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Possession and Damages for Tortious Interferences with Chattels

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Abstract—The common law has long maintained that, where a defendant has tortiously interfered with a chattel that was in the claimant's possession at the time of the wrong, the claimant is, in general, to be presumed to be the 'absolute and complete owner' of the chattel. It is argued in this article that the rule lacks a satisfactory justificatory basis: the justification that has been endorsed by the courts is fatally flawed, and the main alternative justifications that have been advanced in the academic literature are also unsatisfactory. If an adequate foundation cannot be found, the rule should be abolished and, if it were to be abolished, there are, it is suggested, good reasons to introduce a similar, but importantly different, rule of presumption.

Keywords: private law, tort law, damages, compensation, personal property, possession

1. Introduction

It is a fundamental principle of the law of torts that the basic aim of an award of compensatory damages is to provide a sum of money which, in the words of Lord Blackburn, 'as nearly as possible … 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'.[1] Yet the damages awarded in numerous cases concerning the protection of proprietary interests in chattels appear to conflict with this principle. It is doubtful that the apparent conflict can be eradicated by pointing to some other kind of recognised remedial function, such as disgorgement or punishment, for the awards are not consonant with any such aim. Consider the following scenarios:

> *The Pledgee*. A pledged his Rolex with B in order to secure his (A's) obligation to discharge a debt of £1,000. While the watch was in B's possession, and at a time when A had not made any payments to B, the watch was destroyed as a result of C's negligence.

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[1] *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 (HL) 38.

The Thief. Y stole X's copy of the first edition of *Pride and Prejudice*. Y remained in possession of the book until Z intentionally set it on fire. The book was wholly consumed by the flames.

The position at common law is that, if B brings proceedings against C, claiming compensatory damages for negligence, the court will be legally required to order C to pay damages to B in respect of the destruction of the Rolex and the measure of such damages is the value of the Rolex.[2] What loss did B actually suffer as a result of C's negligence? B was in possession of the Rolex under a pledge. When a valid pledge is created, the pledgor retains his interest and the pledgee acquires a limited legal proprietary interest—a pledge—in respect of the chattel.[3] This interest comprises a right to immediate possession and a power of sale in the

[2] *The Winkfield* [1902] P 42 (CA). This result can be contrasted with the position under the Roman rules of *damnum iniuria datum* in the time of Justinian. Where a defendant wrongfully damaged a thing that had been pledged, the creditor could sue the defendant if the debtor was insolvent or if the creditor had lost his action against the debtor and, in such circumstances, the creditor had 'the action under the *lex Aquilia* up to the amount of the debt… but the Aquilian action [was] open to the debtor in respect of any amount exceeding the debt': D.9.2.30.1.

[3] *Franklin v Neate* (1844) 13 M & W 480, 153 ER 200; *The Odessa* [1916] 1 AC 145 (PC) 157–59 (Lord Mersey). For discussion of the nature of a pledgee's interest, see TC Williams, 'The True Nature of a Pawnee's Interest in Goods Pawned' (1915) 31 LQR 75; Hugh Beale and others, *The Law of Security and Title-Based Financing* (3rd edn, OUP 2018) paras 5.03–5.12.

event of default.[4] If the pledgee exercises the power of sale, she should apply the proceeds of sale to the payment of the debt and must account to the pledgor for any surplus.[5] The pledgor has the power to redeem the pledge by discharging the secured obligation.[6] In *The Pledgee*, C, by his negligence, destroyed the Rolex and, since the destruction of a chattel extinguishes the proprietary interest(s) in the chattel, one consequence of C's negligence is that B lost her interest. So, as a result of C's negligence, B lost possession of the Rolex under the pledge and, other things being equal, the measure of her loss is the value of the pledge. If the market value of the Rolex was significantly greater than the debt owed to B—say £10,000—and if the court orders C to pay this sum to B, B will receive a substantial windfall.[7] Unless B's award can be properly regarded as falling within

[4] *Donald v Suckling* (1866) LR 1 QB 585 (QB) 594–97 (Shee J), 604 (Mellor J), 612–14 (Blackburn J); *Re Morritt* (1886) 18 QBD 222 (CA).

[5] *The Odessa* (n 3) 157–59 (Lord Mersey); *Mathew v TM Sutton Ltd* [1994] 1 WLR 1455 (Ch) 1461–63 (Chadwick J).

[6] *The Ningchow* [1916] P 221 (PDA).

[7] It might be said that, if A does not sue C, and B is not able to obtain the full value of the chattel from C, C will be left with a windfall; and that, as C is a wrongdoer, B is more deserving of the windfall than C. C's windfall is a result of the fact that C has not paid damages to A. How can B be any more deserving of the value of (part of) A's loss than C? Desert is usually analysed as a three-place relation between a person who deserves something (the deserver), the thing that she deserves (the desert), and that in virtue of which she deserves it (the desert basis): see Louis Pojman, 'Equality and Desert' (1997) 72 Philosophy 549, 555–56. Does B deserve the full value

a recognised category of non-compensatory damages, this outcome seems to involve a departure from the fundamental principle of compensatory damages.

It is true that the common law has long recognised that, in such circumstances, B must account to her bailor, A, for the amount by which the sum received from the defendant, C, surpasses her true loss;[8] and that A is barred from bringing an action against C in respect of the destruction of the chattel.[9] In this way, the common law seeks to ensure that B's windfall is eliminated; that the bailor, A, is properly compensated; and that the wrongdoer, C, is not subject to a double liability. These are laudable aims, but the common law's means of

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of the chattel in virtue of the fact that C is a wrongdoer? It is difficult to see how she can. To say that C is wrongdoer is just to say that C has breached a duty owed to another. Where a person has breached a (morally binding) duty owed to another, sound norms of corrective justice provide reasons for the law to enable the person who has been wronged to obtain redress from the wrongdoer in respect of the wrong: see John Gardner, 'What is Tort Law For? The Place of Corrective Justice' in his *Torts and Other Wrongs* (OUP 2019). But these norms provide no reason to require C to pay damages *to B* in respect of loss suffered by A. Of course, the reasons provided by sound norms of corrective justice are not the only reasons that the law should recognise. The point is that the fact that C is a wrongdoer (ie has breached a duty owed to A and a separate duty owed to B) does not explain why B deserves, any more than C, to obtain the value of the loss suffered by A.

[8] *The Winkfield* (n 2) 55 (Collins MR); *O'Sullivan v Williams* [1992] 3 All ER 385 (CA) 387 (Fox LJ).

[9] *The Winkfield* (n 2) 61 (Collins MR). Conversely, if the bailor recovers the full value of the chattel, the bailee will be barred: *O'Sullivan v Williams* (n 8).

realising them raises a pressing question: why was C required to pay B damages that did not truly represent B's loss in the first place?

Turning to *The Thief*, Y, by taking possession, acquired a legal interest in respect of the book.[10] This interest is capable of lasting forever (as opposed to for a term);[11] it can be alienated (eg by a sale);[12] and it comprises a right to immediate possession that grounds duties, owed by others, not to physically interfere with the chattel.[13] There is a lack of consensus over what this interest should be called.[14] Common labels include 'a legal title',[15] 'an ownership interest',[16] and a

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[10] *Armory v Delamirie* (1722) 1 Strange 505, 93 ER 664; *Costello v Chief Constable of Derbyshire Constabulary* [2001] EWCA Civ 381, [2001] 1 WLR 1437; Ben McFarlane, *The Structure of Property Law* (Hart 2008) 144–46, 154–56; William Swadling, 'Property: General Principles' in Andrew Burrows (ed), *English Private Law* (3rd edn, OUP 2013) paras 4.422–4.428.

[11] Swadling (n 10) paras 4.131, 4.422.

[12] G Battersby and AD Preston, 'The Concepts of "Property," "Title" and "Owner" Used in the Sale of Goods Act 1893' (1972) 35 MLR 268; Ewan McKendrick (ed), *Goode on Commercial Law* (5th edn, Penguin 2016) paras 7.24–7.30.

[13] *Costello* (n 10) [14] (Lightman J). The interest will not comprise a right to immediate possession where it is encumbered by a limited legal interest, such as a pledge or a lease: see n 79 below.

[14] See Robin Hickey, *Property and the Law of Finders* (Hart 2010) 162–68; Luke Rostill, 'Terminology and Title to Chattels: A Case Against "Possessory Title"' (2018) 134 LQR 407, 423–25.

[15] Swadling (n 10) paras 4.130, 4.422.

[16] Simon Douglas, *Liability for Wrongful Interferences with Chattels* (Hart 2011) 20–33. See also McFarlane (n 10) 140–46; 154–55

'general property interest'.[17] One advantage of 'general property interest' is that this term is used in the Sale of Goods Act 1979 and, for this reason, it will be used in this article.[18] What matters, for present purposes, is not what the interest is called, but the fact that more than one of these interests can exist in respect of the same chattel at the same time. In *The Thief*, for instance, X and Y each held, from the moment Y acquired possession of the book until the moment it was destroyed, a general property interest in respect of the book. Since there can be multiple general property interests in respect of the same chattel, it is necessary for the law to rank the competing interests. The general rule is that an earlier title prevails over a later title.[19] In *The Thief*, X may or may not have had the best (strongest) general property interest, but since his interest arose before Y's, X's general property interest was better than Y's. Y was, therefore, bound by X's right to immediate possession. They each held the same kind of interest, but Y's was inferior to X's. Y, in other words, had an *inferior* general property interest.

Since Y acquired, by taking possession, a general property interest that comprised a right to immediate possession, Z, by intentionally destroying the book, committed the tort of conversion as against X and Y. If Y brings proceedings against Z, claiming damages for conversion, and if Y and Z have no

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[17] Hickey (n 14) 166–67; Rostill (n 14) 424.

[18] Sale of Goods Act 1979, s 61(1). See also *Sewell v Burdick (The Zoe)* (1884) 10 App Cas 74 (HL) 92–93 (Lord Blackburn).

[19] McFarlane (n 10) 146; Swadling (n 10) para 4.423.

knowledge of X's identity, the court will be legally required to order Z to pay damages to Y in respect of the destruction of the book and the measure of such damages is the value of the book.[20]

Could Z defeat Y's claim, or reduce the damages that he is required to pay to Y, by establishing that X has a better right? The position at common law is that, at least where the claimant is in possession of the chattel at the time of the defendant's tortious interference,[21] the defendant cannot, in general,[22] defeat the claimant's action, or reduce the extent of his liability, by establishing that a third

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[20] *The Winkfield* (n 2). It appears that the rules barring a second action against a wrongdoer apply only to actions brought by bailors or bailees and, consequently, if Y were to recover the value of the chattel from Z, this would not bar X from also suing Z and recovering the value of the chattel: *Attenborough v London and St Katharine's Dock Co* (1878) 3 CPD 450 (CA) 454 (Bramwell LJ); Law Reform Committee, *Eighteenth Report (Conversion and Detinue)* ((1971) Cmnd 4774), paras 51, 52, 57. If, however, X were to recover the full value from Z, Y would be liable to reimburse Z insofar as Y had been 'unjustly enriched': Torts (Interference with Goods) Act 1977, s 7(4).

[21] There has been much debate over the position at common law where the claimant is *not* in possession at the time of the alleged tort, but has merely a right to immediate possession. See: Patrick Atiyah, 'A Re-Examination of the *Jus Tertii* in Conversion' (1955) 18 MLR 97; CD Baker, 'The *Jus Tertii*: A Restatement' (1990–91) 16 UQLJ 46.

[22] The position is different where the defendant interfered with the chattel, or defends the action, by the authority of the third party. In such circumstances, the common law allows the defendant to invoke the title of the third party: *Biddle v Bond* (1865) 6 B & S 225, 122 ER 1179 (QB); *Rogers Sons & Co v Lambert & Co* [1891] 1 QB 318 (CA); *The Jupiter (No 3)* [1927] P 122 (PDA) 137 (Hill J).

party has a better right in respect of the chattel than the claimant. In England and Wales, the common law position was amended by section 8(1) of the Torts (Interference with Goods) Act 1977, which provides that a defendant to an action for 'wrongful interference with goods'[23] is 'entitled to show, in accordance with rules of court, that a third party has a better right than the plaintiff as respects all or any part of the interest claimed by the plaintiff, or in right of which he sues'. In order for a defendant to be able to rely upon this provision, the third party must be identified.[24] Where more than one claimant with an interest in the chattel is before the court, the court is required, by section 7(2) of the 1977 Act, to apportion the damages so 'as to avoid double liability of the wrongdoer as between those claimants'.

[23] In s 1, the Act defines 'wrongful interference with goods' as '(a) conversion of goods (also called trover), (b) trespass to goods, (c) negligence so far as it results in damage to goods or to an interest in goods, (d) ... any other tort so far as it results in damage to goods or to an interest in goods'.

[24] *Costello v Chief Constable* (n 10) [15] (Lightman J). There is some judicial support for the view that the third party must be joined: *de Franco v Commissioner of Police of the Metropolis*, The Times, 8 May 1987 (CA). The Civil Procedure Rules (CPR) require the claimant to identify 'every person who, to his knowledge, has or claims an interest in the goods': CPR 19.5A(1). The defendant may apply to the court for a direction that a third party be made a party to the proceedings for the purpose of establishing whether he has a better right than the claimant: CPR 19.5A(2).

Applying these rules to *The Pledgee*, C could prevent B from recovering the full value of the watch by establishing, in accordance with section 8(1) of the 1977 Act, that A has a 'better right' in respect of 'part of the interest claimed by' B.[25] B's damages would be reduced accordingly: the measure of B's damages, in respect of the destruction of the watch, would be the value the pledge. As to *The Thief*, if Z is aware that X has a better title to the book than Y, Z could also invoke section 8(1). Suppose, however, that Y and Z have no knowledge of X's identity. In such circumstances, the statutory provisions would not be applicable and the common law rules would apply. Consequently, Z would be required to pay the full value of the book to Y.

This state of affairs gives rise to two questions, which are the main focus of this article: (1) what is the explanation of the law's ostensible departure from the fundamental principle of compensatory damages in cases where a defendant converts, trespasses against, or negligently damages or destroys chattels with respect to which the claimant has a limited interest (eg a pledge) or an inferior general property interest? (2) Is it justifiable for the law to award such claimants damages that do not reflect what they have truly lost? It is argued in Section 3 that

[25] Due to the pledge, A clearly did not have, at the time of the tort, a better right to immediate possession than B. But since B is bound by A's reversionary interest, and since (as discussed in section 3 below) B's claim to recover the full value of the chattel is based on B having 'absolute and complete ownership', A does have a 'better right' in respect of 'part of the interest claimed by' B. See Law Reform Committee (n 20) paras 73–74.

the correct explanation of the departure from the fundamental principle of compensatory damages is that the law applies the '*Winkfield* rule'. This rule requires the court to presume that the claimant has, not an inferior general property interest or a limited legal interest such as a pledge, but what the courts have called 'absolute and complete ownership'. As for question (2), it is argued in Section 4 that the legal basis of the *Winkfield* rule is unsatisfactory, and that the alternative justifications that have been advanced in the literature on this topic also fail to justify the rule. It is suggested that the rule should be replaced by a different rule of presumption.

The primary objective of this article is to examine the legal grounds—actual and potential—of the *Winkfield* rule. To do this well, it is necessary to provide a detailed account of the rule and the legal framework in which it is situated. We need to know what the law is before we can properly evaluate it and, unfortunately, a short explanation will not suffice. This is for two reasons. First, there is, as we will see, a lack of consensus among scholars as to the content and significance of the *Winkfield* rule and the surrounding legal landscape. For example, there is widespread disagreement over the nature of the basic measure of recovery in conversion, and also as to the legal effects of possession. Consequently, an assessment of the grounds of the *Winkfield* rule risks missing its mark, and generating even more confusion, unless it is preceded by a sound explanation of the doctrine. Secondly, a core part of the argument in Section 4 is that, in order to be able to properly evaluate the law's reasons, one must

differentiate two related, but distinct, legal consequences of being in possession of a chattel. Hence, it is important to be clear as to what these consequences are.

2. Damages in the Chattel Torts

Since it is not possible to properly evaluate the *Winkfield* rule unless one understands how it relates to the law's general approach to the assessment of damages for tortious interferences with chattels, this section provides a brief explanation of the relevant legal rules. It focuses on the three main chattel torts: conversion, trespass to chattels, and negligence.[26]

Awards of damages in the law of torts often aim to make good a loss ('compensatory damages'), but some awards are non-compensatory: they may, for example, aim to punish the defendant ('punitive damages') or to deprive the defendant of gains that he has made ('gain-based damages').[27] It is clear that, where a defendant has, by his negligence, damaged or destroyed the claimant's chattel, the claimant is entitled to recover compensatory damages.[28] Where a defendant has committed the tort of trespass to chattels or conversion as against

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[26] In England, Wales, and Northern Ireland, detinue no longer exists as a distinct tort. It was 'abolished' by s 2(1) of the Torts (Interference with Goods) Act 1977. But the conduct that gave rise to a cause of action in detinue is still tortious—it generates a cause of action in conversion: see Simon Douglas, *Liability for Wrongful Interferences with Chattels* (Hart 2011) 78, 94.

[27] See Andrew Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th edn, OUP 2019) 9–10, 35–39, 335–38, 360, 503.

[28] *The Liesbosch* [1933] AC 449 (HL); Douglas (n 26) 187–98.

the claimant and, as a result thereof, the claimant has suffered a loss and the defendant has made a gain, the claimant may elect whether to recover compensatory damages or gain-based damages.[29] This is widely, though not universally, accepted insofar as trespass is concerned.[30] It is sometimes thought, however, that the position in conversion is different—that, in conversion, a claimant may generally recover damages that are not loss-based or gain-based. Andrew Tettenborn, for instance, has claimed that conversion 'boasts an … idiosyncratic measure of damages': whereas other torts, including torts involving interference with property, such as trespass and negligence, 'are about compensation', in conversion, '[t]he claimant generally recovers not his loss, but the worth of the thing converted'.[31]

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[29] *Oughton v Seppings* (1830) 1 B & Ad 241, 109 ER 776; *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 (HL); *Chesworth v Farrar* [1967] 1 QB 407 (QB). For a detailed discussion, see Burrows (n 27) 339–52.

[30] One of the leading cases on compensatory damages in tort law, *Livingston v Rawyards Coal Co* (1880) 5 App Cas 25 (HL), concerned trespass to chattels.

[31] Andrew Tettenborn, 'Damages in Conversion—The Exception or the Anomaly?' (1993) 52 CLJ 128, 128. It seems that Professor Tettenborn's view remains essentially unchanged: Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (10th edn, Thomson Reuters Australia 2011) para 4.210.

The main objection to this view is that it was rejected by the House of Lords in *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 & 5)*.[32] In *Kuwait*, Lord Nicholls (with whom Lord Hope, Lord Steyn and Lord Hoffmann agreed)[33] asserted that the tort of conversion does not 'command awards of damages measured by some special and artificial standard of its own'.[34] Rather, '[t]he fundamental object of an award of damages in respect of this tort, as with all wrongs, is to award compensation for loss suffered'.[35] The reason that, in conversion, the measure of damages is normally 'the market value of the goods at the time the defendant expropriated them',[36] is that 'generally this represents the

[32] [2002] UKHL 19, [2002] 2 AC 883. See also: *Hiort v London and North Western Railway Co* (1879) 4 Ex D 188 (CA) 196–97 (Baggallay LJ), 199 (Thesiger LJ); *Brandeis Goldschmidt & Co Ltd v Western Transport Ltd* [1981] QB 864 (CA) 870 (Brandon LJ); *IBL Ltd v Coussens* [1991] 2 All ER 133 (CA) 139 (Neill LJ), 142 (Nicholls LJ).

[33] *Kuwait Airways* (n 32) [123]–[124] (Lord Steyn), [125] (Lord Hoffmann), [169] (Lord Hope).

[34] ibid [67].

[35] ibid.

[36] The reason that the measure of damages, where the claimant has been deprived of the chattel, is usually the value of the chattel *at the time of the conversion* is that this reflects the requirement that the claimant should mitigate her loss. Accordingly, in some circumstances a different date of assessment will be appropriate: *Sachs v Miklos* [1948] 2 KB 23 (CA); *Trafigura Beheer BV v Mediterranean Shipping Co SA* [2007] EWCA Civ 794, [2007] 2 CLC 379 [38]–[41] (Longmore LJ); James Goudkamp and Edwin Peel, *Winfield & Jolowicz on Tort* (19th edn, Sweet & Maxwell 2014) para 18–051.

amount of the basic loss suffered by the plaintiff owner'.[37] But where it does not, the court must apply 'some other measure'.[38] Hence, where the chattel that the defendant has converted has been returned to the claimant, the claimant's damages should not be assessed by reference to the value of the chattel, as this does not represent what the claimant has lost as a result of the conversion.[39] Similarly, where the claimant would have been deprived of the chattel, as a result of his own conduct, even if the defendant had not converted it, the claimant will not be entitled to recover the value of the chattel, for this does not reflect what the claimant has lost.[40] This illustrates that, in conversion as in other torts, the claimant generally must establish that the loss was caused by the defendant's wrong.[41]

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[37] *Kuwait Airways* (n 32) [67].

[38] ibid.

[39] *Moon v Raphael* (1835) 2 Bing NC 310, 132 ER 122; *Chinery v Viall* (1860) 5 H & N 288, 295; 157 ER 1192, 1195 (Bramwell B).

[40] *Hiort v London and North Western Railway* (n 32).

[41] An exception to the ordinary requirements for causation of loss applies, on policy grounds, to cases involving successive conversions: *Kuwait Airways* (n 32) [72]–[86] (Lord Nicholls), [126]–[129] (Lord Hoffmann). See also Burrows (n 27) 55; Douglas (n 26) 198–201; James Edelman (ed), *McGregor on Damages* (20th edn, Sweet & Maxwell 2017–18) para 8-030. The fact that, in *Kuwait Airways*, the House of Lords recognised and applied an *exception* to the usual rules regarding causation of loss demonstrates that the compensatory principle was a foundational aspect of the reasoning that led to the decision in that case.

Where a defendant has tortiously interfered with the claimant's chattel and the claimant seeks to obtain compensatory damages, how will the courts assess the monetary value of the claimant's loss? The courts have asserted on many occasions that where, as a result of the tort, the claimant has been deprived of the chattel, the basic measure of the claimant's damages is ordinarily the market value of the chattel (though the claimant will be entitled to also recover damages for consequential losses, subject to the ordinary limiting principles).[42] However, references to the 'market value of chattels' must be approached with caution, for two reasons. First, the term, as Andrew Burrows has pointed out,[43] is ambiguous because it may refer to the market selling price or the cost of purchasing a replacement in the market. This reflects a more basic distinction between 'awarding the claimant its lost financial advantage from not having the goods (diminution in value) and, on the other hand, awarding it the costs of acquiring substitute goods (cost of cure)'.[44] A similar choice must be made where the claimant's chattel has been damaged as a result of the tort.[45] Secondly, one may

[42] eg, *General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd* [1963] 1 WLR 644 (CA) 649 (Diplock LJ); *Kuwait Airways* (n 32) [67] (Lord Nicholls).

[43] Burrows (n 27) 209, 219.

[44] ibid 219. Which measure is appropriate depends on a number of factors, including mitigation of loss, whether the claimant's sole purpose in having the chattel was to sell it, and whether the claimant has replaced, or intends to replace, the chattel: Burrows (n 27) 189, 206, 210–11, 219–20.

[45] ibid 211–14.

transfer, under a contract of sale, an inferior general property interest in respect of a chattel,[46] and the market selling price of an inferior general property interest is ordinarily lower than the market selling price of the best general property interest. In the context of the law concerning damages for tortious interferences, it is clear that references to the 'market value of chattels' are usually shorthand for the market value of the best general property interest in respect of them.

If the foregoing account of the law is correct, an award of damages in respect of a tortious interference with a chattel ordinarily aims to compensate the claimant, though other forms of damages, such as gain-based damages, may be recovered in certain circumstances. Why, then, is a claimant who has a limited interest (eg B in *The Pledgee*) or an inferior general property interest (eg Y in *The Thief*) able to recover from a defendant who has tortiously interfered with the chattel damages that do not reflect the claimant's loss? An answer to this question is provided in Section 3. It might be thought, however, that the urge to posit and answer the question arises from a major misunderstanding of the nature of damages in respect of tortious interferences with chattels. The primary aim of such damages, one might claim, is *not* to compensate for loss, but to provide a substitute for the right infringed. In *Torts and Rights*, Robert Stevens argued that, if a tort or breach of contract has been committed as against the claimant, he will

[46] McKendrick (n 12) paras 7.24–7.30.

be entitled, ordinarily, to an award of 'substitutive damages'.[47] Such damages are 'awarded as a substitute for the right infringed';[48] they 'are not compensatory for loss at all'.[49] The measure of substitutive damages is the objective value of the infringement of the right at the time of the wrong.[50]

The 'substitutive rights thesis' cannot be fully evaluated here,[51] though it should be noted that, insofar as conversion is concerned, the thesis is not consistent with the reasoning of Lord Nicholls in *Kuwait Airways v Iraqi Airways*.[52] The important point, for present purposes, is that the thesis does not justify the rules that enable B in *The Pledgee* and Y in *The Thief* to recover the value of the chattel. If one accepts the substitutive rights thesis, the measure of damages should be the objective value of the infringement of the right. Since the objective value of B's right, and Y's right, is less than the value of the best

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[47] Robert Stevens, *Torts and Rights* (OUP 2007) ch 4.

[48] ibid 60.

[49] ibid 62.

[50] ibid 60–66. See also Robert Stevens, 'Rights and Other Things' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart 2011) 126–27.

[51] For discussion, see James Edelman, 'The Meaning of Loss and Enrichment' in Robert Chambers, Charles Mitchell, and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009); Andrew Burrows, 'Damages and Rights' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart 2011); Stevens, 'Rights and Other Things' (n 50) 121–33.

[52] See nn 32–41 and accompanying text. Contrast Stevens, *Torts and Rights* (n 47) 63–65.

general property interest, it seemingly follows that their awards should be reduced. As Stevens has said, '[w]here the claimant's interest in the property is not absolute, his damages reflect the right he has'.[53] Even on the substitutive rights thesis, therefore, the measure of damages for the loss of the chattel should not be the value of the best general property interest in the chattel.

It might be thought that there is a simple explanation as to why the damages awarded to B or Y reflect the value of the best general property interest. The solution to the puzzle, it may be said, is that the common law endorses the doctrine of relative title:[54] the claimant must have a right that is good as against the defendant, and it is (generally) irrelevant whether a third party has a better right than the clamant. If the fact that a third party has a better right is irrelevant, then the fact that the claimant has an inferior right must be irrelevant too. This, one may conclude, is why the claimant is awarded the value of the best right.

The problem with this explanation is that it does not fully address the issues that this article is concerned with. We will see in the next section that relativity of title must feature in a sound explanation of the law's approach. A core aim of this article, however, is to examine *why*, when assessing the claimant's remedy, the law treats the fact that the claimant has an inferior right,

[53] Stevens, *Torts and Rights* (n 47) 65.

[54] This explanation was suggested by a reviewer of an earlier draft of this article.

and a third party has a better one, as irrelevant. Relativity of title is not the answer to this question. It is what the question is about.

3. The *Winkfield* rule

To explain why B in *The Pledgee* and Y in *The Thief* are able to recover damages that do not reflect their losses it is necessary to consider *The Winkfield*.[55] This is the leading case in this area: it has been cited with approval by numerous Law Lords in the Privy Council and the House of Lords,[56] and followed by courts in Australia,[57] Canada,[58] and New Zealand.[59] Two steamships, the Mexican and the Winkfield, were involved in a collision, as a result of which the Mexican sank with a portion of the mails that she was carrying at the time. The proprietors of the

[55] *The Winkfield* [1902] P 42 (CA).

[56] eg *Eastern Construction Co Ltd v National Trust Co Ltd* [1914] AC 197 (PC) 210; *Morrison Steamship Co Ltd v Greystoke Castle* [1947] AC 265 (HL) 278 (Lord Roche), 293 (Lord Porter), 302 (Lord Simonds), 309 (Lord Uthwatt); *Alfred McAlpine Construction Ltd v Panatown Ltd (No 1)* [2001] 1 AC 518 (HL) 581 (Lord Millett).

[57] eg *Russell v Wilson* (1923) 33 CLR 538 (HCA) 546–47 (Isaacs and Rich JJ); *Anderson Group Pty Ltd v Tynan Motors Pty Ltd* [2006] NSWCA 22, (2006) 65 NSWLR 400 [55], [96] (Young CJ in Eq); *Clambake Pty Ltd v Tipperary Projects Pty Ltd (No 4)* [2008] WASC 293 [12] (Heenan J).

[58] eg *Minichiello v Devonshire Hotel (1967) Ltd (No 2)* (1977) 79 DLR (3d) 656 (BCSC) 658–662 (Rae J), affd (1978) 87 DLR (3d) 439 (BCCA).

[59] eg *Trailways Transport Ltd v Thomas* [1996] 2 NZLR 443 (NZHC) 445–46 (Tompkins J); *R v Ellerm* [1997] 1 NZLR 200 (NZCA) 208 (Heron J).

Winkfield admitted that they were liable in negligence. The Postmaster-General sought to recover the value of letters and parcels that had been lost on board the Mexican and in respect of which no claim had been made by, or instructions received from, the senders or addressees.

Sir FH Jeune P disallowed this claim on the basis that the Postmaster-General was not under any liability to the parties interested in the lost letters and parcels in respect of which the claim was made. The judge relied upon *Claridge v South Staffordshire Tramway Co*.[60] In that case, the defendant had injured a horse that had been bailed. The Divisional Court held that the bailee was not entitled to recover damages, because he was under no liability to his bailor for the injury to the horse and, therefore, the depreciation in value of the horse was not a loss suffered by him. Hawkins J said: 'I cannot understand why a bailee should be allowed to recover damages beyond the extent of his own loss simply because he happened to be in possession'.[61]

In *The Winkfield* the Court of Appeal accepted that *Claridge* was wrongly decided. Sir Richard Collins MR, in a judgment with which Stirling and Mathew LJJ concurred, accepted the bailee's submission that possession gave him 'as against a wrongdoer … a complete title to recover the full value, without distinction whether the action was in trespass, trover, or case'.[62] The Master of the

[60] [1892] 1 QB 422 (DC).

[61] ibid 424.

[62] *The Winkfield* (n 2) 48.

Rolls maintained that it 'is well established in our law' that 'possession is good against a wrongdoer and that the latter cannot set up the *jus tertii* unless he claims under it'.[63] A bailee's entitlement to recover the whole value does not rest on the ground that the bailee is liable to the bailor for the loss caused. It rests on the fact that, as between possessor and wrongdoer, the 'presumption of law' is that "the person who has possession has the property";[64] and 'it is not open to the defendant, being a wrongdoer, to inquire into the nature or limitation of the possessor's right'.[65] The 'root principle' is that 'as against a wrongdoer, possession is title. The chattel …is *deemed* to be the chattel of the possessor and of no other, and therefore its loss or deterioration is his loss'.[66] In other words, as between the possessor and a stranger, 'possession gives title – that is, not a limited interest, but *absolute and complete ownership*'.[67] In contrast, '[a]s between bailor

[63] ibid 54.

[64] ibid 55, quoting Lord Campbell CJ in *Jeffries v Great Western Railway Co* (1856) 5 El & Bl 802, 806; 119 ER 680, 681. William Swadling has claimed that such statements involve a 'misnomer' because '[p]resumptions properly-so-called are methods of proof of facts': Swadling (n 10) para 4.426. But a legal rule may require the courts to take a *legal* proposition as true in certain circumstances, and it is appropriate to describe such a rule as a rule of presumption, even though it does not concern what Swadling calls a 'presumption properly-so-called'.

[65] *The Winkfield* (n 2) 55.

[66] ibid 60 (emphasis added).

[67] ibid (emphasis added).

and bailee the real interests of each must be inquired into, and … [the bailee] must account for that which has become its equivalent and now represents it'.[68]

When considering Collins MR's reasoning, it is important to distinguish the following two questions: (i) why is a person who was in possession of a chattel able to successfully bring an action for wrongful interference? (ii) Why is a person who was in possession of a chattel and who brings such an action able to obtain damages that represent the full value of the chattel? The first question may be regarded as one that is concerned with the basis of the possessor's ability to successfully sue at all. The second is a question about the measure of the possessor's damages.

It might be thought that Collins MR's rule of presumption provides an exhaustive answer to both questions.[69] On this view, possession is not *per se* a source of property rights; but a mere possessor is able, in certain circumstances, to sue in the chattel torts by virtue of the rule that a possessor is to be presumed to have 'absolute and complete ownership'.[70] Now, there are undoubtedly some English cases that support this view.[71] However, the true position, in the modern

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[68] ibid 60–61.

[69] For discussion of this view, see Luke Rostill, 'Relative Title and Deemed Ownership in English Personal Property Law' (2015) 35 OJLS 31.

[70] See eg David Fox, 'Relativity of Title at Law and in Equity' (2006) 65 CLJ 330.

[71] eg *R v Allpress* [2009] EWCA Crim 8, [2009] 2 Cr App R 58. For further discussion, see Rostill (n 69).

law, is that possession is a source of property: generally speaking, a person acquires, upon obtaining possession of a chattel, a general property interest, which comprises a right to immediate possession.[72] Ordinarily, at least, one other person—eg the person who lost the chattel or the person from whom the chattel was stolen—will already have a general property interest in respect of the chattel and this pre-existing interest will be given priority over the new interest acquired by the possessor. In such circumstances, the possessor acquires, not the best (strongest) general property interest, but an inferior general property interest. A finder or thief who acquires an inferior general property interest is, in one important respect, in a similar position to a pledgee: none of these parties hold the best general property interest.

The rule that the Court of Appeal applied in *The Winkfield* requires the court to presume that a possessor—whether she is a pledgee, a finder, or a thief—had, at the time of the alleged tort, 'absolute and complete ownership'. When considering how to interpret this expression, it is important to keep in mind that what this article has called a 'general property interest' is sometimes called an 'ownership interest'.[73] What does it mean to say that a general property interest, or an ownership interest, is 'absolute and complete'? 'Absolute' is an ambiguous

[72] See nn 10–19 above and text thereto.

[73] See n 16 above. See also Hickey (n 14) 162–64.

word.[74] In one sense of the term, to say that an interest is 'absolute' is to say that it is exclusive, ie that, with respect to a particular chattel, there can be no more than one such interest.[75] But, as we have seen,[76] the thought that a general property interest is exclusive in this sense is mistaken. There is, in principle, no limit on the number of general property interests that may exist in respect of a chattel. A second meaning of 'absolute' is 'best' or 'strongest'.[77] When understood this way, it is possible to apply the term within a relative title system: to say, for instance, that A has an 'absolute' general property interest is just to say that he has the best (strongest) general property interest in the chattel.[78]

As for the word 'complete', this appears to signify that the interest comprises a right to immediate possession. Such an interest is to be contrasted with a reversionary interest. A general property interest comprises a right to immediate possession unless it is encumbered by limited legal interest, such as a

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[74] See Peter Birks, 'The Roman Law Concept of Dominium and the Idea of Absolute Ownership' [1985] Acta Juridica 1, 1.

[75] ibid 27–28.

[76] Text to nn 18 and 19 above.

[77] See eg Battersby and Preston (n 12) 269–70; McKendrick (n 12) para 2.23.

[78] It is often not possible to identify the person who actually has the best general property interest. It some contexts, however, the holder of the best general property interest can be easily identified, such as where a person manufactures a new thing: see eg *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch 25 (CA) 46 (Buckley LJ).

pledge or a lease.[79] In *The Pledgee*, for example, A, by creating the pledge, conferred on B an interest that comprised a right to immediate possession. This right bound A and the rest of the world (except anyone with a stronger general property interest than A, or an interest derived from a stronger general property interest). A was left, therefore, with a reversionary interest (more precisely, a reversionary general property interest).

It is submitted, therefore, that, where the *Winkfield* rule applies, the court presumes that the claimant has a general property interest that (i) is the best such interest in respect of the chattel and (ii) comprises a right to immediate possession. The court presumes, in other words, that the claimant's general property interest is 'absolute and complete'. The claimant's damages are assessed on this basis. This means that, where, in reality, the claimant has an inferior general property interest, or a limited legal interest (eg a pledge), the claimant's damages are assessed on a fictitious basis. This will not necessarily result in the claimant receiving damages that exceed her true loss, for it may well be that, in a given case, the value of the claimant's interest is not less than the value of the best general property interest in the chattel. A long lease, for example, might not be worth less than the best general property interest. But in many cases, the claimant will obtain damages that substantially exceed her loss, as *The Pledgee* illustrates.

[79] *Gordon v Harper* (1796) 7 TR 9, 101 ER 828; *Halliday v Holgate* (1867–68) LR 3 Ex 299.

Insofar as the damages issue is concerned, the authority of *The Winkfield* has never been seriously questioned (though some exceptions to the rule have been recognised).[80] Indeed, in *Eastern Construction v National Trust*, Lord Atkinson, delivering the judgment of the Privy Council, asserted that the *Winkfield* rule 'must be now taken as conclusively established'.[81] Collins MR's explanation as to why a possessor is able to recover the value of the chattel from a tortfeasor is, therefore, legally authoritative.[82]

What is the scope of the *Winkfield* rule? On what may be called the 'narrow version' of the rule, the rule applies only if the claimant was actually in possession at the time of the alleged tort. On the 'broad version', on the other hand, the rule applies if, at the time of the alleged tort: (i) the claimant was in possession of the chattel; or (ii) the claimant had, with respect to the chattel, a right to immediate possession. The broad version of the rule was expressly

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[80] See text to n 86 below.

[81] *Eastern Construction v National Trust* (n 56). Compare *Clambake Pty Ltd v Tipperary Projects Ltd (No 4)* [2008] WASC 293 [12] (Heenan J).

[82] The *Winkfield* rule was applied by Beatson J in the recent case of *Blue Sky One Ltd v Mahan Air* [2010] EWHC 631 (Comm). This illustrates that, in the context of the English law of conversion, the rule has not been supplanted by the decision of the House of Lords in *Kuwait Airways* (n 32). This is not surprising; *The Winkfield* was not mentioned in the *Kuwait Airways* case.

endorsed, and applied, by the Privy Council in *The Jag Shakti*.[83] It has also been approved by courts in England and Wales,[84] and in Australia and Canada.[85]

One controversial issue concerns the number and scope of the exceptions to the *Winkfield* rule.[86] One exception is well established: the *Winkfield* rule does not apply where the defendant has a proprietary interest in the chattel that binds the claimant and which is inconsistent with the claimant having 'absolute and complete ownership'.[87] The fundamental basis of the exception is that to apply the *Winkfield* rule in such circumstances would be to deny the defendant's rights. Suppose that a pledgee brings an action against the pledgor for wrongfully re-taking possession before the pledge has determined. In such circumstances, treating the pledgee as though she had the best general property interest would be

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[83] *The Jag Shakti* [1986] AC 337 (PC). For a detailed and critical discussion of the case, see Norman Palmer (ed), *Palmer on Bailment* (3rd edn, Sweet & Mazwell 2009) paras 4-123–4-133.

[84] *Martin v Norbury* (Unreported, 21 July 1999, CA); *HSBC Rail (UK) Ltd v Network Rail Infrastructure Ltd* [2005] EWCA Civ 1437, [2006] 1 WLR 643.

[85] eg *RM Campbell Vehicle Sales Pty Ltd v Machnig* (Unreported, 22 May 1981, NSWSC); *Minichiello v Devonshire Hotel* (n 58).

[86] Compare eg *The Jag Shakti* (n 83) 345–46; Palmer (n 83) paras 4-095–4-098; Magda Raczynska, 'The Proprietary Nature of Title-based Financing Interests' in Ben McFarlane and Sinéad Agnew (eds), *Modern Studies in Property Law: Volume 10* (Hart 2019) 134–35.

[87] *Brierly v Kendall* (1852) 17 QB 937, 117 ER 1540; *Moore v Shelley* (1883) 8 App Cas 285 (PC); *Belsize Motor Supply Co v Cox* [1914] 1 KB 244 (KB); *Blue Sky One v Mahan Air* (n 82) [98]–[99] (Beatson J).

inconsistent with the pledgor's rights, because the pledgor has a (reversionary) general property interest that binds the pledgee. A second exception applies, it seems, where the operation of the *Winkfield* rule would lead to circuity of actions.[88] A third exception is illustrated by cases in which a finance company has let out goods under a hire-purchase agreement, a third party has tortiously interfered with the goods and, at the time of the wrong, the finance company had a right to immediate possession (eg because the hire-purchase agreement provides that the hire-purchaser's right to possession is to determine if the hire-purchaser breaches certain terms; and those terms were, in fact, breached by the hire-purchaser). The courts have maintained that, in such circumstances, the claimant's damages must be limited to the amount of the actual loss suffered by it, which will usually be the balance outstanding on the hire-purchase price.[89] As Lord Denning MR explained in the leading case, *Wickham Holdings v Brooke House Motors*, 'the finance company are entitled to recover what they have lost by reason of [the defendant's] wrongful act. This is normally the outstanding balance on the hire-purchase price. But they are not entitled to more than they have lost'.[90] Insofar as the *Winkfield* rule is incompatible with awarding the finance company

[88] *Chartered Trust plc v King* (Ch, 23 February 2001). See also Palmer (n 83) paras 4-095, 4-098; *Maynegrain Pty Ltd v Compafina Bank* [1982] 2 NSWLR 141 (NSWCA) 156–57 (Hutley JA).

[89] *Wickham Holdings Ltd v Brooke House Motors Ltd* [1967] 1 WLR 295 (CA).

[90] ibid 301.

damages that reflect its true loss, the *Winkfield* rule is not to be applied.[91] In *Blue Sky One v Mahan Air* Beatson J maintained that the rationale that underpins the decision in *Wickham Holdings* is that, as there is no basis upon which the hire-purchaser could recover the money paid under the hire-purchase agreement, if the finance company recovered the full value of the chattel it would end up with a 'windfall':[92] it 'would both get the full value of the [chattel] and keep all the instalments already paid to it by the hirer'.[93] If this is right, the approach taken in *Wickham* is, presumably, not limited to the hire-purchase context, but applies to materially similar cases (eg where a seller of goods, who retains his title under a retention of title clause, sues in conversion a person to whom the buyer, in breach of the contract, has delivered the goods, and the buyer is unable to recover the purchase money that he has already paid).[94]

Fourthly, following the enactment of section 8 of the Torts (Interference with Goods) Act 1977, a person who is in possession of a chattel, or has a right to immediate possession in respect of a chattel, will, as we have seen,[95] not be treated by the courts as the 'absolute and complete owner' if the defendant is able

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[91] This is illustrated by the application of *Wickham Holdings* in *VFS Financial Services (UK) Ltd v Euro Auctions (UK) Ltd* [2007] EWHC 1492 [103]–[107] (Judge Richard Seymour QC).

[92] *Blue Sky One v Mahan Air* (n 82) [108].

[93] ibid [112].

[94] Edelman (n 41) para 38-065; Raczynska (n 86) 133–35.

[95] See text to nn 23 and 24 above.

to identify a third party with a 'better right' than the claimant. Consequently, in many cases, particularly cases involving claims by bailees, the result will not be determined by the *Winkfield* rule, and the practical importance of the rule is, therefore, much less than it was. But the rule is not redundant.[96] It continues to affect the outcomes of the many cases in which it is not possible to identify the person or persons who have a better right in the chattel. In such cases, the claimant will be treated as the holder of the best general property interest in the chattel and her damages will be assessed on this basis. Accordingly, it is important to determine whether the rule is justified.

4. Is the *Winkfield* rule justifiable?

This section advances, and argues for, three claims. First, that the law's justification of the *Winkfield* rule—the justification that has been endorsed by the courts—is fatally flawed and must be rejected. Secondly, that the main alternative justifications of the rule, or decisions based on the rule, that have been advanced in the academic literature are also unsatisfactory. If these claims are correct, it is doubtful that the *Winkfield* rule, in its current form, is justified, and legal reform may be required. This brings us to the third claim: there are good reasons to

[96] See Graham Battersby, 'The Present Status of the *Jus Tertii* Principle' [1992] Conv 100, 100–103.

replace the *Winkfield* rule with a similar, yet importantly different, rule of presumption.

A. The 'Normal Justification' of the *Winkfield* Rule

Why do the courts presume that a person who is in possession of a chattel, or has a right to immediate possession, has the best general property interest in the chattel? And why is the defendant generally precluded from rebutting the presumption by establishing that a third party has a better right in the chattel than the claimant? According to Norman Palmer, the 'normal justification' for the *Winkfield* rule is that 'it tends to a more tranquil society by safeguarding peaceable possession against the incursions of strangers'.[97] This justification, as Palmer notes, was embraced by Lord Campbell CJ in *Jeffries v Great Western Railway*,[98] in a judgment that has been cited with approval on many occasions, including by Collins MR in *The Winkfield*.[99] Lord Campbell CJ asserted that possessors should be presumed to have 'the property' because it is 'essential for the interests of society that peaceable possession should not be disturbed by wrongdoers'.[100] It is important to emphasise that Palmer regarded the 'normal

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[97] Palmer (n 83) para 4-122.

[98] *Jeffries v Great Western Railway* (n 64).

[99] *The Winkfield* (n 2) 55.

[100] (1856) 5 E & B 802, 805; 119 ER 680, 681. Lord Campbell's account of why possession should be protected bears a significant resemblance to Savigny's well-known explanation of the

justification' as the legal ground of the rule that possessors should be presumed to have 'absolute and complete ownership'; and, thus, as the rational basis of the possessor's ability to recover the full value of the chattel. Palmer is very clear on this point. It underpins his claim that, as a matter of principle, a bailee who has a *right* to possession, but not possession, should recover 'only the value of his limited interest'.[101] The protection of a person who has lost possession is, Palmer tells us, 'less essential to the peace of the community because there is no possibility of a direct or violent incursion'.[102]

There are four major objections to the 'normal justification' of the *Winkfield* rule. It is argued below that, while the first objection, advanced by Fleming, does not succeed, the other three justifications have real force, and the 'normal justification' fails to justify the *Winkfield* rule.

The first objection is that, in the conditions obtaining in the United Kingdom at the present time, there is no need for the law of torts to protect the possessor. Fleming argued that it may have been justified to treat a possessor as the owner 'in the turbulent days of the distant past', when the rule 'was a useful

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protection given to possessors in Roman law. See Friedrich Karl von Savigny, *Treatise on Possession* (Erskine Perry tr, 6th edn, Sweet 1848) 27–28; James Gordley and Ugo Mattei, 'Protecting Possession' (1996) 44 Am J Comp L 293, 294–98.

[101] Palmer (n 83) para 4-124.

[102] ibid para 4-122.

adjunct to the preservation of the peace'.[103] But the rule has 'survived into the modern law, despite the disappearance of conditions that once lent it justification'.[104] This, for various reasons, is not a good argument. One problem is that it presupposes that the only reason for the law to protect possession is that doing so serves to maintain the peace—that, as Pollock and Maitland put it, laws protecting possession are established and maintained 'in the interest of public order'.[105] However, there are other reasons for the law to protect possessors of chattels from intrusions by strangers. This point, also, was recognised by Pollock and Maitland. 'To allow men to … seize goods without form of law,' they claimed, 'is to invite violence'.[106] The concern is that, if the law were to fail to provide protection to individuals who are in possession of chattels or land, others would seek to take such things from possessors; and the attempts to seize, and to resist such seizures, would often lead to violence. Land and chattels, as Donaldson LJ put it in *Parker v British Airways Board*, 'would be subject to a free-for-all in which the physically weakest would go to the wall'.[107] So, 'an invitation to all the

[103] John G Fleming, 'Tort Liability for Damages to Hire-Purchase Goods' (1959) 32 ALJ 267, 267.

[104] ibid.

[105] Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I* (2nd edn, CUP 1898) vol 2, 41.

[106] ibid.

[107] [1982] QB 1004 (CA) 1009.

world to scramble for the possession', as Lord Kenyon CJ described it,[108] should be avoided, irrespective of whether it is likely to lead to civil unrest, on the ground that such invitations engender violence.

While Fleming's objection does not hit its mark, the 'normal justification' can be criticised on other grounds. First, while there are good reasons to protect the possessor from intrusions by strangers, the law can provide appropriate protection to possessors without enabling them to obtain a windfall. Indeed, since possession, as we have seen,[109] is a source of rights, the law already provides adequate protection to possession, quite apart from the *Winkfield* rule. The possessor actually has a right to immediate possession, which grounds duties, on persons generally, not to physically interfere with the chattel. If this right is infringed, the possessor will be entitled to bring an action, claiming damages or, if the wrongdoer still has the chattel, delivery up.

One factor that seems to have contributed to the influence of the 'normal justification' thesis is the prevalence of the thought that the *Winkfield* rule explains, not only the measure of the recovery, but why a mere possessor is able to successfully sue at all. If this thought were correct, then, without the rule, possession would not be satisfactorily protected. But once it is recognised that benefiting from the *Winkfield* rule is not the only important consequence of

[108] *Webb v Fox* (1797) 7 TR 391, 397; 101 ER 1037, 1040.

[109] Text to nn 10–19.

obtaining possession, and that possession is a source of rights, the argument no longer holds. To put the point another way, Collins MR's reasoning in *The Winkfield* is inadequate because it fails to explain why, in addition to enabling a possessor to bring an action against an interferer, the law should treat the possessor as the 'absolute and complete owner' and thereby enable the possessor to recover the full value of the chattel. As Wills J said in in *Claridge v South Staffordshire*, '[a] physical interference with possession is a wrong for which undoubtedly a bailee may sue; but it is quite another thing to say that he may recover in such action the same damages as if he were the owner'.[110] Collins MR's reply—that the possessor is entitled to the full value because he is presumed to be the 'owner'—may well have been supported by the authorities, but it does not actually address the substance of the objection.

Secondly, the 'normal justification' fails to explain why the rule applies to possessors who are *not* in possession at the time of the alleged tort. If the justification of the *Winkfield* rule is that it serves to protect possession, why does the rule apply where the claimant has a right to immediate possession but is not actually in possession? It might be said that this is not so much an objection to the 'normal justification' of the *Winkfield* rule, or to the actual decision in the *Winkfield*, as to the extension of the rule in *The Jag Shakti*—it is, in other words,

[110] [1892] 1 QB 422 (DC) 424. A similar point was made by Hawkins J at 424: '[t]he right to bring an action against the wrongdoer is one thing; the measure of the damages recoverable in such action is another'.

an objection to the broad version of the rule. Palmer appears to have taken this view.[111] He claimed, as we have seen, that the broad version of the rule is not supported by the 'normal justification', because, where the claimant is not in possession, 'there is no possibility of a direct or violent incursion against him'.[112] For Palmer, however, it was not *The Winkfield* that was problematic, but the 'extension advanced in *The Jag Shakti*', which was not supported by the 'principal authorities' discussed in *The Winkfield* or by the judgment of Collins MR in *The Winkfield* itself.[113] Palmer was right to criticise *The Jag Shakti*, but the law's difficulties are more fundamental than he believed. The chief problem is not that the 'normal justification' does not support the broad version of the *Winkfield* rule; it is that the 'normal justification' does not justify even the narrow version of the rule.

Thirdly, the 'normal justification' does not explain why the *Winkfield* rule applies to cases in which the claimant has merely a right to immediate possession at the time of the alleged tort, but does *not* apply to cases in which the claimant has a reversionary interest. In *The Pledgee*, for example, A was left, once he had pledged the chattel, with a reversionary general property interest. A could bring an action against C for what is usually called 'reversionary injury'.[114] But the

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[111] Palmer (n 83) paras 4-122–4-133.

[112] ibid para 4-122.

[113] ibid para 4-130.

[114] See, eg, *HSBC Rail v Network Rail* (n 84).

Winkfield rule is not applicable where a claimant brings an action for reversionary injury.[115] The claimant is able to recover damages only in respect of the loss that he or she has actually suffered as a result of the defendant's interference.

Given that (i) the 'normal justification' does not explain why a claimant with a right to immediate possession is able to recover the value of the chattel from a tortfeasor, and (ii) no other rationale for the broad version of the *Winkfield* rule has been advanced in the cases, it is perhaps not surprising that the distinction that the law has drawn between, on the one hand, claimants with a reversionary interest and, on the other, claimants with a right to immediate possession, lacks a principled basis. This defect has been discussed by Cynthia Hawes.[116] Hawes points out that a pledgor and pledgee each hold an interest in the chattel; that, according to the cases, the latter, but not the former, is to be regarded as the 'absolute owner' of the chattel and can thereby recover the full value of the chattel from a wrongdoer; and that this distinction 'continues to exist for no defensible reason'.[117] Hawes maintains that the solution is to extend *The Winkfield* rule to claimants who have a reversionary interest: just as a bailee may recover the full value of the chattel, one who holds a reversionary interest 'could equally recover the full amount'.[118] Hawes is right to maintain that the distinction that the law

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[115] ibid.

[116] Cynthia Hawes, 'Tortious Interference with Goods: Title to Sue' (2011) 17 Canterbury LR 331.

[117] ibid 348.

[118] ibid 350.

currently draws between 'possessory' and 'reversionary' interests lacks a principled basis. But if, as it seems, the *Winkfield* rule itself lacks a rational foundation, then the appropriate way to deal with this is to do the opposite of what Hawes has proposed: the *Winkfield* rule should not be extended to claimants with reversionary interests; it should be abolished altogether. The basic principle of compensatory damages should be applied to the claimant's position as it truly is, rather than to a fictional account of the claimant's position.

B. Alternative Justifications of the *Winkfield* Rule

If the arguments advanced above are correct, the 'normal justification' of the *Winkfield* rule is woefully defective. Are there any other arguments that support the rule or decisions based on the rule? Two main alternative arguments have been advanced in the literature. The first argument seeks to justify, not the *Winkfield* rule itself, but the outcomes of cases in which the rule has been applied and, in particular, awards of the full value of a chattel to claimants who have a limited legal interest (eg a pledge) or an inferior general property interest. This argument's starting point is the fact that the law concerning the chattel torts has multiple aims. One aim is to provide just compensation where a claimant suffers loss as a result of the defendant's tort. Another aim is, in appropriate cases, to realise the claimant's right to possession by requiring the defendant to restore possession to the claimant. Sarah Green and John Randall QC, for instance, have

maintained that, while one function of the law of torts is to provide just compensation where a wrong has been committed,

> in the tort of conversion there is a second fundamental object… namely the vindication of the claimant's proprietary rights in the subject asset. 'But for' that second object, the awards of damages to claimants who in reality have suffered no loss … would be hard indeed to justify.[119]

It seems that what Green and Randall, and a number of other eminent scholars,[120] have in mind when they claim that the chattel torts, or some of them, serve to 'vindicate' proprietary rights is that they enable proprietors to recover their chattel or its value from the person who is currently possessing it (though it should be emphasised that the term 'vindicate' is used in multiple ways by lawyers). According to Tettenborn, the tort of conversion serves to 'vindicate' the claimant's proprietary rights by allowing proprietors to 'get back their property or

[119] Sarah Green and John Randall, *The Tort of Conversion* (Hart 2009) 170. See also 168–69, 214–15, 219–20.

[120] See eg Andrew Tettenborn, 'Conversion, Tort and Restitution' in Ewan McKendrick and Norman Palmer (eds), *Interests in Goods* (2nd edn, Routledge 1998) 825; Tony Weir, *A Casebook on Tort* (10th edn, Sweet & Maxwell 2004) 483.

its value from a wrongful possessor'.[121] Building on these accounts of the various functions of the torts that protect proprietary interests in chattels, one might argue that the reason why a person with an inferior general property interest or a limited legal interest is able to obtain a monetary award for the full market value of a chattel is that such an award seeks, not to compensate the claimant, but to realise the claimant's right to obtain possession by requiring the tortfeasor to pay the monetary value of the restoration of possession. The award is a monetary substitute for delivery.

This, however, is not a good argument. In the first place, the *Winkfield* rule applies irrespective of whether the claimant, or the defendant, is in possession at the time of judgment. Accordingly, the rule can apply to cases in which the claimant has *not* been deprived of possession, such as where the defendant has by his negligence damaged goods in the claimant's possession. In such cases, there is no question of possession being restored to the claimant and, consequently, no possibility of 'vindicating' the claimant's right to obtain possession by ordering the defendant to provide a monetary substitute for delivery.

Secondly, ordering the defendant to pay the market value of the chattel (ie the market value of the best general property interest in the chattel) to the claimant does not necessarily amount to ordering the defendant to pay the

[121] Tettenborn (n 120) 825. The courts may order the defendant, if he or she is in possession of the chattel, to deliver it to the claimant: Torts (Interference with Goods) Act 1977, s 3.

monetary value of *restoring possession* of the chattel to the claimant.[122] This is because the monetary value of the restoration of a chattel in respect of which the claimant has a limited legal interest (eg a pledge) or an inferior general property interest is not necessarily the same, and often will not be the same, as the monetary value of the best general property interest.

It might be said that, where a claimant has an inferior general property interest, the reason for awarding the claimant the value of the best such interest is that there is no market for inferior interests. Accordingly, if the claimant were to receive the monetary value of an inferior general property interest in the chattel, she usually would not be able to purchase an equivalent chattel in the marketplace. The claimant, it may be argued, should receive an award that enables

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[122] The Law Reform Committee appears to have overlooked this point in its *Eighteenth Report*. The committee, which comprised several distinguished judges, including Lord Diplock and Lord Pearson, maintained that 'in many cases it is both just and convenient that a plaintiff relying on actual possession should be allowed to recover the full value of the chattel from a wrongdoer': Law Reform Committee (n 20) para 60. In particular, where the claimant relies upon possession or a right to immediate possession, and no *tertius* has been joined to the action, the claimant 'should be entitled to recover the chattel itself, or damages on the basis that he had a full proprietary interest': ibid para 75. The committee thought that this was 'a just result, inasmuch as the plaintiff (for example, a bailee whose bailor had disappeared) would, but for the wrongful interference, have continued to enjoy the chattel': ibid. Alas, this argument fails to notice that there is an important conceptual distinction between the monetary value of recovering possession of a chattel and the monetary value of the best general property interest in a chattel.

her to *actually obtain possession of* an equivalent chattel and, therefore, the claimant should receive the monetary value of the best general property interest in an equivalent chattel.

It is important to note that this response re-characterises the aim of the award in such a way as to change the terms of the debate. The aim, on this view, is *not* to provide the claimant with the monetary value of the restoration of possession of the chattel in respect of which she (the claimant) has an inferior interest; rather, the aim is to award such a sum as will enable the claimant to obtain possession of an equivalent chattel. Why should the law adopt this approach? It might be said that this is the most appropriate way in which to compensate the claimant where possession has not been restored to her. On a cost-of-cure approach to compensation, the claimant—in order to be put, insofar as money can do it, in the position she would have been in but for the wrong—should receive such a sum as will enable her to obtain a replacement chattel. Given that, ordinarily, inferior interests are not available, or not readily available, in the marketplace, the claimant will be able to purchase a replacement chattel only if she receives the cost of acquiring the best general property interest in an equivalent chattel. An analogy can be drawn to those cases in which a used chattel was destroyed by a tortfeasor, no second-hand equivalent chattel could be obtained, and the claimant was awarded a sum that enabled her to purchase a

brand-new chattel.[123] In such circumstances, the claimant could obtain possession of an equivalent chattel, and the breach could be thereby cured, only if the claimant received the value of a new chattel. Similarly, in *The Thief*, as there is no market for inferior interests, Y could obtain possession of an equivalent chattel (the first edition of *Pride and Prejudice*) only if Y is awarded the value of the best general property interest in respect of such a chattel.

Importantly, however, compensation is, as a matter of law, to be assessed on a cost-of-cure basis only if it is reasonable to do so.[124] Reasonableness, in this context, depends upon a number of factors, including whether the claimant incurred, or should have incurred, the cost of cure in taking reasonable steps to mitigate her loss; and whether the claimant has already cured or, if not, whether she intends to.[125] Since the appropriateness of awarding the cost of cure depends on the facts of the case, one cannot look to the law on cost of cure in order justify the result in every one of the very many cases in which, as a result of the application of the *Winkfield* rule, a claimant with an inferior general property

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[123] eg *Dominion Mosaics and Tile Co Ltd v Trafalgar Trucking Co Ltd* [1990] 2 All ER 246 (CA). Where, however, the 'betterment' confers a real benefit on the claimant, an appropriate amount should be deducted from the claimant's award: *Voaden v Champion (The Baltic Surveyor and the Timbuktu)* [2002] EWCA Civ 89, [2002] 1 Lloyd's Rep 623.

[124] *Southampton Container Terminals Ltd v Hansa Schiffahrts GmbH (The Maersk Colombo)* [2001] EWCA Civ 717, [2001] 2 Lloyd's Rep 275.

[125] *The Maersk Colomobi* (n 124); *The Baltic Surveyor* (n 123).

interest in a chattel has received the monetary value of the best interest. To put the point differently, the argument merely shows that the outcomes of *some* cases would not be affected by the abolition of the *Winkfield* rule.

The second alternative argument is that the *Winkfield* rule, by enabling bailees to recover the value of the chattel from a wrongdoer, serves the interests of bailors. Palmer, for instance, has said that one of the advantages of the *Winkfield* rule is that it arms 'the bailee with the power to protect his [the bailor's] interests' where the bailor is 'absent from the scene of the wrongdoing, or even ignorant of its occurrence, until it is too late for him to assert an effective remedy'.[126] A defender of the rule might add that, where the bailee is holdings goods for many separate bailors, allowing the bailee to recover damages in respect of the losses suffered by the various bailors is efficient, practicable, and very convenient. In *The Winkfield*, for example, if the Postmaster-General had been able to recover damages only in respect of his own true loss, then many distinct claimants—each sender or recipient—would have needed to bring his or her own claim for a small sum of money. These are genuine advantages, but it is highly doubtful that these considerations can justify the rule. In the first place, a defence that focuses on how the rule might benefit bailors cannot justify the current rule, which is applicable irrespective of whether the possessor, or person with a right to immediate possession, is in a bailment relationship. A second point is that, as

[126] Palmer (n 83) para 4-134.

Palmer seems to have recognised,[127] and as was explained many years ago by Warren and, more recently, by Fleming,[128] the aforementioned advantages appear to be outweighed by countervailing considerations. Where the bailee recovers the value of the chattel, the bailor is deprived of the opportunity of choosing whether the wrongdoer is made to pay damages in respect of the loss that the bailor has suffered. Moreover, the bailor has 'no adequate safeguards against the bailee absconding with the proceeds, mishandling the litigation, or accepting a disadvantageous settlement in full satisfaction of the claim'.[129] As for cases in which a bailee is holding goods for a multitude of distinct bailors, these can be dealt with under the ordinary civil procedure rules concerning joint actions, representative actions, and group litigation.[130]

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[127] ibid.

[128] Edward H Warren, 'Qualifying as Plaintiff in an Action for a Conversion' (1936) 49 Harvard LR 1084, 1096–97, 1102–1103; Fleming (n 103) 269, 275.

[129] Fleming (n 103) 269.

[130] CPR 19. For a detailed discussion of these rules, see Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (3rd edn, Sweet & Maxwell 2013) ch 13. To say that cases involving numerous bailors can be dealt with under these rules is not to say, of course, that the rules are entirely satisfactory. But if the general civil procedure rules are unsatisfactory, the better approach is, not to retain the *Winkfield* rule, but to reform the general rules.

C. An Alternative Rule of Presumption

Given that the 'normal justification' of the *Winkfield* rule is beset with difficulties, and that the other justifications that have been advanced in the literature also fail to justify the rule, it is highly doubtful that the *Winkfield* rule, and the departures from the fundamental principle of compensatory damages that it has triggered, are justified. If the rule is not justified, there are good reasons to replace it with a somewhat similar, but importantly different, rule of presumption, which may be called the 'supreme title presumption'. According to this rule, if a claimant establishes that she, or a person from whom she derives her interest, has a general property interest in a certain chattel, the court must presume that the claimant, or the person from whom she derives her interest, has the best such interest in the chattel unless it is established that the claimant, or the person from whom she derives her interest, has an inferior interest.

Why should such a rule be introduced? Suppose that a claimant establishes that she acquired a general property interest in respect of a certain chattel, and that, thereafter, the defendant wrongfully destroyed it. Suppose, also, that the *Winkfield* rule has been abolished. A question arises as to the quantum of damages. The defendant contends that the claimant is not entitled to the full value of the chattel, because she is only entitled to recover damages that represent her true loss, and she has failed to establish that she has the best general property interest. The problem faced by the claimant is, of course, that it is usually very

difficult for her to establish the strength of her title.[131] There is no general register of interests in chattels. And, ordinarily, it is not possible to provide a complete account of the chain of title with respect to a chattel. Consequently, there will often be uncertainty as to the strength of the claimant's title. But the dispute between the claimant and the defendant, which must be resolved, cannot be determined unless the uncertainty is dealt with. The problems that arise from the difficulty of proving title are not problems faced by English law alone: they are problems that must be dealt with in any property system that lacks a comprehensive scheme of title registration. One way to deal with them is by establishing appropriate rules of proof.[132] The major advantage of adopting a rule which requires a court, if the claimant establishes that she has a general property interest, to presume that the claimant has the best such interest in the chattel, is that this serves the interests of persons who really do have the best interest. It

[131] Warren advanced a similar point as part of his defence of the view that possession with an assertion of title should be sufficient against a wrongdoer: Warren (n 128) 1098. In England and Wales, the problem is mitigated, but not resolved, by the rules concerning the extinguishment of title by lapse of time: Limitation Act 1980, ss 3, 4.

[132] Many legal systems have adopted such rules. In Scotland, for example, there is a rebuttable presumption that the possessor of a corporeal moveable is the owner: *Prangnell-O'Neill v Lady Skiffington* 1984 SLT 282 (IH); Kenneth Reid and others, *The Law of Property in Scotland* (Law Society of Scotland/Butterworths 1996) para 130. Similar rules exist in the French and German legal systems: see Sjef van Erp and Bram Akkermans (eds), *Cases, Materials and Text on Property Law* (Hart 2012) 99, 145.

serves their interests by enabling them to recover the compensation that they are actually entitled to, notwithstanding that they are not able to prove that they have the best interest.

The supreme title presumption would disadvantage some defendants, and enable some claimants to obtain a windfall, but these concerns are mitigated by three considerations. First, the defendant may rebut the presumption by establishing that the claimant, or the person from whom the claimant derives her interest, does not have the best interest. Secondly, while, in some cases, the claimant will be overcompensated as a result of the operation of the presumption (because, in truth, the claimant has only an inferior interest), the defendant is not required to pay more compensation than is actually due from him in total. Thirdly, the rule that the claimant is liable over to a person who does have a better interest,[133] helps to ensure that the money that the defendant pays is ultimately received by the person who is truly entitled to it.

The supreme title presumption is distinct from the rule of presumption applied in *The Winkfield* in two key respects. First, while the *Winkfield* rule requires the court to presume that anyone who has possession, or a right to immediate possession, has the best general property interest, the supreme title presumption requires the court to presume that a person who has a general property interest has the best such interest. The rule would not, therefore, require

[133] Torts (Interference with Goods) Act 1977, s 7(4).

the court to treat a person who claims to have, or is shown to have, a limited interest (such as a pledge) as though he had the best general property interest. Secondly, even where the claimant has a general property interest, the rule would not apply where it was proved, on the balance of probabilities, that the claimant has an inferior interest. This reflects the fact that the function of the rule is to deal with an evidential problem, ie the problem of establishing the strength of title. Where it is shown that the claimant has an inferior interest, there is no reason for the rule to apply. A major vice of the *Winkfield* rule is that it goes beyond what is necessary to resolve the evidential issue: the presumption can be rebutted only in limited circumstances, with the result that a claimant who clearly did not have the best general property interest may be treated as though she had it.

Are these differences significant? It is true that, since, under English law,[134] the *Winkfield* rule does not apply where a third party with a 'better right' than the claimant has been identified, the result of many cases would be the same. The suggested reform would make an important difference, however, where it is clear that the claimant has a limited interest, or an inferior general property

[134] If the arguments presented in this article are correct, the case for reform is even stronger in those jurisdictions (such as Australia) that have adopted the *Winkfield* rule but have not enacted the equivalent of sections 7 and 8 of the Torts (Interference with Goods) Act 1977. For discussion of the current position in Australia, see: Sappideen and Vines (n 31) paras 4.40, 4.170, 4.190, 4.210, 4.250; Kit Barker and others, *The Law of Torts in Australia* (5th edn, OUP 2012) 104–105, 124–25, 137–45.

interest, but the relevant third party cannot be identified. Under the current law, the claimant in such a case could invoke the *Winkfield* rule and her damages would be assessed on the fictitious basis that she had the best general property interest at the time of the tortious interference. If, however, the law were to be reformed in the way suggested, the claimant's compensatory damages would be assessed in light of her true position.

5. Conclusion

This article has argued that the *Winkfield* rule, which has been accepted and applied by the courts on many occasions, is beset with difficulties, which spring from the fact that the rule lacks a satisfactory justificatory foundation. It has also suggested that the *Winkfield* rule should be replaced with a rule of presumption that better reflects the underlying reasons. It is not possible to examine every argument that may be advanced in support of the *Winkfield* rule or against the proposed reform, but it is hoped that enough has been said to cast doubt on the justifiability of the current law, and to shift the argumentative burden to those who wish to defend it.