Confusing Contract and Tort When Measuring Damages for a Seller's Conversion Of Goods Sold

By Nicholas Curwen*

I. Introduction

The rules of property law, contract law and tort law occasionally coincide on the same set of facts. This concurrence of disparate legal regimes can create conceptual difficulties. It is not always immediately apparent how to avoid a conflict between the rules or avoid one set of rules producing an undesirable result. One example is where a contract for the sale of goods transfers ownership to the buyer on credit terms. Before the price is paid and before delivery the seller wrongfully resells the goods elsewhere or, having delivered the goods to the buyer, the seller wrongfully retakes them and then sells them elsewhere. In response the buyer relies on their ownership and sues the seller in tort, usually conversion, claiming the full value of the goods. When assessing the buyer's damages the court will have one eye on the outstanding price. If the seller's conversion means that they are unable to deliver the goods then that prevents them from suing for the price.[1] In such circumstances, if the buyer were entitled to the full value of the goods in conversion they would acquire an unjustified windfall. Alternatively, if the goods were converted after delivery then the seller is entitled to raise a counterclaim for the unpaid price, but if the buyer is insolvent no more than a dividend, if any, will be payable.

These unusual situations do not seem to have been considered by the New Zealand courts but they have been considered by the courts in England and Australia. The relevant rules, whether derived from statute or common law, would appear to be the same in all three jurisdictions so conclusions drawn from the other two jurisdictions are applicable in New Zealand. When dealing with the problem outlined above the English and Australian courts have struggled to give a convincing explanation as to why the unpaid price should or should not be taken into account when assessing the buyer's damages in tort. This article will highlight the way in which those courts have failed to apply the appropriate rule when measuring the buyer's loss and it will argue in favour of a more principled basis for their decision making.

II. Measuring Damages: The Difference Between Contract And Tort

Calculation of the buyer's loss in contract and tort reflect the different purposes which the two regimes pursue. The main aim of awarding damages for breach of contract is to compensate the plaintiff for their lost expectations. The plaintiff alleges that the defendant failed to make them better off. Damages should therefore attempt to place the plaintiff in the position they would have

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1 See the Sale of Goods Act 1908 s 30.

been in had the contract been performed.[2] The court must decide what the parties ought to have done according to their contractual obligations. In our case the seller should have delivered the goods or not retaken them and the buyer should have paid the price. If the seller in fact fails to deliver then in most cases the buyer will only suffer loss if the value of the goods, usually measured by the market price, rises between the making of the contract and the seller's breach.[3] The buyer will then have to spend more in order to buy similar goods elsewhere. Alternatively, if the seller wrongfully retakes goods which have already been delivered they are in breach of their warranty for quiet possession.[4] If the contract had been performed then the buyer would have kept the goods and paid the price. The buyer's loss is therefore the difference between the value of the goods when they were retaken less the unpaid price. So in the absence of a rise in the market price the loss is usually nominal.

The courts however have become confused when trying to explain how the unpaid price should be taken into account when the buyer sues in tort. The main aim of awarding damages in tort is to reverse loss already inflicted by the defendant. The plaintiff alleges that the defendant has made them worse off. Calculation of the damages should therefore attempt to place the plaintiff in the position they would have been in had no tort been committed.[5] This principle of restorative justice requires the court to speculate what *would* have happened, which is not the same as calculating contract damages where the court has to decide what *should* have happened. The full significance of this difference has been overlooked by the courts in all the cases on sale which we will consider. Here the relevant cases will be examined and where the judicial techniques used are found to lack either coherence or conviction, a more principled basis for the decision will be suggested by applying the principle of restorative justice. First though we need to consider the way in which damages should be measured in conversion because it is a muddled amalgam of both tort and property law.

III. Damages in Conversion: The Difference Between Property and Tort

If the plaintiff is the unencumbered owner of goods and wants to recover those goods from a defendant who wrongfully detains them, then the claim takes the form: 'those are my goods; I am entitled to their immediate possession; return them to me.' This is a proprietary claim because it vindicates the plaintiff's ownership by requiring the return of what belongs to the plaintiff. There is no allegation of breach of duty and there is no request for damages so it is not a claim in tort. The common law has never given full effect to this proprietary claim.

The oldest surviving action for the recovery of goods is detinue. It is a claim that the defendant wrongfully detains the plaintiff's goods. The remedy at common law gives the defendant the option of returning the goods or paying their full value to the plaintiff. It is therefore the defendant and not the court who decides whether the goods should be returned to the plaintiff. In the old

2 See *Robinson v Harman* (1848) 1 Ex 850, 855; 154 ER 363, 365 (Parke B).

3 See the Sale of Goods Act 1908 s 52.

4 See the Sale of Goods Act 1908 s 14(b).

5 See *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39 (Lord Blackburn).

days detinue often failed to produce any remedy because the defendant could wage his law.[6] Trover, later to be called conversion, emerged in the 16th century as a form of trespass on the case to overcome that particular procedural defect.[7] It lay for a wide range of unlawful interferences with the plaintiff's goods including unlawful detention. However, because it was an action on the case the only remedy at common law was damages. Equity intervened by ordering the defendant who wrongfully detained the goods to deliver them to the plaintiff. This intervention was only available if the goods were unique or substitutes were not readily available.[8] So the defendant today will be ordered to return the goods only if they cannot be replaced. Otherwise the defendant will be ordered to pay the full value of the goods.[9]

If the defendant wrongfully disposes of the plaintiff's goods, and therefore no longer detains them, then the plaintiff will require compensation for their loss. Necessarily this is a claim in tort and the obvious action in this instance is conversion. The appropriate remedy here should not necessarily be the full value of the goods. In accordance with the restorative principle it should be the plaintiff's loss. However, when trover first emerged it was designed to replace the more proprietary claim in detinue and that led to the old rule that damages in trover should reflect the plaintiff's whole interest in the goods. In doing so the difference between a proprietary claim and a claim in tort for compensation was ignored. However, the weight of modern authority recognises that the plaintiff in conversion should recover no more than their actual loss.[10] This should clearly be the rule where the claim is in tort and it has been accepted by the New Zealand courts as applying to claims in conversion.[11] In *UDC Finance Ltd v Philip Mills Ltd,*[12] Holland J, in the context of a claim in conversion, quoted with approval the following passage from Todd (et al), *The Law of Torts in New Zealand*:[13] 'The object of an award of damages in tort is to put the injured party into the position in which he or she would have been had the injury, with its consequent damage, not occurred. This is known as the principle of restitutio in integrum.'[14]

However, the New Zealand courts have not had the opportunity of applying this rule to the problem dealt with in this article, hence the emphasis on English and Australian cases. In all the cases which we will consider the defendant seller no longer possessed the goods, so the basic rules of tort for measuring damages were relevant but not always judicially appreciated. We will begin with the difficult case of *Chinery v Viall*.[15]

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6 This involved the defendant swearing his innocence and then hiring a group of compurgators prepared to testify before the court that he spoke the truth. It enabled the defendant to avoid liability. Wager of law was abolished by s 13 of the Civil Procedure Act 1833, 3 & 4 Wm 4, c 42.

7 Wager of law was not available in actions of trespass on the case.

8 See *Pusey v Pusey* (1684) 1 Vern 273, 23 ER 465 and *North v Great Northern Railway Co* (1860) 2 Giff 64.

9 See Stephen Todd (et al), *The Law of Torts in New Zealand* (4th ed, 2005) 12.3.04 (2).

10 See *Wickham Holdings Ltd v Brooke House Motors Ltd* [1967] 1 WLR 295, 299-300; *Butler v The Egg and Egg Pulp Marketing Board* (1966) 114 CLR 185, 192; *Brandeis Goldschmidt & Co Ltd v Western Transport Ltd* [1981] QB 864, 870; and *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [63-86].

11 See *UDC Finance Ltd v Philip Mills Ltd,* 10 May 1991 High Court, Christchurch Holland J CP577/89 and *Campbell v Dominion Breweries Ltd* [1994] 3 NZLR 559.

12 10 May 1991 High Court, Christchurch Holland J CP577/89.

13 (1st ed, 1991) 23.2.1.

14 Ibid 11.

15 (1860) 5 H & N 288; 157 ER 1192.

IV. The Buyer Sues In Tort But Is Not Liable For The Price

In *Chinery v Viall* sheep were bought on credit. The buyer became owner straight away and was entitled to possession but found it convenient to leave the sheep with the seller until he was able to collect them. Before payment the seller wrongfully resold most of the sheep. The buyer sued him for failure to deliver the sheep in accordance with the contract and also sued in conversion for the full value of the sheep. At the trial the jury found that the buyer's loss in contract for the seller's failure to deliver was £5. On the second count in conversion a verdict was entered on behalf of the plaintiff for £118 19s; the full value of the converted sheep.

On appeal Bramwell B, speaking for the whole court, accepted the buyer's right to sue in conversion and furthermore held that a resale by the seller prevented him from suing the buyer for the price.[16] However, the judge reduced the buyer's damages of £118 19s in conversion to just £5. He pointed out that it was not an absolute rule that damages in conversion were to be measured by the value of the goods. The plaintiff should be awarded no more than the real damage he sustained, which required the unpaid price to be taken into account. Bramwell B then said, 'the principle deducible from the authorities being that a man cannot by merely changing the form of action entitle himself to recover damages greater than the amount to which he is in law entitled, according to the true facts of the case and the real nature of the transaction.'[17]

Bramwell B was equivocal about the real basis for his decision. First, he said that the buyer could recover no more than his real loss in conversion but then suggested that the buyer could recover no more in conversion than in contract. However, if the buyer's loss in conversion is to be reduced by the unpaid price why is it necessary to invoke a rule that prevents tort damages exceeding contract damages on the same facts? The suspicion is that Bramwell B could not work out exactly how the unpaid price should be used to limit the buyer's damages in tort and so, as a safety measure, introduced a somewhat arbitrary rule that cut down tort damages by asserting the supremacy of contract rules. It is no wonder that the case has been used to support two quite different propositions. On the one hand it has been cited as authority for the proposition that damages in conversion should reflect the plaintiff's actual loss.[18] On the other hand it has been relied on in support of the far more dubious proposition that if the same facts give rise to an action in contract and an action in tort then the tort damages cannot exceed the contract damages.[19]

Concentrating on the buyer's loss in tort, *Chinery v Viall* has been explained as a case where the buyer's damages had to be reduced in order to reflect the seller's proprietary interest in the goods as an unpaid seller in possession.[20] This is a strange rationalisation because Bramwell B expressly rejected the notion, argued by the seller's counsel, that the seller had a proprietary interest in the goods which therefore prevented the buyer from suing him in conversion. He noted that a plaintiff in conversion needed both a right of property in the goods and a right of possession. The court accepted the buyer's right to sue in conversion so the buyer must have been regarded

16 The latter rule is now contained in s 30 of the Sale of Goods Act 1908 which requires that the seller must be ready and willing to give possession before they can sue for the price.

17 (1860) 5 H & N 288, 295; 157 ER 1192, 1195.

18 See *Hiort v London and North Western Railway Co* (1879) LR 4 Ex D 188, 199 and *Butler v The Egg and Egg Pulp Marketing Board* (1966) 114 CLR 185, 192.

19 See *The Arpad* [1934] P 189, 233.

20 See *Attack v Bramwell* (1863) 3 B & S 520, 528; 122 ER 196, 199; *Johnson v Stear* (1863) 15 CB (NS) 330, 335-336; 143 ER 812, 814; *Belsize Motor Supply Co v Cox* [1914] 1 KB 244, 252; and *Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd* (1968) 121 CLR 584, 603.

as having the right to immediate possession.[21] A lien is the right of a creditor to retain possession of a debtor's goods until the debtor satisfies an outstanding debt due to the creditor. It therefore confers on its holder the right to immediate possession of the goods. As the buyer in this case had the right to immediate possession, because he had title to sue in conversion, it follows that the seller could not have had a lien over the sheep for the price. The seller had after all agreed to hold the sheep to the buyer's order and thereby had become the buyer's bailee at will. The common law did not confer a non-consensual lien on sellers who held the goods as the buyer's agent or bailee at will: such a lien was first introduced by section 41(2) of the Sale of Goods Act 1893.[22] Even if the seller were regarded as having a lien his unlawful resale would have had the effect of discharging the lien.[23]

When *Chinery v Viall* was heard at first instance the jury calculated the buyer's loss for breach of contract at £5. Bramwell B used that figure as the measure of the buyer's loss in conversion, so it seems that he substituted the measure of loss in contract for the measure of loss in tort. If that was the case then it was an illegitimate manoeuvre. Winfield criticised Bramwell B's judgment on the ground that plaintiffs should be free to choose whichever cause of action produced the greater award of damages.[24] However, in *The Arpad*[25] a majority in the English Court of Appeal held that where wheat was sold on cost, insurance and freight terms, and the sea carrier failed to deliver all the shipped wheat to the buyer, the latter could sue the carrier for failure to deliver under the carriage contract but could not recover greater damages by suing the carrier in conversion. Maugham LJ specifically relied on *Chinery v Viall* for that proposition. In so far as *Chinery v Viall* and *The Arpad* held that conversion damages could not exceed contract damages on the same facts, they must now be regarded as impliedly overruled in England by the House of Lords' decision in *Henderson v Merrett Syndicates Ltd*.[26] In that case their Lordships held that if the same facts generated both a claim for breach of contract and a claim in tort then the plaintiff must be permitted to take advantage of the remedy which was more advantageous to him. So Winfield has been vindicated. Furthermore, the Court of Appeal in New Zealand has accepted the rule in *Henderson v Merrett*.[27]

The prevailing view that tortious liability is compatible with contractual liability on the same facts is more principled than that relied on in *Chinery v Viall* and *The Arpad*. It was simply an obfuscation for Bramwell B to talk of the 'true facts' and the 'real nature of the transaction.' The facts clearly determine the nature of the action available to the plaintiff. The same set of facts can generate both a claim in contract and a claim in tort. It is misleading to suggest that there is an independent technique for measuring such a loss; it must be measured using contract rules or tort rules. When those rules produce different measures of damages why should contract rules prevail over tort rules? By way of an answer, in *The Arpad*, Maugham LJ said 'though technically the

21 For the requirement that the plaintiff in conversion must have the right to immediate possession see: *Gordon v Harper* (1796) 7 TR 9; 101 ER 828; *Bloxam v Sanders* (1825) 4 B & C 941; 107 ER 1309; *Owen v Knight* (1837) 4 Bing (NC) 54; 132 ER 709; and *Bradley v Copely* (1845) 1 CB 685; 135 ER 711.

22 56 & 57 Vict, c 71. The equivalent provision in the New Zealand Sale of Goods Act 1908 is s 42(2).

23 See *Mulliner v Florence* (1878) 3 QBD 484.

24 See P Winfield, *The Province of the Law of Tort* (1931) 80-81.

25 [1934] P 189.

26 [1995] 2 AC 145.

27 See *Riddell v Porteous* [1999] 1 NZLR 1, 9 (CA); *Allison v KPMG Peat Marwick* [2000] 1 NZLR 560, 582 (CA) and *Price Waterhouse v Kwan* [2000] 3 NZLR 39, 44 (CA).

facts may be held to amount to conversion by the defendant to his own use, yet the real ground of the action is breach of contract to deliver.'[28] In effect Maugham LJ regarded the action for breach of contract as the 'real' claim and the action in conversion as a technicality. Such an approach is unprincipled and arbitrary because it overlooks the fact that contract and tort represent different types of claim which are satisfied by damages that are calculated using different techniques. In tort damages represent reparation for loss already inflicted whereas in contract damages compensate for lost expectations. Another way of putting it is to say that, 'tort damages look back to a former, unharmed plaintiff; contract damages look forward to a future, unharmed plaintiff.'[29] To confuse these two approaches creates incoherence.

What seems to have concerned Bramwell B was the old rule that damages in conversion were to be measured by the full value of the goods, whether or not that reflected the buyer's actual loss. To avoid that unwelcome result he seems to have substituted contract damages for tort damages. It would have been preferable had he concentrated on tort damages and clearly explained how they did not have to be measured by the full value of the goods. His failure to do that led to vague and unconvincing reasoning.

In the earlier case of *Gillard v Brittan*[30] a buyer had taken delivery of goods but not paid the full price before the seller unlawfully retook the goods. The buyer sued in trespass and was awarded damages measured by the full value of the goods. It is instructive to compare the case with *Chinery v Viall*.

V. The Buyer Sues In Tort And Is Liable For The Price

In *Gillard v Brittan*[31] cloth was sold on credit and delivered to a Bristol tailor. The cloth was made into clothes which had the effect of transferring ownership to the buyer if it had not already been transferred. Having paid only part of the price the buyer secretly left his business premises and moved to Devon, taking all his stock with him. With difficulty the seller managed to trace the buyer and wrongfully took some of the clothes made from the cloth the seller had supplied. The buyer then successfully sued in trespass for the full value of the clothes retaken. The buyer could just as easily have sued in conversion but it would have made no difference to the quantification of damages because the plaintiff was the owner claiming the loss of his goods. It was assumed by the court that the seller's unlawful conduct had not prevented him from suing for the price; he had after all delivered the goods.

The seller's real difficulty in *Gillard v Brittan* was that a debt in one cause of action could not be set-off against damages in another cause of action, so the plaintiff's damages in trespass could not be reduced by the unpaid price. The common law recognised a set-off in one limited situation only: the buyer's right to set-off damages for a seller's breach of warranty for quiet possession against the seller's claim for the price.[32] Set-offs were first introduced by section 11 of the Insol-

28 [1934] P 189, 234.

29 Stephen Todd (et al), *The Law of Torts in New Zealand* (4th ed, 2005) 22.2.03.

30 (1841) 8 M & W 575; 151 ER 1168.

31 This case was not referred to by Bramwell B in *Chinery v Viall* but it was referred to in support by the buyer's counsel.

32 See *Mondel v Steele (*1841) 8 M & W 858; 151 ER 1288. The rule is now to be found in the Sale of Goods Act 1908 s 54(1)(a).

vent Debtors Relief Act 1729[33] and section 4 of the Debtors Relief Amendment Act 1735.[34] Under those statutes debts could only be set-off against other debts and in *Gillard v Brittan* the plaintiff was claiming unliquidated damages in tort rather than claiming a debt. Also at that time there was no provision for counterclaims. These were first introduced by section 24(3) of the Supreme Court of Judicature Act 1873.[35] All the seller could have done in this case would have been to bring a separate cross action for the unpaid price.

Denman J[36] could not reconcile *Gillard v Brittan* with *Chinery v Viall* and thought that the later case must be taken to have overruled *Gillard v Brittan*. McGregor disagrees, arguing that *Chinery v Viall* is distinguishable because in that case the seller could not sue for the price.[37] But that in itself is not enough to justify the different decisions in the two cases. In *Gillard v Brittan* the court was clear that the unpaid price could not be taken into account when measuring the buyer's damages in tort. If the seller wanted to recover the price he would have to sue for it as a breach of contract. In measuring contract damages if the buyer is liable to pay the price then they ought to pay so their liability to pay necessarily reduces the measure of the seller's liability. The same technique cannot be used when measuring tort damages because the issue here is whether the buyer *would* have paid, not whether they *should* have paid. That does not mean that the unpaid price is necessarily irrelevant when calculating loss in tort, rather it means that the buyer's liability to pay is irrelevant. The way to ensure that the buyer does not recover a windfall from the seller is to concentrate on the *restitutio in integrum* principle and apply it rigorously. It is something the courts have consistently failed to do in cases where a buyer has sued a seller in conversion.

VI. Using The Rules Of Tort To Prevent Windfalls

An alternative way of justifying the decision in *Chinery v Viall*, which relies purely on the law of tort, can be found in the decision of the High Court of Australia in *Butler v The Egg and Egg Pulp Marketing Board*.[38] In that case Mr Butler was an egg producer and by statute all eggs produced by chickens owned by egg producers in Victoria belonged absolutely to the Egg and Egg Pulp Marketing Board. Egg producers had to deliver the eggs to the Board, which would then sell the eggs. In return the Board had to pay each egg producer their proportion of the net proceeds of sale. Mr Butler failed to comply with the statute and sold the eggs elsewhere. The Board sued him in conversion claiming the full value of the eggs which was Aus £4,000. If the Board had been able to sell the eggs, the sum that it would have had to pay the defendant would have been Aus £2,900. Accordingly the defendant argued that he was only liable to pay the difference of Aus £1,100 because that represented the Board's loss.

It was accepted by the court that because the defendant had failed to deliver the eggs to the Board he was prevented from suing for his proportion of the notional net proceeds. Such an entitlement was dependent on delivery of the eggs. It therefore appeared that the Board was entitled to the full value of the eggs. However, Menzies J cited *Chinery v Viall* as authority for the proposition that a plaintiff in conversion could only recover their actual loss. Taylor and Owen JJ went

33 2 Geo 2, c 22.

34 8 Geo 2, c 24.

35 36 & 37 Vict, c 66.

36 See *Johnson v Lancashire & Yorkshire Railway Co* (1878) 3 CPD 499, 507.

37 See Harvey McGregor, *McGregor on Damages* (17th ed, 2003) [33-058].

38 (1966) 114 CLR 185.

further and invoked *Livingstone v Rawyards Coal Co*,[39] arguing that the Board should be put in the position it would have been in if no tort had been committed. On that basis the defendant would have complied with his statutory obligation and delivered the eggs to the Board, which would have sold them and paid the defendant his share of the net proceeds. Accordingly the Board's loss was Aus £1,100 and that was the measure of the damages payable.[40]

In *Chinery v Viall* the seller could not sue for the price so in modern conditions he would be unable to plead a counterclaim. Nonetheless the case can be explained by applying the reasoning adopted in *Butler's* case. Had the seller not converted the sheep it is likely that the buyer would have collected them and paid the price. The buyer's loss was therefore the difference between the contract price and the value of the sheep when they were converted by the seller, so the buyer's loss was minimal. Bramwell B reached the right decision but without identifying the correct rule.

The ratio in *Butler's* case has been criticised by Stevens[41] who prefers what he calls a 'rights model' view of the law of tort as opposed to a 'loss model' view. In his opinion damages in tort should be substitutive for the defendant's violation of the plaintiff's primary right rather than reflect the plaintiff's loss. He regards both *Butler's* case and *Chinery v Viall* as cases where the plaintiff was awarded reduced damages, not as a reflection of their loss but in order to prevent their unjust enrichment. This is clearly at odds with the ratio in *Butler's* case where the court invoked a well-established rule of the law of tort to measure the plaintiff's damages by reference to their loss. This does seem preferable to Steven's interpretation.

Stevens' approach views the plaintiff as prospectively unjustly enriched. This must be because the plaintiff is regarded as initially entitled to the full value of the goods in conversion. Presumably their damages are to be treated as substitutive for the violation of their rights as owner. That enrichment is then prevented because otherwise it would be at the defendant's expense as well as being unjust. This analysis of *Chinery v Viall* requires the law of tort to uphold the buyer's entitlement to the full value of the goods even though they have suffered no loss. That is indefensible; otherwise why invoke unjust enrichment to prevent payment of the damages? It also involves convoluted reasoning which could be avoided by simply applying the *restitutio in integrum* principle. Using that rule there is no possibility of the plaintiff, even potentially, obtaining a windfall so unjust enrichment theory is redundant. The principle of Occam's razor would, in this instance, seem to favour the loss-based approach to calculating tort damages rather than the rights-based approach.

Calculating loss in tort inevitably requires the use of assumptions. The court must speculate what would have happened had no tort been committed. In the case of a sale it can usually be assumed that the buyer would have paid for the goods if the seller had complied with their own obligations. If events establish that that assumption is unfounded, then applying the *restitutio in integrum* principle cannot be used to limit the buyer's damages. In particular, if the buyer is insolvent they are unable to pay the price and so the measure of their loss cannot be reduced by the unpaid price because they would not have paid the price even if the seller had committed no tort. This situation arose in another Australian litigation involving electrical appliance manufacturers, Healing (Sales) Pty Ltd, and electrical appliance retailers, Inglis Electrix Pty Ltd.

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39 Referred to in above n 5.

40 *Butler's* case was specifically approved of in *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19 by Lord Nicholls [66-67] speaking for the majority.

41 See Robert Stevens, *Torts and Rights* (2007) 65-66.

VII. The Insolvent Buyer Suing In Tort

Healing sold and delivered domestic electrical goods to Inglis on credit, ownership passing on delivery. During the credit period the buyer encountered financial difficulties and the bank with a floating charge over the buyer's assets lawfully appointed a receiver. The seller's response was to launch a co-ordinated raid on all the buyer's retail shops in Sydney and unlawfully repossess the goods already delivered. The goods were then resold. The buyer, at the instigation of the receiver, duly sued in conversion. The seller did not set up a counterclaim for the price, presumably because the buyer was insolvent.[42] Nor was a set-off pleaded, presumably because a set-off required the other party to claim a debt whereas the buyer in this case claimed unliquidated damages in conversion. Instead the seller argued that the unpaid price should be taken into account when assessing the buyer's damages. At first instance[43] Macfarlane J held that the seller's wrongful seizure of the goods relieved the buyer of their obligation to pay the price. Applying *Chinery v Viall* and *Butler's* case, Macfarlane J held that the buyer's loss had to take into account the unpaid price. Accordingly he awarded the buyer nominal damages for their loss.[44]

Macfarlane J's judgment regarding the plaintiff's loss was reversed by the New South Wales Court of Appeal[45] which held, applying *Gillard v Brittan*, that the buyer was still liable to pay the price. The buyer was therefore entitled to the full value of the goods in conversion. If the seller wanted to recover the price then they would have to sue for it. This decision was upheld by a majority in the High Court of Australia.[46] In reaching this conclusion both appellate courts understandably felt that they had to distinguish *Chinery v Viall* and *Butler's* case but they made heavy weather of it.

In the New South Wales Court of Appeal, Herron CJ distinguished *Chinery v Viall* on the ground that the buyer in that case was not liable for the price. In contract that clearly makes a difference but he failed to explain why that made a difference in tort. He distinguished *Butler's* case on the ground that it was not a case of sale and both Herron CJ and Sugarman JA distinguished the case on the ground that Mr Butler had an interest in the eggs as bailee. Quite why it mattered that in *Butler's* case there was no sale is unclear, the plaintiffs in both cases were after all suing in tort. What is clear though is that just because Mr Butler was a bailee it did not give him a proprietary interest in the eggs as against the Board. He was bound to deliver the eggs to the Board before payment and so had no lien on them. Furthermore his common law title to the eggs, based upon his possession, could not be enforced against the Board because their statutory title predated his title. Therefore Mr Butler's status as a bailee in possession cannot be considered as a distinguishing feature.

In the High Court for the first time the seller argued that their unlawful repossession of the goods amounted to breach of their warranty for quiet possession implied by section 17(2) of the Sale of Goods Act 1923-1953 (NSW).[47] Accordingly the buyer was entitled by section 54(1) of the same Act[48] to set-off the damages recoverable for this breach against any claim the seller

42 Unlike a set-off a counterclaim does not diminish the damages recoverable by an insolvent plaintiff.

43 See *Inglis Electrix Pty Ltd v Healing (Sales) Pty Ltd* [1968] 1 NSWR 409.

44 He did however award them exemplary damages of $3,500 for the defendant's contumelious conduct.

45 See *Inglis Electrix Pty Ltd v Healing (Sales) Pty Ltd* (1967) 87 WN (Pt 2) (NSW) 264.

46 See *Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd* (1968) 121 CLR 584.

47 A similar provision is found in the New Zealand Sale of Goods Act 1908 s 14(b).

48 The same provision is found in s 54(1)(a) of the New Zealand Sale of Goods Act 1908.

might make for the unpaid price. It meant that the seller could not enforce payment of the price so the unpaid price ought to be taken into account when measuring the buyer's damages in conversion. This argument found favour with Barwick CJ and Menzies J but it did not impress the majority. Kitto J agreed that the seller was in breach of the warranty for quiet possession but pointed out that the seller was not suing for the price so there was no need for the buyer to rely on a set-off. Owen J agreed. Windeyer J went further and held that the seller was not in breach of the warranty. All three agreed that the unpaid price should not be deducted from the buyer's damages in conversion. In reaching that conclusion they needed to explain why, in *Chinery v Viall* and in *Butler's* case the plaintiffs were not entitled to the full value of the goods.

Kitto J followed *Gillard v Brittan*, distinguishing it from *Chinery v Viall* on the ground that in the former case there had been an actual delivery and therefore the seller could sue for the price. This point clearly made a difference if the action was for breach of contract but he failed to explain why it made a difference in tort. Furthermore he seemed to suggest that because the seller retained possession he had a lien. In Kitto J's view:

The whole point of [*Chinery v Viall*] lay in the interest which the seller had in the goods by reason of being in possession of them at the time he converted them – that is to say his interest as an unpaid seller, which had necessarily to be allowed for in valuing the loss by the buyer of *his* interest in the same goods.[49]

However, as we have seen, when *Chinery v Viall* was decided the seller could not have had a non-consensual lien.[50] Now, under both Australian and English sale of goods statutes, an unpaid seller has a statutory lien.[51] But even if *Chinery v Viall* were to be decided today the seller would be deemed to have lost his lien by the unlawful resale and therefore susceptible to an action in conversion by the buyer.[52]

Kitto J distinguished *Butler's* case on the ground that, like *Chinery v Viall,* the plaintiff in that case never acquired possession of the goods. He said:

> These cases illustrate one simple proposition, that the loss which a plaintiff has suffered by a conversion of goods which were not in his possession, and for which he would have had to pay the defendant a sum of money if he were to obtain possession of them, is a loss of no more than the difference between the value of the goods and the sum he would have had to pay; and therefore in any form of action in respect of the conversion he cannot recover as compensatory damages more than the amount of that difference.[53]

This proposition seems to conflate the methods for calculating loss in contract and in tort. It explains why the buyer's liability to pay the price is relevant in contract but it does not explain its relevance in tort. It confuses what ought to be done with what was likely to have happened. Furthermore, Kitto J suggested that it did not matter what the cause of action was; whether the action was in contract or in tort the damages had to be calculated in the same way. This approach has now been rejected in both Australia[54] and New Zealand.[55] Contract and tort perform different functions and neither should be permitted to suppress the other.

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49 (1968) 121 CLR 584, 603.

50 This point was made by Sutton in 'Damages for Conversion of Goods Sold' (1969) 43 *Australian Law Journal* 95.

51 The equivalent provision in the New Zealand Sale of Goods Act 1908 is s 42(2).

52 See *Mulliner v Florence* (1878) 3 QBD 484.

53 (1968) 121 CLR 584, 602.

54 See: *Hawkins v Clayton* (1988) 164 CLR 539 (HCA); *Bryan v Maloney* (1995) 182 CLR 609 (HCA); and *Astley v Austrust Ltd* (1999) 197 CLR 1 (HCA).

55 See the cases referred to in above n 27.

Windeyer J also seemed to distinguish *Butler's* case on the ground that the plaintiff in that case was not liable to pay for the eggs. He agreed with Taylor and Owen JJ who had said in *Butler's* case that to award the Board the full value of the eggs would have placed them in a better financial position than if the defendant had complied with his obligation to deliver the eggs to them.[56] According to Windeyer J that was sufficient to distinguish the two cases. It is certainly a distinction on the facts but it does not help us understand the *legal* distinction. It does not explain why the basic rule for measuring loss in tort, as explained in *Butler's* case, is irrelevant when the plaintiff is liable to pay the price.

In *Healing v Inglis* none of the judges in the appellate courts gave a convincing explanation as to how *Chinery v Viall* and *Butler's* case could be distinguished from the case before them. They all failed to see the relevance of the basic rule for measuring loss in tort as enunciated in *Butler's* case. Those oversights lead them to make erroneous distinctions or to state factual distinctions without adequately explaining why those distinctions made a legal difference.

In order to distinguish the cases properly we need to concentrate on the assumptions that underpinned the reasoning in *Butler's* case. Applying those assumptions to *Chinery v Viall* we are able to say that but for the seller's wrongful resale the buyer would have collected his sheep and paid for them. The buyer's loss was therefore the difference between the contract price and the market value of the sheep at the time of the seller's conversion. If the evidence establishes that those assumptions are unfounded, then the rule cannot be used to limit the buyer's damages. In particular, if it transpires that the buyer cannot pay because they are insolvent, as in *Healing v Inglis*, then *Butler's* case cannot be used to limit the buyer's loss. By contrast if the buyer were to sue in contract their insolvency would be irrelevant in measuring their loss because the buyer ought to pay, it is not a matter of calculating whether the buyer would have paid. As the goods had already been delivered, if the buyer sued in contract they would have to allege breach of the seller's warranty for quiet possession. Putting the parties in the position they would have been in had they performed their contractual obligations means that the buyer would have kept the goods and paid for them. The loss would therefore be the value of the goods when the seller unlawfully retook them less the unpaid price, so the loss was likely to be minimal. This clearly illustrates the point that calculation of loss in contract and tort on the same facts does not always produce the same measure of damages. In *Healing v Inglis* the appellate courts reached the right decision but failed to apply the correct rule. They concentrated on whether the plaintiff was liable to pay for the goods instead of whether they would have paid for them. In doing so the courts confused the rule for measuring loss for breach of contract with the rule for measuring loss in tort.

Having failed to set-off the unpaid price against the buyer's damages in conversion, Healing then had to rely on their claim in contract for the price, a claim that would abate with the claims of all the insolvent buyer's other unsecured creditors. It is only fair that the unpaid price should not have been deducted from the damages payable by the seller because otherwise the seller would have achieved an undeserved priority over the buyer's other creditors.[57] It would have meant that the seller would have profited from their own wrong, thereby encouraging creditors to take the

56 The same point had been made by Bramwell B in *Chinery v Viall:* see (1860) 5 H & N 288, 294; 144 ER 113, 119.

57 In support of the decision in *Healing v Inglis* this point is made by K C Sutton in the article referred to in n 50 above and by J R Pedden, 'Measure of Damages in Conversion and Detinue' (1970) 44 *Australian Law Journal* 65. However, neither author notices any conflict between *Healing v Inglis* and *Butler's* case.

law into their own hands.[58] The obvious way for Healing to have avoided this pitfall would have been to reserve title until the price was paid.

VIII. A Reconsideration Of *Gillard v Brittan*

This reassessment of the justification for the decisions in *Chinery v Viall* and *Healing v Inglis* requires a reconsideration of *Gillard v Brittan*. Applying the rule in *Butler's* case to *Gillard v Brittan* we need to be able to say what the buyer in that case would have done had the seller not unlawfully taken the clothes. The buyer's behaviour in avoiding his creditors strongly suggests that he was insolvent. If that be the case then even if the seller had not recovered the clothes the price would not have been paid. It therefore justifies the court's decision to award the buyer the full value of the clothes. By keeping the clothes the buyer was not repudiating the contract so the seller could not treat the contract as terminated. In any event by changing the nature of the goods the buyer had prevented restoration of the *status quo ante*, so that also prevented the contract from being regarded as terminated. On the same facts today the seller could then counterclaim for the price in the same proceedings but if the buyer were insolvent only a dividend would be payable. This outcome is justified in order to prevent the seller from benefiting from his unlawful conduct and thereby stealing a march on the buyer's other creditors.

If the evidence had suggested that the buyer would have paid the balance of the price then his loss would have been the value of the clothes when they were unlawfully taken less the unpaid price. If the case were heard today and the seller counterclaimed for the unpaid price the buyer could raise a set-off for the seller's breach of the warranty for quiet possession. The measure of that set-off claim would be the unpaid price so the two claims would cancel each other.

IX. Conclusion

Where the seller is no longer in possession of the buyer's goods but the seller's prior conversion or trespass has caused loss to the buyer, then the buyer will require compensation for that loss. The buyer can claim in tort and the ordinary rules for measuring loss in tort should apply to such a claim. The model for this approach is the principle of *restitutio in integrum*. It requires that the plaintiff should be placed in the position they would have been in had no tort been committed. We need to concentrate on what the buyer would have done rather than what they ought to have done. It means that the buyer's liability to pay the price is irrelevant in measuring loss in tort. Instead, in most cases, the real issue will be whether the buyer is insolvent.

The principle of *restitutio in integrum* has been recognised in most common law jurisdictions as the main rule for measuring loss in the tort of conversion. However, in the cases on sales which we have considered, the courts have failed to appreciate the full relevance of this rule.[59] That oversight has driven the courts to rely on inapplicable property rules by inventing non-existent liens. It has also persuaded the courts to allow contract rules to subvert tort rules when measuring damages. The courts should have no choice as to whether to apply the rules of contract law or tort law when measuring the plaintiff's loss. Each regime pursues different purposes and uses different

58 This point was made by Willes J in *Edmondson v Nuttall* (1864) 17 CB (NS) 280, 295; 144 ER 113, 119.

59 Exceptionally the court in *Butler's* case did appreciate the significance of the rule but it was not a case concerned with a sale.

techniques to achieve those purposes. To compensate the buyer for loss of ownership in conversion by awarding damages for non-delivery in contract is confused and incoherent.

One reason for this confusion seems to have been the courts' inability to see how they could use the law of tort to avoid the old rule that the measure of damages in conversion was the full value of the goods. That rule works injustice where the buyer is not liable for the price but the buyer can be denied a windfall without subverting the rules of tort. First, we must recognise that where the defendant no longer possesses the goods an action in conversion is an action in tort; it is not a proprietary action in disguise. We must then apply the fundamental rule of tort for measuring the plaintiff's loss, that is, the buyer should be placed in the position they would have been in had no tort been committed. In a case like *Chinery v Vial*, where the buyer is not liable for the price, it ensures that the buyer does not reap a windfall. By contrast, in a case like *Healing v Inglis*, where the buyer is insolvent, it ensures that the seller does not profit from their own wrong.