

OBLIGATIONS VIII

REVOLUTIONS IN PRIVATE LAW

University of Cambridge

19–22 July 2016



Obligations Conference

A biennial conference on the law of obligations



**UNIVERSITY OF
CAMBRIDGE**



Melbourne Law School

SPONSORS



TRAVERS SMITH



On behalf of the Faculty of Law at the University of Cambridge and Melbourne Law School we are delighted to welcome you to the Eighth Biennial Conference on the Law of Obligations.



The Obligations Conferences bring together scholars and practitioners from throughout the common law world to discuss current issues in contract law, the law of torts, equity and unjust enrichment. The series originated at Melbourne Law School, where the first conference was held in 2002 and the second in 2004. Subsequent conferences in the series have been held at the University of Queensland, the National University of Singapore, the University of Oxford, the University of Western Ontario and the University of Hong Kong. The conferences in the series so far have focused on taxonomy, principle and policy, justifying remedies, goals, rights and challenging orthodoxy in the law of obligations. At Obligations VIII we are turning our attention to Revolutions in Private Law.

Revolutions can shake intellectual, political and philosophical foundations: 2016 is the 350th anniversary of Newton's 'discovery' of gravity, and the 100th anniversary of Einstein's 'discovery' of general relativity. It is also the 50th anniversary of the publication of Goff and Jones' *The Law of Restitution*, and the 500th anniversary of the publication of Sir Thomas More's *Utopia*. What changes mark the most significant paradigm shifts in private law? What effects have they brought? What has provoked them in the past, and what might deliver them in the future? These questions are relevant across the entire sweep of the law, and are common to all jurisdictions. We hope that this conference theme – Revolutions in Private Law – and its underlying questions will provoke serious discussion about the types of issues which unsettle the law, and how we as lawyers help to resolve the ructions.

We are very pleased that you have joined us for what promises to be an exciting three days of discussion, debate and analysis.

Sarah Worthington

*Downing Professor
of the Laws of England,
Co-Director of the Cambridge
Private Law Centre and Fellow
of Trinity College, Cambridge*

Andrew Robertson

*Professor of Law at the
University of Melbourne*

Graham Virgo

*Professor of English Private
Law, Pro-Vice-Chancellor for
Education, Co-Director of the
Cambridge Private Law Centre
and Fellow of Downing College,
Cambridge*

Conference Programme

DAY 1: TUESDAY 19 JULY

4:00–6:00 PM	REGISTRATION Grace Howard Room, Downing College
6:00–7:00 PM	PLENARY 1 Opening Keynote Address <i>‘People and Principle in the Developing Law’</i> The Rt Hon. the Lord Carnwath of Notting Hill SCJ Chair: Professor Sarah Worthington Howard Theatre
7:00 PM	TRAVERS SMITH CHAMPAGNE RECEPTION Downing College Art Gallery (with access to Ai Weiwei Exhibition)
8:00 PM	DINNER Downing College Hall POST-DINNER DRINKS Howard Building (cash bar until 11:00 pm)

DAY 2: WEDNESDAY 20 JULY

ALL DAY	Access to Ai Weiwei Exhibition Downing College Art Gallery
8:45–9:45 AM	PLENARY 2.1 <i>‘Private Law’s Revolutionaries: Authors, Codifiers and Merchants’</i> Professor Hector MacQueen, FBA, FRSE Chair: Professor Sarah Worthington Howard Theatre
10:00–11:00 AM	PARALLEL 2A Panel I: Maitland Room (E Staircase) Chair: Matt Dyson (Cambridge)

Larry DiMatteo (Florida)
‘Unframing Legal Reasoning: Recurrent and Epochal Change’

Stephen Waddams (Toronto)
‘Revolutions in the Classification of Obligations’

Panel II: Howard Theatre
Chair: Stelios Tofaris (Cambridge)

James Plunkett (Oxford)
‘Duty Methodologies in Australia, Canada and the UK’

Erika Chamberlain (Western Ontario)
‘Home Office v Dorset Yacht: A Revolution in Duty Methodology’

Panel III: Assembly Room (Howard Building)
Chair: Keith A Rowley (Nevada)

Sarah Worthington (Cambridge)
‘Revolutionary Breakthroughs in Personal Property Law’

Sarah Green (Oxford)
‘The Meaning of Money’

11:00–11:30 AM **MORNING REFRESHMENTS**

11:30 AM–1:00 PM	PARALLEL 2B Panel I: Maitland Room (E Staircase) Chair: Janet O’Sullivan (Cambridge) David McLauchlan (Victoria Univ of Wellington) <i>‘The ICS Principles: A Failed Revolution in Contract Interpretation?’</i> Joanna McCunn (Cambridge) <i>‘Revolutions in Contractual Interpretation: A Historical Perspective’</i> Franziska Myburgh (Stellenbosch) <i>‘Thomas Kuhn’s Structure of Scientific Revolutions, Paradigm Shifts And Crises: Analysing Recent Changes in the Approach to Contractual Interpretation in South African Law’</i>
------------------	--

	<p>Panel II: Howard Theatre Chair: Roderick Bagshaw (Oxford) Peter Cane (ANU) <i>‘Tort Law and Government Liability in the Administrative State: Revolution and Evolution’</i></p> <p>Hanna Wilberg (Auckland) <i>‘Revolution and Counter-Revolution in Negligence Liability for Public Authority Exercises of Statutory Discretion: A Partial Evaluation’</i></p> <p>Jason Varuhas (Melbourne) <i>‘The Socialisation of Private Law’</i></p> <p>Panel III: Assembly Room (Howard Building) Chair: Ben McFarlane (UCL) Robert Stevens (Oxford) <i>‘The Equitable Estoppel Disaster’</i></p> <p>Andrew Robertson (Melbourne) <i>‘Equitable Estoppel Revolutions’</i></p> <p>John Mee (Cork) <i>‘Revolution or Civil War?: The Resulting Trust versus the Common Intention Constructive Trust’</i></p>		<p>Panel II: Howard Theatre Chair: Kit Barker (Queensland) Graham Virgo (Cambridge) <i>‘The Illegality Revolution’</i></p> <p>Andrew Dyson (LSE) <i>‘Reviving a Revolution: New Support for Hart & Honoré’s Theory of Causation’</i></p> <p>Panel III: Assembly Room (Howard Building) Chair: Mark Gergen (Berkeley) Katy Barnett (Melbourne) <i>Attorney-General v Blake: Far from Revolutionary in Practice’</i></p> <p>Craig Rotherham (Nottingham) <i>‘The Classification of Release-Fee Damages and the Structure of Revolutions in Legal Taxonomy’</i></p>
		3:00–3:30 PM	AFTERNOON REFRESHMENTS
		3:30–4:30 PM	PARALLEL 2D
			<p>Panel I: Maitland Room (E Staircase) Chair: Steve Hedley (Cork) Geoffrey Samuel (Kent) <i>‘Have There Been Scientific Revolutions in Law?’</i></p> <p>TT Arvind (Newcastle UK) <i>‘Paradigms Lost or Paradigms Regained? Legal Revolutions and the Path of the Law’</i></p> <p>Panel II: Howard Theatre Chair: Donal Nolan (Oxford) Jason Neyers (Western Ontario) <i>‘The Coming Revolution in the Tort of Public Nuisance?’</i></p> <p>Pey-Woan Lee (SMU) <i>‘Understanding Civil Conspiracy’</i></p>
1:00 PM–2:00 PM	LUNCH		
2:00-3:00 PM	<p>PARALLEL 2C Panel I: Maitland Room (E Staircase) Chair: John Mee (Cork) James Fisher (Tokyo) <i>‘Making Trusts Civilised: War, Revolution and the English Trust in Japan’</i></p> <p>Neil Jones (Cambridge) <i>‘No Magic in Words? From Uses to Trusts: Causes and Effects’</i></p>		

	Panel III: Assembly Room (Howard Building) Chair: Elise Bant (Melbourne) Nick McBride (Cambridge) <i>'Restitution and Unjust Enrichment: the Coming Counter-Revolution'</i> Ben McFarlane (UCL) <i>'Evaluating the Value Revolution'</i>
4:45–5:45 PM	PLENARY 2.2 <i>'Revolutions in Private Law:'</i> Professor David Ibbetson FBA Chair: Professor Sarah Worthington Howard Theatre
6:00 PM	HART PUBLISHING DRINKS Fellows' Garden, Downing College
7:30 PM	DINNER Downing College Hall POST-DINNER DRINKS Howard Building (cash bar until 11:00 pm)

DAY 3: THURSDAY 21 JULY

8:45–9:45 AM	PLENARY 3.1 <i>'Risk Revolutions in Private Law'</i> Professor Jenny Steele Chair: Professor Andrew Robertson Howard Theatre
10:00–11:00 AM	PARALLEL 3A Panel I: Maitland Room (E Staircase) Chair: James Lee (KCL)

	Prue Vines (UNSW) <i>'Taking Common Law Concepts Seriously: Changing the Paradigm in Private Law Thinking in Response to the Statutory "Revolution" in Private Law'</i> Elise Bant and Jeannie Paterson (Melbourne) <i>'Remedies under Consumer Protection Statutes: Revolution and Evolution?'</i>
	Panel II: Howard Theatre Chair: John CP Goldberg (Harvard) Matt Dyson (Cambridge) <i>'Foreman Good, to Judge Better: The Post-Revolutionary Effects of Losing the Civil Jury'</i> James Goudkamp and Donal Nolan (Oxford) <i>'Private Law Scholarship and Empirical Methods: Contributory Negligence in the 21st Century'</i>
	Panel III: Assembly Room (Howard Building) Chair: Amy Goymour (Cambridge) Niamh Connolly (TCD) <i>'Revolution or Evolution in the Common Law? Restitution and Invalid Contracts'</i> Tatiana Cutts (Birmingham) <i>'Modern Money Had and Received'</i>
11:00–11:30 AM	MORNING REFRESHMENTS
11:30 AM–1:00 PM	PARALLEL 3B Panel I: Maitland Room (E Staircase) Chair: Stephen A Smith (McGill) Mark Gergen (Berkeley) <i>'Privacy, Privity, and Private Ordering'</i> Sandy Steel (Oxford) <i>'The Continuity Thesis: Revolutions and Revisions'</i>



DOWNING COLLEGE
UNIVERSITY OF CAMBRIDGE

THE HOWARD CONFERENCE CENTRE

Howard Theatre
Howard Building
Howard Lodge

A Staircase

The Hall
SCR
Fleet Room

E Staircase

West Lodge and
Maitland Room
Music Room and
The Tim Cadbury Room
Conference Services Office

R Staircase

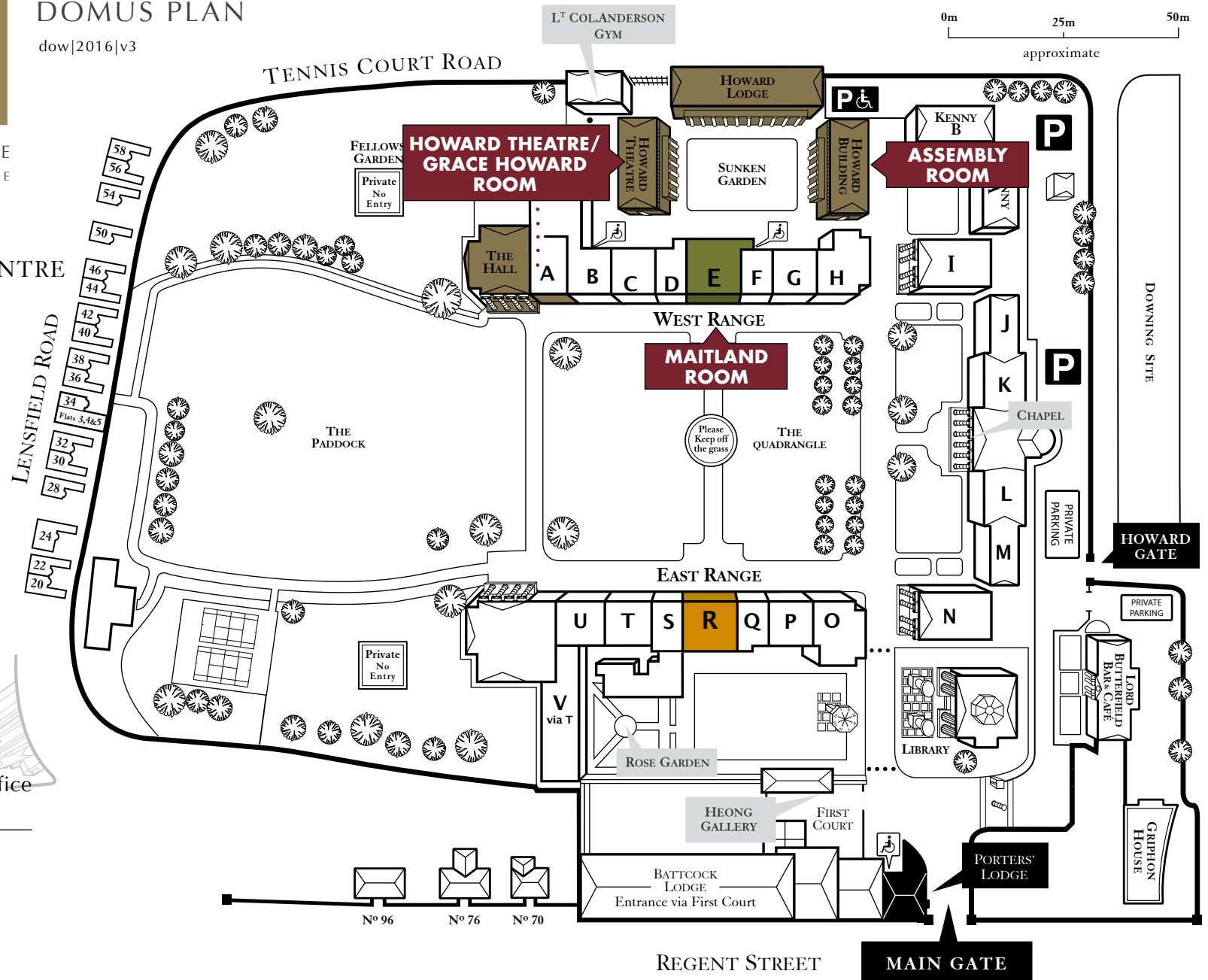
Wilkins Room

Level Entrances

PORTERS' LODGE 01223 334800

DOMUS PLAN

dow|2016|v3



© THE MASTER, FELLOWS, AND SCHOLARS OF DOWNING COLLEGE IN THE UNIVERSITY OF CAMBRIDGE

Frederick Wilmot-Smith (Oxford)

'The Death of Private Law'

Panel II: Howard Theatre

Chair: Jane Stapleton (ANU)

Janet O'Sullivan (Cambridge)

'Foresight, Fault and Intuition in Negligence:

Why Reasonable Foreseeability Has Had Its Day'

Kenneth W Simons (California Irvine)

*'The Hegemony of the Reasonable Person
in Anglo-American Tort Law'*

Gregory C Keating (USC Gould)

'Products Liability As Enterprise Liability'

Panel III: Assembly Room (Howard Building)

Chair: Peter Cane (ANU)

Roderick Bagshaw (Oxford)

'The Constitutionalization of Private Law: Why Resist?'

Allan Beever (Auckland UT)

'Administrativism and the Conceptualisation of Private Law'

Francois du Bois (Leicester)

'A Public Revolution in Private Law?'

1:00–2:00 PM

LUNCH

2:00–3:00

PARALLEL 3C

Panel I: Maitland Room (E Staircase)

Chair: Neil Jones (Cambridge)

Jessica Palmer (Otago) & Charles Rickett (Auckland UT)

'A Revolution in Trust Law—

The Legacy of the Discretionary Trust'

Andreas Televantos (Cambridge)

*'There and Back Again: Losing the Fiduciary Requirement
for Equitable Tracing Claims'*

3:00–3:30 PM

3:30–4:30 PM

Panel II: Howard Theatre

Chair: James Edelman (Federal Court of Australia)

Shawn Bayern (Florida State)

'An American Revolution in Private Law:

The Law and Economics Movement and Its Failures'

Andrew Gold (De Paul)

'Fiduciary Law After the Law & Economics Revolution'

Panel III: Assembly Room (Howard Building)

Chair: Benjamin C Zipursky (Fordham)

Charlie Webb (LSE)

'Fact and Value in Common Law Adjudication'

Stelios Tofaris (Cambridge)

'Codifying Private Law: A Common Law Revolution?'

AFTERNOON REFRESHMENTS

PARALLEL 3D

Panel I: Howard Theatre

Chair: Jeannie Paterson (Melbourne)

Jonathan Morgan (Cambridge)

'Down with Frustration'

Paul S Davies (Oxford)

'Concurrent Liability: A Spluttering Revolution'

Panel II: Assembly Room (Howard Building)

Chair: Peter Turner (Cambridge)

Man Yip (SMU) and James Lee (KCL)

'Constructing 'Context' in Equity: Revolution or Restoration?'

Rosemary Langford (Melbourne)

*'The Proscriptive Fiduciary Revolution—
Insights from Directors' Duties'*

5:15–6:15 PM

PLENARY 3.2

‘Legal Obligations and Legal Revolutions’

The Hon. Michael D Kirby AC CMG

The 2016 Cambridge Freshfields Lecture

Chair: Professor Andrew Robertson

Cambridge Law Faculty

10 West Road CB3 9DZ (see map on page 16)

6:30 PM

CHAMPAGNE RECEPTION

Trinity College

Wren Library Exhibition of Legal Manuscripts

8:00 PM

HERBERT SMITH FREEHILLS

FORMAL CONFERENCE DINNER

Trinity College

Speaker: The Rt Hon. the Lord Walker of Gestingthorpe

(Dress Code: lounge suit or equivalent)

DAY 4: FRIDAY 22 JULY

9:15–10:45 AM

PLENARY 4.1

Panel Discussion: Goff and Jones at Fifty

Sir Terence Etherton (Chancellor)

Elise Bant (Melbourne)

Amy Goymour (Cambridge)

Mitchell McInnes (Alberta)

Helen Scott (Cape Town)

Chair: Professor Graham Virgo

Howard Theatre

11:00–11:30

MORNING REFRESHMENTS

11:30–1:00

PARALLEL 4A

Panel I: Howard Theatre

Chair: Nick McBride (Cambridge)

John CP Goldberg (Harvard) and

Benjamin C Zipursky (Fordham)

‘MacPherson at 100’

Steve Hedley (Cork)

‘The Unacknowledged Revolution?’

From Individual to Collective Liability in Negligence’

Richard Wright and Karen Vaysman (Chicago Kent)

‘The Quiet Revolution:

Res Ipsa Loquitur and the Standards of Persuasion’

Panel II: Assembly Room (Howard Building)

Chair: Jessica Palmer (Otago)

Michael Bryan (Melbourne)

‘Maitland and the Unfinished Revolution in Equity’

Pauline Ridge (ANU)

‘Modern Equity: Revolution or Renewal from Within?’

Peter Turner (Cambridge)

‘Recovering the Equitable Doctrine of Relief against Forfeiture’

1:00–2:00 PM

LUNCH

2:00–3:30 PM

PARALLEL 4B

Panel I: Howard Theatre

Chair: Jason Neyers (Western Ontario)

Paula Giliker (Bristol)

A Revolution in Vicarious Liability:

Lister, the Catholic Child Welfare Society Case and Beyond’

Claire McIvor (Birmingham)

‘Revolutionary Thinking and the Erosion of Legal Principle:

The Tort Law Examples of Vicarious Liability and Accessory Liability’

Additional Information

Rachel Leow (Cambridge)

A Misguided Revolution in Vicarious Liability?

Panel II: Assembly Room (Howard Building)

Chair: Jonathan Morgan (Cambridge)

Stephen A Smith (McGill)

From Remedies to Rights—What's Left?

The Hon. Justice James Edelman

(Federal Court of Australia)

Hadley v Baxendale

Victor Goldberg (Columbia)

Reckoning Contract Damages: Valuation of the Contract as an Asset

3:30–4:00 PM

AFTERNOON REFRESHMENTS

4:00–5:00 PM

PLENARY 4.2

*The Revolutionary Trajectory of EU Contract Law
towards Post-national Law*

Professor Hugh Collins FBA

Chair: Professor Graham Virgo

Howard Theatre

5:00–6:00

CLOSING DRINKS

Grace Howard Room

WIFI

Eduroam is available throughout the University of Cambridge, including Downing College. Those whose institutions support Eduroam can access it by using the login credentials of their home university.

For those without access to Eduroam, wifi passwords are available from the registration desk or the Porters' Lodge when checking in.

USEFUL CONTACT NUMBERS

Downing Porters

Downing College, Regent St, Cambridge CB2 1DQ
+44 1223 334 800

Trinity Porters

Trinity College, Trinity Street, CB2 1TQ
+44 1223 338 400

Law Faculty

10 West Road, CB3 9DZ
+44 1223 330 033

Panther Taxis

+44 1223 715 715

(for those who prefer not to walk to the Faculty of Law or Trinity College)

STUDENT HELPERS

We are very grateful to the following student volunteers for their assistance during the conference:

Imogen Dodds

Emily Gordon

Robert O'Sullivan

Rajiv Shah

Elizabeth Virgo

Map of Cambridge: Walking Directions

