ROGER HALSON AND DAVID CAMPBELL (EDS), *RESEARCH HANDBOOK ON REMEDIES IN PRIVATE LAW* (EDWARD ELGAR 2019)

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I. INTRODUCTION

Is 'remedies' even a subject? This is the intriguing question Steve Hedley asks in Chapter 1 of the new *Research Handbook on Remedies in Private Law*, edited by Roger Halson and David Campbell.[1] What is the added value of investigating remedies by themselves, seeing how intimately connected they are with substantive law and how dependent they seem on questions of procedure? After all, even the definition of remedies (to say nothing of their classification) is a permanent subject of controversy.[2] The *Handbook* helps explain exactly why remedial law is a worthy subject matter of its own. The editors have assembled an impressive array of contributions on the various aspects of remedial law in common law jurisdictions and beyond.

As the editors themselves state in the foreword, innovation in the law of remedies has been widespread over the last 25 years, with the law being in a state of flux.[3] Of course, remedies, often in conjunction with rights, have been the subject of many treatises and articles over the years.[4] However, Halson

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1 Steve Hedley, 'Is "Remedies" a Subject?' in Roger Halson and David Campbell (eds), *Research Handbook on Remedies in Private Law* (Edward Elgar 2019).

2 Ibid 3.

3 See for example Rafal Zakrzewski, *Remedies Reclassified* (Oxford University Press 2005) 2. See also SM Waddams, 'Remedies as a Legal Subject', (1983) 3 Oxford Journal of Legal Studies 113.

4 See the references in the footnote above but also the previous work by the editors in Donald Harris, David Campbell and Roger Halson, *Remedies in Contract and Tort* (Cambridge University Press 2005). See also Nili Cohen and Ewan McKendrick (eds), *Comparative Remedies for Breach of Contract* (Oxford Hart 2005); Charles EF Rickett (ed), *Justifying Private Law Remedies* (Oxford Hart 2008); Andrew Burrows, *Remedies for Torts and Breach of Contract and Equitable Wrongs* (Oxford University Press 2019).

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and Campbell argue that recent changes in remedial law actually reflect the encroachment of social justice or welfarist considerations upon the traditional realm of private law. Private law increasingly outright mandates specific outcomes instead of just providing a framework for the development of private relations. This is an interesting, if controversial, position to adopt and indeed many of the contributions included in the volume could be said to reflect the rising tension between the private sphere and the public good. The *Handbook* helps make sense of these conflicts, investigating to what extent private law can retain its integrity in the face of present challenges.

These trends and tensions have sparked renewed interest in remedies at the European level,[5] which has peaked in conjunction with European Union (EU) harmonization efforts. The June 2020 agreement for a new collective redress mechanism, aiming at rendering consumer damages effective,[6] joins the IP Enforcement Directive of April 2004 as a recent example of 'remedies thought' in EU law.[7] Against this backdrop, the *Handbook*'s intimate look into the distinct character of remedial law should be of interest to any private law scholar reading this journal.

II. Structure and Comments

The volume contains diverse contributions touching on issues of contract, equity, restitution and tort law. It consists of 27 separate chapters grouped under five headings. The first part is of a general nature, beginning with a contribution by Steve Hedley discussing remedies as a subject matter and the merit of doing so. This is followed by a historical overview of contract (Stephen Waddams) and then tort law (Paul Mitchell) remedies, as well as

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5 See for example the newly published volume by Franz Hofmann and Franziska Kurz (eds), *Law of Remedies: A European Perspective* (Intersentia 2019).

6 See European Commission, 'Commission Welcomes Confirmation of Provisional Agreement to Strengthen Collective Redress in the EU' <https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_1227> accessed 8 July 2020.

7 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L195/16.

two chapters on how remedial rules operate in practice in the civil justice system (Annette Morris) and in commercial transactions (Catherine Mitchell). Part II is titled 'the Protected Interest' and focuses not only on reliance damages (David McLauchlan) and the performance interest (David Winterton), but also restitution (Peter Jaffrey) and equitable remedies for breach of trust (Duncan Sheehan). Part III groups together several chapters relating to termination for fundamental breach (Qiao Liu), non-pecuniary loss (Roger Halson), the literal enforcement of obligations (Andrew Tettenborn), common mistake and frustration (Catherine MacMillan) and market damages in sales of goods (David Campbell). It also contains a critical analysis of the UK Consumer Rights Act of 2015[8] (James Devenney), a chapter on injunctions through the lens of nuisance (Robert Palmer and Ben Pontin) and an overview of gains-based damages (Katy Barnett). Part IV provides an interesting look into other common law jurisdictions such as Australia (Sirko Harder), New Zealand (Rick Bigwood) and Canada (Jeff Berryman), along with an enlightening overview of the solutions adopted by the mixed Scots law (Laura Macgregor). It also contains two chapters that will no doubt be very useful for European and comparative private lawyers, namely on harmonisation instruments at the European (Mel Kenny) and international (Ewan McKendrick, Qiao Liu and Xiang Ren) levels. Finally, Part V serves as a summary of the main themes of the book and is of a general theoretical nature. There, one can find a notable contribution on tort law and the tort system (Alan Beever), which is followed by an analysis of the structure of remedial law (Stephen A. Smith). This part ends with a complementary two-chapter discussion of default rules in contract remedies (Jonathan Morgan and William Whitford).

A common theme that emerges from many contributions is the complex relation between the law of remedies and the theories of justice that may or may not underlie it. In the first chapter, Steve Hedley opines persuasively that focusing on remedies reveals issues that would be invisible otherwise, invoking the value judgments that judicial decisions as to remedies frequently involve.[9] It is important for scholars to consider just how flexible remedies should be and whether the common law fails to enforce its own morality by

8 Consumer Rights Act 2015 (UK), ch 15.

9 Hedley (n 1) 2.

requiring that mere damages be paid for breach of contract instead of specific performance. After all, remedies are crucial for potential litigants and the interest of the parties in the litigation process (or lack thereof) often revolves around what remedies might be available. Therefore, both substantive law *and its remedies* must be fair, as only remedies can satisfy the 'users' of private law. However, this is often ignored.

Hedley's observations are nicely complemented by Stephen Waddams' and Paul Mitchell's overviews of the history of remedies in contract and tort that follow. The chapters show the influence of history and legal categories as obstacles to reform. Waddams analyses the primacy of monetary remedies and observes that this primacy is qualified; in practice, the preference is not as strong as is sometimes suggested, as illustrated by exceptions in disputes over land sale contracts and other types of cases. Results in civilian and common law are often quite similar in practice even if the conceptual starting point is different.[10] However, the distinction between categories matters in other areas: Breaches of contracts are not treated the same way as torts. Mitchell, in turn, analysing the history of tort remedies in England and Wales, emphasises the influences not just of legal categories but also of historical origins and of a 'rationalistic commitment to compensation' on the law of tort remedies.[11] These three constraining forces create a kind of path dependency in the evolution of law and often work as an impediment to reform. Ultimately, it is often the participants in the legal system and their values and assumptions—principally informed by the aforementioned factors—that shape how a given area of substantive law operates in practice. Mitchell's tripartite classification of constraining forces is doubtless a very interesting explanatory framework that helps illuminate the process of legal development.

The subsequent chapter by Catherine Mitchell offers another instance where practical reality "clashes" with the law in the books, pointing to the limitations of theoretical accounts and empirical investigations on contract

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10 Stephen Waddams, 'The Modern History of Remedies for Breach of Contract' in Halson and Campbell (n 1) 17, 18.

11 See Paul Mitchell, 'The Modern History of Tort Remedies in England and Wales' in Halson and Campbell (n 1) 33, 45.

law remedies.[12] There are some instances where remedies broadly track commercial expectation and others where they deviate from them and we lack the empirical evidence necessary to understand when parties contract out of remedial rules. While, in certain transactions, breach may constitute a 'wrong', in others it may be a legitimate response to difficulties. Thus, usage of the word 'wrong' is not always supported by the reality of commercial contracting.

Chapter 24 serves as a great addition to the above. Alan Beever draws a useful dichotomy between tort law and the tort system and highlights the implications of this separation. One should always keep in mind that tort law is the law, whereas the tort system is the institution created by a particular application of the law. The need to distinguish the study of the tort system from that of tort law does not mean that each study will *always* yield insights relevant to the other.[13] The current institutional structure of the personal injury system may not be up to the task of enacting the substantive law and thus may not be relevant to the task of constructing an ideal system. Beever persuasively criticizes the prevalent policy based approach to tort and the uncritical adoption of law and economics thought. He points out that positive law is by no means a perfect instantiation of corrective justice but actually suffers from being detached from it, which is often overlooked when discussing tort remedies. Therefore, 'fit' is not necessarily the correct benchmark. The failure of the tort and contract systems to achieve corrective justice (or whatever other standard we choose to implement) due to how remedies are granted in practice should not lead us to hasty conclusions on how we should shape remedial laws, as this may generate a kind of feedback loop that causes us to favour the existing system.

In sum, law in practice and the law on the books can diverge significantly. However, institutional arrangements tend to influence the law and shape the appropriate remedial response and no theory of substantive law would be complete without being aware of how to deal with this divergence. Insurance settlements, social welfare, complex commercial customs and contractual

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12 Catherine Mitchell 'Remedies and Reality in the Law of Contract', in Halson and Campbell (n 1) 68, 84.

13 Alan Beever, 'Tort Law and the Tort System: From Vindictiveness to Vindication' in Halson and Campbell (n 1) 439.

terms influence remedial law; all are important factors in the reality of how we perceive both our tort system and tort law. A closer look into remedies helps illustrate the fault lines.

A parallel thread that emerges is the relation of remedial law to social and distributive justice. Indeed, everywhere in the book conflicts can be found that relate directly to the distributive aspects of the various remedies. Those social justice aspects are prominent, for example, in the sixteenth chapter, which discusses English law and injunctions through the lens of nuisance. Lord Denning's famous aphorism that the injunction would make the village 'much the poorer' takes a central role here.[14] Palmer and Pontin first explain how injunctions have been historically used to coerce powerful economic forces even going back to medieval times. Thus, compared to damages injunctions are inherently risky for courts who 'cannot afford to get it wrong'.[15] Older precedents such as *Coventry v Lawrence*[16] and *Miller v Jackson*[17] but also new cases like the 'Chelsea stadium dispute'[18] show that injunctions involve delicate weighing of conflicting interests. Of course, a central problem is the extent of discretion that should be granted to the courts. By granting injunctions instead of damages in certain disputes courts implement certain value judgments. For instance, the presumption in favour of granting an injunction in nuisance cases demonstrates how courts still think of property as more than a mere commodity. Damages often cannot compensate for the loss of enjoyment of one's home, which is something that does not have a monetary 'price'. This shows how closely linked the choice of remedies is to fundamental questions of justice.

Other chapters of the volume are more technical or doctrinal in nature but no less interesting, as they show how remedial law is still in flux. A good example is Chapter 7 on restitution. Peter Jaffrey makes clear that the development of the law of restitution on the basis of unjust enrichment obscures the differences between different types of remedies. This chapter

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14 *Miller v Jackson* [1997] QB 966, 976.

15 Robert Palmer and Ben Pontin, 'Injunctions Through the Lens of Nuisance' in Halson and Campbell (n 1) 294.

16 *Coventry v Lawrence* [2012] EWCA Civ 26.

17 *Miller v Jackson* (n 14).

18 Palmer and Pontin (n 15) 308.

amply demonstrates that remedies and substantive law exist in an uneasy relationship.[19] For instance, restitution is often construed as a remedy and unjust enrichment as the associated cause of action. Jaffrey disagrees, instead distinguishing between the different types of restitution claims. By accepting a general cause of action, in this case unjust enrichment, we unavoidably cause a certain path dependence in the incremental change of case law. Ultimately, taxonomy and legal categories matter in remedies. Hence, we should not be hasty to group together disparate claims and assume that a common cause of action exists. Jaffrey makes a persuasive case that a tendency to create legal categories can often obscure rather than clarify the law. For a civilian lawyer it is not difficult to envisage a general cause of action based on unjust enrichment; however, the same does not necessarily need to be true in common law.

In the face of prevailing uncertainty, there is space for devising innovative approaches. In Chapter 12, volume editor Roger Halson attempts to create a unified framework for damages for non-pecuniary loss in both contact and tort. This is remarkable given the significant differences that exist even among different torts. The author criticizes various grounds offered as a rationale for justifying restrictions on recovery of damages for non-pecuniary loss in contract, such as the inability to quantify such losses or reticence to punish defendants.[20] Halson argues that contract should be brought closer to tort in that respect and that generalist limits to recovery such as remoteness, mitigation and contributory negligence are sufficient in both areas.[21]

Lastly, the comparative law aspects of this book are fascinating and offer something that has been missing from previous treatises on remedies. The discussion of remedial rules in Scots Law deserves particular attention, as this system unites different types of remedies deriving from both civil and common law, which co-exist in a complicated relationship with each other. In particular, the unique ways in which Scots law deals with the issues of

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19 Peter Jaffrey, 'Restitution', in Halson and Campbell (n 1) 110.

20 Roger Halson, 'The Recovery of Damages for Non-Pecuniary Loss in Contract and Tort: A Unified Approach' in Halson and Campbell (n 1) 199.

21 On non-pecuniary loss in different civil law systems, cf Katarzyna Kryla-Cudna, 'Breach of Contract and Damages for Non-Pecuniary Loss' (2018) 26 European Review of Private Law 515, 516.

retention and 'specific implement' should be of interest to every comparative lawyer.[22] Furthermore, Berryman's discussion of Canadian law shows that domestic conditions like the absence of sophisticated supply chains or the abundance of real property exert strong influence on the shaping of remedies, once again illustrating the influence of institutional arrangements on remedial law stressed earlier in this review.[23] Such factors can explain divergence in rules concerning, for instance, punitive damages and the availability of specific performance.[24] Thus, although common law jurisdictions do influence each other, it is remarkable how the incremental evolution of the case law can also lead to different results.

Patterns of harmonization and fragmentation are also apparent on the international and European level. A comparison of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts, on the one hand, with the Principles of European Contract Law and the Draft Common Frame of Reference, on the other, is illuminating. For instance, the fact that specific performance is enshrined as the principal remedy in the CISG does not necessarily guarantee its widespread use across disputes. Contracting parties may simply ignore this provision and request payment of damages; domestic courts and arbitrators may interpret it through the lens of their own national law. This is yet another example of how law operates in practice under real life constraints. That is, commercial transactions and the domestic understanding of remedies exert a strong pull that leads the law in practice to diverge from the law on the books. Nonetheless, according to chapter authors Ewan McKendrick, Qiao Liu and Xiang Ren, a consensus seems to be gradually emerging as to when the remedy should and should not be available.[25]

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22 Laura Macgregor, 'Remedies for Breach of Contract in Scots Law' in Halson and Campbell (n 1) 336.

23 Jeff Berryman, 'Canadian Perspectives on Contract Remedies' in Halson and Campbell (n 1) 371.

24 In Scots Law, evidence of uniqueness is required for specific performance under *Semelhago v Paramadevan* (1996) 2 SCR 415.

25 Ewan McKendrick, Qiao Liu and Xiang Ren, 'Remedies in International Instruments' in Halson and Campbell (n 1)409.

III. Conclusion

There is much more to this book. One also can find highly interesting chapters on remedies in trusts, remedial discretion, defaults, and different types of damages. Any reader of this work with even a passing interest in common law, comparative law or legal theory stands to gain much, even if some additions could be desirable. For instance, the extensive coverage of remedial law in common law jurisdictions could be complemented, possibly in subsequent editions, by a chapter on the civil law perception of remedies, which could indeed help better illuminate the common law approach. In addition, some contributions seem to focus less on remedial law in the strict sense and more on substantive law. That is not necessarily a criticism, though, given how intimately the areas are intertwined. Lastly, the volume would benefit from a chapter or two focusing on the economic analysis of specific remedies, given the rich work on the subject.[26] The same could be said about empirical research on remedies.

In conclusion, the book clearly proves that remedies is, in fact, its own subject. Researching remedies helps scholars come to terms with the increasing complexity of the law and find common threads. For one, it leads to a better conceptualization of theoretical problems, such as the relation between the law and the systems that enforce it.[27] Furthermore, it reveals interesting discrepancies across the various common law jurisdictions, which can be explained as points of principle, products of domestic conditions, or both. While these sorts of issues require scholars to keep an eye on the actual practice of the law, practical realities need not be decisive in shaping the law itself. In any case, it is obvious that there is a pressing need for research on the topic, as wrong turns can happen and remedial law remains the object of intense disputes implicating fundamental questions of justice and socio-

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26 Of course, many contributions do cover aspects of legal economic thought but a self-standing chapter would still be of value. See for example Stephen A Smith, 'The Structure of Remedial Law' in Halson and Campbell (n 1) 458; Jonathan Morgan, 'Contract Remedies as Default Rules' in Halson and Campbell (n 1) 476.

27 Duncan Sheehan and TT Arvind 'Private Law Theory and Taxonomy: Reframing the Debate' (2015) 35 Legal Studies 480.

political structures.[28] The *Handbook* is not merely a comprehensive reference work, but also includes a number of innovative contributions to existing scholarship. Overall, the editors and contributors to this volume have succeeded in providing an in-depth review of the law of remedies that can both open up new debates and rejuvenate old ones.

[28] See for example Palmer and Pontin (n 15); Annette Morris, 'Personal Injury Compensation and Civil Justice Paradigms' in Halson and Campbell (n 1) 47.