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THE LAW OF OBLIGATIONS: CONNECTIONS AND BOUNDARIES

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The first conference on Obligations was held in Melbourne in 2002. It was an extremely successful conference with a broad attendance that included senior academics and judges from Australia and across the common law world. A second conference was held in 2004 and a third will take place in 2006. This volume contains nine of the papers given at the first conference together with an introduction by Andrew Robertson.

Underlying many of the papers given (and most of those published in this volume) was Professor Peter Birks' taxonomy of the law of obligations, which divides the sources of obligations into those derived from consent, wrongs, unjust enrichment and a miscellaneous group of others. In various ways many of the papers and much of the commentary were sceptical about the extent of the utility of the taxonomy, and that is reflected in those published here. Only two of the papers (those of James Edelman on money remedies and Robert Chambers on classifying property) accept it without much qualification, though Chambers' proposed taxonomy of property rights which indicates very clearly how broad the miscellaneous 'other' category is suggests that it may have a limited importance. Three are overtly sceptical of the elements of the taxonomy: Andrew Robertson's rejection of any bright line distinction between contract and tort is equally a rejection of consent and wrongs as independent categories; Steve Hedley rejects the category of unjust enrichment altogether; and Joachim Dietrich is concerned not merely at the breadth of the category of 'other' but at the existence of obligations which he believes lie between contact and tort (consent and wrongs). Michael Tilbury's elegant critique of the assumption that there is a mirror relationship between right and remedy so that the Birks taxonomy automatically applies to remedies as well rights and proposal for a different taxonomy of remedies both rejects imperialist claims made by the more enthusiastic proponents of Birks' taxonomy and indicates a limited range of uses for taxonomies in general. The conclusions of the other three papers (Michael Bryan on rescission of a contract as a prerequisite to a restitutionary remedy, Megan Richardson on the basis and development of breach of confidence and Ralph Cunnington on the desirability of disgorgement damages in contract) are ultimately

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based on reasoning that is independent of the taxonomy, though the two former authors pay passing lip service to it and Cunnington expressly prefers a more direct approach to his topic than the taxonomy route.

On the whole neither the believers nor the iconoclasts (with the exception of Dietrich) are especially persuasive. Edelman argues that all money remedies for wrongs should be called damages and that it is wrong to see damages as having a purely compensatory function. He points to nominal and exemplary damages as showing that present usage of the word already indicates a broader range of functions for it, and goes on to advocate its extension to 'restitutionary' and 'disgorgement' damages. And he points out, plausibly enough, that breach of some equitable duties, such as those of loyalty and care, are functionally equivalent to common law torts, and that equity's money remedies for these should also be called damages. It is not at all clear what the point of this is. At one point Edelman argues that the common terminology will make it easier for courts to see that there are issues of causation and remoteness that may affect the response to any wrong and that it will be easier for courts awarding equitable remedies to draw on common law analogies when it is appropriate to do so. But before this he has emphasised that just as different torts treat causation and remoteness of damage issues differently, so the equitable wrongs will necessarily do so. So devising the appropriate principles for each different rule remains the principal task, and calling every monetary remedy (other than restoration of a trust fund) damages is no help in performing it. Edelman denies that it is a hindrance, too; but he seems to think that the terminology alone justifies the greater use of disgorgement damages in torts cases and imposition of exemplary damages in equity. Whether or not one agrees with his objectives, the route is wholly unpersuasive, a point explicitly recognised in a related context by Cunnington who rejects the classificatory route of treating contractual rights as property as an adequate basis for advocating disgorgement damages in contract.

Chambers argues that the taxonomy of consent, wrongs, unjust enrichment and other is appropriate for a classification of property rights according to their source, and that this will enable the courts to avoid inconsistencies in their treatment of essentially similar issues that arise according to whether they treat a case as raising a property or an obligations issue. Unhappily the instances he gives of such confusion are unpersuasive. He finds, for example, the decision in *Garcia v National Australia Bank* ('*Garcia*')[1], where a registered charge over the family home granted by the plaintiff to the bank to secure a guarantee was set aside because the bank should have ensured that the plaintiff fully understood what the consequences of the transactions might be and had entered into them freely, incompatible with that in *Pyramid Building Society v Scorpion Hotels Pty Ltd* ('*Pyramid*')[2], where the bank was held entitled to enforce a registered but forged mortgage securing a loan to the forger against the registered proprietor. He ascribes

1 (1998) 194 CLR 395

2 [1998] 1 VR 188 (Vic CA).

the inconsistent results to the respective courts treating *Garcia* as a case of obligation and *Pyramid* as a case of property, and asserts that they would have avoided this if they had perceived that the sources of property rights are the same as those of obligations. But the scheme of the Torrens system allows a transaction between the parties to it to be set aside if there are vitiating grounds but does not allow a registered interest to be challenged by a previous proprietor unless the new proprietor has committed a fraud on the former one. *Garcia* is a case of a voidable transaction between the parties to it; *Pyramid* a case where the bank acquired an unchallengeable property interest from 'other' sources (the Torrens legislation). Chambers shows that it is possible to classify the sources of property rights according to Birks' taxonomy, but again leaves one wondering what the point of doing so might be. The most interesting ideas that emerge from his application of the taxonomy are the ideas that estoppels are based on consent and that the 'other' category is very broad and very important.

The iconoclasts put forward stronger cases but are also less than wholly persuasive. Robertson argues that in the common law at least it is wrong to see contract as based on consent and as therefore distinct from tort, which is based on the imposition of community standards. The argument is based on the objective theory of contract, the imposition of standard, statutory and implied terms, the objective interpretation of terms and the rules about frustration and breach. The argument is good as far as it goes, but how far that may be is less clear. Every legal system has to define how a contract is made, and there is a considerable body of opinion that classifies breach of contract as wrong (for example, Tilbury does in his essay in this volume). It is interesting that the common law derives consent from inferences from voluntary behaviour rather than treating subjective intentions as conclusive, but that is scarcely fatal to the category of consent-based obligation (it might even be helpful to theorists such as Chambers, who sees estoppels as based on consent or Allan Beever and Charles Ricketts, who see the *Hedley Byrne*[3] principle as based on it. Robertson's conclusion is that courts and theorists who argue against imposing community standards on the parties to contract or filling gaps in a contract on the ground that contractual obligations are free expressions of individual wills that give rise to a purely privately created sphere of regulation between the parties overstate their point and misunderstand the nature of the obligation. Well, yes; courts have often established and legislatures codified and reformed the background terms of the contracts most commonly entered into according to community standards, and courts have very generally upheld the provisions of standard form contracts. They have shown a much greater reluctance to intervene with respect to specific obligations and contracts where there has been an opportunity for sensible negotiation, and acceptance of his overall argument does not involve such practical consequences as, for example, support for a wider basis for the implication of terms in particular contracts. It is therefore right to criticise views which posit absolute distinctions between the categories of tort and contract and seek to draw stringent and generally applicable consequences from so doing so

3 'Interpretive Legal Theory and the Academic Lawyer' (2005) 68 MLR 320.

long as it is accepted that this still leaves courts the fundamental task of determine what are the proper consequences of an analysis which recognises both differences (which are often substantial) and similarities between the categories.

Hedley's rollicking assessment of the shrinking of the category of unjust enrichment to the basic actions for money had and received and *quantum valebat* is both entertaining and persuasive, and his criticism of *Pavey and Matthews v Paul*[4] forceful. It is a shame he pushes the point to contemplating the category as not simply shrinking but vanishing by arguing that even these actions can be placed in an extended and updated category of contract law. The very bare outline of an updated contract law that he sketches seems to have much in common with Robertson's, but there is nothing even in Robertson's more extended account of contract that lends any skerrick of plausibility or weight to the argument. By contrast, Dietrich's carefully agnostic treatment of taxonomic issues leaves him with the conclusions that estoppels and the courts' treatment of liabilities arising from pre-contractual negotiations demonstrate not merely that the 'other' category is very broad but that particular bases of liability fall between contract and tort. This may accept a more subjective view of contract than that adopted by, say, Robertson (let alone Hedley); whatever the verdict on classificatory matters it is a constructive approach to the legal issues it analyses.

Tilbury takes as his main concern the refutation of arguments that Birks's classification of rights requires a corollary that remedies should mirror rights more or less precisely (as in principle they did under the forms of action, where the adoption of a particular form of action carried with it a particular remedy). His rejection of 'monist' theories of the relationship between right and remedy is convincing and his endorsement of a *via media* which gives great weight but not exclusive influence to the nature of the right being upheld (the 'sticky' relationship proposed by David Wright[5]) persuasive. He rightly distinguishes between the discretions involved in defining the limits of principles, the fact-finding process and the application of principles to facts (which are common to all decision making processes) from the discretions as to whether to award or to mould and modify remedies which are common in equitable and administrative law contexts and are generally more or less highly structured according to a set of accepted principles (the attempt to conflate them by Edelman, seems at best naive). Tilbury concludes that any useful taxonomy of remedies should be based on their function such as compensation, restitution, punishment, prevention and fulfilment and counsels against allowing abstract categories pitched at a high level of abstraction to dictate how the law should develop, especially since they ignore local influences such as the remedial smorgasbord allowed by the *Trade Practices Act* in Australia and the civilian influence on UK law that the European Union may stimulate.

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4 (1987) 162 CLR 221.

5 D Wright, 'Wrong and Remedy: A Sticky Relationship' [2001] *Singapore J Leg St* 1.

The thrust of Cunnington's essay is that although a case can be made for treating a right to contractual performance as a property right and an argument that breach of contract should in appropriate cases attract disgorgement damages as a breach of a property right can be made, it should be rejected and any case for disgorgement damages in contract made directly. He points out that since *Lumley v Gye*[6], contractual rights are protected against intentional interference by a third person and that this gives them some element of 'excludability', the most important characteristic of a property right. But he sees it as illegitimate to use the classification of a right as one of property as the sole justification for imposing disgorgement remedies for its breach and attempts to do so can easily use the plasticity of the concept of property to disguise policy decisions. His preference is to argue that there is no reason to confine disgorgement remedies to breaches of property rights and that they should be available for breach of personal rights, especially contractual rights, when the usual remedies do not provide any or any appropriate relief. The argument against the use of property rights is well made; the argument in favour of disgorgement damages in contract is only sketched for elaboration elsewhere.

In a scholarly and penetrating essay Bryan argues that the requirement that a contract be rescinded as a precondition of restitutionary remedies is misstated and misconceived, and that provided that *restitutio in integrum* is practicable at the point of judgment it is an available remedy that the courts should and do award. The contrary view is convincingly criticised and the argument is carefully supported, though the slightly different view of the High Court that the crucial moment might be that of the commencement of the action (*Alati v Kruger*[7]) is dealt with somewhat elliptically between a statement of principle and a footnote.

Richardson's main thesis resembles Cunnington's to the extent that she rejects the blanket use of the concept of 'property' as the basis of actions for breach of confidential information on the ground that it is too blunt to deal with the specific issues arising from areas as disparate as the disclosure of trade secrets, personal information and government information. The common thread of unconscientious conduct on the part of the defendant links the different issues but the public interest operates differently with respect to the definition of protected information and the availability of defences and remedies (for example, whether an injunction or damages is the more appropriate response). She supports her conclusion by reference to the economic analysis which supports property rights, liberal theories of their acquisition and utilitarian theories for promoting the social good. In the course of her argument she prefers conceptions of property which emphasise the tradeability of rights rather than the power to exclude others from their use. The conclusion is plainly defensible, but I found the reasoning, which draws on different bodies of theory in way which ultimately risks merging them rather than

6 (1853) 2 E & B 216.
7 (1955) 94 CLR 216. 223.

establishing and applying a Yale/Toronto kind of liberal law and economics theory over a harder line Chicago model, confusing.

The essays, then, are of varying quality. As for an assessment of the utility of Birks' taxonomy, Dietrich's preference for Peter Cane's view that the categories are convenient expository devices which should not be given dispositive significance seems closest to the mark. The most successful contributions are generally those which deny them dispositive effect without also denying them expository virtues. Justinian, building on Gaius's early classificatory efforts, may have claimed to bring the imperial constitutions into splendid harmony, but the Institutes were an expository student text, the guiding precepts it proposed for the law were 'to live honourably, not to harm others and to render each person their due' and the analytical categories of the law of obligations — delict, quasi delict, contract and quasi-contract — less than definitive or compelling. At least, unlike Gaius, Justinian's introductory phrase — 'now let us go on to obligations'— does not leave the reader in the classification of property. It is perhaps not surprising that taxonomy can help in the exposition of the common law and may possibly help to avoid the development of inconsistent or even incoherent principles, but is unlikely to attain anything like the degree of 'splendid harmony' that would enable it to have dispositive effects.