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## *Rights and Remedies*

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### I INTRODUCTION

THE RELATIONS OF rights and remedies are subtle and complex and raise a number of issues. These include the questions: Can there be a legal right that is unprotected by a remedy?<sup>1</sup> Is the nature of the legal right reflected in the type of remedy offered for its protection, or is it vice versa, namely is it the type of remedy available that sheds light upon the nature of the right involved? Another important issue, that received relatively little attention, relates to the role of discretionary remedies. Courts usually enjoy a broad discretion with regard to the type of remedy to be granted. This means that similar or even identical rights may, in certain circumstances, be accorded one type of remedy for their protection, while in other, sometimes quite similar circumstances, a different type of remedy would be offered. How does this discretion, or rather inconsistency, in the field of remedies affect our understanding of the nature of the legal right involved and the right-remedy relations?

There are four models that can explain the rights-remedies relations:

- 1) The primacy of the remedy model
- 2) The primacy of the right model
- 3) The unity of the right-remedy model
- 4) The 'acoustic separation' model.

### II THE PRIMACY OF THE REMEDY MODEL

Under this model it is the potency of remedy and its availability which determines the nature of the legal right and, indeed, its very existence.

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<sup>1</sup>Peter Birks, in his article 'Rights, Wrongs and Remedies' (2000) 20 *Oxford Journal of Legal Studies* 1, pointed out that the term 'remedy' has a number of meanings. In this chapter the

The right derives from the remedy and as a matter of sequence the remedy precedes the right. Consequently the absence of a remedy points to the non-existence of a legal right. This model is in line with the traditional approach of the common law under which 'where there is a remedy there is a right' (*ubi remedium ibi ius*), and the granting of a remedy via an action in court remains to date a major vehicle for the development of new legal entitlements and the expansion of established legal rights.<sup>2</sup>

This model, in its extreme form, was adopted by Holmes in whose view '[t]he primary rights and duties with which jurisprudence busies itself ... are nothing but prophesies.' A legal right (and a legal duty) 'is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court'.<sup>3</sup> This view was followed by the 'bad man' approach to the law. The 'bad man' does not worry about rights. He is concerned only with legal consequences, namely sanctions and remedies. Hence the absence of a remedy means freedom of action. In fact, freedom of action is maintained even if a remedy is available but that remedy falls short of actually preventing the specific course of action. In this type of situation it is open to the obligated party to weigh the advantages of breaching the other party's right against the 'cost' of the remedy and to decide accordingly. The famous example is that of breach of contract, which Holmes assumes entails mere liability in damages. The denial of specific enforcement leads him to the conclusion that a party to a contract may (or perhaps we should say: is entitled) to breach the contract subject to his liability to pay damages.<sup>4</sup>

The difficulty with this approach lies in its assumption that the remedy provides a perfect substitute<sup>5</sup> for the right. It is a kind of indulgence that

term 'remedy' refers to an order of the court in the plaintiff's favour on the ground that his initial entitlement has been infringed, appropriated, withheld or taken advantage of in a manner disallowed by the law.

<sup>2</sup>Thus the case of *Lumley v Gye* (1853) El & Bl 216, 118 ER 749 that established the modern tort of interference with contractual relations has in fact expanded the ambit of the contractual right by granting the parties to the contract a legally protected entitlement vis à vis third parties. The recent decision in *Att-Gen v Blake* [2001] 1 AC 268 (HL) that recognised the right to recover gains derived from a breach of contract has also expanded the contractual right, this time vis à vis the other party to the contract. The case of *White v Jones* [1995] 2 AC 207 (HL) provides an example of a court creating a legally protected interest via a tort action. In this case it was held by a 3–2 majority that a solicitor who was instructed to prepare a will but failed to do so within a reasonable time could be liable in negligence to the intended beneficiary. Consequently, the expectancy of the intended beneficiary was turned into a legally protected interest. Obviously this protection is fairly narrow. On the correlativity of rights and duties see generally EJ Weinrib, *The Idea of Private Law* (Harvard University Press, Cambridge, Massachusetts, 1995).

<sup>3</sup>OW Holmes 'The Path of the Law' 10 *Harvard Law Review* 457, 458 (1897), reprinted in *Collected Legal Papers* (Harcourt, Brace & Co, New York, 1920) 167, 168–9.

<sup>4</sup>OW Holmes, above n 3, at 462 (in *Collected Legal Papers* at 175); OW Holmes *The Common Law* (Little Brown, Boston, 1881) 300–1. For a criticism see D Friedmann 'The Efficient Breach Fallacy' (1989) 18 *Journal Legal Studies* 1. See also L Smith, chapter 10 below.

<sup>5</sup>Clearly in instances in which the legal right is specifically enforced the judgment reflects the entitlement in its initial form and does not constitute a remedial substitute.

the wrongdoer is entitled to purchase. The fact that the remedy is designed to vindicate the right, not to replace it, is disregarded.<sup>6</sup> Similarly disregarded is the distinction between price on the one hand and remedies and sanctions on the other.<sup>7</sup> A sign that provides: 'Parking Prohibited, Penalty \$10' is viewed as identical to a sign: 'Parking Allowed. Price \$10'.

No doubt, there are rare situations in which a party is unilaterally entitled to 'encroach and pay' or in other words to 'purchase' the right to infringe upon another's entitlement. The decision in *Vincent v Lake Erie Transportation Co* provides a conspicuous example.<sup>8</sup> In that case the defendant's ship unloaded cargo at the plaintiff's dock. When unloading was complete a violent storm developed and it became highly dangerous for the vessel to leave the dock. The master decided to leave the vessel moored and the wind and waves threw it against the dock. The court recognised the defence of necessity, but held the defendant liable for the damage caused to the dock on the ground that 'where the defendant prudently... avails itself of the plaintiffs' property for the purpose of preserving his own more valuable property ... the plaintiffs are entitled to compensation for the injury done'.<sup>9</sup>

This decision provided the cornerstone for the incomplete privilege theory developed by Bohlen, under which

an act may be so far privileged as to deprive the person whose interest is invaded ... of the privilege ... to terminate or prevent the invasion ... but not so far as to relieve [the actor] from liability to pay for any material damage he does thereby.<sup>10</sup>

This approach has been adopted by the Restatement (Second) of Torts<sup>11</sup> and the Restatement of Restitution.<sup>12</sup> The question whether liability in this type of situation is in torts or in restitution has long been debated,<sup>13</sup> but need not concern us here. For our purposes it suffices to point out the distinction between impermissible trespass or encroachment of another's protected interest on the one hand and the use or appropriation of another's entitlement within the ambit of the incomplete privilege doctrine on

<sup>6</sup>Friedmann, above n 4.

<sup>7</sup>Cf R Cooter 'Prices and Sanctions' (1984) 84 *Columbia Law Review* 1523.

<sup>8</sup>109 Minn 456; 124 NW 221 (1910).

<sup>9</sup>*Ibid*, 460; 222.

<sup>10</sup>C Bohlen 'Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality' (1926) 39 *Harvard Law Review* 307, 313.

<sup>11</sup>§ 197.

<sup>12</sup>§ 122.

<sup>13</sup>For the view that liability is in restitution see R Keeton 'Conditional Fault in the Law of Torts' *Harvard Law Review* (1959) 401, 72; D Friedmann 'Restitution of Benefits Obtained through the Appropriation of Property or the Commission of a Wrong' (1980) 80 *Columbia Law Review* 504, 542-3; E J Weinrib, above note 2, 196-203. For the view that liability is in tort see G Palmer *The Law of Restitution* (Little Brown, Boston, 1978) vol 1, 139-40.

the other hand. This distinction has some practical implications. Thus, in the case of impermissible trespass the owner may use self-help to resist or expel the intruder. But where the intruder's act is permissible under the incomplete privilege doctrine, the owner is required to tolerate the intrusion. In such a case an attempt by the owner to expel or resist the intruder is wrongful and constitutes a tort vis-à-vis the intruder.<sup>14</sup> Such practical implications may seem marginal,<sup>15</sup> but the basic distinction between a wrong and a permissible act remains important. In the one case the actor committed a transgression. His act was legally as well as morally wrong, and the function of the remedy is not only to compensate the victim but also to deter such conduct. In the other case the remedy is more like a price. It is a payment which the actor is required to make for having lawfully appropriated or damaged that which belongs to another.<sup>16</sup>

The famous article by Fuller and Perdue 'The Reliance Interest in Contract Damages'<sup>17</sup> appeared some 50 years after the publication of Holmes' theory. It shares Holmes' fascination with remedies, places the emphasis upon the remedy of damages and almost completely disregards the possibility of specific performance. Holmes' theory as well as Fuller and Perdue's article represent the centrality of the remedy approach and reflect an attempt to view the contractual right through the looking glass of the damages awarded for its breach.<sup>18</sup>

The well-known article by Calabresi and Melamed 'Property Rules, Liability Rules and Inalienability: One View from the Cathedral'<sup>19</sup> deviates in one aspect from the strict dominance of the remedy model. It assumes that decisions as to entitlements, namely allocation of legal rights, must precede the determination as to their protection via the law of remedies. But in other respects it follows Holmes' approach and emphasises the centrality of the remedy to the understanding of the

<sup>14</sup> *Prosser and Keeton on Torts*, 5th edn (West Publishing Co, St Paul, Minnesota, 1984) 147.

<sup>15</sup> There may be some other practical implications. Thus, where the act was privileged and no damage was caused, nominal damages will presumably not be awarded. In addition, where the act was wrongful, damages may be awarded on a more liberal scale, and the award of punitive damages in some cases is also conceivable.

<sup>16</sup> The availability of a remedy against a defendant who committed no wrong has recently become the focus of an extensive literature in the field of restitution; the core case being that of payment made under a mistake in which the recipient was completely innocent. See eg Birks, above n 1; K Barker 'Rescuing Remedialism in Unjust Enrichment Law: Why Remedies are Right' [1998] *Cambridge Law Journal* 301; S A Smith 'The Structure of Unjust Enrichment Law: Is Restitution a Right or a Remedy?' (2003) 36 *Loyola Law Review* 1037.

<sup>17</sup> (1936) 46 *Yale Law Journal* 52, 373.

<sup>18</sup> For a similar approach see PS Atiyah 'Holmes and the Theory of Contract' in PS Atiyah *Essays on Contract* (Clarendon Press, Oxford, 1986) 57, 61 stating that: 'it is impossible sensibly to discuss *how* binding a contract is until one knows what form of damages are likely to be awarded for its breach'. For a different approach see D Friedmann 'The Performance Interest in Contract Damages' (1995) 111 *Law Quarterly Review* 628; D Kimel 'Remedial Rights and Substantive Rights in Contract Law' (2002) 8 *Legal Theory* 313.

<sup>19</sup> (1972) 85 *Harvard Law Review* 1089.

nature of the legal right and its implication for the actor's freedom of action. Calabresi and Melamed assume that an entitlement can be protected either by a property rule or a liability rule (in addition it might be inalienable). When an entitlement is protected by a liability rule it means that 'someone (a 'bad man'?) may destroy the initial entitlement if he is willing to pay an objectively determined value for it'. A number of examples are offered to demonstrate the application of a liability rule. These include eminent domain and cases of nuisance for which no injunction is granted so that the plaintiff's remedy is limited to damages. Also included in this category are accidents on the ground that potential victims have no right to stop the activity that might injure them.

If we were to give victims a property entitlement not to be accidentally injured we would have to require all who engage in activities that may injure individuals to negotiate with them before the accident, and to buy the right to knock off an arm or a leg.<sup>20</sup>

It is thus conspicuous that no distinction is drawn between permissible conduct and wrongful misconduct, and there is similar failure to distinguish between the price of acquisition and damages imposed for the consequences of a wrong. Eminent domain, accidents and some nuisances are all included in the same category of 'liability rules'. In the case of eminent domain, which is a permissible appropriation of property against payment, the payment to the owner is simply the price, which the public authority is required to pay for the lawful (albeit forced) taking. In the case of accidents and nuisance the payment, which the wrongdoer is liable to make, constitutes damages for the wrong. However, the tacit assumption, in line with Holmes' approach, is that this distinction makes no difference. Since mere monetary payment is involved in all these situations, they can all be included in the same category of liability rules, within which a person is allowed to appropriate or damage another's protected interest subject to the payment of money, and the question whether such payment is to be regarded as damages or price is of no moment.

At this stage I would also point out that Calabresi and Melamed disregard certain situations which do not fit neatly in their division of the subject, eg the case in which an employee, in breach of his contract, seeks to work for another employer. The former employer may sometimes get an injunction but not specific performance.<sup>21</sup> More problematic is the very common situation in which the court has a discretion with regard to the remedy. It may grant specific performance or an injunction, but it may deny these remedies and hold that the award of damages is the only

<sup>20</sup> *Ibid*, at 1108.

<sup>21</sup> *Cf Lumley v Wagner* (1852) 1 De Gm & G 604, 42 ER 687.

appropriate remedy. How is the plaintiff's interest to be classified beforehand or is it capable of being classified only after the court rendered its decision? The significance of discretion for the proper understanding of the rights — remedies connection is further examined below.<sup>22</sup>

### III THE PRIMACY OF THE RIGHT MODEL

This model seems to follow naturally from any attempt systematically to organise the law. It is typical of the continental legal systems and is likely to be adopted in any systematic codification. Every comprehensive legislation in the field of private law is likely to begin by defining legal rights and duties. This approach which is often termed 'from rights to remedies' or 'where there is a right there must be remedy' assumes that the legal right precedes the remedy both in time and in importance. Remedies are merely derivative and follow from the legal rights. Under such an approach legal rights have an independent existence and it is possible to conceive of legal rights unsupported by legal remedies.

As a matter of interpretation a question sometimes arises: what is the position where the law defines a right without referring to the remedy to be granted in case of its breach? Is it to be assumed that a remedy must be available on the ground that 'where there is a right there must be a remedy',<sup>23</sup> and if so what kind of remedy, or should it be assumed that the whole array of remedies recognised by the legal system is to be applied? The following examples illustrate the issue:

- 1) Section 9 of the Israeli *Land Law* 1969 deals with 'conflicting transactions'. It provides in essence that where a person undertakes to effect a transaction in land and, before this transaction is completed, he undertakes towards another person to effect a conflicting transaction 'the party to the first transaction shall prevail'. This rule does not apply if the party to the second transaction 'has acted in good faith and for consideration' and title was transferred to him 'while he is still in good faith'.

The section thus provides an order of priority between conflicting transactions. It reflects an idea similar to the Anglo-American concept of 'equitable ownership', under which the purchaser's contractual right is stronger than a mere personal right and comes close to a real (property) right.<sup>24</sup> But the section says little about the remedial implications in case

<sup>22</sup>Text after n 54 below.

<sup>23</sup>This was the position adopted in the great case of *Ashby v White* 2 Raym. Ld. 938, 92 ER 126, in which the plaintiff was awarded damages for having been maliciously deprived of his right to vote, and Holt CJ stated that 'it is a vain thing to imagine a right without a remedy'. The decision is commonly regarded as illustrating the principle that the existence of a right calls for a remedy to protect it. See H Broom, *A Selection of Legal Maxims*, 10th edn (1939 by RH Kersley) 118.

<sup>24</sup>The purchaser as the equitable owner is entitled to specific performance. However, the precise nature of the relationship between equitable ownership and the right to specific

of a breach, except that 'the party to the first transaction shall prevail'. This obviously means that if claims for specific performance are brought against the seller both by the party to the first and the party to the second transaction, the claim of the former will be allowed while the claim of the latter will be denied (but the party to the second transaction will presumably be entitled to damages for breach of contract). It is also clear that the party to the first transaction can direct his claim for specific performance not only against the seller but also against the party to the second transaction, if the latter acquired title without consideration or without being in good faith. But what about other potential remedies? Can the party to the first transaction claim damages from the party to the second transaction, if the latter acquired title without consideration or without being in good faith, on the ground that such acquisition of title infringes the right of the party to the first transaction? And if the party to the second transaction sold the property, can the party to the first transaction claim the proceeds of the sale in restitution? The answer to these questions depends on our understanding of the nature of the right of the party to the first transaction and our assumption regarding the type of remedies available for its protection.<sup>25</sup>

- 2) A somewhat similar issue arises with regard to remedies for breach of contract. All modern legal systems offer a set of remedies for breach of contract, notably specific performance, damages and termination. A question does however arise whether the traditional remedies are exhaustive or is the injured party also entitled to restitution of the profits gained by the other party as a result of the breach? A detailed discussion of this issue will not be attempted here.<sup>26</sup> For our purposes it suffices to point out the approach under which the issue is to be determined in accordance with our understanding of the nature of the contractual right and the type of entitlement that it confers upon the parties to the agreement. If the contractual right is conceived as a kind of property,<sup>27</sup> a right that confers upon its owner an entitlement to the other party's performance,<sup>28</sup> then it may be concluded that the innocent party can recover the profits gained by the other party in consequence of the breach. It should however be noted that there is a great diversity among contractual rights. They differ in their content, ambit and the nature of the entitlement that they confer. It is thus clearly conceivable that some remedies, such as enforcement or

performance is somewhat obscure. The right to specific performance is sometimes predicated on the plaintiff's equitable ownership. Conversely, the plaintiff may be considered equitable owner because he is entitled to specific performance. Cf HF Stone 'Equitable Conversion by Contract' 13 *Columbia Law Review* 369, 386 (1913).

<sup>25</sup> These issues are discussed in N Grabelsky-Cohen 'The Nature of an Undertaking to Effect a Transaction' (1978) 4 *Tel-Aviv University Studies in Law* 33.

<sup>26</sup> See generally R Goff and G Jones *The Law of Restitution*, 6th edn (Sweet & Maxwell, London, 2002) 515–27, and more recently A Kull 'Disgorgement for Breach, the "Restitution Interest" and the Restatement of Contracts' (2001) 79 *Texas Law Review* 2021; J McCamus 'Disgorgement for Breach of Contract: A Comparative Perspective' (2003) 36 *Loyola of Los Angeles Law Review* 943. See also *Att-Gen v Blake*, above note 2.

<sup>27</sup> Friedmann, above n 13.

<sup>28</sup> Friedmann, above n 18.

restitution of gains will be available for certain contractual rights but not for others.

Another issue relates to classification. It is clear that the different remedies are available to protect different rights. In fact the twofold division of property rules versus liability rules, reflects an oversimplification, since there is a whole gamut of possibilities, and the question arises to what extent does the type of remedy available or the limits upon its application affect the classification of legal rights and our understanding of their nature. This point is discussed in the following section.

#### IV THE UNITY OF THE RIGHT-REMEDY MODEL

This model casts doubt upon the right-remedy dichotomy and assumes that the remedy constitutes an integral part of the legal right. Each right or category of rights has a number of attributes. The remedy available for its protection, its potency or weakness or even the lack of any effective remedy is simply one of the many attributes of the legal right.

This model does not necessarily mean that a legal right does not have a 'life of its own', namely that a right cannot exist unless some remedy is available in case of its breach. Rather it assumes that the remedy or lack of it is simply one of the attributes of the legal right. Under this approach rights can be classified in accordance with their strength, ie according to the remedies available for their protection. The weakest right is the one for which no legal remedy is available in case of its breach. Section 32(a) of the Israeli *Contracts (General Part) Law 1973* offers an example of this type of legal right. It provides that 'A gambling, lottery or betting contract ... does not provide ground for enforcement or damages'.<sup>29</sup> The *Contracts Law* thus envisages a type of contract that is valid and binding and confers legal rights and yet no legal remedy is available to protect it. In this respect it is a very weak right. Yet, there is no denying that at least in the eyes of the legislator it is a valid and legally binding right.<sup>30</sup> In this respect it is similar to a legal right that cannot be enforced by virtue of a statute of limitation.<sup>31</sup>

Enforceable rights are in this respect 'stronger' than non-enforceable rights. But the enforceable rights category can be sub-divided according to the effectiveness of the remedies accorded to their protection. Thus,

<sup>29</sup> This limitation does not apply to gambling, lottery or betting contracts regulated by Law or for which a permit has been issued under any Law (section 32(b) of the *Contracts Law*).

<sup>30</sup> The nature of this legal right and its implications are discussed in D Friedmann and N Cohen *Contracts* (Aviram Publications, Tel-Aviv, 1991) vol 1 343–53 (Hebrew).

<sup>31</sup> It is assumed that under the statute the right does not expire, so that it remains valid but unenforceable.

certain contractual rights, notably those relating to the performance of personal work or personal service are not specifically enforceable, although damages are awarded for their breach.<sup>32</sup> The right to the personal work of another is thus 'stronger' than the right acquired by a gambling contract, but 'weaker' than the right acquired under a contract for the purchase of land for which specific performance is usually available.

This does not exhaust the possibilities of ranking of different legal rights. There is a great array of remedies and sanctions. Some are available in case of breach of certain rights at least with regard to certain breaches. Thus, punitive damages may be available in torts but are not usually granted in cases of breach of contract.<sup>33</sup> Does this indicate that where punitive damages are available the infringed right is 'stronger' than the right the breach of which entails merely compensatory damages? The difficulty lies in the fact that punitive damages are the exception and their award depends more on the reprehensibility of the defendant's conduct than on the nature of the plaintiff's right. But this seems to indicate a kind of separation of right and remedy and is hardly in line with the unity right-remedy model.

Finally, there arises the difficult issue of discretionary remedies, which play a highly important role in private law. In the case of a breach of a legal right the court has often a discretion either to specifically enforce the right or to award damages.<sup>34</sup> How is the right to be described when the remedy for its protection is not known in advance, and only *ex post facto* we can tell if it was protected by a property rule or a liability rule?<sup>35</sup>

The picture is further complicated by virtue of the fact that in certain situations it is the defendant who is entitled to choose the remedy. Thus, where the defendant misappropriated the plaintiff's chattel, the plaintiff could either sue in conversion, in which case he would recover the value of the chattel in monetary terms, or sue in detinue in which case it was the defendant who had a choice either to return the chattel or pay its value.<sup>36</sup> Moreover, even where the plaintiff elects to claim damages, his right of

<sup>32</sup>In Israel this is expressly provided by section 3(2) of the *Contracts (Remedies for Breach of Contract) Law 1970*.

<sup>33</sup>Exceptionally, courts in the United States awarded punitive damages, notably in insurance cases, for what was termed 'bad faith breach' of contract. See *Farnsworth on Contracts* 2nd edn (Aspen Law & Business New York, 1998) 788–91; JD Calamari and JM Perillo *The Law of Contracts* 4th edn (West Publishing Co, St Paul, Minnesota, 1998) 542–3.

<sup>34</sup>At the initial stage it is usually the plaintiff who has the choice either to demand specific performance (or injunction) or to claim damages. But while he is generally entitled to damages as a matter of right, if he chooses to demand specific performance, his claim is subjected to the court's discretion.

<sup>35</sup>See the terms used by Calabresi and Melamed, above n 19, and the discussion in the text after n 54 below.

<sup>36</sup>This was the position of the common law under which the plaintiff had actually no right to specific restitution. To prevent this possibility the plaintiff might resort to Chancery to seek a discretionary order of redelivery, but this was not always available. See JG Fleming *The Law of Torts* 9th edn (Law Book Co, Sydney, 1998) 81.

recovery is not absolute since the courts assumed a discretionary power to allow the defendant in certain circumstances to restore the chattel in lieu of damages.<sup>37</sup>

Hence, the nature of the legal right has some effect upon the choice of remedy, but this effect is not necessarily decisive. A great variety of other circumstances are taken into account, which indicates that the remedy, though it is in some respects closely linked to the right, is in other respects quite independent of it. This leads us to the model examined in the following section.

## V THE 'ACOUSTIC SEPARATION' MODEL

The 'acoustic separation' theory was developed, in the context of criminal law, by Dan-Cohen in his article 'Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law'.<sup>38</sup> Dan-Cohen points out that legal rules can be divided into 'conduct rules', that are intended to guide private actors, and 'decision rules' that are binding on officials who apply the law to the conduct of others. It is customary to think that directions for conduct and directions for decisions in response to such conduct must be in complete congruity, and it has even been argued that decision rules imply or embody the corresponding conduct rules. Thus, a rule directed to the judge requiring him to 'cause to be hanged whoever ... is convicted of stealing' intimates to men in general that they must not steal.<sup>39</sup> The opposite view focuses on conduct rules (in the above example, 'let no man steal') and concludes that the role of the courts and other officials is merely to apply or enforce the conduct rule. Common to the two approaches is the view under which there is but one set of rules. In this respect both assume the existence of a unitary system. Dan-Cohen considers that both views cannot be accepted and that their underlying unitary assumption is untenable. He advocates the separatist view under which conduct rules and decision rules constitute different categories and thus draws attention to 'the potential independence of these two sets of rules'.<sup>40</sup> Hence

the distinction between conduct rules and decision rules cannot ... be abolished without loss. We therefore need an account of the two kinds of rules that preserve the distinction between them and that depicts their interrelationship ...<sup>41</sup>

<sup>37</sup> Fleming, above n 36, 80.

<sup>38</sup> (1984) 97 *Harvard Law Review* 625, reprinted in M Dan-Cohen *Harmful Thoughts: Essays on Law, Self, and Morality* (Princeton University Press, New Jersey, 2002) 37.

<sup>39</sup> *Ibid*, 626. This example is taken from J Bentham *A Fragment on Government and An Introduction to the Principles of Morals and Legislation* (Blackwell, Oxford, 1948) 430.

<sup>40</sup> Dan-Cohen, above n 38, 629.

<sup>41</sup> *Ibid*, 629–30.

Complete harmony between a conduct rule and a decision rule can sometimes be maintained, but in other instances they may well diverge. The discrepancy between the two categories is likely to result from a conflict of values, which may require a broadly defined conduct rule while the decision rule needs to be more narrowly structured. In other words, the policy considerations underlying conduct rules are not necessarily identical to those underlying decision rules. Consequently, a conduct rule can prohibit a certain act, yet the decision rule may direct the official to condone it in certain circumstances. The acoustic separation model developed by Dan-Cohen envisages a situation in which the law contains two sets of messages. One is directed at the general public and provides guidelines for conduct, while the other set of messages is directed at the officials and provides guidelines for their decisions.<sup>42</sup> This model assumes that the private actors know the conduct rules but are unaware of the decision rules (hence the acoustic separation) which will be applied by the authorities if the conduct rule is breached. An attempt is thus made to convince the private actors to abide by the conduct rule and keep them ignorant of the decision rule that might lead the official to overlook the breach of the conduct rule. A possible example is that of duress, regarding which some maintain that the law ought to require the individual subjected to the pressure to make the socially correct choice. Others emphasise 'the unfairness of punishing a person for succumbing to pressures to which even his judges might have yielded'.<sup>43</sup> The acoustic separation model offers a possible way to cope with this conflict between the values of deterrence and fairness by including the defence of duress among the decision rules but excluding it from the conduct rules. Since members of the public will not be aware of the duress defence, their conduct will be guided by the criminal proscription. But since the duress defence is included in the decision rules, the person who acted under duress will not be punished.<sup>44</sup>

The theory as developed by Dan-Cohen concentrates on criminal law but it is of general application.<sup>45</sup> The idea that 'decision rules', namely rules guiding the officials who apply the law, embody the conduct rules, corresponds to the common law traditional 'from remedy to right' approach in private law.<sup>46</sup> The opposite view under which decision rules must follow the conduct rules so that the two set of rules will maintain complete congruity, corresponds to the centrality of the right approach under which the remedy follows the right.<sup>47</sup>

<sup>42</sup> *Ibid*, 630.

<sup>43</sup> *Ibid*, 633.

<sup>44</sup> *Ibid*, 633.

<sup>45</sup> Indeed Emily Sherwin, in her article 'Law and Equity in Contract Enforcement' (1991) 50 *Maryland Law Review* 253, 300–14, applied it to contract remedies.

<sup>46</sup> Text preceding n 4 above. There are however some differences between private law remedies and decision rules. These are examined in the text after n 47 below.

<sup>47</sup> Text following n 22 above.

The idea that policy considerations regarding punishment (decision rules) may differ from the considerations that underlie the definition of the crime is also applicable to private law. It means in essence that the policy considerations relating to the appropriate remedy are not necessarily identical with the considerations supporting the right, which the remedy is meant to protect. It is therefore not surprising that rights and remedies do on occasion diverge. The reason is obvious. The rules defining rights and obligations (sometimes described as 'primary' duties and obligations) provide general conduct guidelines that apply in ordinary everyday situations. The remedies deal with situations that arise after a primary duty has been breached or in which a benefit or an entitlement has been transferred or acquired in circumstances that give rise to a duty to restore it.<sup>48</sup> These situations are exceptional in the sense that they are not expected to occur, since the public is expected to observe the primary duties and obligations. Hence, while primary duties and obligations are concerned with everyday conduct, remedies deal with 'accidents' that occur when the everyday rules are not followed or when because of a mishap a transfer or acquisition is reversible.

A major difference between remedies in private law and criminal penalties is that criminal penalties are invariably imposed by courts or other public officials (hence their description as decision rules). But private law remedies provide rules directed at the private parties ordering them how to deal with the situation that occurred after the primary breach or after a reversible transfer or acquisition has been made. Only if they do not reach agreement is the court likely to intervene at the behest of one of the parties involved. Hence, while in criminal law there are two stages: definition of the offence (conduct rule) followed in case of breach by court imposed penalty (application of a decision rule), we have in private law three stages. First, there are the primary rights and duties (primary conduct rules). Second there are rules directed at the parties regarding the way they should deal with the event (these are usually secondary conduct rules<sup>49</sup>). The third stage is reached only if the second stage is not successfully concluded by the parties and the court is called upon to resolve the issue. It is only at this stage that decision rules are applied.<sup>50</sup>

Despite this difference between criminal law and private law, a basic similarity between remedies and penalties remain, namely that conduct

<sup>48</sup> See above n 16 and accompanying text.

<sup>49</sup> However where the defendant was completely innocent (above n 16 and accompanying text) the requirement that he restores the benefit received constitutes a primary conduct rule.

<sup>50</sup> Arguably, in jurisdictions in which plea-bargaining is commonly used to resolve criminal cases, the process can be compared to the second stage described above with regard to private law. The difference is that in criminal law a court decision is generally required in order to sanction the bargain, and the court has at least in theory a measure of control over the bargain. In private law if the parties reach an agreement, there is no need to resort to the court, unless of course the agreement is not honoured.

rules (in private law: primary conduct rules) are meant to regulate normal everyday behaviour and to prevent an occurrence that will lead to the imposition of a penalty or will justify the grant of a remedy. Penalties and remedies are meant to deal with the situation after an undesired event has nevertheless occurred. In other words, primary conduct rules view the situation *ex ante*. Penalties and remedies view the situation *ex post*, and the view *ex post* is not necessarily identical to the view *ex ante*. Hence the differences in the policy considerations that apply to the two categories. *Ex ante* considerations focus on the best way to ensure that the primary conduct rule be observed, that rights are not infringed and that obligations are kept. Remedies and secondary conduct rules must deal with the situations that arise after a breach has occurred and damage has been sustained or a reversible transfer has been made. They face a situation of *fait accompli* and must therefore consider the practical way of correcting the wrong or otherwise restoring the balance between the parties. Hence rules relating to the plaintiff's duty<sup>51</sup> to mitigate the loss and in the case of restitution, rules relating to change of position.

Obviously, the rules on remedies and secondary conduct rules may affect the actors bound by the primary conduct rules. A person facing the possibility of breach of a primary duty may well consider the consequences. Indeed this is the cornerstone of Holmes' theory.<sup>52</sup> The issues involved are complex and give rise to a number of questions including the one relating to the pre-existing knowledge of the remedial consequences of the breach.<sup>53</sup> If it is assumed that such knowledge is lacking or deficient then we do indeed face a situation of partial acoustic separation.<sup>54</sup> A related question is concerned with the certainty and predictability of the remedy. It will be examined in the following section.

## VI CERTAINTY, PREDICTABILITY AND DISCRETION IN THE LAW OF REMEDIES

It is a basic tenet of criminal law that the definition of every offence be made known beforehand (the non-retroactivity principle)<sup>55</sup> and that the

<sup>51</sup> The term 'duty' is a misnomer. See J Beatson (ed) *Anson's Law of Contract* 28th edn (OUP, Oxford, 2002) 615–16.

<sup>52</sup> Above n 4 and accompanying text.

<sup>53</sup> Another question which will not be explored here is: to what extent does the very existence of a legal duty, irrespective of whether a remedy is available for its breach (or its effectiveness), influence the conduct of the parties?

<sup>54</sup> Emily Sherwin concluded that the lack of adequate lay understanding of the complexity of contract remedies create a condition of partial acoustic separation in the area of contract law. See above n 45, 306–8.

<sup>55</sup> This is reflected in the well-known maxim *nullum crimen sine lege*. For a discussion see A Ashworth *Principles of Criminal Law* 4th edn (OUP, Oxford, 2003) 69–74.

offence must be clearly and strictly defined so as to create maximum certainty.<sup>56</sup> There is no similar commitment regarding the sanction. The court usually has a broad discretion regarding the punishment to be imposed.<sup>57</sup> The offender is entitled to know beforehand if the act he is about to commit constitutes an offence. But he has no vested right regarding the precise measure of punishment. All he is entitled to know is the maximum penalty (and sometimes also the minimum penalty) prescribed by the law for the offence. But this provides little guidance as to the actual punishment that will be imposed. Civil law is not committed in the same degree as criminal law to certainty and to the non-retroactivity of rights and obligations. Court decisions constantly lead to the creation of new rights and the imposition of new duties, usually with retroactive effect. Nevertheless, I would maintain the following propositions. First, certainty is an important value of private law, notably in the areas of contract and property, though less so in the areas of torts and restitution. Second, certainty is much less significant in the area of remedies. A person is entitled to know what are his property rights and his primary contractual rights and obligations. He has no similar entitlement to certainty with regard to the remedy in case of an infringement or breach. In this respect there is some similarity between criminal law and private law. Both have a strong commitment to certainty and non-retroactivity in the definition of primary conduct rules and a much weaker commitment to certainty in matters relating to the consequences of breach (sanctions and remedies).

This does not mean that there are no rules regarding remedies. But it does mean that even if they are described as non-discretionary they usually have a built-in flexibility that makes prediction of the precise result extremely difficult. Thus, damages for breach of contract are granted as a matter of right and there are rules regarding their calculation. But these rules, even if they seem clear, contain many open-ended points that leave much to the court's discretion. Thus, the rule on mitigation requires the innocent party to take reasonable steps to mitigate the loss. But what is reasonable remains a matter of appreciation, with considerable flexibility. There is similar flexibility with regard to consequential damages that are subject to the rules on remoteness. These rules focus on foreseeability from which we may perhaps deduce that the defendant who could foresee the damage that may result from the breach, is able to know in advance the extent of his liability.<sup>58</sup> But this is totally unrealistic. The rules

<sup>56</sup> Ashworth, above n 55, 75–8.

<sup>57</sup> This is unlike the situation under ancient law under which punishment for each offence was generally fixed. See eg Exodus 22:37.

<sup>58</sup> *Hadley v Baxendale* (1854) 9 Ex 341; 156 ER 145 and J Beatson *Anson's Law of Contract*, above n 51, 600–9. See further Kramer, chapter 12 below.

on remoteness are notorious for their complexity. It is extremely difficult to foresee what kind of damage the court will regard as foreseeable. In addition the foreseeability rule itself is subject to exceptions and instances of liability for unforeseeable loss are clearly conceivable.<sup>59</sup> Consequently, it is very difficult for the party in breach to appraise beforehand the extent of his liability in damages. He is unlikely to know if the innocent party is going to suffer consequential losses for which he may be liable and he is often unlikely to know if the innocent party is able to mitigate the loss.

Uncertainty in the application of remedies is openly admitted when the remedy is discretionary.<sup>60</sup> This is usually the case where the plaintiff seeks enforcement. In Anglo-American law the relevant remedies, namely specific performance and injunction, are equitable, and therefore discretionary. But why should these remedies be discretionary? Are there any reasons other than historical which call for limiting the plaintiff's right by subjecting it to the court's discretion? This leads us to the distinction between conduct rules and decision rules. A conduct rule prohibits breach of contract or the encroachment of another's right. But the law of remedies consists in the main of decision rules. Although a conduct rule was breached, the remedy is not necessarily enforcement. The court may consider that under the circumstances the mere award of damages is more appropriate.

This also offers an explanation of the inherent uncertainty in the law of remedies, an uncertainty that remains even where the legal right is clearly defined. Although the remedy is strongly linked to the right, it is applied after the event. Policy considerations *ex post* may differ from those existing *ex ante*, just as the view after the event may present a picture that differs from that seen before the occurrence. Hence also the inherent uncertainty of remedies. It is often difficult to know before the breach the kind of situation that will emerge after it is committed. The need to deal with the kind of situation that cannot always be foreseen beforehand is reflected in the flexibility of the decision rules embodied in the law of remedies.

Let me conclude by referring once more to the distinction discussed above between prices on the one hand and remedies and sanctions on the other.<sup>61</sup> Prices are normally fixed and pre-determined while remedies and sanctions are not.<sup>62</sup>

<sup>59</sup> Thus torts law developed the 'eggshell skull' rule (the tortfeasor takes the victim as he finds him): Fleming, above note 36, 234–6. This rule will probably also apply to cases of breach of contract causing death or bodily injury. Cf. also the liability imposed on a shipowner for loss resulting from market fluctuation: *Koufos v C Czarnikow Ltd* [1969] 1 AC 350.

<sup>60</sup> See however Birks' objections to 'strong discretion' in this area (above n 1, 16–18, 22–4).

<sup>61</sup> Above n 7 and accompanying text.

<sup>62</sup> There are of course exceptions. A fine may be fixed while price may sometimes be left open to be determined by an appropriate body (as, for example, in the case of eminent domain).