law as a way to regulate private conduct.

Should a welfarist reviewing the tort system support cuts in damages now in the hope of the more equitable reallocation of resources at some later date, or should a defense be mounted of the existing level of support given to the fortunate few who succeed in their common law claim?