



Gain-Based Damages: Contract, Tort, Equity and Intellectual Property

James Edelman

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On July 27, 2000 the House of Lords delivered a decision where, for the first time in English law, it explicitly recognised that damages for civil wrongs can be assessed by reference to a defendant (wrongdoer)'s gain rather than a claimant's loss. The circumstances in which such gain-based damages might be available were left for development incrementally.

This book considers the nature of gain-based damages and explains when they have historically been available and why, and provides a framework for appreciating the operation of such damages awards. The first part of the book justifies the existence of these damages, which focus upon a defendant wrongdoer's gain made as a result of a civil wrong, explaining the nature and need for such a remedy and the scope of civil wrongs. The core thesis of the book is that two different forms of such gain-based damages exist: the first is concerned with restitution of a defendant's gains wrongfully transferred from a claimant; the second is concerned only with stripping profits from the defendant's hands. Once these two gain-based damages awards are separated they can be shown to be based upon different rationales and the basis for their availability can be easily understood.

The second part of the book considers and applies this approach, demonstrating its operation throughout the cases of civil wrongs. The operation of the two forms of gain-based damages is demonstrated in cases in the area of tort (chapter 4), contract (chapter 5), equitable wrongs (chapter 6) and intellectual property wrongs (chapter 7). It is shown that these gain-based damages awards have long been available in these areas and their operation has conformed to clear principle. The difficulty that has obscured the principle is the nomenclature which has hidden the true gain-based nature of many of these damages awards.

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