

RESTITUTIONARY PRINCIPLES IN TORT: WRONGFUL USER OF PROPERTY AND THE EXEMPLARY MEASURE OF DAMAGES

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That the proper object of an award of damages in tort is to compensate the plaintiff for a measurable loss incurred has been an orthodoxy for years.¹ In the familiar expression of Lord Blackburn in 1880, the 'general rule' was that:

'where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.'²

In 1966 members of the High Court restated the canon, observing that

'the injured party should receive compensation in a sum which, so far as money can do, will put him in the same position as he would have been in if the contract had been performed or the tort had not been committed.'³

The 'compensation' referred to here means a notional restoration of the plaintiff to a previous state, or *restitutio in integrum*.⁴ Despite the seeming breadth of the principle, it is clear that the compensation of itself does not justify or explain all damages awarded by the courts. Non-compensatory awards are acknowledged by two leading Australian texts on the law of torts; but the texts treat non-compensatory awards as exceptional, to be placed in categories outside the norm, as 'nominal', 'exemplary', 'aggravated' and 'liquidated' damages.⁵ As such, they are effectively quarantined from the ambit of the compensatory principle. For all awards of damages outside the exceptional categories, the ordinary measure may be assumed to apply. Does this mean

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¹ I am indebted to Professor Francis Trindade of Monash University for his comments on an earlier draft of this article. See generally J G Fleming *The Law of Torts* (7th edn Sydney, Law Book Co, 1987) 1; FA Trindade and P Cane *The Law of Torts in Australia* (Melbourne, Oxford University Press, 1985) pp 6-9; H McGregor ed *McGregor on Damages* (15th ed, London, Sweet & Maxwell, 1988) 7 and the cases there cited.

² *Livingstone v Rawyards Coal Company* (1880) 5 App Cas 25, 39.

³ *Butler v Egg and Egg Pulp Marketing Board* (1966) 114 CLR 185, 191, per Taylor and Owen JJ, citing the Lord Blackburn passage above, cf Menzies J, 192, 'The true rule is . . . that the plaintiff is entitled to recover no more than the real damage he has sustained'; see also *Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd* (1968) 121 CLR 584.

⁴ Paraphrasing Lord Wright in *The Edison* [1933] AC 449, 459; also *Pennant Hills Restaurants Pty Ltd v Barrell Insurances Pty Ltd* [1977] 2 NSWLR 827, 855 per Mahoney JA, 'The purpose of an award of damages is . . . to put the plaintiff in the position in which he would have been had he not suffered the wrong in question.'

⁵ See Fleming, op cit Trindade and Cane, op cit, and cf M J Tilbury *Civil Remedies* (Sydney Butterworths 1990) pp 194-306, where further *rationales* of damages are suggested.

that for every wrong done to a plaintiff, outside the categories, some loss should be supposed?

It is the contention of this article that a group of cases, concerned with damages for the wrongful use of property, has insufficiently been recognized as an exception to the compensatory rule. In fact, the wrongful user cases have more in common with those torts cases where exemplary damages are awarded to deter certain torts and redistribute their proceeds. Both groups of cases share the as yet unorthodox rationale that unjust enrichment should be identified and reversed.

The wrongful user part of this inquiry draws on a problematic aspect of the 'proprietary' torts, referring to actions which protect the property owner's right to exclusive possession. That aspect is where a person infringes possessory rights and makes *a gain unmatched by the owner's loss*. Consider this:

'A, being a liveryman, keeps his horse standing idle in the stable, and B, against his wish or without his knowledge, rides or drives it out. [Is it] an answer to A for B to say: Against what loss do you want to be restored? I restore the horse. There is no loss. The horse is none the worse; it is the better for the exercise.'⁶

Most people would agree that the answer should entail the user being under some liability. For no man should benefit by his own wrong.⁷ Further,

'supposing a person took away a chair out of my room and kept it for twelve months, could anyone say [the tortfeasor] had a right to diminish the damages by showing that I did not usually sit in that chair, or that there were plenty of other chairs in the room?''⁸

Again it may be intuitively right that the chair user should not benefit from the enjoyment of its owner's property rights without making some recompense.⁹

The matter has even been put so high as to say that, where one person misuses another's property, the security of all property and titles in society requires the user to be civilly sanctioned.¹⁰ Perhaps,

'[T]he very essence of the nature of property is the right to its exclusive use. Without it, no beneficial right remains. However plausible, [the defendant] cannot be heard to say that his wrongful invasion of [the plaintiff's] property right to exclusive use is not a loss compensible in law. To hold

⁶ Lord Shaw in *Watson Laidlaw & Co Ltd v Pott, Cassels and Williamson* (1914) 31 RPC 105, 119 (HL).

⁷ Remarkd by Lord Hatherley LC, in relation to the defendant's wrongful trespass in circumstances where the plaintiff could prove no loss. See *Jegon v Vivian* (1871) LR 6 Ch App 742, 761.

⁸ Lord Halsbury LC in *The Mediana* [1990] AC 113, 117.

⁹ Cf. S J Stoljar *The Law of Quasi-Contract* (2nd ed, Sydney, Law Book Co, 1989), pp 108-9.

¹⁰ See A M Honore 'Ownership' in A G Guest (ed) *Oxford Essays in Jurisprudence* (Oxford, Oxford University Press, 1961) 113, 'the right to have exclusive physical control of a thing . . . is the foundation on which the whole superstructure of ownership rests'; see also discussion in J M Finnis *Natural Law and Natural Rights* (Oxford, Oxford University Press, 1980) pp 171-2;

otherwise would be subversive of all property rights since [the defendant's] use was admittedly wrongful and without claim of right.¹¹

Once the used property has been returned to its rightful possessor, torts and the common law generally provide only the sanction of damages against its wrongful user. There are no further resources unless the owner wishes to sue in equity.¹² If the person entitled to the property in question experiences no loss by the user's use of it, it may follow on the compensatory rationale that only nominal damages should be awarded. That means that the action in tort will vindicate the owner's property right, but not allow any recompense for the wrongful use. Yet this may offend the sense of justice described above.¹³ What will be argued is that principles of unjust enrichment supply the only plausible rationale of a damages award in cases where one person uses another's property and no loss can be proven. The same unjust enrichment principles, by more general consent, explain a class of exemplary damages awards in the area of torts whereby profits are made.¹⁴ Because the law of torts measures both awards by the respective defendants' benefit and rather unconventionally ignores anyone's possible loss, a restitutory rethinking of orthodoxy may be needed.

WHERE PROPERTY IS USED AND NO LOSS IS CAUSED

Two questions arise here. What should be the measure of damages for user where the plaintiff suffers no loss? Has a tort occurred at all, where no loss exists to be compensated? A convenient starting place for consideration of both are the following words of Nicholls LJ in the English Court of Appeal:

'a person who has wrongfully used another's property without causing the latter any pecuniary loss may still be liable to that other for more than nominal damages. In general, he is liable to pay, as damages, a reasonable sum for the wrongful use he has made of the other's property.'¹⁵

This he called the 'user principle', a name which will be adopted here.¹⁶

The dictum comes from the recent case of *Stoke-on-Trent County Council v Wass*,¹⁷ where the plaintiff was a town council. It was alleged that the defendant trader conducted an unlicensed market, which constituted an infringement of the Council's statutory right to hold markets in a particular locality. In addition to seeking an injunction to close the infringing market down, the

¹¹ *Olwell v Nye & Nissen Co* 173 P 2d 652, 654 (Supreme Court of Washington State).

¹² Being a 'substitute' for performance of the defendant's obligations; cf the prerogative writs and specific relief in equity: F H Lawson *Remedies of English Law* (2nd ed (London, Butterworths, 1980) pp 14-5 and pp. 173-7.

¹³ See text to fn 9.

¹⁴ Where 'a defendant . . . has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk', Lord Devlin in *Rookes v Barnard* [1964] AC 1129, 1226; see the text at fn 101 *infra*.

¹⁵ *Stoke-on-Trent City Council v W & J Wass Ltd* [1988] 3 All ER 394 (CA).

¹⁶ *Id* p 402, Nourse and Mann LJJ concurring.

¹⁷ [1988] 3 All ER 394.

council argued that the defendant was liable to pay substantial damages to it for his wrongful infringement during the period when the market remained open. At first instance before Peter Gibson J, the Council was allowed the injunction. Peter Gibson J also made an award of damages equal to what would have been a reasonable licence fee for the council to charge the defendant for allowing him to conduct the market for the time he did.

On appeal, these damages were unanimously disallowed. Justifying this, Nicholls LJ reasoned that the defendant's act was not proven to be a 'disturbance' of the council's statutory right to hold markets within the locality. This being so, he continued, the defendant's act was not such an invasion of the right of another to warrant an application of the user principle. For the principle was only concerned with the infringement of property rights and, properly construed, the Council's market right did not have this status. If the market right did entail a monopoly, it was only one which the law was only willing to protect by restraining proven disturbance. Here the Council had only proven a wrongful user not amounting to a disturbance. It followed that the law gave no damages for the trader's appropriation and use of the Council's market right.¹⁸

How the market right was characterized in the *Stoke-on-Trent* case was the only limitation on the user principle which Nicholls LJ examined. The decision may be questionable,¹⁹ but it is not a matter which will concern us any further. Instead, we will explore the corollaries of the principle, asking whether it should be subject to three additional limitations not discussed in that case. Namely, should,

1. the misused property be of nature profit-earning, or used in a hiring business?²⁰ ('the first limitation');

2. there be proof that the plaintiff was deprived of the property's use?²¹ ('the second limitation'); and

3. there be proof that the defendant had actual use and enjoyment of the property, as opposed to the mere custody of it?²² ('the third limitation').

These limitations to the user principle describe some of the emerging areas of uncertainty in a supposed 'restitutionary' measure of damages in tort. Authorities differ on approaches to be taken, particularly as between different types of property. For this reason, we shall examine land and chattels separately.

¹⁸ Id p 403; the argued analogy of the wrongful use of a patent was disallowed. A patent monopoly, it was said, was sufficiently protected to have the status of 'property'. See criticism of this aspect of the judgment in IM Jackman 'Restitution for Wrongs' [1989] *CLJ* 302, 307.

¹⁹ The Council's entitlement to an injunction to protect the market right was not questioned on appeal. Why was it appropriate to impose a further 'proof of disturbance' requirement for the purposes of the damages claim?

²⁰ *McGregor on Damages*, op cit, paras 1417-1421.

²¹ See GB Klippert 'Restitutionary Claims for the Appropriation of Property' (1981) 26 *McGill LJ* 506, 543-7.

²² See J P Dawson 'Restitution Without Enrichment' (1981) 61 *BUL Rev* 563, 617-9.

Land

The common law background to user of land claims may be summarized in the following propositions:

(i) A defendant who wrongfully occupies a landlord's property after the termination of a tenancy becomes a tenant at sufferance, until the landlord elects to treat him as a trespasser.²³

(ii) The landlord is entitled to recover from the wrongful occupier as tenant the rental value of the premises for the period of the wrongful occupation. This is the form of claim traditionally brought by the common count for 'use and occupation'.²⁴

(iii) Where the defendant is a trespasser, or the landlord has exercised an election to treat a former tenant so, the plaintiff will normally be entitled to recover damages for the trespass from the date of the wrongful entry. This damages action is quaintly referred to as for 'mesne profits'.²⁵

(iv) A plaintiff may claim both recovery of the land and mesne profits for its wrongful occupation in the one proceeding. If the plaintiff is successful in it, a single judgment will then be then entered. Very often such proceedings are undefended. If so, judgment is entered in default for recovery of possession, with mesne profits to be assessed.²⁶

(v) In an assessment after obtaining judgment in default, or at the trial of a defended action, the ordinary measure of the damages is the market rental of the land for the period of the wrongful occupation.²⁷

A plaintiff claiming damages by way of mesne profits, or for the defendant's use and occupation, therefore, need show no loss in order to qualify for a substantial damages award.²⁸ Compensation for loss is formally irrelevant in either of the ordinary actions based on the wrongful use of land. The award is based on the value of the defendant's *benefit* instead, computed as the rent the defendant would otherwise have to pay.

This ordinary measure of damages for the wrongful occupation of land does not apply where there is no available market for the land. For does not a rental value presuppose a rental market? Such a difficulty occurred in the remarkable case of *Edwards v Lee's Administrators*.²⁹ This 1936 decision of the Kentucky Court of Appeals continues still to illuminate the rationale of actions for mesne profits. Some years before the decision in that case, a Kentucky farmer called Edwards had discovered a large cave under his farm. This

²³ See fn 24 infra.

²⁴ Explained in *Anderson v Bowles* (1951) 84 CLR 310, 319, per Dixon, Williams, Fullagar and Kitto JJ, referring to *Foa on Landlord and Tenant* 7th edn, 2, *Cole on Ejectment*, pp. 635-6 and *Henderson v Squire* (1869) LR 4 QB 170.

²⁵ *Ibid*, see also *Lynch v Port Jackson Trading Corporation Pty Ltd* [1950] VLR 153, 154 Sholl J; *Elliott v Boynton* [1924] 1 Ch 236.

²⁶ Pursuant to the Rules of Court of the various Australian State and Territory Supreme Courts: Ord 20 (NSW), Ord 21.03 (Vic), Ord 52 r 1 (Qld), Ord 48 r 1 (SA), Ord 53 r 1 (Tas.); see *Goodwin v McAulay* [1952] QWN 7.

²⁷ *Halsbury's Laws of England* 4th ed, vol 27, para 255; *McGregor on Damages* op cit paras 1417-142; *Bullen and Leake and Jacob's Precedents of Pleadings* I H Jacobs ed (London, Sweet & Maxwell 1975), pp 69-70.

²⁸ See a discussion of this principle by Lord Hatherley in *Jegon v Vivian* fn 7, 761.

²⁹ 96 SW 3d 1028 (1936).

he decided to advertise and exploit for the purpose of attracting visitors. He named it 'The Great Onyx Cave', probably on account of the unusual rock crystal formations which it contained. Then

'circulares were printed and distributed, signs were erected along roads, persons were employed and stationed along the highways to solicit the patronage of passing travellers, and thus the fame of the Great Onyx Cave spread year to year . . . Edwards built a hotel near the mouth of the cave to care for travelers . . . and ultimately secured a stream of tourists who paid entrance fees sufficient not only to cover the cost of operation, but also to yield a substantial revenue.'³⁰

Lee was a neighbour of Edwards. Some time after the enterprise commenced, Lee issued proceedings to establish that a substantial portion of the cave lay under his adjoining land. This, he said, was so, even though Lee admitted that the only access to the cave was through Edwards' property. Damages for trespass and wrongful occupation were then claimed, as well as an injunction to prevent continuance of the occupation and account of profits made. The Court at the outset ordered a survey, which disclosed that about a third of the cave was indeed under Lee's land. That one third included the most attractive of all the cave's crystal formations. But the Court was then pressed with the arguments for Edwards that damages must be nominal: for Lee himself could not be said to use or occupy his portion of the cave and, not having an entrance to it, there was no one except Edwards on whom he might confer a right of beneficial use. Consequently, Lee's portion of the cave was said to have no rental value to base the measure of damages in a wrongful occupation award.³¹

The Court was unmoved by these reasons. It allowed that Lee was entitled to substantial damages for wrongful occupation of his portion of the cave notwithstanding what limitations Lee's claim had. Stites J said that

'it is apparent that rental value has been adopted, either consciously or unconsciously, as a convenient *yardstick by which to measure the proportion of profit derived* by the trespasser directly from the use of the land itself.'³² [emphasis added]

Damages were awarded equal to that proportion of profits (excluding the hotel) which the area of the cave under Lee's land bore to total area of the cave. So the absence of a rental value or market for the the plaintiff's property did not stop substantial profits by way of mesne profits being awarded for its use. They were calculated to equal the appropriate proportion of the actual profits the defendant derived by his wrongful act. As before, the damages award was based in the defendant's benefit or enrichment: this time measured by the profits the defendant derived and not a notional rental expense saved.

Certain other unusual features of an action for mesne profits were referred to in the underground cave case, raising two of the three additional limitations on the user principle discussed above. Applicable to use of land claims,

³⁰ Id p 1029, described by Stites J.

³¹ Viz. there was no market for Lee's portion of the cave: id 1030.

³² Id 1031, relying on the 'wayleave' cases, referred to at notes 33-4.

these are that it may be required of the plaintiff to prove that the land is ordinarily leased out and/or to prove that the plaintiff was actually deprived of the land's use.

The negative of both propositions had been established in a line of English trespass to land and mineral conversion of minerals authorities of the nineteenth century. These involved claims arising out of the unauthorized use of passages in coalmines, called 'wayleaves'. Often these claims were combined with claims for conversion by unauthorized removal of coal as well. *Phillips v Homfray*³³ was such a case, which involved a user of land claim. Homfray and his partners conducted a coal-mining business on land adjoining the plaintiff's farm. In the course of operations, coal taken from the defendants' land was brought to the surface by being carried along unauthorized 'roads or passages', made under the plaintiff's farm. In the first stage of the action, the plaintiff was held entitled to what the Court described as 'compensation for this surreptitious act', which on the facts could not have been compensation for any loss the plaintiff incurred. The award was to be measured by what a bill in equity would establish as the reasonable price that the defendants should have paid for the wayleave they enjoyed.³⁴

A case analogous to the wayleave line of authorities raised a policy issue behind the measure of damages issue. In *Whitwham v Westminster Brymbo Coal and Coke Co*,³⁵ a coal-mining firm had trespassed on a neighbour's farm over an eight year period, tipping spoil from the colliery onto the land. The value of this use to the defendant was considerably greater than the two other possible values of the wrong: namely, consequent diminution in the value of the land and whatever was the value of the use deprivation which the plaintiff had suffered. Which of the users was the Court to take as the measure of the damages award? Fortunately for the plaintiff, the English Court of Appeal found that the applicable value was the one which provided the property owner with the largest measure of recovery. The measure of damages was the value of the land use which the defendant had derived for the eight year term of its tipping activity, plus interest.³⁶ So whether phrased as the price which should have been paid for a user enjoyed, or as a user profit derived, the measure of the result arrived at is the same. In both cases it is the value of the defendants' benefit. Using an observation referred to above,³⁷ such an approach gives the Court a 'convenient yardstick' for computation of what we might now recognize as the defendant's unjust enrichment.

³³ (1871) 6 Ch App 770. Subsequent to this decision, but before final judgment was obtained, one of the defendant trespassers died. By what was then the rule, the tortious action became extinguished. The plaintiff tried to continue the action in quasi-contract, but was finally unsuccessful in the Court of Appeal, some sixteen years after proceedings had been commenced.

³⁴ Id 780-1; and see the text at fn 142, below; cf. the discussion of this judgment in Gummow 'Unjust Enrichment, Restitution and Proprietary Remedies' in P Finn (ed.) *Essays on Restitution* (Sydney, Law Book Co, 1990), 60-1. See also *Hilton v Woods* (1867) LR 4 EQ 432; *Jegon v Vivian*, fn 7.

³⁵ [1896] 2 Ch 538.

³⁶ Id. Lindley LJ, 541-2, Lopes LJ 542-3, Rigby LJ, 543.

³⁷ *Edwards v Lee's Administrator*, fn 29, quote at fn 32.

The *Penarth Dock Engineering Co Ltd v Pounds*³⁸ case is another application of the user principle to a claim for wrongful occupation of land. The plaintiff was a company which had sold a floating dock to the defendant, as part of a plan to vacate the site where the dock was moored. No time for the defendant to remove the dock had been agreed. Denning J found that, when the defendant had still not removed the dock a year after the agreement was entered, it became in respect of the dock a trespasser. The defendant pointed out that during and after the year in question, the storage area had at all times been unused. No one had been inconvenienced. To this, Denning J said:

'[T]rue it is that the Penarth Company themselves would not seem to have suffered any damage to speak of . . . [but] the test of the measure of damages is not what the plaintiffs have lost, but what benefit the defendant obtained by having the use of the berth.'³⁹

An award was accordingly made in favour of the plaintiff of what would have been a reasonable weekly charge for the berth, multiplied by the number of weeks of the trespass. *Yakamia Dairy Pty Ltd v Wood*⁴⁰ was another wrongful use of land case, where the plaintiff could not prove damage. The defendant there entered a dairy farm in Western Australia lawfully as the plaintiff's manager. But he later brought his own cattle onto the land and depastured them, without the plaintiff's consent. The plaintiff brought an action for use and occupation based on the wrong and judgment was given that the manager should pay an award of damages equal to the agistment fees the plaintiff might reasonably have charged for the use of its land.

In a case unlike the foregoing, where the plaintiff is in the *business* of letting the land wrongly occupied, either use and occupation or mesne profits claims are independent of the state of the business at the time of the wrong. The plaintiff need not show that the property would or might have been let to some one else during the period of the wrongful occupation. This proposition seems basic enough, but it is supported by surprisingly little authority⁴¹ excepting the recent case of *Swordheath Properties Ltd v Tabet*.⁴²

The *Swordheath Properties* case involved an action for possession and damages for wrongful occupation instituted by a landlord, against persons who continued to occupy rented premises after the tenant had departed. At trial it was established by the landlord that it was entitled to possession of the premises upon the tenant's departure. Substantial damages in the nature of an occupation rent were then claimed from the occupiers on account of their 'squat'. However the landlord did not obtain these at first instance, for the reason that it failed to provide necessary evidence as to its ability to re-let the

³⁸ [1963] 1 Ll LR 359; see the analogous *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (damages for breach of restrictive covenant).

³⁹ Id 361-2.

⁴⁰ [1976] WAR 57.

⁴¹ Observed in *McGregor on Damages*, op cit, para 1420, where these propositions are advanced; *Halsbury*, 4th Edn under 'Trespass to Land', vol 12, para 1170, cites only the wayleave cases and under 'Mesne Profits', vol 27 para 255, cites only one further case (hereunder).

⁴² [1979] 1 WLR 285 (CA).

premises during the period of the wrongful occupation. The Court of Appeal unanimously held that this reason was wrong. No evidence of loss of business or other rent was necessary in order for the plaintiff to prove its case. The landlord was entitled to what it had at first instance established was the market rent for these premises over the period of the wrongful user.⁴³

So, in respect of land, authority appears clear that the first two possible limitations on the user principle do not apply. First, plaintiffs need not be landlords, nor need the land be rental property, in order for substantial damages for wrongful use to be obtained. Secondly, the fact that the plaintiff was deprived of the use of the land need not be established. The third limitation, proof of the *defendant's* use of the land, possibly does not apply either. For the defendant's user has only been treated as relevant to the threshold question of whether the defendant was in occupation at the time alleged.⁴⁴ No authority amongst the wrongful user of land cases has been found which uses the restitutory consideration of whether the defendant has had beneficial use of the land in order to test the rightness of an order of substantial damages for its occupation. Perhaps the issue of whether a defendant did use the land beneficially, on the one hand, or on the other, not use it at all, is simply irrelevant after the defendant's occupation is shown. It may even be put as high as a rule of law that a market rent is payable to one who establishes an entitlement on the tests discussed, for mesne profits and use and occupation. This account will now pass to the surprising differences in the measure of damages in claims arising from the detention of chattels. One or more of the limitations may, and possibly should, restrict those claims.

Chattels

At common law in Australia there are possibly four separate, but overlapping, tortious actions to remedy interference with in chattels.

The first remedial action is trespass to chattels. If the defendant intentionally destroys, damages or merely uses chattels, he or she may be liable for actual loss the plaintiff suffers as a consequence — which may be as high as the full value of those chattels and as low as nominal damages.⁴⁵ This action is appropriate to remedy lesser interferences with a plaintiff's possession of a chattel, such as wrongful user.⁴⁶ It may be that the wrong of trespass to chattels is actionable *per se*, without proof of actual damage by the plaintiff.⁴⁷ Which is to say, the plaintiff may claim nominal damages or equitable relief, but not substantial damages, merely on the basis of wrongful user. This occurred in *Penfolds Wines Pty Ltd v Elliott*,⁴⁸ where the plaintiff sought an injunction to restrain the defendant hotelkeeper from using its empty bottles for the marketing of his own wine. There was no question of substantial damages for the

⁴³ Id pp.287–8 Megaw LJ, Browne and Waller LJJ agreeing.

⁴⁴ An example of this is in the judgment of McHugh JA in *Newington v Windeyer* (1985) 3 NSWLR 555, 564.

⁴⁵ Fleming, *op cit* p 47–9.

⁴⁶ Trindade and Cane, *op cit* pp 106–8.

⁴⁷ Id 108–9.

⁴⁸ (1946) 74 CLR 204.

wrongful user. The majority did not allow the equitable relief and Dixon J held that the facts disclosed no tort or wrong to the plaintiff's possession at all.⁴⁹ However Latham CJ did say of the width of the trespassory tort that

'[A] mere taking or asportation of a chattel may be a trespass without the infliction of any material damage. The handling of a chattel without authority is a trespass . . . Unauthorized user of goods is a trespass; unauthorized acts of riding a horse, driving a motor car, using a bottle, are all equally trespasses, even though the horse may be returned unharmed or the motor car unwrecked or the bottle unbroken.'⁵⁰

Accordingly, in *Schemmell v Pomeroy*⁵¹ the plaintiff mother claimed trespass to a chattel and conversion against her own 14 year old son and friend of the same age. This was for illegally using and wrecking her motor car without her consent. The Court held that the defendants were clearly liable in trespass and the crash may have 'converted' the trespass into a conversion and liability for substantial damages.⁵²

The second remedy for the interference with chattels is the anomalous 'action on the case'. This refers in recent times to the decision of the High Court in *Beaudesert Shire Council v Smith*,⁵³ where the Court ordered substantial damages against the Council for its destruction of Smith's water rights. The Court said that the liability was independent of trespass, negligence or nuisance and based in the plaintiff suffering loss at the defendant's hands.⁵⁴ As such it is of little restitutionary significance.

The third remedy for interference with chattels is conversion. It enables the owner, or person in actual possession of chattels, or person with an immediate right to possession of them at the relevant time, to take action against another who 'converts' or interferes with the chattels and oblige that other to pay damages equal to the full market value of the chattels at the time of the wrongful act.⁵⁵ Such a measure is prima facie what the plaintiff will have lost. In early decisions, the unauthorized use of chattels without loss to the plaintiff has been treated as a conversion leading to the same full measure of damages.⁵⁶ However the continuing authority of those decisions is questionable

⁴⁹ Id p 224, Starke and McTiernan JJ at 221 and 235 holding that the facts were insufficient to attract equitable intervention.

⁵⁰ Id pp 214-5 (dissenting as to the outcome).

⁵¹ (1989) 50 SASR 450, White J.

⁵² Id p 453; see also *Wilson v New Brighton Panelbeaters Ltd* [1989] 1 NZLR 74 (trespass by unauthorized towing of motor vehicle and subsequent conversion when the vehicle is delivered to a rogue).

⁵³ (1966) 120 CLR 145, per Taylor, Menzies and Owen JJ.

⁵⁴ Id p 156.

⁵⁵ *Butler v Egg and Egg Pulp Marketing Board*, n.3; Trindade and Cane, op cit p 112, p 250.

⁵⁶ See *Lord Petre v Heneage* (1701) 12 Mod 520; ER 1491 (executor's wife who wore deceased's necklace liable in conversion); *Poulton v Wilson* (1858) 1 F & F 403; 175 ER 782 (bricklayer's tools detained and used — damages measured by market value); *Craig v Marsh* (1935) 35 SR (NSW) 323 (tenant left manufacturing equipment on premises — used by new tenant — conversion and substantial damages).

after some of the dicta expressed in *Penfolds Wines Pty Ltd v Elliott*.⁵⁷ A number of cases have established the inconsistent principle that if the plaintiff's actual loss is for some reason more or less than the market value of the chattel at the time of the wrongful act, then damages for conversion will be adjusted in quantum to become an appropriate measure of compensation for the wrong.⁵⁸ As the act of conversion is completed and the action accrued, either before or at the time the defendant's user commences, conversion is not a suitable remedy for the wrong we are investigating. Our present concern is with the wrong of user, not the acts of conversion which may have preceded or accompanied it. It may also be inappropriate to award compensation for what has been termed a 'consequential loss', flowing from the act of conversion, in respect of the defendant's wrongful detention of a chattel.⁵⁸ Detention is a separate and subsequent wrong.

So, in the outline of remedies sketched so far, an action framed in conversion may not be the correct way for a plaintiff to obtain substantial damages for wrongful user. Yet one case should be noted before passing from conversion, *Bilambil-Terranora Pty Ltd v Tweed Shire Council*.⁶⁰ This was a decision of the New South Wales Court of Appeal in 1980 and concerned the measure of conversion damages. If the case did not involve a wrongful user, it underlined deficiencies in the compensatory measure of damages comparable to the kind here considered. This is the measure of damages to apply where the plaintiff makes a small or ambiguous loss. In that case, the Tweed Shire Council had trespassed on the plaintiff's land and removed gravel from the soil. This much was admitted. A dispute then arose as to the correct measure of damages for the tort. It was argued for the Council that compensation should not exceed the value of the royalty that the Council should have paid the plaintiff for removing the gravel as it did. For the Council had a power to compulsorily acquire the gravel upon payment of a royalty. However the majority of judges deciding the issue thought that the wayleave cases involving conversion, and the analogy of the mesne profits cases, justified the conclusion that the measure of damages was the larger figure of the gravel's market value.⁶¹ This was so, even though the plaintiff was not in the business

⁵⁷ Note 48, 231, Dixon J 'In point of policy there is no reason why the law should make it a civil wrong to put a chattel to some temporary and harmless use at the request and for the benefit of a person possessed of the chattel'.

⁵⁸ *Amorety v The City of Melbourne Bank* (1887) 13 VLR 431, 433, per A'Beckett J. (damages increased, where converted shares increased in value after the conversion); also *Ley v Lewis* [1952] VLR 119 (rise in value of army surplus); *Butler v Egg and Egg Pulp Marketing Board* fn 3, 191, Taylor and Owen JJ, 192, Menzies J (damages reduced because of the plaintiff's obligation otherwise to pay the defendant for the goods converted); also *Astley Industrial Trust v Miller* [1968] 2 All ER 36, *Western Credits Pty Ltd v Dragan Motors Pty Ltd* [1973] WAR 184 and *Maynegrain Pty Ltd v Compafina Bank* [1982] 2 NSWLR 141 (CA) (reductions to reflect the plaintiff's limited interests in goods);

⁵⁹ But see *Egan v State Transport Authority* (1982) 31 SASR 481, 528-9, per White J. Since detinue has been abolished in the UK by the *Torts (Interference with Chattels) Act 1977* (UK), any damages now awarded there for wrongful user must be expressed as for a consequential loss in conversion: see *McGregor on Damages*, n 1, para 1358.

⁶⁰ [1980] 1 NSWLR 465.

⁶¹ Id p 477, per Reynolds JA, 494-5, per Mahoney JA.

of selling gravel and any market for the gravel was subject to the Council's overriding acquisition power.⁶² The Council's trespassory conduct, on the majority view, justified this greater measure of damages. Mahoney JA said:

'[T]he result of the adoption of this method of arriving at damages for the loss of minerals may result, in a sense, in a plaintiff recovering more than it might otherwise have received in respect of the minerals. If the tort had not been committed, the likelihood may be that it would never have mined the minerals or received anything from them at all. But such a result is not unprecedented . . .'⁶³

He concluded with words not insignificant for the point that this article makes, that

'whether the law of unjust enrichment forms part of Australia law as such, the influences which inform it are not without effect in our law.'⁶⁴

Detinue is the fourth type of remedy concerned with interference with chattels. The right of action in detinue is constituted by the defendant withholding possession of a chattel adversely to the rights of the owner, or person entitled to possession.⁶⁵ 'Withholding possession' is as close as this or any other tort comes, in referring to the defendant's wrongful user of the chattels. Detention is central to the wrong and, as Diplock LJ noted in *General & Finance Facilities Ltd v Cooks Cars (Romford) Ltd*:

'an action in detinue today may result in a judgment in one of three different forms: (1) for the value of the chattel as assessed and damages for its detention; or (2) for the return of the chattel or recovery of its value as assessed and damages for its detention; or (3) for the return of the chattel and damages for its detention.'⁶⁶

A claim for damages in detention is in the usual case combined with a claim for return of the chattel detained, or its value. Because the wrong in such a case is a continuing one, the measure of the detained chattel's monetary value in lieu of restoration is value at the date when the court hands down its judgment.⁶⁷ Damages for detention are peculiar to detinue and they are awarded quite independently of the return of the chattel, or its value. At the same time, these damages are a composite part of the ordinary award of damages for the tort, as the above dictum of Diplock LJ shows.⁶⁸

Reported cases of detinue, where damages for detention have been

⁶² And the plaintiff was not in a true market at all, as was argued for the Council and Samuels JA (dissenting) held at 487.

⁶³ Id pp 494-5.

⁶⁴ Id p 495.

⁶⁵ See Fleming, op cit p 53; possession is shown to be adverse by the defendant's refusing to comply with the plaintiff's demand for the chattel's return.

⁶⁶ [1963] 1 WLR 644.

⁶⁷ Trindade and Cane, op cit p 256.

⁶⁸ See text at fn 66; the author of the 13th edn of *McGregor on Damages* (London, Sweet & Maxwell 1972), writing before the UK abolition of detinue, is of this view: para 1032.

awarded, have principally been for loss constituted in either of the following ways:

(i) the plaintiff was wrongfully deprived of the commercial or private use of a chattel and incurred the expense of having to take a replacement on hire;⁶⁹ or

(ii) the plaintiff wrongfully deprived was in the business of hiring out chattels of the type detained and suffered loss of the profits which would normally have been made from hiring out the chattel to others.⁷⁰

Must all wrongful detention of chattels claims be claims based on loss incurred, and in either of these ways, in order to succeed? Decided cases do not seem to include recovery on other bases. Accordingly, where the plaintiff was not in the hiring business in *Mizza v H V McKay Massey Harris Pty Ltd*⁷¹ he was awarded nominal damages only, in a detention of farm tractor claim. The plaintiff had abandoned farming in favour of gold-mining and stored the tractor with a neighbour before it was detained.⁷² There was no basis on which he could be compensated for a loss incurred. The second, the hiring type of case will occupy us further, as judicial dicta in the hiring cases adverts more to the restitutory potential which the action in detinue has.

Before we pass to a consideration of the detinue cases, two prefatory matters will detain us. The first is a comparative survey of the relevant common law in the United States. In most American states, actions to remedy both the wrongful taking of chattels and the wrongful detention of chattels are now brought under the title of 'replevin'.⁷³ Modern practice in the United States has seen detinue 'superseded almost entirely by actions of replevin broadened in scope'.⁷⁴ Damages for wrongful detention may be either the 'value of use' of a chattel had by the defendant, or interest on the chattel's overall value — whichever is the greater.⁷⁵ This rule is subject to exceptions. One is that if the plaintiff had shown no interest in using the chattel and it was practically abandoned before being disposed of by the wrongdoer, no recovery for its user in the wrongdoer's hands is available.⁷⁶ With certain other exceptions, the

⁶⁹ *Matthews v Heintzman & Co* 16 DLR 522 (1914) — damages in detinue equal the cost of a replacement (private hire of piano); *Egan v State Transport Authority* fn 59 (cost of hiring 'reasonable substitute' for detained construction equipment); discussed by Lord Wright in *The Edison* fn 4, 459–60 (claim in negligence for the loss of a dredger).

⁷⁰ This is the more common situation. See *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246; *Mrs Eaton's Car Sales Ltd v Thomasen* [1973] 2 NZLR 686 and *Gaba Formwork Contractors Pty Ltd v Turner Corporation Ltd* (1991) Aust Torts Rep 81-138.

⁷¹ *Id.* (1935) 37 WALR 87, SC of WA Northmore CJ.

⁷² Distinguishing *The Edison*, fn 4, as dealing with a business as a going concern. See at 88–9 'the plaintiff was deprived of a machine for which he had no use . . . The measure of the plaintiff's damages is the value of the machine to him'.

⁷³ Differences in law between state jurisdictions are not material to this account; effectively in all states, conversion and detinue are combined in the one action. This is comparable to the modern UK position, see fn 47.

⁷⁴ 66 *Am Jur* 2d, Replevin, para 160.

⁷⁵ 77 *Corpus Juris Secundum* para 277.

⁷⁶ *Ibid.*; effectively imposing the second limitation, discussed above at n.21; cf. *Mizza v H V McKay-Massey Harris Pty Ltd* fn 71; other exceptions prevent user claims in respect of

value of the defendant's user of a chattel is the measure of damages under this rule — regardless of whether the plaintiff previously used the chattel in a hiring business, or otherwise used it for business or for pleasure or had not used it at all.⁷⁷ It does not appear that the plaintiff must show that the *defendant* had actual use of the property in order that the value of the use should be recoverable from him. Instead the inquiry is directed to the nature of the property. So,

'where the property detained consists of horses, tools and implements of trade, the general rule is that the party deprived of possession is entitled to the reasonable value of the use during the period of the wrongful detention.'⁷⁸

A second prefatory consideration dismisses a compensatory shortcut to the measurement of damages for detention. The plaintiff in a detinue action is not as of right entitled to damages for detention equivalent to the difference in the market values of the chattel detained before and after the period of the detention.⁷⁹ Any loss such as this, referable to the chattel's inherent value rather than use value, must be proven and will not be assumed. The significance of such a change in overall value of a chattel is covered by the traditional view that

'if, in an action for wrongful detention by one man of that which belongs to another, there be no substantial loss at all sustained, but the mere denial of the right, which right is vindicated in the course of the action, in such a case, there being no pecuniary damage sustained, no pecuniary compensation is given, and nominal damages will be enough.'⁸⁰

On the measure of damages for the wrongful detention of chattels, *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd*⁸¹ is probably the most important decision of modern times. The plaintiff in that case was in the business of hiring out portable electric switchboards and one had been hired to a theatre. The defendant company purchased the theatre after the switchboard had been hired by the previous owner, then refused to return it. At first instance there was a finding that the defendant was determined not to let the plaintiff have its switchboard back, as it was trying to re-sell or lease the theatre with it as a going concern.⁸² The plaintiff brought proceedings in detinue, including a claim for damages for the switchboard's detention. In determining the detention award, the trial judge gave in damages a sum which

chattels 'kept for sale or consumption', or where the plaintiff's own use is not prevented.

⁷⁷ *Ibid*, the first limitation is thus ignored; cases are cited allowing recovery of the use value of things such as horses, fishing equipment, milk cows and motor vehicles.

⁷⁸ *66 Am Jur 2d*, para 120; the third limitation seems not adverted to; cf Denning LJ's distinction between the liabilities of users and of 'warehouseman', *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* fn70, referred to below at fn81.

⁷⁹ *Williams v Peel River Land and Minerals Co Ltd* (1886) 55 Lt 689 (CA); *Brandeis Goldschmidt & Co Ltd v Western Transport Ltd* [1981] 1 QB 864, 872 per Brandon LJ, Ackner and Donaldson LJ agreeing.

⁸⁰ *Williams v Peel River Land and Mineral Co Ltd*, *ibid*, 692, Bowen LJ.

⁸¹ Fn 70 *supra*.

⁸² Observed by Somervell LJ, fn 70, at 250.

equalled the plaintiff's normal hiring rate for the period of the detention, reduced by the contingencies that at any one time only about 75% of the plaintiff's stock of switchboards were on hire, that the hiring rate was not infrequently reduced, and that the switchboard in question might have been accidentally destroyed.⁸³ In the result, the damages were about half the normal rate for the period. The plaintiff appealed against this reduction and the Court of Appeal unanimously held that it should not have been made. The appeal court held that the hiring business contingencies could not be relied upon by the defendant and the plaintiff's normal rate of hire for the time was the appropriate measure.

Somervell LJ's judgment recognized that in the *Strand Electric* case

'[T]he wrong is not the mere deprivation, as in negligence and possibly some detinue cases, but the user.'⁸⁴

With no authority directly in point, he saw the 'nearest analogy' to be mesne profits. The principle of mesne profits, it was said, 'should apply where a defendant has detained and used a chattel of the plaintiff which the plaintiff, as part of his business, hires out to users.'⁸⁵ Somervell LJ expressly limited this chattel detained application of the mesne profits principle to claims involving hiring businesses, saying

'I do not wish in this so far unchartered field to go beyond the facts of the case . . . the principle may be more widely applied in the United States of America and would cover, for example, detention and use of a private motor-car. I am not saying this is wrong. There may be no distinction in principle. The question had, however, better be left till it arises.'⁸⁶

After exploring the new principle in this way, he went on to dismiss one of the 'contingencies' argued for by the defendant on a fairly narrow basis. He said, in effect, that the defendant was precluded by its conduct from claiming a reduction in the normal hire rate that bona fide hirers would have to pay.⁸⁷

Romer LJ concurred in the narrower of the two approaches that Somervell LJ took, in a judgment which it could be said amounted to

an attempt . . . to press the result into the straightjacket of loss to the plaintiff.⁸⁸

He agreed that 'it does not lie in the mouth of such a defendant to suggest that the owner might not have found a hirer'.⁸⁹ However he went on to express 'no opinion' about:

'what the plaintiffs' rights would have been in the matter of damages had the property detained been of a non-profit earning character, or if, although

⁸³ Id 249.

⁸⁴ Id 252.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ *McGregor on Damages*, op cit para 1358.

⁸⁹ *Strand Electric*, fn70, p 257.

profit-earning, the plaintiffs had never applied it to remunerative purposes.⁹⁰

It is the judgment of Denning LJ that is for present purposes of most significance. Denning LJ began by raising the central issue, whether in the circumstances damages for detention were governed by the compensatory rule. In wrongful detention cases and upon the then existing state of authority, he thought, the matter was undecided. So, in place of the compensatory rule, he decided to justify his award by its principle adapted from the wayleave cases

'[I]f a wrongdoer has made use of goods for his own purposes, then he must pay a reasonable hire for them, even though the owner has in fact suffered no loss.'⁹¹

And as to the nature of this user claim, he considered that

'[T]he claim for a hiring charge is therefore not based on the loss to the plaintiff, but on the fact that the defendant has used the goods for his own purposes. It is an action against him because he has had the benefit of the goods. It resembles, therefore, an action for restitution rather than an action of tort.'⁹²

Denning LJ did not limit his formulation of the user principle by requiring that the plaintiff prove that the chattel was hired out, or of a profit-making nature. Nor was the plaintiff required to show any deprivation in the use of it.⁹³

Denning LJ did state that the third limitation should be applicable to chattel claims invoking the user principle. As he put it, if a carrier or warehouseman 'merely detains' goods without using them for his or her own purposes, then damages to equal the reasonable hiring charge would be inappropriate. Damages in the 'warehouseman' situation should be limited to the compensatory basis only. In such a case, it is thus appropriate that the damages be reduced by the contingencies in the manner disallowed.⁹⁴ This 'warehouseman' rider to the user principle is consonant with the theory of unjust enrichment, for such a person does not 'use' and is not enriched by what is in his warehouse: there is no benefit which justice requires the defendant to restore. Reception of the *Strand Electric* case in Australia was initially quite reserved. *Strand Electric* was dealt with cautiously in *McKenna & Armistead Pty Ltd v Excavations Pty Ltd*,⁹⁵ decided in 1957. The Full Court of the Supreme Court of New South Wales was there concerned with the measure of damages for a breach of bailment. It had been found that the vendor of earth-moving equipment sold, then continued to use it, after the date agreed when the equipment was to have been delivered to the purchaser. Damages for

⁹⁰ *Ibid.*

⁹¹ Id 254, citing *Whitwham v Westminster Brymbo Coal Company*, fn 35.

⁹² Id 254-5.

⁹³ *Ibid.* So neither of the first two limitations applied.

⁹⁴ Op cit 254; *Trindade and Cain*, op cit 258; see also *Egan v State Transport Authority*, fn 59.

⁹⁵ [1957] SR (NSW) 515.

detention measured by a reasonable hiring rate were awarded at first instance and *Strand Electric* was cited as authority therefor. On appeal it was held that damages should be compensatory only — restricted in this case to proven deterioration in the equipment and whatever expense caused by the delay.⁹⁶ *Strand Electric* was distinguished, as dealing with a claim made by a plaintiff ‘the owner of income-producing goods, [who] had been wrongfully denied their possession.’⁹⁷ The purchaser in the *McKenna* case was acknowledged to need the goods (or chattels) for use in its construction business. But as that purchaser did not ordinarily hire the goods out, the same were not ‘income-producing’ in the required sense for the Court to allow the user principle to apply. So was the reasoning in *Strand Electric* distinguished and the compensatory rationale allowed to prevail.

Damages for detention were subsequently litigated in *Egan v State Transport Authority*.⁹⁸ Egan was a builder of railway bridges and culverts. He entered an contract with the Authority, which contained a term which allowed the Authority to determine its contract with Egan in certain events and take possession of all of his plant and materials on site. Egan contested a determination which the Authority made in 1966 and sued in conversion and detinue in respect of the seizure of equipment which followed. By Court order made in 1982, the seizure was declared wrongful and Egan was held entitled to be paid the 1982 value of the goods in conversion as well as ‘consequential loss in detinue’ together with exemplary damages in respect of his wrongful deprivation of the goods during the intervening time.⁹⁹ What we have seen to be the ordinary measure of damages for detention was not considered. The authority of *Strand Electric* was distinguished as providing for the plaintiff a compensatory measure of the plaintiff’s ‘expected profit’, which the wrong in the *Egan* case denied. *Strand Electric*’s reasoning was treated as restricted to the hirings out of chattels and inapplicable to the wrong here, which caused Egan to need to hire in the relevant chattel(s).¹⁰⁰ In consequence, the authority of what Somervell and Denning LJ said in *Strand Electric* was again ignored.

Strand Electric was followed in the United Kingdom by Parker J, in *Hillesden Securities Ltd v Ryjack*,¹⁰¹ although only on its compensatory rationale. The plaintiff *Hillesden Securities* was in the business of leasing Rolls Royce motor vehicles. One of the vehicles was let to a hirer who sold it and ceased to make rental payments. At trial, the plaintiff sued for conversion of the Rolls Royce, which the hirer admitted.¹⁰² The plaintiff also claimed damages equal to its ordinary hiring rate for the whole period of the Rolls Royce’s detention,

⁹⁶ Id 519.

⁹⁷ Ibid. See also *Eastern Construction Co Pty Ltd v Southern Portland Cement Ltd* (1960) 78 WN (NSW) 293, per Owen J, 294 (negligence — measure of damage to crane)

⁹⁸ Fn 59.

⁹⁹ Id 530–1, following A I Ogos *The Law of Damages* (London, Butterworths, 1973), which also takes this approach.

¹⁰⁰ Id 529.

¹⁰¹ [1983] 1 WLR 959 (first instance).

¹⁰² Because of s 3 of the *Torts (Interference with Goods) Act 1977* (UK), which abolishes detinue.

to which the hirer replied that the measure of damages for detention after the date of the conversion was restricted to interest on the value converted.¹⁰³ Such an argument had some plausibility by virtue of the fact that conversion is not a continuing wrong and it was complete at the time of the wrongful sale. This may exploit unintended effects of the *Torts (Interference with Goods) Act 1977* (UK) with the result that less than justice is done to the plaintiff. Parker J did not accept the argument and allowed the full hiring rate until the vehicle was restored to its rightful owner.¹⁰⁴ He did this in reliance on *Strand Electric*, though for a reason that might in its narrowness have appealed only to Romer LJ:

'[the hirer] cannot be heard to say that by putting it out of his power to return the car he terminates his liability.'¹⁰⁵

Reception of *Strand Electric* restitutionary rationale showed eventual signs of warming with the approving dicta of Samuels JA in the *Bilambil-Terranora Pty Ltd v Tweed Shire Council* case, discussed above.¹⁰⁶ Something even closer to an acceptance of the majority reasoning in *Strand Electric* occurred with the decision of the Supreme Court of New South Wales in *Gaba Formwork Contractors Pty Ltd v Turner Corporation Ltd*.¹⁰⁷ The facts of the *Gaba Formwork* case resembled those of *Strand Electric* — a fact of passing significance, as Giles J was not disposed to limit his decision to the terms of the compensatory rationale. The plaintiff Gaba hired formwork to a builder, some of which the builder declined to return. Gaba sued in detinue for the value of the formwork and also damages for detention up until the date of judgment. For the detention part of its claim, Gaba alleged that it was not required to prove more than what was its ordinary hiring rate at the relevant time and, citing *Strand Electric*, Gaba submitted that it did not have to deal with, or deny, its claim to the full rate of hire by contingencies affecting the hiring business. Giles J upheld this submission, after an extensive review of the authorities. Significantly, he said that damages for detention should be independent of the plaintiff's loss.¹⁰⁸ He continued

'[I]n my view I should follow *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* so far as it applies to the facts before me. It has stood for nearly forty years and, while confined to where the defendant has used for his own purposes goods which the plaintiff would or might otherwise have hired out for reward, has been generally accepted in that situation. It produces a just result, and that a degree of departure from the principle of compensatory damages applied in *Butler v The Egg and Egg Pulp Marketing Board* is permissible in such circumstances is, I think, supported by the majority decision in *Bilambil-Terranora Pty Ltd v Tweed Shire Council*.¹⁰⁹

¹⁰³ Fn 101, 961.

¹⁰⁴ Id 963

¹⁰⁵ Id 963; *semble* that same would appeal to Somervell LJ for a similar reason.

¹⁰⁶ Fn 60, at 485-6 (dissenting).

¹⁰⁷ Fn 70.

¹⁰⁸ Id 60, 314.

¹⁰⁹ *Ibid*, identifying *Butler v Egg and Egg Pulp Marketing Board*, fn 3, with the compensatory principle.

It seems, then, that Giles J was prepared to accept the restitutionary rationale of the Somervell and Denning LJJ in *Strand Electric* and at the same time apply to it the hiring business limitation. Citing *Pavey & Matthews Pty Ltd v Paul*¹¹⁰ and *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation*,¹¹¹ he conclusively acknowledged

'the influences which inform the law of unjust enrichment are not without effect in our law.'¹¹²

What, it might be asked, is implied by the requirement in Giles J's dictum that the defendant 'used [the goods] for his own purposes'? In restitutionary terms, the user must be beneficial, that is, such as to confer a benefit on the defendant, in order to be reversed. When can it be supposed that the defendant was benefited? What subjective or objective factors should count as proof of this? We have seen that Denning LJ in *Strand Electric* excepted from the user principle the defendant who is a 'warehouseman'.¹¹³ Presumably this was in reference to a person who enjoys no beneficial use. It is, indeed, hard to see what beneficial use of a chattel a warehouseman could subjectively or objectively have. But the matter becomes less plain when a chattel is wrongly possessed by a creditor, say, pursuant to a security interest. Could not the creditor be benefited, even though he was purporting to be exercising a lien?¹¹⁴ Perhaps a gratuitous bailee might be liable to the user principle also. *Graham v Voigt*¹¹⁵ involved a landlord who was said to be a gratuitous bailee of certain glassware and stamp albums. The plaintiff, a former tenant, alleged that he agreed with his landlady that she would take care of the items in consideration of being permitted to have the use and benefit of them. He sued for the return of the goods or their value when she would not give them up. The Court allowed the claim and awarded a large measure of 'general damages' in conversion, additionally to the value of some of the goods and the return of the rest.¹¹⁶ No damages for detention were claimed, but if sought they might well have been allowed in place of the general damages. If so, the user principle would have been applied and benefit extended to the possession of a gratuitous bailee. It may be desirable that this development be accompanied by some acceptable theory of what a benefit is.¹¹⁷

In sum, the restitutionary view in *Strand Electric*, as eventually followed, has not quite been stripped of its compensatory clothes. The 'compensatory' first limitation and need for a hiring business still (unnecessarily) attends it.

¹¹⁰ (1987) 162 CLR 221, 227, 254-7 and 267.

¹¹¹ (1988) 164 CLR 662, 673.

¹¹² Fn 70, 69,314 noting that restitutionary reasonable fees are allowed in wayleave, mesne profit, patent infringement, confidential information and restrictive covenant cases.

¹¹³ See fn 94.

¹¹⁴ The defendant Authority in *Egan v State Transport Authority*, fn 59, came to possess the goods pursuant to a contractual forfeiture, but substantial damages for detention were awarded notwithstanding; see also *Poulton v Wilson*, fn 56.

¹¹⁵ (1989) 95 FLR 146.

¹¹⁶ Exceeding the value placed on the goods themselves: see id, 156.

¹¹⁷ See Birks, op cit, 116-7 and M Garner 'The Role of Subjective Benefit in the Law of Unjust Enrichment' (1990) 10 O JLS 42, 43-4 and references in both to the considerable literature on this subject.

But there is no sign that the second limitation applies to make the plaintiff prove deprivation of use. And what is implied by the restitutionary third limitation, for the relief of carriers and others defendants who enjoy no benefit by the thing detained, is not at all clear. When restitutionary principle is further developed in Australia, the remaining perplexities in this position may be overcome.

WHERE A DEFENDANT COMMITS A 'CALCULATED TORT': EXEMPLARY DAMAGES

This is one of the few, recognized, non-compensatory heads of tort damages. Punishment is the rationale usually accepted for its existence.¹¹⁸ Various acts of the defendant are thought to merit punishment, including one of restitutionary significance: the defendant's making profits by a tortious act, with a certain intention. The award of exemplary damages for profit-making with this intention will concern us here.

The intention is shown by the plaintiff demonstrating that the defendant has calculated that his profit by a wrongful act to exceed the normal measure of damages payable. An exemplary award, in addition to the compensatory measure, in this situation has the effect of subtracting a profit made by the defendant and passing it to the plaintiff. In his article on the subject, Ghandi quotes from an unreported judgment of a onetime member of the English Court of Appeal in a case where the tort of conspiracy had been raised.¹¹⁹ In an interlocutory hearing and after assuming jurisdiction to award exemplary damages had been established according to the English tests,¹²⁰ Templeman LJ says:

'there will have then to be evidence as to the amount of profits which the defendants stood to make and therefore the amount which might be a yardstick for awarding exemplary damages.'

The current editor of *McGregor on Damages* says that the 'real purpose' of exemplary damages of this type is 'not the punishment of the defendant but the prevention of his unjust enrichment.'¹²¹ Profits from a wrong must be ascertained and redistributed.

That the English courts can award exemplary damages in respect of profit-making wrongs was confirmed by the House of Lords in *Rookes v Barnard*.¹²² Australian and English courts share this jurisdiction, even if the Australian

¹¹⁸ Trindade and Cane, *op cit*, 242; Fleming, *op cit*, 2; P R Ghandi 'Exemplary Damages in English Tort Law' (1990) 10 *L S* 182, 190-1.

¹¹⁹ *Abbey Life Assurance Co Ltd v Sackville* (CA, unreported): Ghandi, n 118, 188.

¹²⁰ Jurisdiction limited to the categories described by Lord Devlin in *Rookes v Barnard*, fn. 14, an approach expressly not followed in Australia: *Uren v John Fairfax and Sons Pty Ltd* (1966) 117 CLR 118, confirmed [1969] 1 AC 590 (PC), which held that the Australian courts had a broader power to grant exemplary damages than *Rookes* allowed; this restated in *Lamb v Cotogno* (1987) 164 CLR 1, 7-8.

¹²¹ Fn 1, para 422.

¹²² Fn 14, as one of three exceptions to a general disapproval.

courts have had little occasion to identify the profit-making species of the 'calculated wrong'. Exemplary awards in Australia have usually been justified for 'outrageous conduct' on defendant's part, or 'contumelious disregard of another's rights'.¹²³ In *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd*¹²⁴ the High Court appeared to be dealing with a wrong raising a possibility of unjust enrichment, when it affirmed an award of exemplary damages of a trespass committed for commercial advantage. However the individual judgments justified the measure of the award by the need to punish, not to remove a profit made.¹²⁵

The United Kingdom cases which have dealt with the matter of exemplary damages and profit-removal concern two main types of wrong: defamation of the deliberate kind and the deceit of landlords. *Cassell & Co v Broome*¹²⁶ is an example of the first. The defendant had published a book about the unhappy fate of a particular convoy of merchant ships during the last war. The book contained defamatory imputations about the plaintiff, a retired naval officer. The House of Lords held that there was sufficient 'calculation' in the wrong to make an award of compensatory damages inadequate, although no mathematical process was suggested.¹²⁷ An exemplary award was justified in circumstances where, as was put, the 'guilty motive' for profit-making through the wrong 'outweigh[s] . . . the chances of penalty'.¹²⁸ Lord Diplock took the matter a step further than the other Lords and saw the award of damages to be activated by a principle of unjust enrichment.¹²⁹

The deceit of landlords type of profit-making wrong has arisen particularly where rent controls are in force. In *Mafo v Adams*¹³⁰ the English Court of Appeal held that if a landlord tricked his tenant out of possession of premises in order to free them from a rent restriction, and make a substantial profit thereby, then the ordinary damages for deceit would not be enough. An exemplary award measured by that profit would be needed.¹³¹ In the Australian case of *Pollack v Volpato*,¹³² \$5000 by way of exemplary damages was awarded against a landlord who trespassed with violence and evicted his tenant hairdresser. This was to enable the landlord to re-develop the site through

¹²³ *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71, 77; a recent statement of this was made in *Midalco Pty Ltd v Rabenalt* [1989] VR 461.

¹²⁴ (1985) 155 CLR 448 (\$400,000 for the 'spiking' of XL's underground storage tanks), discussed by J J Hockley 'Exemplary Damages for Trespass to Land' (1988) 62 LJ 415, 415-6.

¹²⁵ *Id.*, 463, Gibbs CJ (Wilson and Mason JJ agreeing), 471, Brennan J.

¹²⁶ [1972] AC 1027; see also *Riches v News Group Newspapers Ltd* [1986] QB 256 (CA).

¹²⁷ *Id.*, Lord Morris, 1094, Lord Hailsham LC, 1078.

¹²⁸ *Id.*, Lord Hailsham LC, 1079.

¹²⁹ Or its reversal on grounds of justice, referred to as *enrichissement indue*, *id.*, at 1129. Significantly for the connections now asserted, he cites the wayleave cases.

¹³⁰ [1970] 1 QB 548.

¹³¹ *Id.* 556, Sachs LJ, Widgery and Plowman LJJ agreeing, although the Court was not persuaded of the landlord's motives and did not in fact make the award. The plaintiff tenant did receive exemplary damages on this basis in *Drane v Evangelou* [1978] 1 WLR 455 (CA) (unlawful eviction) and the following cases cited in *McGregor*, 17 HLR 120, fn 1 para. 419: *McMillan v Singh* (1984) 17 HLR 120 (trespass) and *Guppy (Bridport) Ltd v Brookling and James* (1983) 14 HLR 1 (nuisance).

¹³² [1973] 1 NSWLR 653 (CA).

a company in which he was interested. However, as the award was measured by the punitive 'impact of the verdict upon the defendant', rather than his anticipated profit, the case has little restitutionary significance.¹³³

The proprietary torts, as might be expected, have also been a source of exemplary damages of restitutionary interest. Wallace J in the Supreme Court of Western Australia considered exemplary damages in the wrongful pasturing of cattle case, *Yakamia Dairy Pty. Ltd. v Wood*.¹³⁴ He stated that he would have awarded exemplary damages for the trespass on an anti-enrichment rationale, had these been sought¹³⁵. Unjust enrichment may also justify the 'deemed conversion' which may be committed by one who infringes another's copyright. By s116(1) of the *Copyright Act 1968* (Cth), the copyright owner may treat each infringing article produced by the wrongdoer as his own property, in conversion and detinue actions. This has the effect of providing for an award of damages for the plaintiff to be inflated by the scale of the defendant's infringement. It is comparable to the exemplary measure of damage discussed, even though no more than ordinary damages are awarded. The aim of both measures is to anticipate the defendant's gain. So in the copyright infringement case of *W H Brine Co v Whitton*,¹³⁶ the defendant Whitton was liable for damages equal to the full value of each soccer ball he imported which wrongfully bore the copyright marking of the Brine Company. Fox J observed that the owner was not merely compensated by this, he was also given a substantial benefit as well.¹³⁷

CONCLUSION

The *effect* of the user principle is to extend the reach of substantial damages, in relation to the wrongful use of property without loss. A plaintiff need no longer force himself into the 'straitjacket' of compensatory damages, but can found his claim on the defendant's benefit. We have noted that this is only a development in relation to chattels. The measure of damages for the wrongful occupation of land has long been benefit-based.¹³⁸

Plaintiffs who claimed for improper use of chattels in the past, and were unable to prove loss, have tried to avoid the compensatory rule by various means. A 'restitutionary' method was to claim a proprietary entitlement to the defendant's profit obtained by the use. In most cases this meant a proprietary claim to the defendant's *saving of expense* — the expense which the user was worth. This claim was made in quasi-contract through a technique known as 'waiver of tort'. The technique assumed that a tort involving the plaintiff's property had been committed and that the proceeds of it, a sum of

¹³³ Id 657-8, per Huntley JA.

¹³⁴ Fn 40.

¹³⁵ Id, 61, referring to the prevention of unjust enrichment and Lord Devlin's 2nd category in *Rookes v Barnard*, fn 14.

¹³⁶ (1981) 37 ALR 190.

¹³⁷ Id, 200.

¹³⁸ Fn 27.

money, remained in the defendant's hands. The plaintiff was said to 'waive the tort' when, by the action of money had and received, he made claim to that sum of money instead of seeking damages for the wrong.¹³⁹ The 'waiver' being an election to sue on the money count rather than prosecute the tort.¹⁴⁰ Such a stratagem was a clumsy way to obtain the defendant's saving of expense. Yet a saving of expense was as close to the 'proceeds' of a wrongful use in the form of a sum of money as the facts of a wrongful user case would permit. A quasi-contractual remedy of the type needed here was not available unless a specific sum of money (or 'proceeds') has been, or is deemed to have been, received by the defendant.¹⁴¹

This proprietary route to recovery for wrongful user without loss was disallowed by the English Court of Appeal in the second stage of the *Phillips v Homfray* case.¹⁴² It was stated by the majority of the Court waiver of tort could not be used when the tortious action failed, to claim in property the 'negative enrichment' of a defendant's saving of expense.¹⁴³ A saving of expense could not be equated with property, such as can be subtracted from another. It could not be claimed in a personal action.

Because of this decision, it has remained unclear whether any independent restitutory right of recovery on account of the defendant's user exists today.¹⁴⁴ Developments in the user principle and benefit-based awards of damages in tort may mean that the restitutory recovery along quasi-contractual lines is in nearly all user cases becoming obsolete,¹⁴⁵ or irrelevant.¹⁴⁶ This has significance in the wider area of restitution for wrongs generally: where one person's property or interests have been appropriated by another. It has been suggested by Friedmann that restitution should begin to look more at the character of the appropriation (or wrongful act), instead of only to the nature of the interest appropriated (or 'property').¹⁴⁷ Restitution for wrongs

¹³⁹ Descriptions of this obscure remedy in works of authority tend to differ. Perhaps the best account of it is in P Birks *An Introduction to the Law of Restitution* revised edn (Oxford, Oxford University Press, 1989), 314–8; cf R Goff and G Jones *The Law of Restitution* 3rd edn (London, Sweet & Maxwell 1986), 605–14 and J Beatson *The Use and Abuse of Unjust Enrichment* (Oxford, Oxford University Press, 1991), 206–11.

¹⁴⁰ See Dawson, fn 22, 612, who observes in relation to user of property claims that 'the shifty phrase, "saving of expenditure" ... should be shunned like contagious disease'.

¹⁴¹ H Street, *Principles of the Law of Damages* (London, Sweet & Maxwell, 1962), 258, R M Jackson, *The History of Quasi-Contract in English Law* (Cambridge, Cambridge University press 1936), 76–8.

¹⁴² (1883) 24 Ch D 439, the first stage and its failure discussed at fn 33.

¹⁴³ Id, 462, Bowen and Cotton LJ, 'the deceased, R Fothergill, by carrying his coal and ironstone in secret over the Plaintiffs' roads, took nothing from the plaintiffs.'

¹⁴⁴ Both Goff and Jones, fn 139, 610–11 and J Beatson, fn 139, 224–9 think that the case is sufficiently important on this account to be overruled. Courts in Canada and the United States are untroubled by the decision and do recognize an independent quasi-contractual liability for wrongful user: see, on almost the same facts, *Raven Red Ash Coal Co v Ball* 39 SE-2d 231 (1946), discussed in Klippert, fn 21, 525.

¹⁴⁵ Jackman, fn 18, 309, excepting where the tortious action is for some reason barred.

¹⁴⁶ Stoljar, fn 9, 109

¹⁴⁷ See D Friedmann 'Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong' (1980) 80 *Columbia LR* 504, 507.

should become more based in the tort and not so limited to a narrow property-base.

Does restitution, through the notion of 'unjust enrichment' and judicial subtraction of gains made by wrongful use, supply a sufficient rationale for the user principle? Is there not a problem with what *is* the gain, made as a consequence of another's wrongful user of the claimant's property? This is the problem of 'attribution'¹⁴⁸ or 'causal linkage'.¹⁴⁹ What can be the measure of a gain 'at the expense of' the plaintiff? Consider again the case of the subterranean cave.¹⁵⁰ Were the profits which Edwards made from the hotel, which he sited at the entrance to the cave, profits made from the wrongful occupation of Lee's land? Or were the hotel profits produced, at least in part, through Edwards' own efforts as a hotel proprietor? The most probable answer is yes, to both questions.¹⁵¹ As Mr Hodder says here,¹⁵² there should be some apportionment made to reach a fair measure of the gain attributable to Edwards' wrong. At least part of the profits of the hotel would not have been made without the underground attraction wrongfully appropriated. Australian courts are not unfamiliar with this exercise of appropriation. It parallels what is done where a constructive trust is implied out of an informal joint enterprise, in order to sort out the property entitlements of former de facto spouses.¹⁵³

Perhaps the compensatory basis of damages is not quite exhausted in this area. Sharpe and Waddams, in the article to which Hodder replied,¹⁵⁴ said that the compensatory rationale should continue to apply on a basis which assumes the fiction of a bargain between the parties. They say that a defendant's wrongful conduct, using property without obtaining permission, in effect deprives the plaintiff of an opportunity of setting his own price for giving permission. Hence damages should be given and explained as compensation for that lost opportunity.¹⁵⁵ Tortious examples of this in the article are nearly all drawn from the user of land repertoire, though we might add to them the analogous case of *Stoke-on-Trent v Wass*,¹⁵⁶ at least at first instance. It will be remembered that the appealed from damages award in that case equalled the reasonable price of a market licence, had the defendant asked for it. The need to employ the fiction of a bargain here greatly reduces the attractiveness of this rationale. Such an explanation for this species of restitution for wrongs reminds one of the implied contract, with its imposition of a reason-

¹⁴⁸ To borrow the expression of Beatson, fn 139, 230-4.

¹⁴⁹ As Klippert would say, see fn 21 generally.

¹⁵⁰ *Edwards v Lee's Administrator*, fn 29.

¹⁵¹ And accordingly the damages proposed in the *Edwards* case excluded *all* the profits from the hotel, very liberally for the defendant. See fn 29, 1032.

¹⁵² J G Hodder 'Profiting from Tortious Use of Property: A Reply to the Lost Bargain Theory' 42 *UT Fac LR* 105, 105-6.

¹⁵³ *Baumgartner v Baumgartner* (1987) 164 CLR 137; H A J Ford and W A Lee *Principles of the Law of Trusts* 2nd edn (Sydney, Law Book Company, 1990) para 2243.

¹⁵⁴ R J Sharpe and S M Waddams 'Damages for Lost Opportunity-to Bargain' (1982) 2 *OJLS* 290.

¹⁵⁵ *Id.*, 290-1.

¹⁵⁶ Fn 15.

able price. Implied contract is now discredited in this use and its failings have been authoritatively exposed.¹⁵⁷

The exemplary measure of damages for profit-making torts fits into this schema in a related way. Exemplary awards for these torts are an indirect way of preventing the wrongdoer's unjust enrichment.¹⁵⁸ If the rationale of exemplary damages is normally expressed to be punishment,¹⁵⁹ and sometimes deterrence,¹⁶⁰ the measure of the award given in profit-making cases is computed largely by reference to the magnitude of the wrongful benefit.¹⁶¹

In relation, then, to both the user principle and some awards of exemplary damages, the measure of damages is the defendant's benefit and not the plaintiff's loss. The *benefit* commodity, its valuation and reversal, is determined not by tortious considerations, but by the categories of property law and restitution — categories with which the law of torts is coming in some areas to intersect.

¹⁵⁷ See *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 227–8, Mason and Wilson JJ, 247–69, Deane J; also Goff and Jones, fn 139, 5–12.

¹⁵⁸ *McGregor on Damages*, op cit para 432.

¹⁵⁹ See fn 101.

¹⁶⁰ Friedmann, op cit, 552–6.

¹⁶¹ As well as the ability of the defendant to pay: *Rookes v Barnard* fn 14, 1228, Lord Devlin.