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Introduction

THE LAW REGARDING the chattel torts is in a bad state. There is no clear answer to the simple question of – how are property rights in chattels protected? The confusion surrounding this area of law results from the multiplicity of available actions: instead of a single tort that protects property rights in chattels, the common law has developed a number of overlapping actions. The four most important of these actions are conversion, detinue, trespass and negligence. The borders between these actions are, to a great extent, governed by historical and arcane divisions. For example, the actions of trespass and negligence are traditionally divided between ‘direct’ and ‘indirect’ interferences with chattels. Detinue is often seen as being more ‘proprietary’ than the other torts. In conversion only the most serious or ‘exclusionary’ interferences with chattels can be litigated in that tort, whereas more minor interferences are typically litigated in trespass. Trespass is also usually seen as a wrong against ‘possession’ of a chattel. This contrasts with the other torts which protect ‘ownership’. The arcane divisions between the actions have not only made the chattel torts unnecessarily complex, but they have introduced arbitrariness into this area of law, and there can be no justification for their retention in a modern legal system. It is for this reason that the need for a structural analysis of the chattel torts is so pressing. The principal aim of this book is to reveal some intelligible order in the chattel torts. By analysing the case law in the context of modern theories of liability, this book aims to provide a coherent and justifiable structure of the chattel torts.

I. The Focus on the Law of Torts

Although the aim of this book is to consider how the torts of conversion, detinue,¹ trespass and negligence protect property rights in chattels, such protection can be achieved through different areas of law. It is important to explain from the outset, therefore, why this book has chosen the law of torts as its focus. In an important article Birks explained that there are three different areas of private law that may afford protection to property rights in chattels: the law of property, the law of

¹ Detinue’s status as a tort is argued for in chapter five.

torts and the law of unjust enrichment.² The reason this book has chosen the second of these areas, the law of torts, as its focus, is that common law legal systems overwhelmingly protect property rights in chattels through the law of torts.

The first alternative to a claim in tort law, a claim in property law, would take the form of a proprietary claim, often called a 'vindicatio'. The vindicatio will be examined in detail in chapter four, but for introductory purposes it is worth noting that under this type of claim the owner of a chattel which is in the hands of another, directly asserts his property right: 'That cow, Buttercup, is mine!'³ A claim in the law of torts, on the other hand, (which will also be examined in chapter four) does not involve the direct assertion of the property right, but the claim that the defendant has infringed that right by interfering with the chattel: 'Because you have committed the wrong of misappropriating my cow, Buttercup, you are under an obligation to pay me damages'.⁴ A notable feature of the common law is that it does not recognise the first type of claim, the vindicatio. Although some have been critical of its absence from the common law,⁵ the vindicatio would be a poor substitute for the chattel torts. When the vindicatio is examined in chapter four it will be seen that, in systems which recognised it, the claim could only be brought against someone in possession of the chattel. This means that it is extremely limited in its scope: a person not in possession of the chattel, either because he has disposed of the chattel or because he never had possession in the first place, such as when he carelessly damages the chattel, cannot be sued in the action. However, there is no corresponding limitation in the law of torts because it is still possible for someone to infringe a property right in a chattel (and hence commit a tort) without taking and remaining in possession of the chattel.

The second alternative to a claim in the law of torts, a claim in unjust enrichment, suffers from similar problems. Although not as limited as the vindicatio, there being no need for a defendant to remain in possession of the chattel, there is a need to show that the defendant was 'enriched' by the receipt of the chattel. In the common case where the defendant infringed the claimant's property right by carelessly damaging his chattel, no claim in unjust enrichment would be available, as the defendant is not enriched. The limited scope of unjust enrichment in this context means that it would also be a poor substitute for the chattel torts.⁶ For these reasons the common law has settled on the law of torts as its primary means of protection for property rights in chattels.

² P Birks, 'Personal Property: Proprietary Rights and Remedies' (2000) 11 *Kings College Law Journal* 1, 3. The last two types of claim, tort and unjust enrichment, are each further divided by Birks into claims which yield personal remedies and claims which yield proprietary remedies. This leaves us, Birks concluded, with five different claims in total.

³ *ibid.*, 4.

⁴ *ibid.*, 6.

⁵ eg A Weir, *A Casebook on Tort*, 10th edn (London, Sweet & Maxwell, 2004) 483.

⁶ There is the added problem that there is much controversy over whether the law of unjust enrichment can protect property rights at all. Swadling persuasively argues that the survival of the claimant's title prevents the defendant from being enriched, precluding any claim being brought for unjust enrichment. See W Swadling, 'Ignorance and Unjust Enrichment: The Problem of Title' (2008) 28 *Oxford Journal of Legal Studies* 627.

It should also be noted that in focusing on the law of torts there is another matter which is excluded from the scope of this book. In some cases a claimant will have delivered his chattel to the defendant under what is termed a 'bailment'. In such cases the defendant usually promises, either under a formal contract or a simple undertaking, that he will take care of the chattel. Although cases in this area of law are often factually similar to those that occur in the chattel torts, in that bailees are frequently sued for damaging or losing the claimant's chattel, they will not be considered in this book. The focus of this book is purely on how tort law responds to the infringement of a property right in a chattel. However, in cases where there is a bailment, the claim is not based upon the infringement of the owner's property right, but on the breach of an undertaking.⁷ The focus of the action is the nature and terms of the undertaking. The fact that the undertaking concerns a chattel is merely incidental. Such cases, therefore, are beyond the scope of this book.

Finally, something should be said about the various torts actually considered in this book. Conversion, detinue, trespass and negligence are by no means the only actions in the law of torts that afford protection to property rights in chattels. For example, claims for property damage can be accommodated by other torts such as nuisance⁸ and products liability.⁹ Further, there are a number of obscure actions such as replevin, rescous and pound breach which are concerned with the protection of property rights in chattels which have been distrained.¹⁰ However, each of these actions is limited to certain factual scenarios, such as claims brought against neighbours, manufacturers or distrainers. It is only the four torts of conversion, detinue, trespass and negligence that establish general principles of liability for interferences with chattels. This book will focus on these four torts purely on the basis that they are the most important.

II. The Proposed Structure

This book is divided into four parts. Part I will examine the property rights protected by the chattel torts. Part II and Part III, which constitute the main part of this book, examine how property rights in chattels are protected by the chattel torts. It is in these sections that a new structure will be proposed. Part IV of this book will then ask what implications this structure has for how the courts award damages in the chattel torts.

⁷ See generally G McMeel, 'The Redundancy of Bailment' [2003] *Lloyd's Maritime & Commercial Law Quarterly* 169 and A Bell, 'The Place of Bailment in the Modern Law of Obligations' in N Palmer and E McKendrick (eds), *Interests in Goods*, 2nd edn (London, LLP, 1998).

⁸ eg *Hollywood Silver Fox Farm Ltd v Emmett* [1936] 2 KB 468 (KB).

⁹ Under the Consumer Protection Act 1987 s 5(1).

¹⁰ See M Jones (et al) (ed), *Clerk & Lindsell on Torts*, 20th edn (London, Sweet & Maxwell, 2010) paras [17-146]–[17-149].

Beginning with Part I, although property rights in chattels are protected through the law of torts, not the law of property, this does not leave us free to ignore the role of property law. A tort is the infringement of a right (or the breach of a duty not to infringe that right). In the context of the chattel torts the relevant right is the claimant's property right in his chattel, and the chattel torts each consist of an infringement of this right. In this sense the chattel torts do not exist independently of the law of property, but are, to use Birks's word, 'parasitic' upon it.¹¹ Any account of the chattel torts, therefore, would be incomplete without an examination of the rights that they protect. This will be the purpose of the first part of this book.

With some idea of the nature of property rights in chattels, we will then move on to the main part of this book, which asks how these rights are actually protected by the chattel torts. The principal aim of this book is to reveal a coherent and justifiable structure of the chattel torts. Under this proposed structure the only division that is drawn by the torts is between intentional interferences with chattels, where liability is strict, and unintentional interferences with chattels, where liability is fault-based. The acceptance of this proposed structure does not merely involve the superficial adoption of clearer labels for the actions. Its acceptance will have the effect of removing the arbitrary divisions which have long been a feature of this area of law. In their place a single justifiable division will be drawn between intentional and unintentional interferences with chattels. It is important to note from the outset that this is not a prescriptive account of the law. The purpose of this book is not to propose a model of how the chattel torts should be structured. Nor does this book provide a purely historical and descriptive account of the chattel torts. The approach of this book is what is sometimes referred to as 'interpretative legal theory', which means that the aim is to reveal some intelligible order in the chattel torts.¹² In doing so, this book will argue for a structure which can be justified according to modern theories of theories of liability, but which also provides the best fit with the outcomes and reasoning in the case law.

Demonstrating this proposed structure, where the only division drawn by the law is between intentional and unintentional interferences with chattels, will depend on being able to show that the law of torts has recognised two separate 'causes of action'. A cause of action is a set of facts, the occurrence of which gives one person legal rights against another.¹³ To demonstrate this proposed structure of the chattel torts it must be shown that the torts have recognised two such 'sets of facts' as giving rise to legal rights: first, the torts must have recognised that if a defendant has intentionally interfered with the claimant's chattel, then the claimant will have legal rights against the defendant although the defendant may have been completely without fault; secondly, the torts must have recognised that if a defendant has unintentionally interfered with the claimant's chattel, then the

¹¹ Birks (n 2 above) 7.

¹² A Beever and C Rickett, 'Interpretive Legal Theory and the Academic Lawyer' (2005) 68 *Modern Law Review* 320.

¹³ *Letang v Cooper* [1965] 1 QB 232 (CA) 244 (Diplock LJ).

claimant will have legal rights against the defendant if the claimant is able to establish that the defendant was at fault. The aim of Part II of this book is to demonstrate the existence of the first of these causes of action; the aim of Part III is to demonstrate the existence of the second.

Part II of this book will focus on the three actions of conversion, detinue and trespass. As each action is examined it will be seen that certain common features emerge. These common features make it possible to argue that the three actions amount, in substance, to a 'single tort' of intentional interference which imposes strict liability. Part III then focuses on the tort of negligence. It will be seen that negligence recognises a corresponding cause of action for the unintentional interference with another's chattel where liability is fault-based. When these two causes of action are taken together, therefore, we are left with the basic structure argued for in this book: the only division drawn by the chattel torts is between intentional interferences with chattels and unintentional interferences with chattels.

A further aim of Part II and Part III of this book is to justify this structure. It is not immediately apparent why tort law would treat intentional interferences with chattels as being distinct from unintentional interferences with chattels. For example, if a claimant is deprived of his car then it makes little difference to his position whether the defendant who deprived him was a thief (intentional interference) or a careless driver who destroyed his car (unintentional interference). In both cases the claimant is equally deprived of his car and has to pay the same amount of money for a replacement. If it cannot be explained why the law would distinguish between these two defendants then the structure proposed in this book is open to the same criticism made of the historical divisions between the actions, ie of being arbitrary. Over the course of Part II and Part III we will see that the reason tort law distinguishes between intentional and unintentional interferences is because it applies different standards of liability: liability is strict in relation to the former, fault-based in relation to the latter. It will be seen that these different standards of liability can be justified because it is only possible to impose strict liability in cases involving an intentional interference with another's chattel; strict liability in the context of unintentional interferences is unworkable, necessitating the adoption of the fault standard in such cases. The different standards of liability, therefore, will be the key to justifying the structure of the chattel torts proposed in this book.

Finally, in Part IV of this book it will be seen that the basic division between intentional and unintentional interferences with chattels is also relevant to rules governing compensation. These rules are far more favourable to a claimant suing for the intentional interference with his chattel than they are to someone complaining of an unintentional interference. In other words, we will see that the structure of the chattel torts is mirrored in the rules governing compensation.