

David Wright*

**UNDERSTANDING THE LAW OF OBLIGATIONS:
ESSAYS ON CONTRACT, TORT AND RESTITUTION**

By Andrew Burrows

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FREQUENTLY it is said that it is harder to write a good, short book than a good, long book. This book barely reaches 200 pages and still it is very good. It consists of a series of essays written by Professor Burrows, the majority of which have been published previously. There are several new pieces in the work. However, the published essays have been updated and, where necessary, modified. By this process the older essays remain relevant. An example of this is the oldest essay in the collection, which is also the most important. It is entitled "Dividing the Law of Obligations" and provides the general structure for all the other essays.

It is at this most fundamental level that Burrows begins his book. Other leading academics have suggested other divisions. For example, Stapleton has proposed a model for the division of obligations based upon the different measures of damages.¹ In his book *The Rise and Fall of the Freedom of Contract*² Atiyah devises the division of the law of obligations around "reliance-based" and "benefit-based" liabilities. Burrows adopts a more traditional tripartite division in the law of obligations. The essential divisions are between contract, tort and restitution. At this level his thesis encounters two quite fundamental difficulties.

The first, and most important, is his failure to incorporate equity. Although Burrows recognises equitable obligations, he sees them as part of torts. This encourages him to suggest, but not develop, a new tripartite division, being contract, tort and equitable wrongs, and restitution. The shortcoming of this proposed scheme is that not all equitable

* BEc, LLB (Hons) (Syd), LLM (UBC); Senior Lecturer, Faculty of Law, University of Adelaide.

1 See Stapleton, "The Normal Expectancies Measure in Tort Damages" (1997) 113 *LQR* 257 and "A New 'Seascape' for Obligations: Reclassification on the Basis of Measure of Damages" in Birks (ed), *The Classification of Obligations* (Oxford University Press, Oxford 1997) pp193-231.

2 Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press, Oxford 1979).

obligations are tort-like. The clearest example of this is the express trust, which is akin to the contract.³

Another problem that this omission causes to Burrows is that it fails to allow him scope to deal with equitable remedies. This is surprising as he laments the historical legacy of the separation of law and equity, but then relies upon it to treat equitable remedies as available only when the common law remedy is inadequate.

In addition, the author fails to address the issue of equitable property. Rather he is content to mention property (presumably common law property) simply in passing. Unfortunately for Burrows, equitable property is frequently simply a special form of obligation. For example, in the classic equitable property decision of *Tulk v Moxhay*⁴ the court discussed obligations. Burrows does not discuss this variety of obligation.

Finally, Burrows makes use of the term "fairness". It is not at all clear what, if any, difference there is between fairness and the term used in equity (particularly Australian equity), unconscionability. If there is no difference between the two terms, it is not apparent why he does not employ the term unconscionability. It is possible to suggest that unconscionability is not used as it has been the subject of much criticism, particularly in England, and that the author wishes not to be associated with such a controversial term. If there is a difference between the two terms, Burrows does not make this clear. If the difference is that fairness is the more general concept (this contention can be argued against by adopting a broad definition of unconscionability), then it could encompass legislation. This introduces the other fundamental difficulty.

The second fundamental difficulty with Burrows tripartite division is its failure to recognise the tremendous importance of legislation, and how it relates to the law of (presumably common law) obligations. In the Age of Statutes such an oversight constitutes a significant omission. Legislation is treated as merely being a supplement to judge-made law.

In any work on the law of obligations, the inter-relationship between the obligations is of great significance. Unfortunately this is another point where Burrows' work encounters some difficulties. The inter-relationship which receives the greatest attention is that between contract and tort. Burrows presents a liberal theory of the imposition of legal obligations. He perceives there to be a valid distinction between tort and contract. Originally the basis for this validity was the different remedial principles involved.⁵

3 The difficulty of dealing with equitable obligations is demonstrated in Beatson's essay "Unfinished Business: Integrating Equity" in Beatson (ed), *The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution* (Clarendon Press, Oxford 1991) pp244-258.

4 (1848) 2 Ph 774; 41 ER 1143.

5 Stapleton still defends this distinction upon remedial principles: see "The Normal Expectancies Measure in Tort Damages" (1997) 113 *LQR* 257 and "A New 'Seascape' for

However, Burrows has now relegated remedial principles to being of second level importance. He has promoted to first level importance, in maintaining the validity of this distinction, the distinction between voluntary and purely imposed obligations. The first is contract, while the second is tort. This defence is attractive but it requires refinement. This is apparent in that Burrows does not indicate how estoppel, which may imply contractual terms, fits into his scheme. In addition, this distinction between voluntary and non-voluntary obligations fails to appreciate that contractual terms may be implied and Burrows does not indicate how an implied contractual term, which neither party has voluntarily assumed, is consistent with his thesis. At this point the distinction would remain valid if the remedial principles, in isolation, provided assistance but the recent decision by the English Court of Appeal in *Attorney-General v Blake*⁶ to permit restitutionary damages for breach of contract does not seem to allow this assistance. Instead, the validity of the distinction may be maintained by a combination of the use qualification (that is, contracts are *generally* about voluntarily imposed obligation) and by an examination of remedial principles.

In the background to much of this discussion has been the law of remedies. This is not surprising, as the law of obligations may be perceived as encompassing the law of remedies. However, Burrows, in this work as well as his book on *Remedies for Torts and Breach of Contract*,⁷ does hint at a partial disassociation of obligation and remedy. He does discuss the difficult issue of the doctrine of election. He is of the view that this doctrine has been given too wide a scope of operation and what the courts should be doing is preventing double recovery. For this sensible view he can call upon the support of Lord Nicholls' judgment in *Tang Min Sit v Capacious Investments Ltd*⁸. In this case, the Privy Council refused the plaintiff recovery of both compensatory and restitutionary damages. According to the Privy Council, to allow both would have been to permit alternative and inconsistent remedies, and so permit double recovery. However, this decision indicates the problem with Burrows' approach. It can be asked why restitutionary and compensatory damages do permit double recovery. Restitutionary damages are gain-stripping in nature, whereas compensatory damages concern loss compensation. The two measures of damages need not involve the same elements at all. So the question is, why is there a prohibition upon receiving both when there is no double recovery? The answer suggested by Burrows is that a combination of both forms of damages achieves neither just a reversal of the defendant's unjust enrichment nor just a compensation of the plaintiff's loss. However, this answer ignores Burrows' original contention that what the courts should be doing is preventing double recovery. He is proposing to use the doctrine of election to prevent the combination of remedies where there is no double recovery. Therefore he is

Obligations: Reclassification on the Basis of Measure of Damages" in Birks (ed), *The Classification of Obligations*.

6 [1998] 1 All ER 833.

7 Burrows, *Remedies for Torts and Breach of Contract* (Butterworths, London, 2nd ed 1994).

8 [1996] 1 All ER 193.

returning to something akin to the original doctrine of election. Burrows' doctrine of election is not based upon the prevention of double recovery. If it was, then he would need to examine when double recovery occurred between the various remedies. He fails to examine the inter-relationship between the various remedies. Rather, under the guise of a doctrine of election based upon the prevention of double recovery, he adopts a doctrine of election based upon a the selection of different remedial principles; for example, restitution or compensation.

Although this book review has focussed upon some of the shortcomings of this work, it is still an extremely important work, produced by a leading academic. The author is a Law Commissioner for England and Wales, as well as being Professor of English Law at University College London, so his views will be important from both an academic and practical point of view. The outline that he draws constitutes an extremely valuable sketch of the law of obligations. This outline is flawed but it provides an invaluable point for the consideration and further discussion of the law in this area.