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MONEY AWARDS IN CONTRACT LAW. *David Winterton, Lecturer in Law, University of New South Wales. Hart, Oxford,* ISBN 978-1-84946-457-4 (2015) xxxii + 335 pp. Hardback £55.

One of the results of the criticism of the law of remedies for breach of contract based on protection of expectation which was so stimulated by the late Professor Birks has been the appearance of highly interesting books based on doctoral researches shaped by that criticism. This criticism shall here be called the Birksian critique, though it is not so much Birks’ precise arguments, which of course were not focused on contract, but rather on a generally negative attitude towards expectation and a generally assured attitude about the possibility of doing better justice that I am trying to identify. The book under review is the latest addition to a line begun by Justice Edelman, as he now is, who was one of Dr Winterton’s supervisors, and continued by, to mention *inter alia* two books which have given your reviewer particular food for thought, those of Dr Barnett and Dr Rowan. The family resemblances are all there. The book under review puts forward an ingenious and novel argument in an erudite and very well written way. Like its kin but even more so, it is profoundly at variance with the law of expectation. This, of course, is the very point of a self-described ‘new account’ of damages, and Dr Winterton is not very much disturbed by any “supposed” lack of fit with what is described as “the orthodox account”. Nevertheless, as with its kin, the book’s novelty is in part created by a failure to give sufficient consideration to how it is that an “older”, “orthodox” law so needful of criticism is the positive law on which the material success of the liberal democracies and the attractiveness of their economic and political values have been based.

As the latest in its line, this book is able to sum up and rationalise the changes to the law of damages that the Birksian critique has managed to effect so far. Dr Winterton tells us that he was inspired by a number of recent “important authorities”, and the list he gives of the most prominent of these is so telling that I must reproduce it: *Blake*,[[1]](#footnote-1) *Ruxley*,[[2]](#footnote-2) *Panatown*,[[3]](#footnote-3) *Farley v Skinner*,[[4]](#footnote-4) *The Golden Victory*[[5]](#footnote-5) and *The Achilleas*.[[6]](#footnote-6) Having established that these cases, or certainly much *dicta* in them, and other cases allied to them are very largely “irreconcilable with the orthodox account”, Dr Winterton puts forward an “interpretative” account of these cases, when by interpretation is meant “revealing” that they have “an intelligible order”. Perhaps it would be better for Dr Winterton to have said two intelligible orders, for his argument is that some cases try to give money awards that are substitutes for performance, such the cost to complete damages sought in *Ruxley*, and the rest try to compensate for the “factual detriment” which is left when, for reasons your reviewer doesn’t understand in any precise way despite the length at which Dr Winterton sets them out, the law seeks to provide “next best satisfaction” rather than a more direct substitute for performance. The ultimate unity of the intelligible order consists in both types of awards trying to “vindicate” the claimant’s interest in performance, though doing so in their different ways. Your reviewer has to confess that, though he understands why Dr Winterton argues as he does within the framework of the Birksian critique, he does not understand even the basic meaning of a “vindication” in the sense Dr Winterton appears to wish to give it when, as is rightly insisted, money awards never involve direct compulsion of primary performance, and usually are “restricted” alternatives to that performance.

That a criticism of remedies for breach originally based on restitution was incapable of being sustained on that basis became clear in Birks’ own later attempts to renounce his brilliant earlier efforts and make, not one, but two new starts. Birks’ attack on the limits of quasi-contract as restitution of subtraction were by far the best things he ever wrote on contract, but it proved impossible to move beyond those limits to a far wider restitution for wrongs, including breach, because, in the absence of subtraction, there is nothing to restore. The books akin to the one under review that I have mentioned have played their part in putting the criticism of expectation on a basis other than restitution, a basis which might best be briefly described as disgorgement. Disgorgement is in this sense a collective noun describing, to use a term beloved of Birks, a “response” to unjust enrichment, inadequate protection of a performance interest, lost opportunity to bargain, cynically and deliberately wrongful conduct, etc, etc. Dr Winterton is generally highly sympathetic to this, and in the end he is committed, as we have noted, to vindication. But he goes further in trying to square the circle of bringing awards which it is very hard to say vindicate within his intelligible order by seeking to find an integral place for mere compensation. In order to focus on two general themes, I must leave it to the reader to follow Dr Winterton’s detailed comments on the case law, which will always be found to be interesting and provocative.

Dr Winterton is strongly influenced by a corrective justice theory which he particularly identifies with Professor Gardner, another supervisor of Dr Winterton’s doctoral research. The principal mark of this influence is not so much in specifics such as the next best argument but in the book’s general approach. Corrective justice requires a wrong to correct, and, as Dr Winterton follows Birks in believing, not merely that it is “generally accepted that the breach of a primary legal duty is a civil wrong”, but that breach of contract is a wrong in the same sense that, in particular, negligence is a wrong, then an analysis akin to Gardner’s comments on tort is justified. But the law of negligence is a judicial construct imposed on citizens, literally so in the UK, where provision against third party liability is almost entirely a matter of compulsion by the state. The law of contract is, of course, not meant to be like this; indeed, it is meant to be quite the opposite. But Dr Winterton determinedly rejects the attempt to trace damages awards to the implied, default or even the express agreement of the parties, tracing them instead to exogenous standards of fairness derived from his theory of corrective justice.

One difficulty with this approach is that it is “dogmatic”, not in any immediately pejorative sense, but in the philosophical sense that one must accept its exogenous standards for the approach to have any purchase against the previous orthodoxy. For those maintaining that orthodoxy, this requires rejecting the standards one holds, and one wonders why one should do so. All one is told is that one’s previous standards do not match up to the new ones, to which the natural reply will be “and your point is?” The difficulty is compounded when the most important standard of contract, respect for free choice, including choice of remedy and indeed of what constitutes substantive fairness, is the first thing that must be rejected. All this can be ignored if one believes, as Dr Winterton does believe, that the law should play the same role in contract as in negligence, which emphasises the role of mandatory rather than default rules. But, if one cannot ignore this, and wishes to understand (prior to perhaps criticising) why the default rules produced by a system of free choice are as they are, then one is left adrift. The main reason your reviewer could not understand a good part of what Dr Winterton precisely meant is that it cannot easily or at all be related to the commercial issues actually confronting the law of remedies. The intelligible order Dr Winterton constructs is a transposition of the filigree of theorising utterly remote from the practical operation of the law that characterises tort theory into the law of contract.

Whilst freedom of contract continues, it will be impossible generally to impose remedies derived from the Birksian critique upon parties which retain the capacity to contract out of such remedies. Nevertheless, the major cases we have seen listed provide more than enough evidence of the mischief that can be caused when dogmatic theorising is turned by appeal courts into law. That Dr Winterton has displayed enormous ingenuity in constructing some sort of order out of these cases is indisputable. What is entirely disputable is whether this is a sensible thing even to try to do. It is wrong, and in recent times decidedly so, to think that everything that appellate judges hand down is law in the most important sense, the sense in which the law works itself pure. The cases on which Dr Winterton focuses certainly are, as he claims, irreconcilable with the orthodox account, but for that reason they were all, save to some extent *Ruxley*, met with astonishment and disapproval from those worried, not only about what was decided, but by judicial legislation of this sort coming to be seen as unproblematic, or even normal.

Who can forget the late Lord Hobhouse “warning” that the “more extensive principle … to be *introduced* [emphasis added] into our commercial law” by the majority decision in *Blake* would have “far reaching and disruptive consequences”;[[7]](#footnote-7) or the late Sir Anthony Coleman describing *The Golden Victory* as “the worst [House of Lords] decision on any aspect of English commercial law” he had ever seen;[[8]](#footnote-8) or the late Mr McGregor receiving *The Achilleas* by saying that “Lord Hoffmann and Lord Hope cannot on their own impose an entirely new idea on the law of damages”[[9]](#footnote-9) and, his initial response of just ignoring their innovation proving impossible to maintain, continuing to insist that time spent on it was time ‘wasted’?[[10]](#footnote-10) Dr Winterton should have given more consideration to whether the right response to this style of adjudication is rationalising it or condemning it. Your reviewer cannot look upon these cases and their impact without recalling Professor Atiyah qualifying his positive assessment of Lord Denning’s contribution to contract law by concluding that “it is a good thing there was only one Lord Denning”;[[11]](#footnote-11) always recognising, of course, that, despite the proliferation of pretenders, one looks in vain for even one contemporary Lord Denning.

Dr Winterton is perfectly frank about his focus on the recent authorities which inspired him and his relative disregard of the “200 years of case law” of the orthodox account. This does not mean, of course, that he ignores that account, and he is too modest about the interest of his comments on a number of famous authorities. What is more, he does purport to relate his new account to the old by saying it deals with two contradictions in the rule in *Robinson v Harman*[[12]](#footnote-12) which he is the first to expose. We are wrong, Dr Winterton tells us, to regard this rule as an adequate statement of the “compensatory principle”, because Parke B’s statement of it is indeterminate about “the underlying *purpose*” of awards “for *financial loss*”; are they substitutes for performance or compensation in Dr Winterton’s terms? The rule is also indeterminate about the “*scope*” of such awards; should they, in particular, embrace non-pecuniary loss, about which Parke B was indeed completely silent? If one reads Dr Winterton’s concerns back into the rule, then he is, of course, right, and the rule is as inadequate as the Birksian critique has long maintained remedies based on expectation generally are. But why would one read the rule in this artificial way? I repeat that I think I know why Dr Winterton argues as he does. His views take up the concerns of the Birksian critique. This is not to say that he gives a non-dogmatic reason for giving weight to those concerns. He doesn’t.

This is all captured by a curious feature of the treatment of *Robinson v Harman* itself. Though there are twenty five entries for *Robinson v Harman* (more than for *Hadley v Baxendale*[[13]](#footnote-13)) in the book’s table of cases, the case itself is never discussed. What is discussed is Parke B’s statement of the rule, severed from its context in the case in a way that simply contradicts what common law reasoning is meant to be. This example of the book under review’s preference for *dicta* rather than *ratio*, so typical of the Birksian critique, is particularly regrettable because the approach taken in the case itself, even with the limits placed on our understanding of it by the reporting of the time, instructively addresses the difficulties the book argues exist.

*Robinson v Harman* concerned, of course, the lease of a dwelling for a term of 21 years at an annual rent of £110, which the vendor breached when it emerged that his interest in the property was not sufficient to allow this disposition of it. Speaking more than a little anachronistically, the initial significance of *Robinson v Harman* was that it established one of the exceptions to the rule in *Bain v Fothergill*,[[14]](#footnote-14) which limited to reliance loss the liability of defendants who failed to complete sales of interests in land because of defects in title. By not normally compensating the purchaser for lost expectation, the conveyancing practice of the time was to in this way share the risks of establishing title, which, prior to general land registration, were unavoidably considerable, often requiring investigation of documents which were, in the famous words attributed to Lord Westbury, “difficult to read, disgusting to touch, and impossible to understand”.[[15]](#footnote-15) But in *Robinson v Harman* the defects in title, arising from the terms on which the defendant had recently inherited an interest in the property, were of a sort that the defendant should reasonably have known and the claimant could not reasonably know, and the rule in *Bain v Fothergill* was not applied. Subsequent case law and commentary has generalised this into the *Robinson v Harman* rule now central to the law of expectation, but let us look back at the case itself.

The defendant did not dispute liability but, no doubt in reliance on the rule in *Bain v Fothergill*, paid £25 into court, which would have met the reliance loss represented by the claimant’s legal expenses, which were found to be something over £15. But in the event £200 beyond the payment into court was awarded, which, deducting the £15, meant that expectation damages were *circa* £210. Although liability for expectation at all was the crux of the case, we cannot directly know from the case itself how these damages, once they were to be awarded, were quantified, which was not discussed, no doubt because it was not in dispute. However, the wording of the conclusion of Alderson B’s judgment in *Robinson v Harman* and the citation of the case in other authorities of the time, of which *Engell v Fitch*[[16]](#footnote-16) is the most important, make one as certain as one can be absent direct evidence that the market damages of obtaining a similar property were awarded. All this is to say, then, that the rule in *Robinson v Harman* which the book under review finds such a source of difficulty is derived from a case in which market damages were regarded as an unproblematic feature of contemporaneous commercial practice. This did indeed involve, to the disapproval of Dr Winterton, both a narrow approach to quantification and, rather than a tendentious concentration on the interests of the claimant, a balancing of the interests of the claimant and the defendant. But it is for these reasons that market damages have all but universally since been found to be a practical and satisfactory default approach.

Despite claiming to be doing the very opposite, Dr Winterton places a very strained construction on Parke B’s silence about non-pecuniary loss in his statement of the rule. But, of course, the very idea of such compensation in circumstances like *Robinson v Harman* would never have occurred to him. It required seventy years of development of the compensation culture arising from negligence after *Donoghue v* *Stevenson*[[17]](#footnote-17) to make Lord Steyn’s speech in *Farley v Skinner* even conceivable.

Whilst the last thing that can be said of the subsequent career of the rule in *Robinson v Harman* is that it has been unproblematic, the justification of its being, until recent times, regarded throughout the common law world as fundamentally sound ultimately lies in the historically unprecedented prosperity which it has played an indispensable part in facilitating. It is wrong of Dr Winterton not to have given more credence to so successful an approach, and to the possibility that the undoubted narrowness of the concept of actionable loss on which it is based reflected what commercial practice thought was the most proper approach for commercial law to take.

It is surely an example of the feature of common law reasoning that used to drive the late Professor Simpson to distraction that there is little in *Robinson v Harman*, save the mellifluousness of Parke B’s statement of the case’s eponymous rule, that has led to its becoming one of the two principal case law expressions, along with Alderson B’s borrowing from Pothier in *Hadley v Baxendale*, of the foundational principles of damages. *Hadley v Baxendale* and *Robinson v Harman*: as reported, and so as formal precedent, what a pair! But at least these cases were rooted in commercial practice. This is the source of the great wisdom expressed in the rules drawn from them, and their great value as precedent in a far more important than purely formal sense. Though statutory, the third principal *locus* of the law of damages, Pt V of the Sale of Goods Act 1893, in which its drafter very successfully “endeavoured to reproduce as exactly as possible the existing law”,[[18]](#footnote-18) draws on the same source. For all that it partakes of their speculative brilliance, and evidently is the work of a scholar of very considerable gifts, the book under review is, I am afraid, further, and indeed redundant, evidence that the lines of adjudication and scholarship the book pursues are characterised by regarding commercial practice, not generally as a source of wisdom, but generally as a source of error, and so, in a most important sense, disregarding the values proper to the law of contract.

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1. *A-G v Blake* [2001] 1 AC 268. [↑](#footnote-ref-1)
2. *Ruxley v Electronics and Construction Ltd v Forsyth* [1996] AC 344. [↑](#footnote-ref-2)
3. *Alfred McAlpine Construction Ltd v Panatown Ltd* [2000] UKHL 43; [2001] AC 518. [↑](#footnote-ref-3)
4. *Farley v Skinner (No 2)* [2001] UKHL 49; [2002] 2 AC 732. [↑](#footnote-ref-4)
5. *Golden Strait Corp v Nippon Yuesn Kubishka Kaisha (The Golden Victory)* [2007] UKHL 12; [2007] 2 Lloyd’s Rep 164; [2007] 2 AC 353. [↑](#footnote-ref-5)
6. *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48; [2008] 2 Lloyd’s Rep 275; [2009] 1 AC 61. [↑](#footnote-ref-6)
7. *A-G v Blake* [2001] 1 AC 268, 299. [↑](#footnote-ref-7)
8. Sir Antony Coleman, Address to the London Maritime Arbitrators Association (2008), quoted in FMB Reynolds, “Commercial Law”, in Louis Blom-Cooper, Gavin Drewry and Brice Dickson (eds), *The Judicial House of Lords 1876-2009* (OUP, Oxford, 2009) 700, 710. [↑](#footnote-ref-8)
9. Harvey McGregor, *Damages* (18th edn, Sweet and Maxwell, London, 2009) para 6-173. [↑](#footnote-ref-9)
10. Harvey McGregor, *Damages* (19th edn, Sweet and Maxcwell, London, 2014) para 8-177. [↑](#footnote-ref-10)
11. PS Atiyah, ‘Lord Denning’s Contribution to Contract Law’ (1999) 14 *Denning Law Journal* 1, 11. [↑](#footnote-ref-11)
12. (1848) 1 Ex 850. [↑](#footnote-ref-12)
13. (1854) 9 Ex 341. [↑](#footnote-ref-13)
14. (1874) LR 7 HL 158. [↑](#footnote-ref-14)
15. *Wroth v Tyler* [1974] Ch 30, 56C (Megarry J). [↑](#footnote-ref-15)
16. (1869) LR 4 QB 659, 668. [↑](#footnote-ref-16)
17. [1932] AC 562. [↑](#footnote-ref-17)
18. MD Chalmers, *The Sale of Goods Act 1893* (2nd edn, W Clowes and Sons, London, 1894) iv. [↑](#footnote-ref-18)