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BOOK REVIEWS

Standing in Private Law: Powers of Enforcement in the Law of Obligations and Trusts. By TIMOTHY LIAU. [Oxford University Press, 2023. xxxvi + 324 pp. Hardback £110.00. ISBN 978-0-19286-966-1.]

Dr. Timothy Liau's *Standing in Private Law* explores – as its title suggests – the nature of "standing" in private law, as well as the content of and justification for private law's standing rules. It offers a much-needed examination of what has traditionally been a neglected issue in private law scholarship. While scattered outposts of standing in private law have been charted in some detail, such as in company law and the tort of nuisance, the subject as a systematic whole has never received direct attention. Liau's project is, therefore, a novel and ambitious one: to carve out space for "standing" as a "distinct and separable private law concept" (p. 2). The result is a meticulous and scholarly work which ought to be read carefully by anyone with a practical or academic interest in the law of remedies.

The book comprises three main parts. Part I, which spans Chapters 2 to 5, forms the primary theoretical backbone of the book. In that part, Liau develops a definition of "standing" in terms of "a power ... to hold [a defendant] accountable before an adjudicative body ... thereby subjecting her to its power (jurisdiction) to make an order against her" (p. 34). He distinguishes this concept from the primary and secondary rights which one might seek to enforce by exercise of one's standing (p. 34), as well as from the court's power to make orders to enforce those rights (pp. 58–64). He also distinguishes standing from the political rights one might have to the assistance of the courts in enforcing one's primary or secondary legal rights (p. 46). He finally introduces his "general descriptive claim", viz., that usually "[o]nly the *apparent* primary right-holder has the standing ... to sue to enforce his rights" (p. 96). Although framed restrictively, Liau's "general standing rule" describes a condition for standing which is both usually necessary and usually sufficient.

Part II is devoted to exploring Liau's "general standing rule", and some of its exceptions, in various aspects of the law of obligations. Chapters 6 and 7 look at contract law. They begin with the claim that the rules on privity of contract are, at least in part, standing rules (pp. 105–12). "Privity" both determines in whom primary contractual rights are vested as well as who may sue to enforce those rights. Privity's answer to the latter, Liau argues, is found in his "general standing rule": it is (usually) the primary right-holder, and no one else, with standing to enforce contractual rights (p. 109). This insight leads Liau to suggest that the aims of the 1999 privity reform could elegantly have been achieved by introducing third-party standing without creating third-party rights. The introduction of the latter, Liau argues, incongruously advantages third-party beneficiaries of promises in cases of failures to perform equal bargains. Where the promisee in a two-party situation would receive merely nominal damages – their loss being offset by not having to pay for performance – a third-party beneficiary is able to receive substantial damages because it is not them who would have had to pay had performance been rendered (p. 130).

The subject of Chapters 8 and 9 is the law of unjust enrichment; specifically, the "special equitable action" in *Ministry of Health v Simpson (Re Diplock)* [1951] A.C. 451. Liau argues that there are insuperable obstacles to treating the disappointed legatees' claim as an ordinary claim in unjust enrichment. This, he says, would be irreconcilable with the Supreme Court's recent insistence in *Investment Trust Companies v HMRC* [2017] UKSC 29 on a "direct transfer" from claimant to defendant (pp. 152–58). Instead, Liau proposes that the claim in *Re Diplock* involved the legatees exceptionally being granted standing to enforce Diplock's estate's right to restitution. He persuasively notes that this provides more satisfactory answers to why the defendants were ordered to make restitution to Diplock's estate rather than to the claimants (pp. 160–61) and how there was an adequate "proprietary base" for the so-called "proprietary claims" (i.e. claims to follow and trace the dissipated funds) to succeed (pp. 161–63). He therefore concludes that, although analogies are often drawn between *Re Diplock* and claims in knowing receipt, the better analogy is instead to be drawn with claims using the *Vandepitte* procedure – a means by which trust beneficiaries are able indirectly to enforce their trustee's rights when the trustee themselves cannot or will not (pp. 176–77).

The final chapter of Part II, Chapter 10, explores exceptions to Liau's "general standing rule" in tort law. Liau draws together an interesting collection of claims – claims under the Fatal Accidents Act 1976, claims under the Congenital Disabilities (Civil Liability) Act 1976, and the claim in *White v Jones* [1995] 2 A.C. 207. These cases, Liau argues, are "doubly exceptional" (p. 237) because they not only involve the conferral of standing on someone other than the right-holder, they also make the damages payable after a successful suit payable to the third-party claimant rather than to the original right-holder. They therefore stand in contrast to Liau's other examples of exceptional standing cases, such as *Re Diplock*, in which the conferral of third-party standing does not change the content of the secondary right being enforced (viz., the payment of a certain sum of damages to the right-holder).

Part III returns to Liau's broader theoretical ambitions. It examines what might justify Liau's "general standing rule" (Chapter 11), as well as what might justify some of the exceptions identified in the previous part (Chapter 12). Liau embraces a range of justifications, both instrumental and non-instrumental. For example, he suggests that the "general standing rule" promotes a somewhat-Kantian notion of "private authority" (pp. 247–51), grants right-holders valuable options to forego their rights or to forgive wrongs against them (pp. 253–57), and facilitates settlements by limiting the range of possible parties (p. 261). The various exceptions to Liau's rule also are justified by a range of different reasons, including facilitating claims where the right-holder is not themselves competent to bring the claim (pp. 289–98) and streamlining the process of litigation where the right-holder is duty-bound to bring the claim (pp. 298–304).

Liau's book is richly-packed and thought-provoking. Particular highlights include the novel and compelling analogy between *Re Diplock* and the *Vandepitte* procedure, as well Liau's disambiguation of the various trilateral normative relations involved in legal proceedings. Much could be written about each and every one of the book's chapters. However, perhaps the book's most significant contribution lies in Liau's broader theoretical claims about what standing is and who has it. My comments focus primarily on that aspect of Liau's work.

Liau defines standing in terms of a litigant's power to subject another person to the court's jurisdiction (p. 34). To this definition we might usefully add two minor qualifications – from which I doubt Liau would dissent. First, Liau's definition of standing appears, on its face, untethered to any particular right. One "has standing" just if one has the power to subject another to the court's jurisdiction. But people do not have standing in the abstract; one has (or does not have) standing in respect of a particular wrong. A modest refinement of Liau's definition might therefore be that standing is "[a] power against another to hold her accountable [*for a particular wrong*] before an adjudicative body … thereby subjecting her to its power (jurisdiction) to make an order against her" (p. 34). Second, while the exercise of standing might be a necessary condition for the court to have jurisdiction over a particular defendant, it is not a sufficient one. For example, English courts do not ordinarily have extra-territorial jurisdiction. Save where there has been a submission to the jurisdiction of the English courts (see Civil Jurisdiction and Judgments Act 1982, s. 15(D)(2)), the jurisdiction of English courts depends on the valid service of process. While a claim form can usually be served as of right within the territorial jurisdiction, valid service outside the jurisdiction must fall within CPR, rr. 6.32, 6.33, or 6.36.

More significantly, Liau's definition of standing involves no reference to the actual legal rights of the claimant. This appears to be by design: Liau expressly accepts that a merely "apparent primary right-holder" may have standing, because they too are able to trigger the court's jurisdiction (p. 96). But this creates some perplexing consequences. First, it means that the existence of standing to sue in respect of a particular wrong is not conditional on that wrong having actually occurred (p. 67, although cf. p. 93). If Charles is battered by David, he has standing to sue David for the battery; but he has standing to sue Xavier for battery in exactly the same sense, even though no battery by Xavier ever took place. Second, relatedly, the wrong-independence of standing means that where most people have at all times standing to sue for any conceivable wrong, persons subject to civil restraint orders or vexatious litigant orders acquire standing even in respect of actual wrongs only when granted leave to institute proceedings by the court. Therefore, although Liau associates himself with those who define standing in "substantive" terms (pp. 83–86), his account of standing is largely procedural. The primary restriction on having standing to sue in respect of a particular wrong is not whether one actually had the relevant right, or that the alleged facts actually occurred; it is that one's ordinary power to sue has not been cut back by court order.

Also potentially problematic are situations where Liau's "general standing rule" seems to come into conflict with his account of standing. Consider *Philipp v Barclays Bank UK plc* [2023] UKSC 25. The claimant, Mrs. Philipp, alleged that her bank had wronged her by conforming to her instruction which – she claimed – they had reasonable grounds to believe she had fraudulently been induced to make. At first instance, her claim was summarily dismissed on the basis that banks owe no duty to decline to conform to instructions, even if they ought reasonably to have suspected the instruction was fraudulently procured. The Court of Appeal, however, disagreed; they held that such a duty does exist. The Supreme Court in turn restored the decision of the first instance judge. According to Liau's "general standing rule", Mrs. Philipp appears ultimately not to have had standing to bring her claim: on the law as ultimately authoritatively determined, she was not even an "apparent" right-holder (i.e. a person alleging facts which amounted to an invasion of her rights). The facts which she alleged disclosed no

violation of any of her rights. But the conclusion that Mrs. Philipp had no standing to sue seems implausible – as does the alternative answer that Mrs. Philipp's claim involved an exception to the normal standing rules. Nor is it an answer to say that Mrs. Philipp had standing on the basis that she merely *claimed* to have a primary right, else this would open the door to recognising standing in cases where Liau rightly wishes to deny it (such as Gardner's example of suing NASA for the alleged wrong of having a bad logo: p. 94).

At the heart of these issues lies the simple fact that there are a range of different senses of "standing". True it is that we might meaningfully speak of "standing" in the procedural sense of persons who are at liberty to initiate proceedings and thereby invoke the jurisdiction of the court. We might equally speak of "standing" in the sense of being the right person to complain of a particular wrong. Conversely, it is true to say that there is a sense in which people subject to vexatious litigant orders are deprived of standing; and a different sense in which people whose statements of case disclose no wrong done to them personally have no standing to sue for those wrongs (p. 95). In this respect, the novelty and ambition of *Standing in Private Law* truly shines – in forcing us to interrogate and clarify a term which has been used all too infrequently and all too imprecisely. To conclude with one final sense of "standing": *Standing in Private Law* will certainly stand out as a rigorous and rich contribution to an area of private law which has long awaited such a work.

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Shakespeare's Strangers and English Law. By Paul Raffield. [Oxford: Hart Publishing, 2023. xx + 268 pp. Hardback £85.00. ISBN 978-1-50992-984-9.]

With *Shakespeare's Strangers and English Law*, Paul Raffield brings to a close his series of monographs on law and Shakespeare. Like its predecessors, this new book sets out to cast new light on particular plays by juxtaposing those plays with aspects of law and legal culture (broadly defined). The juxtaposition enables Raffield to suggest echoes, parallels, allusions and contexts which mutually illuminate the plays and the law.

In *Shakespeare's Strangers* the five central plays are *Measure for Measure*, *The Comedy of Errors*, *Troilus and Cressida*, *The Merchant of Venice* and *King Lear*. The unifying theme is "what it meant to be a 'stranger' to English law in the late Elizabethan and early Jacobean period" (p. i). However, the book does not confine itself to these plays – indeed, some if its most engaging discussion is prompted by *The Book of Sir Thomas More*; nor does it limit itself to strangers – there is a very valuable analysis of the likely first performance of *Troilus and Cressida* at an Inn of Court (pp. 141–50), for instance. This is not a book that announces a thesis, then proceeds to demonstrate it. It is, rather, a series of wide-ranging reflections on, and responses to, the selected plays. This review highlights some of the most striking and interesting of these reflections and responses.

Raffield's point of departure is Shakespeare's contribution to the multi-authored *The Book of Sir Thomas More* (c. 1600), in which Sir Thomas More is shown