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Review of "Liability for Wrongful Interferences with Chattels" by Simon Douglas (2011)

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REVIEW ESSAYS AND BOOK REVIEWS

Liability for Wrongful Interferences with Chattels, by Simon Douglas (Oxford, U.K., Hart Publishing, 2011, xx, 222 pp., £55)

In this carefully researched book, Simon Douglas argues that there are (or there ought to be) essentially only two separate actions provided at common law for wrongful dealing with chattels — two actions distinguished by the “fault” element of the torts concerned (one for “intentional” harm, the other for “negligent” harm), but also by their rules concerning causation. This view, of course, challenges the generally recognised common law paradigm: that there are three major actions dealing with what may be called the “goods torts,” conversion, detinue and trespass to goods; and that the general tort of negligence may apply in some cases (although without special rules relating to negligent harm to chattels).

Douglas does a very good job of setting out his thesis clearly, signalling how he will approach proving it, and keeping the reader on track. He argues that the common law today recognises effectively only two chattel-based actions in tort: one dealing with liability for *intentional* interferences with a chattel, which despite the reference to “intention” is a “strict liability” tort; the other, liability for *unintentional* interferences, which requires proof of “carelessness” in the sense required in the tort of negligence, but does not require proof of physical “harm” to the chattel.

There is much to be commended in this careful book. Chapter 2, for example, gives a very good overview of why property rights are “thing-related” and why it would not be a good idea to allow goods tort actions in relation to intangible rights. But overall the suggested scheme does not convince as a statement of the common law.

Douglas’ scheme is a rational division of the law. It is reminiscent, however, of the well-known passage in *Pride and Prejudice*, chapter 2:¹

“I should like balls infinitely better,” said Caroline Bingley, “if they were carried on in a different manner . . . It would surely be much more rational if conversation instead of dancing were made the order of the day.”

“Much more rational, I dare say,” replied her brother, “but it would not be near so much like a ball.”

1. Jane Austen (London, T. Egerton, Whitehall, 1813).

Douglas' scheme for the restructuring of the tort actions concerning chattels is indeed much more rational than the common law, but it is not near so much like the actual content of the common law.

Of course, any academic exercise that seeks to bring some order to the disparate decisions of common law judges over many centuries and in varied jurisdictions will wrestle with these problems. A systematisation that is consistent and coherent is desirable; to achieve it one may occasionally have to surmise that some judges got it wrong. But if an analysis of an area of tort law has to cut off whole streams of common law jurisprudence in order to work, the analysis may not be convincing to the judges or practitioners who have to apply it.

Douglas, in the present author's view, does not have the balance quite right. At least, it would be nigh impossible to support Douglas' analysis before a court in Australia; and it is suggested that the common law in Australia is worth considering as a significant part of the common law world. It also seems likely that the view will not readily be accepted in other common law jurisdictions.

The most obvious example is Douglas' view that the tort of trespass to chattels is *not* based on "actual possession" of the chattel concerned. This is not a minor point. The point must be made, however, if he is to persuade us that what are usually thought of as the three separate "goods torts," conversion, detinue, and trespass to goods, are really all the one tort: the tort of intentional interference with a chattel. Traditionally, there is a need to show actual possession to establish trespass to goods, while there is no similar need for the other two torts.

Indeed, Douglas wants to go even further and to establish that, in effect, there is no such legal concept as "possession," at least when applied to goods. He suggests:²

Whilst there may be a good justification for the existence of a limited "possessory right", it is suggested that it does not exist.

Douglas acknowledges that most text writers and judges think that there is such a concept as "possession," and that making out that the claimant was in actual possession of the chattel is essential to a claim for trespass to goods.³ He traces this view back to *Ward*

2. Douglas, pp. 30-31.

3. He cites, for example, at p. 31, the comments of the 20th edition of *Clerk & Lindsell on Torts* (Michael Jones and Anthony Dugdale, London, Sweet & Maxwell, 2010), and acknowledges that other leading texts agree.

v. Macauley,⁴ in which a landlord was denied a remedy in trespass to goods against seizure of his furniture, which was at the time in the possession of his tenant. But Douglas then attempts to persuade the reader that the case is no longer relevant, by noting that no *English* decision cites it.

Footnoted in that context, however, is a reference to the fact that *Ward* was cited in *Penfolds Wines Pty Ltd. v. Elliott*,⁵ in the High Court of Australia. For the Australian lawyer, this is something akin to seeking to establish the proposition that the law of negligence cannot protect a consumer where they cannot rely on a contract, and then footnoting *Donoghue v. Stevenson*⁶ as a minor exception! *Penfolds Wines*, for all its complexities and occasional obscurity, remains the leading decision on the goods torts in Australia. As well as its value as a considered decision directly on this point from the highest court of the land, it gains added lustre because of the involvement of Dixon J., usually regarded as one of the common law's leading jurists, not simply Australia's greatest judge.⁷

In the decision in *Penfolds Wines* there is no doubt that Dixon J. affirmed that actual possession was essential for an action in trespass to goods. The case involved a wine bottle that had been entrusted, through a chain of bailments, to a retailer on condition that he not re-use it. He did in fact refill it with other wine, and pass it on to a subsequent purchaser. But the owners of the bottle, Penfolds, were unable to make out their claim for trespass to goods, because they were not at the time in actual possession of the bottle, it having been delivered lawfully to each bailee in the chain. In one of the shortest sentences in a lengthy judgment, his Honour put it starkly: "Trespass is a wrong to possession."⁸

Douglas seems not to shy away from recognising that his view is contrary to common law authority of high standing. He argues, however, that to make possession a requirement for trespass will mean that there is a "gap" in the protection offered by the law where "a claimant is out of possession of his chattel at the time of

4. (1791), 4 T.R. 489 (K.B.).

5. (1946), 74 C.L.R. 204 (H.C. Aus.).

6. [1932] A.C. 562 (H.L. (Sc.)).

7. See, for example, Lord Reid's comment about Dixon J.: "There is no greater authority on questions of legal principle" (*R. v. Warner*, [1969] 2 A.C. 256 (H.L.), at p. 274).

8. *Penfolds Wines*, *supra*, footnote 5, at p. 224. The statement has never been doubted, in Australia at least. See fairly recently *Slaveski v. Victoria*, [2010] V.S.C. 441 (Vict. S.C.), at para. 295: "The tort protects the plaintiff's possession of goods."

the interference and the interference does not amount to a conversion or detinue,”⁹ citing *Penfolds* as a case where this “gap” materialised.

Of course to describe the situation as a “gap” is to predetermine one’s response, since gaps, in this metaphorical context, need to be filled. Yet it is perfectly possible to conclude simply that the set of rights held by someone who has ownership of a chattel does not include the right to object to a minor touching or “interference” while that person is not in actual possession of the chattel. There is nothing inherently illogical about such a view, which is the result of the decision in *Penfolds* and seems to make much sense. The common law is willing on the one hand to intervene to prevent even minor touching of a chattel (not involving long-term harm to the chattel) currently being held by a person. As in the law of battery, it is prepared to protect even a minor touching of the person’s body, and for the same reasons, to avoid the matter quickly escalating into violence. But, on the other hand, the common law will not interfere to protect against such minor touching, where the complaint is not made by the person currently in possession.

Douglas’ revision of the law will meet with little sympathy in Australia. But it is suggested that more generally it seems to cut across a number of important common law principles. Indeed, by the end of chapter 3 we are told that, in addition to not protecting “possessory rights,” the law neither protects chattel leases nor equitable rights in chattels.

Chapter 4 examines the requirements for “conversion.” As Douglas notes, the courts have used various terms over the years to describe the essence of conversion. One that Douglas does not seem to favour is the term used by Dixon J. in *Penfolds Wines Pty Ltd. v. Elliott*:¹⁰ “exercise of dominion.” Dixon J. uses this term to distinguish the action for conversion from the action for trespass to goods, where it is sufficient to show a mere touching or “asportation.”

Yet, because Douglas aims to argue that the three traditional “goods torts” are really only one, he has to eliminate the differences by challenging the decisions that establish those differences. *Fouldes v. Willoughby*¹¹ is the classic example here. The case involved a ferryman removing the plaintiff’s horse from a

9. Douglas, at p. 33, note 75.

10. *Supra*, footnote 5, at p. 229.

11. (1841), 8 M&W 540 (Ex. Ct.).

ferry. The action for conversion failed because there was no exercise of “dominion” over the horse. (There could, it seems clear on the authorities, have been an action for trespass to goods, but this was not taken.) Yet Douglas’ over-riding aim of equating the different torts leads him in the end to cast real doubt on the correctness of *Fouldes*. In concluding his discussion in chapter 4, he suggests that the distinction between interferences that “exclude” the true owner, and those which do not, is not all that important, and implies that in fact the plaintiff in that case ought to have succeeded: “Admittedly his interference was not so extensive as to exclude the claimant, but this should be reflected at the remedies stage . . .”¹² Clearly, without directly saying so, Douglas thinks that *Fouldes* was wrongly decided, or at least should now be overturned. We have, then, yet another case which would be regarded by most lawyers interested in the area as firmly settled, being cast aside to fit the new theory.¹³

The treatment of the action for negligence in relation to goods suffers similar problems. In chapter 8, for the purposes of redrawing the law, Douglas needs to establish that an action for negligence is available in relation to personal property where there has been merely an interference with use of the property, as opposed to actual physical harm. But the cases he cites are not in the end persuasive. One of the key Australian cases, *Perre v. Apand Pty Ltd.*¹⁴ clearly used the category of “economic loss,” rather than damage to goods, to deal with harm caused by an interference with the right to freely sell potatoes. No actual potatoes were harmed in the making of the decision. Yet for some reason Douglas seems to suggest that this case supports his view that a mere interference with goods will be sufficient to establish a claim in negligence. It does not. Chapter 9 clearly suggests that *The Wagon Mound (No. 1)*¹⁵ must have been wrong; again, this proposition would need very strong support given the high authority and regular citation of the decision ever since.

12. Douglas, at p. 76.

13. Another area where an Australian lawyer could not agree with the analysis is in the support offered at pp. 109-110 to the view that since *Letang v. Cooper*, [1965] 1 Q.B. 232 (C.A.), the action for trespass is only available for intentional as opposed to negligent wrongdoing. This view has been rejected at the highest level in Australia (see *Williams v. Milotin* (1957), 97 C.L.R. 465 (H.C. Aus.)) and was in any case only *obiter* in *Letang*.

14. (1999), 198 C.L.R. 180 (H.C. Aus.), discussed by Douglas, pp. 156-157.

15. [1961] A.C. 388 (P.C.).

In the end, Douglas' restatement of the law of personal property may indeed be a more sensible way for the law to be shaped. But it seems fairly clear that it does not represent the current law, and that a final court of appeal tempted to adopt his restatement of the law would have to effectively overturn a number of important and long-standing precedents in order to do so. It may not be fashionable to say so, but to the present author it seems that such a process would be better undertaken by a Law Reform Commission than by a judge or series of judges. Indeed, it is interesting that Douglas himself notes that his proposals are effectively very similar to those put forward by the English Law Reform Committee some years ago.¹⁶ The result of that Report was a reforming statute that adopted some, but by no means all, of the recommendations.¹⁷ If Parliament declined to adopt these suggestions for change, it seems odd to suggest that either the courts have already moved to do so, or that they should now do so in disregard of those Parliamentary decisions. Of course courts in other common law jurisdictions outside England and Wales would not be subject to those particular considerations; but they may be given pause at being asked to undertake a fundamental "legislative" reshaping of a well-established area of private law.

It may be argued that criticisms of this sort are too narrow, that the author is at liberty to suggest how the goods torts *ought* to operate. Indeed he is. But these comments are offered against the claim that the book is "not a prescriptive account of the law" and that its aim is "not to propose a model of how the chattel torts should be structured."¹⁸ The author's aim, he says, is in some sense to provide a model that has a "best fit with the outcomes and reasoning in the case law." At this level it has to be said that, in this author's judgment, it does not succeed.

The "goods torts" are not a highly popular area of academic study, nor do they feature in many significant judicial decisions, and Douglas is to be commended for a careful overview of the current scene as the background to his proposals. Yet it may be that one reason that the law is not often litigated is that, illogical as some of the distinctions made here are, they are reasonably well understood by those who draw up commercial contracts in mundane but wide-reaching areas like bailment and sale of goods.

16. Law Reform Committee, *Conversion and Detinue*, 18th Report, Cmd. 4774 (London, H.M.S.O., 1971), noted by Douglas especially at pp. 123-124.

17. The Torts (Interference with Goods) Act 1977.

18. Douglas, p. 4.

A wholesale judicial revision of the law in the area may in the end do more harm than good. It may also be doubted whether it would be a legitimate use of the judicial power to settle disputes over private rights.

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