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Violating the Enjoyment of a Licence: A New Tort?

Introduction

For over two decades, Manchester Airport plc v Dutton[1] has been a controversial and rather enigmatic decision. This article advances a new account of it. Rather than viewing the case as an attempt to modify the rules of existing causes of action – which seems to be a dead end – it treats Dutton as the starting point for a new tort. It is based on a wrong of 'violating' the 'enjoyment' of a contractual licence. Third parties are under a duty not to do so, and contractual licensees have a corresponding (non-proprietary) right against them. This interpretation is a promising one. It offers the most plausible fit with both the reasoning and (crucially) the remedy in Dutton. This in turn suggests a way forward for scholarship on protecting contractual licensees. In addition, the new analysis shows that Dutton has a resonance in property and tort law more broadly. It may be relevant to our understanding of when 'property' exists, and it would overthrow traditional ideas about the uses of possession orders. Indeed whatever its ultimate fate, Dutton offers cause to reflect on how and why a new tort was created.

The crucial judgment in Dutton was that of Laws L.J., with whom Kennedy L.J. agreed. He held that the contractual licensee plaintiff, not being able to show standing on the basis of prior possession of the relevant land, could nevertheless obtain a possession order against protestors who had prevented it from accessing the land in question. This of itself has been controversial. Writers have rejected the idea that a proprietary remedy (a possession order) can ever be granted to protect a personal right (a licence). Laws L.J. is said to have failed to explain why it could be otherwise.

It will be suggested here that this criticism is somewhat unfair. Laws L.J. went far enough to allow us to fill in the blanks in his judgment. This is because he poses the question 'in every case' to be whether there has been a 'violation' of the 'enjoyment' of the 'licence';[2] and he affirmed that 'where there is a right, there is a remedy.'[3] In these ideas one finds a new legal wrong. Indeed, this wrong

[1] [2000] Q.B. 133.
[2] Ibid, 150.
[3] He uses a Latin maxim to this effect: ibid, at 150.

would tally with a possession order being an appropriate remedy on the facts of Dutton, even though its execution would involve the removal of anyone found on the land. The nature of the plaintiff's licence, together with the absence of any intention requirement for the new wrong, meant that any third party on the land would be 'violating' the 'enjoyment' of the licence. They could hence be removed as well when the possession order was executed. For this purpose, however, the word 'possession' (as is used in the procedural rules, in possession orders and in warrants of possession) must be interpreted to mean something like 'effective control.'

It seems that this new right is not proprietary. Neither Dutton nor any later case challenges the orthodoxy that a licence creates no such right. The reasons for this are not explained, but one possibility is that the right is not 'thing-related' to anything that can be owned. Even the scope for a possession order does not make the right pertain to land, for it does not put the licensee in such possession as goes hand in hand with title. Dutton on this account would clarify what it means for a right to 'relate' to a thing. In addition, the absence of any suggestion that the right relates to the 'value' of the licence tends to confirm that one cannot have a property right in a contract. The case does however support a personal right to similar effect.

It is worth being clear from the outset that this article does not go in detail through all of the post Dutton case law. What Dutton stands for has yet to be settled by any of these later decisions.[4] The chief focus will hence be on the reasoning of Laws L.J. The facts and judgments in other cases will be mentioned only insofar as they illuminate the discussion of Dutton.

The structure of this article is as follows. The first section notes the decision in Dutton, and summarises the academic reaction to it. The second and third sections then seek to show that the criticism of the case to date is not entirely persuasive. The former explains why Dutton can be seen as advancing a new wrong; the latter looks specifically at why Laws L.J.'s approach to remedies accords with one. After this, the implications of the new account are explored in the fourth and final section.

1. Dutton and its reception

a. The decision

In this section, we will mention the facts and the outcome in Dutton, and then its academic reception. The facts of the case itself are quite well-known. The defendants were third party protestors. The plaintiff had a contractual licence to occupy the relevant land in order to lop and fell frees on it. The conduct of the defendants was preventing the plaintiff from accessing the land. The plaintiff sought an order for possession as against the defendants. The issue, as described in the notice of appeal, was whether the plaintiff's licence gave it 'an interest in land sufficient to enable it to seek an order for possession'.[5]

Chadwick L.J. (dissenting) took an orthodox view of the law, and decided against the plaintiff. There are two main steps to his reasoning. Firstly, the replacement of the common law action in

[4] See section 2(a).
[5] See Dutton [2000] Q.B. 133, 139 per Chadwick L.J.

ejectment with the modern procedural rules for possession claims had not been done with any intention to move away from the standing rules in ejectment.[6] Thus a plaintiff would still need to show a legal interest in the land, giving a present right to possession. Secondly, a licence did not give a sufficient title in this respect. The case law had consistently proceeded on this basis. A licensee in prior factual possession did have a title as against a 'mere wrongdoer', but only because they would be relying on the fact of possession and not on their licence.

Laws L.J. (with whom Kennedy L.J. agreed) adopted a different view. He accepted that the plaintiff did not have legal title to the land,[7] and so would not have had standing in ejectment. Yet this was not material. When ejectment was replaced by the modern procedural rules for the recovery of land,[8] so the remedy of a possession order ceased to be linked to the standing rules that had governed ejectment. Consequently, these rules did not settle the modern position of contractual licensees. They had 'no voice in the question';[9] and it was a 'false assumption' to say that the plaintiff needed to have legal title to the land.[10]

Having reached this view, Laws L.J. concluded that a possession order was a suitable remedy for the 'wrong' which he felt to have occurred. He explained that:

> 'Otherwise the law is powerless to correct a proved or admitted wrongdoing; and that would be unjust and disreputable. The underlying principle is in the Latin maxim… "ubi jus, ibi sit remedium".'[11]

Elsewhere, he stated that:

> 'In every case the question must be, what is the reach of the right, and whether it is shown that the defendant's acts violate its enjoyment. If they do, and (as here) an order for possession is the only practical remedy, the remedy should be granted.'[12]

Presumably in applying this idea more specifically to the case before him, he also said:

> 'In my judgment the true principle is that a licensee not in occupation may claim possession against a trespasser if that is a necessary remedy to vindicate and give effect to such rights of occupation as by contract with his licensor he enjoys.'[13]

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[6] Ejectment was put onto a statutory footing by the Common Law Procedure Act 1852. This Act removed various fictions surrounding it. The action was later renamed one 'for the recovery of land' in 1970 by RSC Ord 113. It was under RSC Ord 113 that Dutton was decided. Today, the procedural rules appear in Part 55 of the Civil Procedure Rules.
[7] Dutton [2000] Q.B. 133, 147 and 149.
[8] See fn. 6, above.
[9] Dutton [2000] Q.B. 133, 149–150.
[10] Ibid, 149.
[11] Ibid, 150.
[12] Ibid.
[13] Ibid.

Laws L.J. added that this principle does not allow a licensee to claim against either the licensor or their successors in title.[14] He also explained that it is the same one 'as allows a licensee who is in de facto possession to evict a trespasser.'[15] In his view there was 'no respectable distinction, in law or logic', between such a case and that of the plaintiff in Dutton.[16]

The other majority judgment was that of Kennedy L.J. For his part, he tried firstly to justify the result on the basis that the modern procedural rules had changed the law, to permit those with an entitlement to occupy to claim a possession order.[17] In the alternative, he agreed with the reasons of Laws L.J.

b. Academic reaction

Case comments on Dutton advanced various critical observations in relation to the decision.[18] To a large extent they echo and amplify Chadwick L.J.'s dissenting judgment. For example, it has been accepted that Parliament, in replacing ejectment with the new procedure for seeking a possession order,[19] had not thereby wished to change the substance of the law that had governed when one could be sought.[20] In this sense the old rules on ejectment remained relevant. One must therefore discount Kennedy L.J.'s reasoning to this effect, and focus on the contentions of Laws L.J., with which he agreed.

With respect more specifically to Laws L.J.'s judgment, an overarching criticism is that he supports his approach by reference to no authority. The closest that he gets to doing so is his claim that 'no respectable distinction' existed, as between the position of a licensee in prior possession and the case of the plaintiff in Dutton.[21] This might be viewed as an attempt to develop the law incrementally, but it is a dubious one. Authors have preferred Chadwick L.J.'s explanation of this point. A licensee in prior possession succeeds, not because of their licence, but since the fact of prior possession is sufficient to evidence a title as against a mere wrongdoer.[22]

Having discounted this basis for Dutton, writers have viewed Chadwick L.J.'s judgment as being more in step with the prior case law. Attention has further been drawn in this respect to authorities, not mentioned at all in Dutton, that licensees do not have standing, qua licensee, either in the tort of private nuisance,[23] or in trespass to land.[24] The same is also true respecting negligence claims for economic loss that has been caused to a licensee.[25]

For all of these reasons, orthodoxy holds that Dutton is incorrect. The actions of the defendants disclosed no known legal wrong. As Swadling has concluded:

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[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] Ibid, 150–152.
[18] The negative response helped to persuade the New South Wales Supreme Court not to follow Dutton in Georgeski v Owners Corporation Sp49833 [2004] NSWSC 109.
[19] See fn. 6, above.
[20] G. Seabourne and E. Paton, 'Unchained Remedy: Recovery of Land by Licensees' [1999] Conv. 535, 540; W. Swadling, 'Opening the numerus clausus' (2000) 116 L.Q.R. 354, 536–537.
[21] Dutton [2000] Q.B. 133, 150.
[22] W. Swadling, 'Opening the numerus clausus' (2000) 116 L.Q.R. 354, 538–539.
[23] Hunter v Canary Wharf Ltd [1997] A.C. 655.
[24] Hill v Tupper (1863) 2 Hurl. & C. 121.
[25] Cattle v Stockton Waterworks Co (1874–75) L.R. 10 Q.B. 453.

> 'If Laws L.J. had instead focused on the content of the right, viz., that it comprised a personal right vis-à-vis the licensor to occupy the land, then it would have been seen that the right was not one which by its nature was capable of binding a stranger to its creation. In other words, he would have seen that there was not as against this plaintiff a "proved or admitted wrongdoing", for the right, being of a personal nature, reached no further than the licensor.'[26]

Views of this sort have continued to be expressed since.[27] Lochery has contended that one must have a property right in land to claim possession of it.[28] She regrets that '[w]e are not told' why a contractual licensee without a property right can now sue for possession.[29]

2. A new wrong

a. The adaption of existing cause(s) of action

It will be suggested here that these criticisms are somewhat unfair. They are reasonable insofar as they highlight the lack of authority behind Dutton. Laws L.J.'s aim, however, seems to have been to create a totally new cause of action – one not constrained by prior decisions. This is how he sidestepped the ostensibly cogent reasoning of Chadwick L.J. His description of the new wrong is also sufficient to allow us to fill in the remaining blanks. From this we can deduce why he (presumably) thought a possession order an appropriate remedy on the facts. Whether he should have taken this approach is a separate matter.[30]

The starting point for understanding Dutton in this way is to cease treating it as a case on the standing rules for any existing cause(s) of action. This is how Dutton has conventionally been understood. Megarry and Wade, for instance, mentions it in the context of possession claims.[31] Clerk and Lindsell suggests that it affords standing in trespass.[32] If this is correct, Dutton must have taken a relaxed view of what 'possession' means, for the purposes of determining locus standi in these actions.[33] The term is being taken to signify mere 'control and use'.[34]

As a matter of precedent, however, the issue of how best to explain Dutton has yet to be settled. This point requires some emphasis, for it is true that, in Vehicle Control Services Ltd v Revenue and Customs Commissioners,[35] the Court of Appeal purportedly applied Dutton in awarding 'damages for

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[26] W. Swadling, 'Opening the numerus clausus' (2000) 116 L.Q.R. 354, 360.
[27] See for example: J. Hill, 'The Proprietary Character of Possession' in E. Cooke (ed.), Modern Studies in Property Law: Volume 1 (Oxford, Hart, 2001); and B. McFarlane, 'Keppell v Bailey (1834); Hill v Tupper (1863): The Numerus Clausus and the common law' in N. Gravells (ed.), Landmark Cases in Land Law (Hart, Oxford 2013).
[28] E. Lochery, 'Pushing the Boundaries of Dutton?' [2011] Conv. 74, 80.
[29] Ibid, 78.
[30] See further sections 3(c), 4(a) and 4(c), below.
[31] E. Cooke, S. Bridge and M. Dixon, Megarry & Wade: The Law of Real Property (9th ed. Sweet & Maxwell, London 2019), para 33-014, n. 105. Reference is also made to Dutton in support of a statement that a licensee in prior factual possession can sue in trespass: ibid, at para. 33-003, n. 36.
[32] M. Jones (ed.), Clerk & Lindsell on Torts (22nd ed. Sweet & Maxwell, London 2017), para. 19-23.
[33] In a possession claim, one must have a right to such 'possession'. In a trespass claim, the wrong is to the fact of such 'possession' of the relevant land (see likewise fn. 45, below).
[34] M. Dixon, 'Editor's notebook' [2010] Conv. 423, 426.
[35] [2013] EWCA Civ 186.

trespass'.[36] Lewison L.J. said that '[t]he traditional view is that a licensee cannot maintain an action for trespass',[37] before adding that '[t]his principle has, to some extent, been modified in more recent times.'[38] These statements might seem to confirm the orthodox understanding of Dutton.

One suggests however that these passages should to be treated with caution. There are three reasons for this. The first one is that other aspects of Vehicle Control are more consistent with the adoption of a different view of Dutton. As we will see later on, Lewison L.J. states the general principle under Dutton in a way that accords with the new interpretation being put forward in this article. He also indicates that Dutton applies even in favour of user licensees (as opposed only to occupational licensees).[39] This also sits uneasily with the claim being one in trespass. It is one thing to suggest that a licence to occupy may give sufficient 'possession' for a trespass claim; it is quite another to claim that any licence can do so. This suggests that the claim is not one in trespass at all.

Even if all of this was not true, Vehicle Control is obiter on the Dutton principle. This is the second point. It may be explained in stages. The appellant in Vehicle Control ('VCS') had licences to manage the running of some car parks. VCS had express rights under these licence agreements to deal with improperly parked vehicles. Crucially, however, it was also held to have entered into further contractual licences with every relevant motorist who had parked their vehicle on the land.[40] These contracts gave VCS the right to take enforcement action in the event of breaches of them. This fact was vital. If VCS proceeded against any motorist for breaching the contract due to an improperly parked vehicle, the motorist could not deny that VCS had a title to do so,[41] or that VCS was in actual possession for the purposes of a trespass claim.[42] As Lewison L.J. observed, it is not 'open to a motorist to deny that VCS has the right to do that which the contract says it can.'[43] This contractual nexus sets the case apart from Dutton. Lewison L.J.'s views are thus obiter on what Dutton stands for.

The final reason is a more contextual one. If Lewison L.J. was treating Dutton as a case that altered standing rules in trespass, one might have expected him to engage more fully with the case law on that claim. There is high authority that exclusivity is the essence of factual possession,[44] and that trespass to land is a wrong to this form of possession.[45] These ideas also go back long before Dutton.[46] One struggles to countenance that Laws L.J. was unaware of them in Dutton, or that Lewison L.J. overlooked them in Vehicle Control. Yet the lack of engagement with them is notable. It may imply that Lewison L.J., like Laws L.J. before him, had something else in mind.

For all of these reasons, it remains unclear what exactly Dutton stands for. That confusion remains in this respect is reflected in a more recent statement by Morgan J. in Hounslow LBC v Devere.[47] As he remarked:

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[36] Ibid, at [44] per Lewison L.J.
[37] Ibid, at [32].
[38] Ibid, at [33].
[39] Ibid, at [35].
[40] The terms were set out in the permits that had been issued to the motorists.
[41] A licensee is estopped from disputing the title of the licensor: Sze v Kung [1997] 1 W.L.R. 1232.
[42] This is the legal fiction of 'trespass by relation': see M. Jones (ed.), Clerk & Lindsell on Torts (22nd ed. Sweet & Maxwell, London 2017), paras 19-28–19-29.
[43] Vehicle Control [2013] EWCA Civ 186, at [44].
[44] JA Pye (Oxford) Ltd v Graham [2002] UKHL 30; [2003] 1 A.C. 419.
[45] Bocardo SA v Star Energy UK Onshore Ltd [2010] UKSC 35; [2011] 1 A.C. 380.
[46] Ibid, at [6] per Lord Hope; Powell v McFarlane (1979) 38 P. & C.R. 452, 470.
[47] [2018] EWHC 1447 (Ch).

> ‘It is not clear precisely what principle was being laid down by Laws and Kennedy LJJ who formed the majority in Manchester Airport plc v Dutton. Were they deciding that a licence which conferred a right to possession entitled the licensee to sue for possession even if he had not been in possession? Were they treating possession and occupation as the same thing for practical purposes? Or were they saying that where there was a contractual right to occupy or use land and that right was interfered with, the licensee could obtain an injunction to restrain that interference and in some circumstances an order for possession of the land would be a more appropriate remedy than an injunction? Is there a special rule in relation to interference with a contract as to the use of land so that the court will restrain an interference with that contract even where the tort of unlawful interference with contractual relations had not been committed?’[48]

It is worth noting also that, in Devere, Morgan J. avoided conflating the Dutton claim with a trespass one.[49] He instead took each of the licensee claimant’s rights in turn, and asked whether the defendants’ actions had ‘violated’ their ‘enjoyment’.[50] On the facts he answered this question in the negative. As will now be seen, this understanding of Dutton is a plausible one.[51]

b. A new wrong

The suggestion to be made here is that Laws L.J. decided to create a totally new wrong. It does not correspond to any recognised one. Laws L.J. cites no authority for a new wrong, for none is to be found. This understanding is also consistent with him saying so little with respect to previous cases.

That Laws L.J. spoke of there being ‘a proved or admitted wrongdoing’[52] has already been noted. The question is what this ‘wrong’ was. As was mentioned before, at one point Laws L.J. said that:

> ‘a licensee not in occupation may claim possession against a trespasser if that is a necessary remedy to vindicate and give effect to such rights of occupation as by contract with his licensor he enjoys.’[53]

This statement hints that the defendants had done something that denied the plaintiff the enjoyment of its contractual right of occupation. This idea is also put forward in broader terms just prior to the previous quotation. Laws L.J. on this occasion explained that:

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[48] Ibid, at [64].
[49] Ibid, at [62] and [69]–[70].
[50] Ibid, at [67].
[51] We say ‘plausible’, for some nuanced aspects of Morgan J.’s approach cannot yet conclusively be said to represent the correct way of interpreting Dutton: see fn. 66–68, and the accompanying text.
[52] Dutton [2000] Q.B. 133, at 150.
[53] Ibid.

> 'I would hold that the court today has ample power to grant a remedy to a licensee which will protect but not exceed his legal rights granted by the licence. If, as here, that requires an order for possession, the spectre of history… does not stand in the way.'[54]

Again, the idea seems to be that the defendant can commit a 'wrong' by infringing the enjoyment of the 'legal rights granted by the licence'. All of this is made yet more explicit two paragraphs later, in a quotation already given earlier on:

> 'In every case the question must be, what is the reach of the right, and whether it is shown that the defendant's acts violate its enjoyment. If they do, and (as here) an order for possession is the only practical remedy, the remedy should be granted.'[55]

Read alongside the two other previously given quotations, this final statement seems to capture the 'wrong' clearly. It indicates a test that can be applied in 'every case'. The 'wrong' seems to be to 'violate' the 'enjoyment' of the 'licence'. It is this 'enjoyment' that the court can grant a remedy to 'protect'.

The idea that this is the relevant wrong also finds support in Vehicle Control. Lewison L.J. explained the effect of Dutton as follows:

> '(i) the court has power to grant a remedy to a licensee which will protect but not exceed his legal rights granted by the licence; and
>
> (ii) in every case the question must be, what is the reach of the right, and whether it is shown that the defendant's acts violate its enjoyment.'[56]

As can be observed, these two points track closely the language of Laws L.J. It is notable again that they emphasise the question of whether there has been a 'violation' of the 'enjoyment' of a licence. As we have also seen, this is the test that Morgan J. sought to apply in Devere.

If Dutton creates a novel wrong, it can be classified as a new tort. One common marker that distinguishes tortious duties from contractual ones is that they are fixed by law.[57] There is no suggestion that the defendants' intentions were in any way relevant in Dutton. Another indicator is that the duty is owed to persons generally, rather than being undertaken towards specific person(s).[58] The duty owed by third parties under Dutton is also of this type.[59] In addition, it seems that this is a tort that may be analysed in terms of licensees having a corresponding right;[60] that is, one not to have 'violated' the 'enjoyment' of their licence. Laws L.J. specifically said the underlying principle to be 'ubi jus, ibi sit

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[54] Ibid, 149.
[55] Ibid, 150.
[56] Vehicle Control [2013] EWCA Civ 186, at [34].
[57] M. Jones (ed.), Clerk & Lindsell on Torts (22nd ed. Sweet & Maxwell, London 2017), para. 1-03.
[58] Ibid.
[59] It is unclear whether the relevant duty is owed to all persons, whether or not they happen to have any contractual licence at the given time, or whether it appears and disappears with licences themselves.
[60] In tort law scholarship, it is 'very much in vogue' to suggest that (at least some) torts can be analysed on the basis of rights and corresponding duties: J. Murphy, 'Misleading appearances in the tort of deceit' (2016) 75 C.L.J. 301, 331.

remedium'.[61] This means that where there is a right, there is a remedy. One might thus explain the idea in Hohfeldian terms.[62] A contractual licensee has a 'liberty' to enjoy the land. This 'liberty' is their contractual licence. But in addition to this, they have a separate 'claim right' not to have their enjoyment 'violated'.

When one thinks of Dutton in this way, it makes more sense generally. Firstly, Laws L.J.'s references to remedies that 'protect' the licence,[63] and that 'give effect to' it,[64] are not necessarily synonymous with enforcing the contractual right (the licence) directly. They could also be explained by a separate claim right. Secondly, Laws L.J.s approach to remedies fits with analysis being put forward here. It is this second point which is the focus of the next section.

3. Remedies and the new wrong

a. Some issues of definition

Thus far, it has been suggested that Dutton has created a new tort. It is one of 'violating' the claim right to the 'enjoyment' of a licence. It is not necessary here to debate comprehensively the limits of this wrong. Instead we will say merely enough, so that we might understand why this explanation fits with Laws L.J.'s approach to remedies in Dutton. Other questions about the limits of the case may be debated another time.

With this aim in mind, we return to the language used by Laws L.J. It will be recalled that he spoke about a wrong of 'violating' the 'enjoyment' of a 'licence'. Some attempt to define these terms is needed. In this respect, one suggests that the terms 'licence' and 'enjoyment' are not especially unclear. A licence 'only makes an action lawful, which without it [would have] been unlawful.'[65] In the context of licences to use land, what would otherwise be 'unlawful' is a reference to any tort to land. This might be a trespass or an assumption of possession. Sometimes it could instead be a nuisance. The 'licence' part of the contract, therefore, is merely the term(s) by which the licensor promises not to treat the licensee as a tortfeasor in any of these senses, in respect of their use of the land in the way(s) envisaged by the contract. This means not taking legal action (or any steps preliminary to it) against the licensee. It also means the licensor not using any self-help remedies that they would otherwise be able to exercise. Any other obligations that the parties may agree to are not part of the 'licence', but simply other terms of the contract.

The next term to consider is 'enjoyment'. The courts themselves have not said explicitly what this means. Given however that the idea of a licence is settled, one can make an educated guess at what 'enjoyment' must connote. One submits that the answer is as follows. Strictly speaking, it does not mean using the land per se. 'Enjoyment' is instead the upshot of doing so. In respect of their use of the land

[61] Dutton [2000] Q.B. 133, 150.
[62] W.N. Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning: and other Legal Essays (Yale University Press, New Haven 1923).
[63] Dutton [2000] Q.B. 133, 149.
[64] Ibid, 150.
[65] Thomas v Sorrell (1673) Vaugh. 330, 351 per Vaughan C.J.

consistently with the licence, the licensee 'enjoys' the right not to be treated as a tortfeasor in relation to the land. Put another way, they 'enjoy' the right not to be the subject of any self-help remedy (or legal action) by the licensor that their conduct would otherwise entitle the licensor to use (/bring). 'Enjoyment' hence presupposes some user of the land by the licensee, in the way(s) envisaged by the contract.

Much more difficult is the term 'violation'. The word itself is vague, because to 'violate' can be 'to fail to… respect (a right or privilege).'[66] 'Respect' is a rather ambiguous term. It is sufficiently malleable to permit a division between actionable conduct and that respecting which there can be no claim. In other words, not every action that affects the 'enjoyment' of a licence need be taken as 'violating' conduct. It would be absurd if, for example, a licensee could sue under Dutton because a delayed train meant that they arrived later than planned at the land in issue, or after a power cut prevented them from using that land for a time.

For the reasons already given, we need not answer here all of the questions that arise with regards to the meaning of 'violation'. One of them is whether the defendant's conduct must interfere with something that the licensee was actually trying (or planning) to do.[67] Another one is whether only conduct that affects the 'enjoyment' of licences giving a liberty of 'use and control' can be 'violating' under Dutton. This would exclude any claims by licensees with a mere contractual entitlement of user.[68] Thirdly, it will be necessary to work out what types of conduct are never 'violating' in any case. The examples of a delayed train or a power cut have already been given. A line will have to be drawn somewhere.

None of these matters need to be resolved for present purposes. The only suggestion that is crucial to the possession orders question, and so which must be made here, is that 'violations' do not have totally to prevent the licensee from 'enjoying' their licence.[69] A partial interference with the enjoyment of it is enough. Of note in this respect is Laws L.J.'s statement in Dutton that:

> 'In every case the question must be, what is the reach of the right, and whether it is shown that the defendant's acts violate its enjoyment. If they do, and (as here) an order for possession is the only practical remedy, the remedy should be granted.'[70]

The words 'as here' are worth underscoring. Laws L.J. is thereby indicating that remedies other than possession orders may be appropriate in some cases of 'violation'. Perhaps one might square this with a requirement of total prevention of enjoyment. On this view Laws L.J. is merely implying that in some cases a remedy other than a possession order might be awarded, even though the defendant has entirely prevented the licensee from using the land. However, possession orders have not traditionally

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[66] Oxford English Dictionary, 'Violate', definition 2(a).
[67] The way that Morgan J. dealt with some of the claimant's rights in Devere [2018] EWHC 1447 (Ch) may hint at this approach. However, there seems to have been no evidence that the defendants' conduct would even in theory have affected their operation (see for example ibid, at [68]).
[68] For indications that Dutton is irrelevant to user licences, see Countryside Residential (North Thames) Ltd v T (2001) 81 P. & C.R. 2, at [13] per Waller L.J., as well as the decisions of the lower courts in Vehicle Control: [2011] UKFTT 125 (TC), at [11]–[13]; and [2012] UKUT 129 (TCC), at [24] and [27]. But see now Vehicle Control [2013] EWCA Civ 186, at [35]; and Devere [2018] EWHC 1447 (Ch).
[69] Contrast E. Lochery, 'Pushing the Boundaries of Dutton?' [2011] Conv. 74, 79.
[70] Dutton [2000] Q.B. 133, 150.

been a matter of discretion.[71] It is more likely that Laws L.J. had in mind 'violations' that fell short of conduct remediable by a possession order. This could naturally extend to things that only partially affect the enjoyment of a licence. To give no protection against such behaviour would lead to incoherent distinctions. This makes it more difficult to imagine that such an approach was intended.

Later cases support this view of the law. They have done so implicitly rather than expressly. In Vehicle Control, for example, the motorists had merely parked their cars in wrong places for a time. They had not thereby taken control of any part of the land. There was no hint that this mattered to a claim under Dutton. The same approach is also suggested in Devere. Morgan J. there at one point phrased the issue in terms of whether there had been an 'interference' with the claimant's rights.[72] Each of the rights were also looked at individually. This does not suggest that the 'wrong' is completely to prevent the enjoyment of the licence. Finally, there is Mayor of London v Hall.[73] In that case the defendants were protestors on Parliament Square Gardens. Their actions had not seemingly rendered all of the claimant's rights over the land impossible to exercise.[74] Nevertheless, in his obiter comments on Dutton, Lord Neuberger M.R. did not intimate that this made any difference.[75] Given what Laws L.J. said in Dutton, one submits that the approach taken in these cases was correct.

b. The possession order in Dutton

To recap the points just made, the test under Dutton is whether there has been a 'violation' of the claim right to 'enjoy' a licence. There is no requirement of intention on the defendant's part to harm the licensee. 'Enjoyment' occurs when the licensee is not being treated as a tortfeasor in relation to the land, in respect of their use of it in way(s) consistent with the licence. It hence presupposes the licensee actually making some such use of the land. 'Violating' conduct is more uncertain in its scope. It has been suggested, however, that the defendant need not have made it impossible for the claimant to enjoy their licence. In principle, a partial interference is sufficient.

Having interpreted the new wrong in this way, we now come to consider the making of a possession order in Dutton. It might be said that the remedy matched the wrong. For the plaintiff to carry out the envisaged work on the land, and so fully to 'enjoy' the licence, they needed to be able to use it free from the presence of third parties. While some of the preparatory work could probably have been done even if there were bystanders, the act of lopping and felling trees is presumably different. One needs the land to be clear while this is occurring. By definition, therefore, anyone who happened to be on the land when the possession order was being executed would be committing the same wrong as the defendants to the action. Their presence would stop the plaintiff from fully enjoying their licence. This amounts to a 'violation' of the claim right to its enjoyment . The third parties' innocence or otherwise is irrelevant, for there is no requirement of intention under Dutton. A possession order would see to the removal of these persons, and so would in practical terms give effect to the licensee's claim right.

[71] McPhail v Persons Unknown [1973] Ch. 447, 458 per Denning L.J.
[72] Devere [2018] EWHC 1447 (Ch), at [67].
[73] [2010] EWCA Civ 817.
[74] See E. Lochery, 'Pushing the Boundaries of Dutton?' [2011] Conv. 74, 79.
[75] Hall [2010] EWCA Civ 817, at [21]–[35].

This account, of course, is only acceptable if the licensee's claim right can be vindicated under the procedural rules on 'possession' claims. We will return to this question very shortly. If for the sake of argument the rules can be used in this way, however, the analysis just put forward explains another otherwise curious assertion by Laws L.J. His Lordship opined in particular that:

> 'In this whole debate, as regards the law of remedies in the end I see no significance as a matter of principle in any distinction drawn between a plaintiff whose right to occupy the land in question arises from title and one whose right arises only from contract.'[76]

This statement has caused real confusion to date.[77] Yet on the explanation being given here this difficulty evaporates. A possession order in favour of a legal title holder can fairly be executed against any persons who are found on the land because they are prima facie committing a wrong as against the legal owner. They each owe the legal owner a duty not to trespass on (/take possession of) the relevant land. The remedy of removing these persons hence corresponds to what the legal estate owner is entitled to. There is a parallel here with possession orders under Dutton. The duty of third parties to the licensee is not quite the same, but if their presence would prevent the licensee from fully enjoying their licence, the licensee might seek a possession order. The execution of the order would then allow the licensee to enjoy their licence. Again, therefore, the remedy is congruent with the right. The two situations are thus the same in principle with respect to remedies. Laws L.J.'s statement, in turn, seems to imply that this is the case whenever the licence is one to occupy the affected land. One later decision is to the same effect.[78]

c. The procedural rules

As has already been acknowledged, this explanation of the possession order in Dutton is only acceptable if the plaintiff licensee's claim right can be vindicated under the procedural rules on 'possession' claims. Otherwise the action should have failed regardless.[79] Laws L.J. implicitly thought that no problem arose respecting these rules, but his reasoning is incomplete. He explains only that the remedy of a possession order is no longer solely the province of a common law ejectment claim, with its attendant rules of standing. This is not a sufficient justification of itself. What also needs to be established is what meaning of 'possession' he is using when interpreting the procedural rules, and why this construction is supportable.

Let us begin then with the meaning of 'possession' being favoured in Dutton. In an orthodox sense, 'possession' means factual possession, coupled with intention to possess.[80] A right to it is one entirely

[76] Dutton [2000] Q.B. 133, 150.
[77] W. Swadling, 'Opening the numerus clausus' (2000) 116 L.Q.R. 354, 360.
[78] Countryside Residential (2001) 81 P. & C.R. 2, at [13] per Waller L.J.
[79] The procedural rules (in CPR 55.1(b)) describe the claim as a 'possession claim against trespassers' (though the claim is not itself defined to say explicitly that the claimant has to have a right to possession). The standard form of the order commands the defendant to 'give the claimant possession' of the property: see Form N26. The warrant of execution tells the bailiffs of the court that they 'are now required to give possession of the land to the applicant.' See form N52. In the High Court, a writ of possession is used instead: see CPR 83.13; and forms 66 and 66A.
[80] JA Pye (Oxford) Ltd [2002] UKHL 30; [2003] 1 A.C. 419.

to exclude third parties from the relevant land for the duration of the right.[81] But the claim right in Dutton was different. Insofar as the case report sets out the licence, the right to enter and occupy existed only for the purpose of carrying out the necessary clearing work. This suggests that, when a given area had been cleared, the plaintiff would only have a right of access over that part, insofar is it enabled them to reach the remaining ones. But such a licence of access can presumably be enjoyed without excluding third parties. This explains why the plaintiff's claim right was different. An entitlement to exclude persons, but only over the areas where one still needs to perform work, is not a legal right of possession. Some other label is needed. In one later case, the term 'effective control' was used to identify which licensees can ever seek a possession order.[82] Another expression that has been adopted is 'use and control, effectively amounting to possession'.[83] We can probably take these as synonymous. While one can doubt what precisely they mean, this question is not crucial here. Perhaps the answer is that they both go hand in hand with licences to occupy.[84] For now, it suffices that Dutton itself – which did involve a licence to occupy – is an example of a claim right of 'effective control'.

Let us assume, therefore, that Dutton treats 'effective control' as 'possession' for the purposes of interpreting the procedural rules. The next question to consider is merits of doing so. In principle they seem to be against it. We have already seen that Parliament did not enact the rules in order to change the law.[85] Neither Dutton nor any later case explains why a novel interpretation of them is allowable. Nevertheless, judges do sometimes adopt an 'updating' construction of enactments: one that caters for developments since they arose.[86] Generally speaking, indeed, enactments are not treated as having a meaning that is fixed in time.[87] Here the substantial change would be emergence of a new claim right, which when it affords 'effective control' is comparable to a right of possession. It is similar in two chief ways. Firstly, although it is not a property right in the land,[88] it is enforceable against a similar class of persons to a possessory title taken by adverse possession. For example, both of them are exigible against persons with no property right at all in the land. Secondly, to vindicate the claim right by means of a possession order would involve very little departure from how such orders are traditionally executed.

This latter point requires some explanation. It emerges when one considers how possession orders work. As a starting point, the bailiffs do not technically deliver 'possession' to the claimant, because they act for the court rather than as agents for the claimant. What they are doing is removing persons found on the land.[89] Of course, why they are doing so will differ according to whether the claimant is a Dutton licensee or a legal title holder. In the former situation they are paving the way for the licensee to enjoy their licence; in the latter case they are making it possible for the legal title holder to assume possession. But in practice their task is virtually the same. Indeed it would not even matter if some persons were expressly excluded from a Dutton order, to reflect the nature of the licensee's claim right.

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[81] Contrast personal rights to exclude: Bruton v London & Quadrant Housing Trust [2000] 1 A.C. 406.
[82] For this description, see Countryside Residential (2001) 81 P. & C.R. 2, at [13] per Waller L.J.
[83] Hall [2010] EWCA Civ 817, at [27] per Lord Neuberger M.R.
[84] See fn. 78, above.
[85] See fn. 20, above.
[86] See generally *Halsbury's Laws of England*, Statutes and Legislative Process (Vol 96 (2018), para 791.
[87] Ibid, para 231.
[88] See section 4(b), below.
[89] R v Wandsworth County Court, ex p Wandsworth London Borough Council [1975] 1 W.L.R. 1314. See also Secretary of State for the Environment, Food and Rural Affairs v Meier [2009] UKSC 11, [2009] 1 W.L.R. 2780, at [35] per Baroness Hale.

The same possibility has been countenanced with respect to 'ordinary' possession orders as well. As Baroness Hale (obiter) has said:

> 'there is nothing to prevent the order distinguishing between those who are and those who are not lawfully there, provided that some means is specified of identifying them. No one would suggest that an order for possession of Hethfelton Wood would allow the removal of Forestry Commission workers or picnickers who happened to be there when the bailiffs went in. In principle, court orders should be tailored to fit the facts and the rights they are enforcing'.[90]

Given these two similarities, one might argue that a claim right that affords 'effective control' should be treated as one of 'possession' under the procedural rules – even though it is not one of possession, strictly defined. This would help to justify the outcome in Dutton. We cannot be completely sure that this was what Laws L.J. himself thought, but it is a plausible deduction from his decision as a whole.

It may now be useful to turn to more recent case law. At present it seems that the courts are favouring a relaxed approach to interpreting the procedural rules. We have already noted the unanimous (but obiter) support for Dutton in Vehicle Control. Of relevance also is Alamo Housing Co-operative Ltd v Meredith.[91] In that case the lease of a former tenant (Alamo) stated that Alamo could still evict its former lessees (the sub-tenants), after the expiry of its lease. This meant that Alamo had an ongoing licence. In other words, the landowner agreed to allow Alamo temporarily to go into factual possession after the expiry of the lease. This was done so that Alamo could then give the landowner vacant possession (which Alamo had covenanted to do). Alamo was held to be entitled to take possession proceedings against the former sub-tenants. Schiemann L.J. said that Alamo had a 'continuing right to possession'.[92] As it had no legal title to the land, this can only be because the court took a wider view of what 'possession' means in this context. On the account given here, this 'right to possession' was Alamo's claim right.

The next case of note is Hall. In obiter remarks, Lord Neuberger M.R. acknowledged the 'real force' in the orthodox view of possession orders,[93] but was more doubtful as to whether it should prevail. In his view:

> 'there is obvious force in the point that the modern law relating to possession claims should not be shackled by the arcane and archaic rules relating to ejectment, and, in particular, that it should develop and adapt to accommodate a claim by anyone entitled to use and control, effectively amounting to possession, of the land in question—along the lines of the views expressed by Laws LJ in Dutton's case'.[94]

This quotation suggests that an entitlement to 'use and control' is very similar to one to 'possession', such that the rules on possession claims might be 'adapted' to support Dutton. This would presumably

[90] Meier [2009] UKSC 11, [2009] 1 W.L.R. 2780, at [36].
[91] [2003] EWCA Civ 495.
[92] Ibid, at [42].
[93] Hall [2010] EWCA Civ 817, at [26].
[94] Ibid, at [27].

mean interpreting 'possession' to include 'use and control' (/'effective control'). Lord Neuberger M.R.'s views here are notable, as he rejected another proposed adaption of the same procedural rules in Secretary of State for the Environment, Food and Rural Affairs v Meier.[95] In that case the Supreme Court held that no possession order could be made in respect of a parcel(s) of land separate from the one(s) on which the defendants were at the time of making the order. Lord Neuberger M.R. viewed such a step as incongruent with the very nature of a possession order.[96] He added that, 'however desirable it is to fashion or develop a remedy to meet a particular problem', this change was not one for judges to make.[97] Yet in Hall we see him taking a different view with respect to Dutton. The difference may reflect what is achievable as a matter of interpretation.

To sum up, later cases support the use of possession orders under Dutton. They are however notable for a lack of clear reasoning. The Supreme Court might yet abandon the approach taken in them, vindicating Chadwick L.J.'s emphasis on the need to have a legal right of possession. This would still leave Dutton licensees with other remedies such as injunctions.[98] If these were felt to be insufficient, the procedural rules might then be amended.

4. The implications of this account

a. A new policy assessment

Thus far, a sketch has been given of the new wrong set out in Dutton, and of how it accords with what Laws L.J. said about remedies in that case. In this final section we will look at the significance of this new understanding. Consideration is given to its impact, not only within the debate about protecting contractual licensees, but also on other areas of property law and tort law scholarship.

Let us start then with the former. This article suggests the case for a renewed emphasis on the policy merits of Dutton.[99] The creation of a new tort is hard to justify except by reference to policy concerns. One might for instance debate whether it is appropriate for this new tort to have emerged judicially rather than through legislation. Given the ill-defined limits of the new wrong, it could also be asked which (if any) formulations of it are acceptable in practice. Perhaps Dutton will not hold up to scrutiny in these respects. In this event the Supreme Court might be more willing to abandon it.

When it comes to assessing whether any version of the new wrong would be satisfactory, the clarification that it creates a new tort is important. It affects how the doctrine can actually evolve. This in turn may affect how well it can meet (or best balance) relevant concerns. A quick example of this may be given. If Dutton involves a tort, it is not obvious that the intention of the parties to the contract

[95] [2009] UKSC 11; [2009] 1 W.L.R. 2780.
[96] Ibid, at [63]–[64] per Lord Neuberger.
[97] Ibid, at [59].
[98] These might now include injunctions against persons unknown, to address threatened acts of trespass. This remedy has been granted in favour of legal title holders since Dutton. For a recent discussion see Vastint Leeds BV v Persons Unknown [2018] EWHC 2456 (Ch); [2019] 4 W.L.R. 2, at [19]–[31].
[99] For perhaps the most detailed discussion to date of the policy merits of Dutton, see B. McFarlane, 'Keppell v Bailey (1834); Hill v Tupper (1863): The Numerus Clausus and the common law' in N. Gravells (ed.), Landmark Cases in Land Law (Hart, Oxford 2013).

could ever be relevant (beyond them having an intention to enter into a licence, and their wishes as to the extent of it). There is indeed no indication in the case law that it is pertinent. Yet things might have differed, had the new wrong been based on a property right.[100] An intention is usually needed to grant legal property rights.[101] The same could have been required in this situation as well. In turn, the presence or absence of such a condition is relevant to in terms of policy; for example, because it touches upon concerns about matters like individual autonomy and allocative efficiency. Perhaps it would be better if Dutton-type protection was confined to cases in which it was objectively intended by the licensor and licensee. There is at least a case for discussing this limitation. It cannot, however, really be achieved by way of adapting Dutton: its basis in tort law stands in the way.

b. The idea of property and proprietary remedies

With the remaining consequences of the new account, one moves beyond the debate about the protection of contractual licensees. Dutton is also of broader relevance. To be addressed in this respect are issues as to the meaning of property, the uses of possession orders, and the inquiries that may follow upon the recognition of a new tort.

We begin then with the importance of the case to the idea of property. The starting point here is the absence of any suggestion, either in Dutton or any later case, that licensees now have some sort of proprietary right. One can take this silence as meaningful. If the courts were advancing a new property right, they would presumably have addressed the resulting clash with the orthodoxy that licences do not create them. This is not something they have done. In addition, there is no mention of a requirement of intention for Dutton to apply – as is typically required to create a legal property right in land.[102] That the Dutton principle does not affect successors in title to the licensor also suggests that the right is not derivative from any quantum of the licensor's property in the land.[103] Property rights, by contrast, have been analysed in this way.[104]

If Dutton does not involve a property right, the question arises why that is so. Laws L.J. himself does not give an explanation. One may, therefore, consider the issue in terms of the claimed features of property rights. In this respect, the answer cannot lie in terms of whom the right is exigible against. The Dutton right is enforceable against a class of persons comparable to the possessory title taken by a squatter – which of course is a property right in land. In addition, one can put aside the idea that 'a right affecting property' must be 'definable', and 'have some degree of permanence and stability'.[105] If the new right is held by every person at all times, regardless of whether they have a licence, this plainly is the case. Even if it arises only when one has a licence, it still arguably would have exhibited these qualities in Dutton itself. The licence in that case was for over nine months, and seems to have had no provision for its determination by the licensor.[106]

[100] For a discussion about why it does not, see section 4(b), below.
[101] See J. Hill, 'Intention and the Creation of Proprietary Rights: Are Leases Different?' (1996) 16 L.S. 200.
[102] Ibid.
[103] For this lack of enforceability, see: Dutton [2000] Q.B. 133, 150 per Laws L.J.
[104] See the discussion about why restrictive covenants can bind successors in title to the covenantor: Rhone v Stephens [1994] 2 A.C. 310. 317–318 per Lord Templeman.
[105] National Provincial Bank Ltd v Ainsworth [1965] A.C. 1175, at 1247–1248 per Lord Wilberforce.
[106] The main terms are set out in Dutton [2000] Q.B. 133, 137 per Chadwick L.J.

If that is correct, one is left with only two other possibilities. Property rights are usually transferrable, so the non-assignability of the right is perhaps a reason.[107] But there is also an explanation to be found with respect to the idea that property rights are 'thing-related'. Pretto-Saakman, for example, suggests that a property right 'is defined by the existence and location of the thing to which [it] relates … [and is] demandable against anyone who holds or is trying to hold the relevant [thing].'[108] Birks also notes that a property right is one, 'the exigibility of which is defined by the location of a thing.'[109]

It may be that the Dutton right is not 'thing-related' in the crucial sense. It relates neither to the land nor anything else. If this is correct, Dutton helps to clarify the meaning of 'thing-relatedness'. The approach it would suggest is quite nuanced. Presuming that the thing in question can be owned, Dutton would hint that a (non-derivative)[110] right will relate to it only if vindicates 'ownership' of it by the claimant. The Dutton right does not do this. An award of damages for violating the right, for example, is not one for a loss of possession of the land. It would instead reflect a denial of the 'enjoyment' of the licence, as that term was defined earlier. Possession orders are similarly analysable. They facilitate this 'enjoyment', rather than vindicate title to the land. Even if a possession order did leave the licensee in factual possession of the land – and very often it would not do so[111] – they would not thereby enjoy any estate in it. A line of authority holds that possession by a licensee merely shows the enjoyment by the licensor of their title.[112] On this view only adverse possession is a root of title. No possession order under Dutton of itself paves the way this result. This may be why the new right is not 'thing-related'.

Two notable consequences of this analysis may now be mentioned. The first one, if a Dutton licensee may obtain a possession order, is to overthrow the conventional understanding of possession orders. Traditionally, this remedy has been regarded as 'proprietary' in nature. Dutton tells us otherwise. A possession order can instead be granted in support of a personal right, and so operate as a personal remedy. In principle, this can happen if the personal right is held against a wide class of persons, contains no requirement of intention, and can be vindicated without putting the right-holder into such possession as gives them title to a physical thing. The new claim right is of this quality.

The 'thing-relatedness' account of Dutton would also entail one final implication. It concerns the 'value' of a contract. In the Dutton case law, there is no hint that this is something in which the licensee has property. This might show that this is not a 'thing' to which property can pertain. With that said, however, Dutton also suggests that a non-proprietary right to similar effect is allowed. The decision may therefore be addressed in scholarship on rights to the enjoyment of contractual ones. To date this literature has focussed instead on the wrong of inducing a breach of contract.[113]

Before moving on, we might ask whether this analysis of 'property' (and its implications) depends on Dutton remaining the law. Would it, in other words, fall away if the case was overruled? One doubts that that is necessarily so. The Supreme Court might dispense with Dutton on an unrelated basis. For

[107] The benefit of a licence is assignable, but the claim right is distinct from it.
[108] A. Pretto-Sakmaan, Boundaries of Personal Property: Shares and Sub-Shares (Hart, Oxford 2005), 90.
[109] P. Birks, 'Five Keys to Land Law' in S. Bright and J. Dewar (eds.), Land Law: Themes and Perspectives (OUP, Oxford 1998), 473.
[110] Such rights are thing-related because they derive from a quantum of thing-related property: see fn. 104 above.
[111] It seems that occupational licensees having standing to seek a possession order under Dutton: fn. 78, above.
[112] On which, see A. Baker, 'Bruton, licensees in possession and a fiction of title' [2014] Conv. 495, 497–499.
[113] See for example S. Douglas, 'The Scope of Conversion: Property and Contract' (2011) 74 M.L.R. 329, 346–349. Contrast OBG Ltd v Allan [2007] UKHL 21; [2008] 1 A.C. 1, at [8] per Lord Hoffmann; at [172] per Lord Nicholls; at [320] per Lord Brown.

example, it could hold that there is no tort of violating the enjoyment of a licence, but at the same time uphold (or leave the door open to) some other version of it, based also on a non-proprietary right. A possible example is a tort that applies only to 'licensees with exclusive possession' and/or contractual tenants.[114] Indeed if possession orders could be made under this tort, it would confirm that they can sometimes operate as a personal remedy.

c. A new tort and its consequences

Our attention turns now to the final consequences of the new analysis in this article. They are ones that flow from the recognition of a new tort. Whatever the eventual fate of Dutton, Laws L.J.'s approach raises issues about why and how judges invent new causes of action to start with. Let us firstly touch upon the question of 'why'. Laws L.J. may have invented a new tort because he could not, in light of statute,[115] usher in a new (and derivative) legal property right in land.[116] This is even though a new such right need not have bound purchasers from the licensor, and the avowed intention behind the legislation was about protecting disponees, with nothing being said about other third parties.[117] Dutton may thus be a cause to reflect on the balance struck by statute in this respect.

If one comes next to how new torts come about, Dutton offers a potential case study. The matters that arise are numerous. What, for example, should we make of Laws L.J. advancing a new wrong without (it seems) the benefit of specific argument on it? The parties' submissions concerned whether the plaintiff's licence gave it a sufficient 'interest in the land', so that it could seek a possession order. Only Chadwick L.J. confined himself to dealing with these contentions. Laws L.J., by contrast, addressed the (more general) issue of whether the plaintiff could 'maintain proceedings to evict the trespassers by way of an order for possession.'[118] It is not clear that he should have done so.

The scope to use Dutton as a case study on how new torts come about is also plain in other ways. We might for instance compare Laws L.J.'s judgment with other ones that have advanced new torts. Should, for example, he have mentioned the policy reasons that supported a new tort?[119] Might it have been helpful had he been more explicit about some of the broader legal issues raised by his judgment? And why did he choose to frame the new wrong in such an ambiguous way? These are just three possible questions for discussion. Indeed, as the new right affects many third parties similarly to a property one in land, comparisons with cases giving rise to new property rights may be made as well.

Conclusion

This article has advanced a new analysis of Dutton. Rather than seeing Laws L.J. as attempting to work within existing torts, it has been suggested that he stated a novel one. Third parties have a duty not to

[114] For contractual tenancies, see Bruton [2000] 1 A.C. 406.
[115] Law of Property Act 1925, s 1.
[116] He could have sought to distinguish Hill (see fn. 24, above) on the basis that it concerned a non-occupational licence.
[117] See Hansard HC Deb (15 May 1922) vol 154, cols 91–92.
[118] Dutton [2000] Q.B. 133, 147.
[119] Contrast Willers v Joyce [2016] UKSC 43; [2018] A.C. 779, at [43]–[58] per Lord Toulson.

‘violate’ the ‘enjoyment’ of contractual licences. The precise limits of the concept of ‘violation’ remain more fully to be worked out. The term does however cover actions by third parties that involve a presence on the land that interferes with the licensee’s exercise of their licence. As a result, one can piece together why a possession order might be a suitable remedy for the new wrong in some cases.

This new analysis has various implications for future scholarship. It suggests that more discussion of the policy merits of the new wrong would be desirable. It also has possible consequences for our understanding of ‘thing-relatedness’ (as a criterion for a property right) and the nature of possession orders. Finally, Dutton could become a case study on how and why the courts go about creating new torts. In this event it may lead to findings of relevance more generally in tort law and property law. Many of the insights from Dutton are, one suspects, still to be gleaned.