

**TORTIOUS INTERFERENCE WITH GOODS IN NEW ZEALAND:  
THE LAW OF CONVERSION, DETINUE AND TRESPASS**

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Philosophy

by

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## **Introduction**

In New Zealand there is no single tort of unlawful interference with goods. Rather, the law protects interests in goods by means of a number of different torts which, although of distinct origin, have in the course of their historical development shifted in nature, varied in their application and overlapped to a large extent. The old forms of action and pleading which shaped so much legal development were influential in the development of these torts and largely dictated their scope. Although now obsolete, these ancient technicalities still cast a long shadow, and largely account for the present form of the law. The result is that the modern law is complex and it is not always easy to define and distinguish the torts and their associated remedies, nor to map the exact boundaries amongst them. The principal torts which today are exclusively concerned with interference with goods are conversion, trespass and detinue.

Detinue as an action was limited to wrongful detention of goods or parting with possession of them; and trespass came to lie only where there was an unlawful physical interference with goods, such as taking or damaging them. Conversion covers a wide range of circumstances and so has encroached and overlapped into the areas occupied by the other, narrower, torts. As a result, conversion (previously called trover) has become the most important of these torts in modern law although it developed later than either trespass or detinue.

The intention of this thesis is to analyse unlawful interference with goods in the civil law and the property interests associated with it. In particular, as the dominant tort in this area, the origins and evolution of conversion will be closely examined as will its place in the current law of New Zealand. This will require a detailed examination of the common law development of conversion as well as the subsequent gradual encroachment on, and modification by statute of, the common law. The topic is inextricably linked with questions of title to goods, and the nature and hierarchy of relevant rights in goods will be central to the thesis. Where it is necessary, reference will be made to the law in other jurisdictions, but the focus of the thesis will be on describing and analysing New Zealand law as it has developed from its English origins and the extent to which New Zealand law has developed its own

unique features. In the light of this examination of the current law, the question of whether reform is desirable or necessary will be considered.

Thus, the thesis will cover:

- an outline of the early history and development in England of conversion
- the evolution of conversion and its essential nature and distinguishing characteristics
- the extent to which conversion currently overlaps with other torts, particularly trespass, detinue and negligence
- interests in goods and their transfer
- property interests giving rise to the right to sue for unlawful interference with goods
- real and personal remedies
- the ranking of competing proprietary and possessory interests, including those of finders and thieves
- the effect of New Zealand legislation: in particular, how the Sale of Goods Act 1908, the Mercantile Law Act 1908 and the Personal Property Securities Act 1999 affect the torts covering wrongful interference
- reform in other jurisdictions
- whether reform is desirable in New Zealand and, if so, what form it should take.



## Chapter 1 Historical background

The tort of conversion may be described briefly as an unlawful interference with, or usurpation of, another's possessory right or interest in goods. The defendant is said to convert the goods to his or her own use, thus manifesting an assertion of rights or dominion over the goods which is inconsistent with the rights of the plaintiff. This denial of the plaintiff's possessory right is the essence of conversion. The possessory right referred to is established by either actual possession or a right to obtain possession; it does not require that the plaintiff be the owner of the goods in question. Thus, a person with actual possession, or the right to it, may claim for conversion of goods, and it is irrelevant that some other person is the owner of them.<sup>1</sup>

The word "conversion" is of course found in the context of the criminal law, as well as in the law of torts. Theft may be committed by the converting of goods. However the criminal law is concerned with moral fault, and the act of theft or stealing is committed only when the taking of the property in question, or using it or dealing with it, is done dishonestly and without claim of right, and with intent to deprive the owner permanently of the property or any interest in it.<sup>2</sup> Conversion of vehicles, ships, aircraft and horses is a separate offence which, because it does not require an intention to deprive the owner permanently of the property, does not itself constitute theft;<sup>3</sup> but dishonesty and lack of claim of right are both essential elements of the offence.<sup>4</sup> By contrast, the honesty or otherwise of a person committing the tort of conversion is irrelevant. Provided the necessary usurpation of the plaintiff's interest in the goods in question is established, the defendant will be liable in conversion, and the defendant's innocent state of mind will not constitute a defence to the plaintiff's claim.

Although, generally speaking, the commission of the crimes of theft or conversion will involve a simultaneous commission of a tortious act, the converse does not hold true. Conversion as a tort and conversion as a crime are conceptually quite distinct. The former is a civil action, shaped largely by the common law, and undertaken by a plaintiff claiming redress for unjustified interference with his or her goods; the latter involves offences defined by statute which may generally be the subject of prosecution by any person or agency and

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<sup>1</sup> The nature of a possessory interest is described further in ch 5.

<sup>2</sup> Crimes Act 1961, s 219

<sup>3</sup> *ibid*, s 226

<sup>4</sup> *ibid*, s 219

which, if established, may result in conviction and punishment.<sup>5</sup> It will therefore be apparent that a tortious act of conversion may or may not also constitute a criminal offence, and that there is no logical or necessary legal link between conversion as a tort and conversion as a crime.

This was not always so, as an examination of the history of the tort of conversion in English law reveals. In mediaeval times, the process of obtaining redress for wrongs which would today be classified as torts often included aims and consequences which would now pertain solely to the criminal law. So, for example, in the period immediately after the Norman Conquest, before the systematic public prosecution of crime was established, the recovery of stolen chattels required the victim to undertake an action called an appeal, which entailed an allegation of robbery or larceny. Although this was a private proceeding undertaken by the victim of theft, the object was both to recover the stolen property and to have the thief punished.<sup>6</sup> The victim's claim to be entitled to property was therefore linked with an allegation of theft, and the proceedings could result in both a return of property to the victim and the punishment of the person appealed against. No clear distinction lay between public and private law in this context.

The prosecution of crime became a matter for the Crown in the twelfth century, and increasingly remained in public hands thereafter. This gradual separation of public and private law meant that victims had to undertake their own proceedings for the return of stolen chattels or compensation for their loss or damage. The procedure for bringing civil actions became, as is well known, governed from the time of Henry II by the use of writs issued from the Chancery, the office of the Crown. Generally, a suit had to be commenced by original writ which was not only the foundation of the action but also had the effect of shaping the substantive law to which it related. In the context of wrongful interference with chattels, the writs of trespass *de bonis asportatis*, and of detinue became widely used in mediaeval times. These writs were, like others, hedged about with difficulties and technicalities.

An action in trespass enabled a plaintiff to recover damages for a lost or stolen chattel. The action was based upon the direct and forceful interference with the plaintiff's right to possession and so could be undertaken, not only by an owner of the goods, but by a bailee in an appropriate case. This writ of trespass, however, had its limitations, particularly as it was available only against the person who had taken the goods from the owner or possessor of

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<sup>5</sup> There are no common law crimes or offences in New Zealand; only conduct proscribed by statute may be the subject of criminal proceedings.

<sup>6</sup> This procedure is summarised in Ames "The History of Trover" (1897-1898) 11 Harv L Rev 227-289; 374-386.

them and not against any person who subsequently received the goods from the original taker. So, “if a man take my horse by force and give it to JS ... I shall not have trespass against JS for the first offender has gained property by tort”.<sup>7</sup>

Nor was trespass available where the injury complained of was merely indirect or consequential. For example, if the defendant threw an object which directly struck and injured the plaintiff, an action in trespass would lie; but if the object were thrown onto a highway so that the plaintiff tripped over it, the action was not available for an injury thereby suffered by the plaintiff. Further, if the defendant was a person who had the plaintiff’s prior authority to deal with the goods but damaged them by misusing them, trespass was not available, for there was no forceful wrong *ab initio*. For the same reason, an act or omission which resulted in damage to the goods was not trespass. An action in trespass retained an affinity with the criminal law, for a successful action carried with it the inevitable implication that the defendant had used force and so committed a breach of the peace. In consequence the defendant could be obliged to pay a fine to the Crown as well as having to pay damages to the plaintiff.

Because trespass was a wrong against possession, it was not available against a bailee to whom the owner had voluntarily delivered the goods and who did not give them back. The appropriate action in such circumstances was detinue. The writ of detinue, an action for the recovery of the chattel or its value, had its basis in bailment, the action arising from the failure of a bailee to carry out his or her agreement to redeliver goods to the bailor. Originally, therefore, detinue was available only against a bailee. As the remedy was confined to the recovery of the goods or their value, it could not be used to obtain compensation for damage to goods short of their destruction. Further, it carried with it the risk that the defendant might choose trial by battle, with the result that the dispute would be decided in accordance with physical strength or fighting ability.<sup>8</sup> Wager of law was also a possibility; this involved the use of compurgators, who might in reality know nothing of the case.<sup>9</sup>

The development of actions on the case enabled the breaking away from the rigid constraints of these writs and allowed the courts some flexibility in devising new causes of

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<sup>7</sup> 21 E 4, 74. This case and others to the same effect are cited in *Branston* (1912) 28 LQR 262.

<sup>8</sup> Trial by battle was not formally abolished until 1819.

<sup>9</sup> Wager of law was abolished in 1833. Detinue enjoyed something of a revival after this, because wager of law had previously been available for detinue but not conversion: see the discussion of this by the Law Reform Commission of British Columbia, LRC 127 ‘Wrongful Interference with Goods’ 1992.

action.<sup>10</sup> Accordingly, additional actions relating to circumstances similar to those in which writs of detinue and of trespass were used came into being. In particular, *detinue sur trover* was an action which did not require the existence of a bailment between the parties and so was available against others such as finders. The action required that the plaintiff declare that he or she had lost the goods, and that the defendant had found them and refused to return them at the plaintiff's request.

These requirements of "losing" and "finding" were carried through into the form of the writ which became known as Trover and Conversion, which had developed as a distinct action of case by the middle of the sixteenth century and became the basis of the modern law of conversion. It has been pointed out that the action on the case for conversion developed at a time from which few law reports survive, but the first plea that the defendant had converted the plaintiff's property appears to be in 1479.<sup>11</sup> An example of the writ is as follows:<sup>12</sup>

The King to the Sheriff greeting. If A shall make you secure of prosecuting his claim, then put by gages and safe pledges X, late of Headington, gentleman, that he be before us in eight days of Saint Hilary, wheresoever we shall then be in England, to show for that whereas the said A heretofore, to wit, on the tenth day of July in the year of our Lord 1624 at Headington in the County of Oxford was lawfully possessed, as of his own property, of certain goods and chattels, to wit, twenty chairs and twenty tables of great value, to wit, of the value of one hundred pounds of lawful money of Great Britain;

and being so possessed thereof, he, the said A aforesaid, at Headington in the county aforesaid, casually lost the said goods and chattels out of his possession;

and the same afterwards, to wit, on the day and year aforesaid, at Oxford in the county aforesaid, came into the possession of the said X by finding;

Yet the said X, well knowing the said goods and chattels to be the property of the said A and of right to belong and appertain to him, but contriving and fraudulently intending craftily and subtilly to deceive and defraud the said A in this behalf, hath not as yet delivered the said goods and chattels or any part thereof to the said A, though often requested so to do, but so to do hath hitherto wholly refused and still

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<sup>10</sup> For varying opinions as to the impetus for case, see, for example, Plucknett (1931) 31 Col L Rev 778; Holdsworth (1931) 47 LQR 334; Landon (1936) 52 LQR 68; Plucknett (1936) 52 LQR 220.

<sup>11</sup> *Anon* YB 18 Edw IV, f 23, pl 5. The plaintiff bailor alleged that the bailee had broken open bailed hampers of silver and "converted them to his own use". This is discussed in detail by Simpson (1959) 75 LQR 364.

<sup>12</sup> Stephen *Treatise on the Principles of Pleading* 2<sup>nd</sup> ed, 1827, 19-20, cited in Fifoot *English Law and its Background*, 1932

refuses; and afterwards, to wit, on the first day of August in the year aforesaid at Oxford in the county aforesaid, converted and disposed of the said goods and chattels to his, the said X's own use, to the damage of the said A of one hundred pounds, as it is said.

And have you there the names of the pledges and this writ.

This writ discloses four assertions: first, that the plaintiff was lawfully possessed of the goods and chattels in question; that he casually lost them; that the defendant found them; and that the defendant subsequently converted and disposed of them to his own use. It was, however, not necessary in reality to prove the alleged losing and finding; the inclusion of these elements, which were not traversable, reflected only the residue of the writ of *Detinue sur Trover*, which had itself developed as an attempt to escape the limitations of the previous legal forms. The new writ of Trover and Conversion was a palimpsest, through which the previous inadequately obliterated legal technicalities could still be seen.

Because the allegations of losing and finding were regarded as merely formulaic legal fictions,<sup>13</sup> the essential features of the tort of conversion were that the plaintiff had been lawfully possessed, or was entitled to possession, of the goods in question and that the defendant had afterwards converted and disposed of them to his own use. These elements continue to constitute the essence of the tort of conversion today.

The breadth of the writ of Trover and Conversion enabled its eventual encompassing of much of the law located in the fields covered by detinue and trespass. It also went further in overcoming some of the deficiencies and limitations of those torts by providing an alternative action with a wider scope than either of them. In consequence during the fifteenth and sixteenth centuries trover to a large extent rendered unnecessary and superseded the actions of detinue and trespass. Some distinctions remained however in the respective ambits of these actions, which did not, and still today do not, completely overlap.<sup>14</sup> Thus detinue but not trover was available against a bailee who carelessly lost the plaintiff bailor's goods; and trespass but not trover lay against a defendant whose interference with the plaintiff's goods damaged them but was not such as to amount to a denial of the plaintiff's possessory right in

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<sup>13</sup> So in 1756 Lord Mansfield stated of the writ: "In form it is a fiction; in substance a remedy to recover the value of personal chattels wrongly converted by another to his own use": *Cooper v Chitty* (1756) 1 Burr 20, 31; 97 Eng Rep 166; and in *Wilbraham v Snow* (1669) 2 Wms Saund 47; 85 ER 624, it was said (citing *Maynard v Basset Moor* 691, *Jones v Winckworth* Hard 111, *Hudson v Hudson* Latch 214): "Regularly the declaration should state that ... the goods ... came to the hands of the defendant *by finding*; but it has been held that the omission of these words is not material after verdict."

<sup>14</sup> The current law defining the parameters of detinue and trespass is discussed in ch 2, below.

them. These distinctions are explained by the different origins and natures of the respective actions as outlined above. The modern law of detinue and trespass and the features which distinguish them from conversion are described further in the next chapter.

Nineteenth century statutory reforms removed these archaic forms of action and the fictions connected with them. Important amongst these was the Common Law Procedure Act 1852 (UK), which fundamentally reformed the law of procedure and pleading. The Act removed the need to state any form or cause of action in any writ or summons and introduced a uniform writ of summons for common law actions. This legislation was replaced by the Judicature Acts of 1873-1875 (UK) and the rules made pursuant to them; in turn they, together with other subsequent legislation dealing with procedure were consolidated by the Judicature Act 1925 (UK). The benefit of this was recognised by Scrutton LJ in *Oakley v Lister*:<sup>15</sup>

Four or five hundred years ago if a person wanted justice from the King's Court he had to obtain a particular form of writ, and, if he chose the wrong one, his claim was not maintainable whatever the facts might be. Before the Common Law Procedure Act and the Judicature Act much the same thing happened. The plaintiff had to express his claim in a way that was legally accurate, and if he did not, a demurrer put an end to the action. Great injustice was thereby done. Now, the Courts find out the facts, and, having done so, endeavour to give the right legal judgment on those facts.

Despite this dictum, and although the old forms of action have been dead for a century and half, their influence on the law has not completely disappeared. The precedents for conversion, trespass and detinue remain as shaped by their historical evolution. In consequence, spectres of the old writs have frequently been observed. So Maitland commented that “[t]he forms of action we have buried, but they still rule us from their graves”;<sup>16</sup> Lord Atkin referred to “ghosts of the past standing in the path of justice clanking their mediaeval chains”;<sup>17</sup> and Salmond wrote that “the old forms of the action are dead, but their ghosts still haunt the precincts of the law”.<sup>18</sup> A modern example of an appearance of such an apparition is *OBG Ltd v Allan*<sup>19</sup> where it was said to be “historically obvious” that a

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<sup>15</sup> [1931] 1 KB 148, 151

<sup>16</sup> Maitland *The Forms of Action at Common Law: Two Courses of Lectures*, 1910

<sup>17</sup> *United Australia Ltd v Barclays Bank* [1941] AC 1, 29 (HL)

<sup>18</sup> (1905) 21 LQR 43

<sup>19</sup> [2005] 2 WLR 1174, 1190 (CA). Whether this is in fact so obvious is discussed in ch 3.2.

chase in action could not be converted; this was because the tort of conversion derived from trover, which required averments of goods lost by their possessor and found by the defendant. In other words, despite the passing of the old forms, the essential features of the individual torts remain.

One of the salient characteristics of conversion is, as its history shows and as will be discussed further in this work, that it protects possessory interests in goods. The plaintiff must establish the requisite entitlement to possession in order to sue in conversion. However, the plaintiff's interest is relevant not only as a prior question, establishing his or her right to sue, but also shapes the determination or result of the case by allocating and ranking the respective rights of the parties in the goods themselves. For this reason conversion, an action in tort, largely operates to define and allocate property interests. The law of conversion therefore cannot be considered without an associated analysis of the law of proprietary and possessory interests in goods.

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## Chapter 2 Other forms of tortious interference with goods

The tort of conversion overlaps with the torts of trespass, detinue and negligence in differing degrees. The reasons for the similarities and differences amongst these torts which are found today are explicable by the way in which each action evolved and the inherent or essential nature of each. The complexity of these torts, and the overlapping nature of them, have led to consideration in several jurisdictions of possible reforms. In particular, several law reform bodies have investigated the desirability or otherwise of retaining separate torts relating to interference with goods, or of combining them into a single statutory tort. The results of such investigations are considered further below.

### 2.1 Detinue

#### 2.1.1 *Nature of detinue*

Detinue is the detention of property with the intention of keeping the property in defiance of the rights of the person entitled to possession of it. Originally, the mediaeval action of detinue was available only to a bailor against a bailee, where the latter failed to return bailed goods. Thus, the action was in essence akin to a claim for breach of contract, because it rested on a failure by the bailee to carry out his or her obligation to return goods in accordance with the terms of the bailment. Clearly, the action in this form was very limited. By the thirteenth century, the scope of the action had extended to allow an owner to claim against a person other than the bailee who was wrongfully holding goods; and a case in which a loser of goods claimed them from a finder in detinue is recorded in the fourteenth century. As described above, detinue *sur trover* was the ancestor of the modern action of conversion. Gradually, as the scope of conversion widened, there was little need for recourse to detinue. Conversion was eventually held to include a refusal to redeliver goods; that is, a refusal to return goods came to be regarded as a positive act which constituted conversion.<sup>20</sup> By contrast, conversion was not committed by a mere inability to return goods because of their loss or destruction, this being an act of nonfeasance. This latter circumstance remained and, it seems, still remains, the only instance of an act of detinue which does not also constitute conversion.

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<sup>20</sup> *Owen v Lewyn* (1673) 1 Ventris 223; 86 ER 150



The tort is not committed by the mere retention by one person of the property of another unless the manifestation of the necessary state of mind is present, as the detention must be consciously adverse to the rights of the other. So in *E E McCurdy Ltd v PMG*<sup>21</sup> it was said that it was the essence of detinue that the detention should be adverse and that unless there were an insistence on a right to hold goods or a refusal to deliver them to the rightful owner, detinue would not be established. In that case, the defendant Postmaster-General, faced with two rival claimants for parcels in his possession, took steps to ascertain which of the parties was entitled to the parcels, retaining them pending resolution of the matter. It was held that he could not be liable in detinue, for he was at all times willing to hand over the goods to the person lawfully entitled to them. The necessary proof that the detention was unlawful was lacking, and the mere fact of possession was insufficient to support the action. By contrast, liability in detinue was established in *Bryanston Leasings Ltd v Principality Finance Ltd*,<sup>22</sup> where the lessee of two vehicles lost their registration books and refused to co-operate in obtaining substitutes for them.

A wrongful detention may be established by proof that the plaintiff demanded the return of the goods and that the defendant refused to return them or failed to do so.<sup>23</sup> The demand which is made must be unconditional and specific.<sup>24</sup> It must also be shown that the refusal is categorical and unqualified, for, as described above, a retention of the goods for some reason such as establishing the entitlement of the claimant to them does not constitute detinue. There is some authority for the proposition that the appropriate demand and refusal form a condition precedent to an action in detinue, and that there is no cause of action until demand and refusal occur. So in *Clayton v Le Roy*<sup>25</sup> Scrutton LJ suggested that a person might be out of possession of his chattel for a hundred years, but no cause of action would arise until a demand and refusal had taken place. Similarly, in *General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd*<sup>26</sup> Diplock LJ said that detinue is a continuing cause of action which accrues at the date of the wrongful refusal to deliver up the goods and continues until the goods are recovered or judgment is obtained. This aspect of the tort obviously gives rise to difficulty; in particular, it permits the owner of the chattel to allow time to run indefinitely before making any demand upon the person who has detained the goods, thereby giving to

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<sup>21</sup> [1959] NZLR 553

<sup>22</sup> [1977] RTR 45

<sup>23</sup> *Re Gillie* (1998) 150 ALR 110 (FCA), *Sala v Manitoba* [2001] 10 WWR 574, *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, 1083-4

<sup>24</sup> *Rushworth v Taylor* (1842) 3 QB 699

<sup>25</sup> [1911] 2 KB 1031, 1048

<sup>26</sup> [1963] 1 WLR 644 (CA)

the plaintiff some ability to control both the date when the cause of action arises and the date at which damages should be assessed.

However, it may be that the problem of when the cause of action arises in detinue may be of little practical significance, for, in current law, almost every case of detinue will also constitute conversion. This is because the essential element of detinue that the detention be adverse to the owner also amounts to a denial of the owner's rights of a kind which is required to constitute conversion. For this reason, detinue is often regarded as being but one form of conversion, that is, conversion by keeping. So in *Cuff v Broadlands Finance Ltd*<sup>27</sup> the Court of Appeal said that a demand by the plaintiff and a refusal to comply with it is the usual, but not the only, means of establishing the defendant's intent to retain the goods as against the plaintiff who has the right to possession of them. Once such an intent is established, the cause of action may be either in conversion or in detinue and, a demand and refusal not being a condition precedent for an action in conversion, but merely evidence of one form of conversion, the problem described above may disappear. The difficulty is further minimised, at least in cases where the defendant has parted with possession of the goods, by the effect of s 6 of the Limitation Act 1950 which provides that where a person has a cause of action in respect of conversion or wrongful detention of goods, and a further conversion or wrongful detention takes place before he or she recovers possession of them, a limitation period of 6 years running from the date of the original conversion or wrongful detention is imposed in respect of the further conversion or wrongful detention; and, at the expiry of the 6 years, the title of the person who has failed to commence an action to recover the chattel is extinguished.<sup>28</sup>

It seems that the only circumstance remaining today in which detinue lies but conversion does not is where the defendant is a bailee who has breached his or her duty to the bailor by allowing the goods in question to be lost or destroyed.<sup>29</sup> As described above, this reflects the essentially contractual nature of the origin of detinue; the bailor's conduct here does not constitute conversion because the delivery of the goods under a bailment is a voluntary, agreed, act on the part of the bailor; and the bailee has not, in such circumstances, converted the goods to his or her own use.

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<sup>27</sup> [1987] 2 NZLR 343 (CA)

<sup>28</sup> The Limitation Bill, which was introduced on 2 June 2009, does not in substance alter this position with regard to the recovery of goods: cls 27, 28.

<sup>29</sup> How this came about is described by Ames (1897-1898) 11 Harv L Rev 374.

Because conversion today covers the entire area of detinue except this single circumstance of the defaulting bailee, the necessity or desirability of the continuance of detinue as a separate tort has been considered in a number of jurisdictions. It was abolished in the United Kingdom<sup>30</sup> by section 2(1) of the Torts (Interference with Goods) Act 1977 UK, which provides succinctly: “Detinue is abolished.” Conversion is correspondingly extended by s 2(2), which provides:

An action lies in conversion for loss or destruction of goods which a bailee has allowed to happen in breach of his duty to his bailor (that is to say it lies in a case which is not otherwise conversion, but would have been detinue before detinue was abolished).

Subsequently, other law reform bodies have considered the matter: in South Australia, the retention of detinue as a separate tort was recommended,<sup>31</sup> as it was in Ontario,<sup>32</sup> and in British Columbia, the creation of a single statutory tort was recommended.<sup>33</sup>

In New Zealand, no statutory intervention has been undertaken, and detinue remains as a separate tort. Whether this should be so is considered in the discussion below in ch 9 on proposed law reform.

### 2.1.2 *The plaintiff's interest*

It is clear that an action in conversion protects only the plaintiff's possessory interest in goods. A plaintiff with either actual possession, or a right to it, will have the required possessory interest in this context, and a right of ownership is not necessary.<sup>34</sup> With respect to detinue, there is however some authority in New Zealand for the proposition that a plaintiff must be able to show a right of possession and a further proprietary right of some kind in the goods at the time of the detention. This view was suggested in *Harris v Lombard NZ Ltd*<sup>35</sup> by McMullin J. In that case, the plaintiff had taken a boat on hire purchase and, the plaintiff being in arrears with payments, the boat was repossessed by the finance company. The boat

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<sup>30</sup> This was recommended by the Law Reform Committee in its Eighteenth Report ‘Conversion and Detinue’ Cmnd 4774, 1971, where it was noted that detinue had fallen into desuetude in the United States.

<sup>31</sup> Law Reform Committee of South Australia, Ninety-fifth Report to the Attorney-General ‘Law of Detinue, Conversion, and Trespass to Goods, 1987

<sup>32</sup> Ontario Law Reform Commission ‘Study Paper on Wrongful Interference with Goods’ 1989

<sup>33</sup> Law Reform Commission of British Columbia, LRC 127 ‘Wrongful Interference with Goods’ 1992

<sup>34</sup> The nature of a possessory interest is described in more detail in ch 5.

<sup>35</sup> [1974] 2 NZLR 161, 166

was then sold in breach of the then current hire purchase legislation. As the plaintiff had a right to damages for breach of statutory duty, McMullin J did not finally determine the question whether the plaintiff would have been entitled to claim in detinue. However he considered it possible that the plaintiff's right to acquire property in the boat which would have arisen on payment of all the instalments might perhaps constitute the necessary property right; and had the plaintiff been shown to have had no property right at all, this would have been fatal to his claim in detinue.

There seems no good reason why detinue should differ from conversion as far as the plaintiff's interest is concerned. A possessory right, although limited, is still an interest in the goods, and such an interest should prevail over that of a wrongdoer, even if only for the reason that there would be, in the absence of a hierarchy of interests, a free-for-all as to entitlement to possession. It has been said in the context of negligence that the possession of a bailee gives a right to sue, for "against a wrongdoer, possession is title"; and the wrongdoer is not concerned to inquire into the arrangement which exists between bailor and bailee.<sup>36</sup> Such reasoning, it is suggested, should also apply to cases of detinue. The Court of Appeal in *Berg v Anglo Pacific International (1988) Ltd*<sup>37</sup> has indicated that this should be so, saying that it should be of no concern to a defendant that the plaintiff is not the "sole and absolute" owner in a case of detinue. However, the Court of Appeal, obiter, cited *Harris v Lombard NZ Ltd* as authority for the proposition that the right to immediate possession and a right of property sufficed for a claim in detinue. As neither *Harris* nor *Berg* concerned a plaintiff with only a possessory right, the point must be regarded as being doubtful as far as New Zealand law is concerned.

Further uncertainty is also cast on *Harris* by the fact that, whatever meaning is attached to the concept of a right of property in this context, the right to sue in detinue is clearly not confined to those who have a general property in the goods. In *Singh v Ali*<sup>38</sup> it was said that an immediate right of possession arising from some special property would be sufficient. This must be so, or standing to claim in detinue would be confined only to owners. However it is clear that a bailee can sue in detinue;<sup>39</sup> and a bailee has been permitted to proceed against his bailor.<sup>40</sup> A finder has also succeeded in detinue.<sup>41</sup> A finder of course does not derive his or her possessory right to the goods from the owner of them, or from any

<sup>36</sup> *The Winkfield* [1902] P 42, 55 (CA) per Collins MR

<sup>37</sup> (1988) 1 PRNZ 713, 716

<sup>38</sup> [1960] AC 167

<sup>39</sup> *Jarvis v Williams* [1955] 1 WLR 71

<sup>40</sup> *City Motors (1933) Ltd v Southern Aerial Super Service Pty Ltd* (1961) 106 CLR 477

<sup>41</sup> *Kowal v Ellis* (1977) 76 DLR (3d) 546

contractual arrangement conferring entitlement to possession; the right is based upon the act of finding and taking possession of the lost goods. If therefore, it is correct that some additional special interest other than the fact of possession or the entitlement to it is required to sue in detinue, it is far from clear what the nature of that interest might be.

There is Australian authority that it is “clear law” that title to sue in conversion depends not upon ownership but upon the right to possession, and that no distinction for this purpose should be made between “trespass to goods, detinue, trover and conversion”.<sup>42</sup> It is submitted that this is good law, and accords with the principles stated in the previous paragraph.

### 2.1.3 Remedies for detinue

The remedies available in detinue differ from those in conversion to some extent, the difference reflecting the respective natures of the torts. Conversion is a single wrongful act and the cause of action arises at the date of the conversion; by contrast, detinue is a continuing cause of action which accrues at the date of the wrongful refusal to deliver up the goods and continues until the goods are delivered up or judgment is obtained. The usual remedy in a case of conversion is damages and, once such a judgment is satisfied, the goods vest in the defendant. In an action in detinue, the plaintiff may seek (1) judgment for the value of the goods as assessed and damages for their detention; or (2) judgment for return of the goods or recovery of their value as assessed and damages for their detention; or (3) judgment for return of the goods and damages for their detention.<sup>43</sup> Once the court has given judgment for the specific restitution of goods, the judgment is enforceable as of right. However, such a judgment is not obtainable as of right,<sup>44</sup> and it seems that even if a right to claim for specific restitution of goods is conferred by statute or by Rules of Court, such claims are still considered according to traditional principles.<sup>45</sup>

A claim by a dispossessed owner of goods for their return is considered according to principles developed in the equitable discretionary jurisdiction of the courts.<sup>46</sup> As the return of the goods is not available as of right, no order will be made if an injustice would result. So

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<sup>42</sup> *Flack v Chairperson, National Crime Authority* (1997) 150 ALR 153 (FCA)

<sup>43</sup> *General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd* [1963] 1 WLR 644. The case contains a useful outline of the history of the remedies available in detinue. In the United Kingdom s 3(2)(a) of the Torts (Interference with Goods) Act 1977 now permits orders for the specific delivery of goods to be made without allowing the defendant the alternative of paying their value.

<sup>44</sup> *Re Gillie* (1998) 150 ALR 110 (FCA)

<sup>45</sup> *Nash v Barnes* [1922] NZLR 303, *Cohen v Roche* [1927] 1 KB 169

<sup>46</sup> *Nash v Barnes* [1922] NZLR 303

in *Nash v Barnes*<sup>47</sup> the innocent buyer of a converted car who had spent money on improving it was not required to return it, and the owner was entitled only to damages. By contrast, in *Re Gillie*<sup>48</sup> the return of goods was ordered when it appeared unlikely that any order for damages would be paid. Further, if the goods in question are ordinary articles of commerce with no unique features, damages will generally be regarded as an adequate remedy.<sup>49</sup> This is because such goods are easily replaceable.

No order for specific restitution of goods can be made unless the goods are sufficiently identified or identifiable. So, if goods have been mixed with others or cannot be precisely defined, an award of damages will be the only possible remedy.<sup>50</sup> An order which cannot easily be put into practice is unlikely to be made.<sup>51</sup>

Where damages are sought in detinue, any assessment must take into account the actual loss suffered by the plaintiff. The action is, of course, for wrongful detention, and this is what must be compensated. Because the cause of action in detinue accrues at the time of the wrongful refusal to return the goods, the plaintiff may continue with his action and seek damages for the detention even if the goods have been restored to him.<sup>52</sup> In consequence, if the goods in question have been restored to the plaintiff before judgment and no further substantial pecuniary loss has been sustained, damages may be merely nominal. On the other hand, it is not necessarily possible to detain another's goods for a period and then pay no more than the costs of the action. The "true view" of this balance was described in *Williams v The Peel River Land and Mineral Co Ltd*<sup>53</sup> that the law lays down limits beyond which it is not possible to wander either in the direction of recouping imaginary profits which might have been made or, in the other direction, if what has been suffered is nothing except a mere bare denial of a right which has been sufficiently vindicated by triumph on the issue, then nominal damages will be enough. Damages will not generally be awarded by reference to any benefit the defendant may have received from the use of the goods during the period of their

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<sup>47</sup> [1922] NZLR 303

<sup>48</sup> (1998) 150 ALR 110 (FCA)

<sup>49</sup> *Cohen v Roche* [1927] 1 KB 169

<sup>50</sup> *John Turner Logging Ltd v Knight & Friedlander* [1999] DCR 779; and see the general discussion by Hammond J in *Butler v Countrywide Finance Ltd* [1993] 3 NZLR 623.

<sup>51</sup> *Butler v Countrywide Finance Ltd* [1993] 3 NZLR 623; cf *Cutler v Oceanside Developments Ltd* [2009] DCR 645

<sup>52</sup> *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246

<sup>53</sup> (1886) 55 LT 689, approved in *Brandeis Goldschmidt & Co Ltd v Western Transport Ltd* [1981] 1 QB 864 (CA) and in *Pargiter v Alexander* 5 Tas R 158, 163

detention; the general principle is that an award of damages is compensatory, and the plaintiff is entitled to what he or she has lost, rather than what another may have gained.<sup>54</sup>

It follows that the normal measure of damages in detinue will be the value of the goods if they are not returned, together with damages for additional losses suffered for their wrongful detention. The date of valuation is the date of judgment because conceptually the damages are in lieu of the return of the goods.<sup>55</sup> The cost of hiring substitute goods may also be allowed, less the expenses the plaintiff would have incurred had he or she still had the goods.<sup>56</sup> Profits the plaintiff might have earned from the goods are also recoverable and in this respect the result is much the same as where damages are assessed in cases of converted goods.<sup>57</sup> If the goods have been returned, the plaintiff must give credit for their value when damages are assessed. This may include any increase in the value of the goods which is due to the efforts of the defendant. So in *Thomas v Robinson*<sup>58</sup> the appellant had added accessories to a car in the *bona fide* belief that the car belonged to him. Some of these items could not conveniently be detached from the car, but in any event, the car had been on sold before the action was brought. It was held that the respondent had to give credit for the added value of the car brought about by the defendant's improvements.

## 2 Trespass

### 2.2.1 *The nature of trespass*

Trespass to goods is a wrongful interference of a direct and physical kind by the defendant with the plaintiff's possession of goods. The old action of trespass to goods, called *de bonis asportatis*, originally required a taking away or removal of goods from the plaintiff's possession, or a complete destruction of the goods. This is no longer the case, and the tort may be committed by acts which fall short of complete removal or destruction. Any unjustified interference with the plaintiff's possession may constitute trespass provided the interference is direct and immediate.

The direct physical interference required for trespass may be committed in a variety of ways. It can be trespass to take goods away even though no material damage results to

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<sup>54</sup> *Finesky Holdings Pty Ltd v Minister for Transport (WA)* (2002) 26 WAR 368, 380-381. This may be subject to principles of restitution, as discussed in the case.

<sup>55</sup> *Rosenthal v Alderton and Sons, Ltd* [1946] KB 374

<sup>56</sup> *Gaba Formwork Contractors Pty Ltd v Turner* (1993) 32 NSWLR 175

<sup>57</sup> *ibid*

<sup>58</sup> [1977] 1 NZLR 385

them;<sup>59</sup> to use goods without authority;<sup>60</sup> to destroy goods or to damage them, however slightly;<sup>61</sup> or to remove an article from one place to another.<sup>62</sup> Unlawfully placing a wheel clamp on a vehicle is a trespass to the vehicle.<sup>63</sup> It is not necessary that the defendant make personal contact with the goods, and the interference may be brought about by some means such as throwing stones or shooting.<sup>64</sup> Chasing cattle may be a trespass.<sup>65</sup> The owner of an animal is not liable in trespass for damage caused to another's goods by the animal, so that the owner of a dog which, for example, "fetches" a golf ball does not thereby commit trespass. It may be otherwise if the owner intentionally causes the act complained of.<sup>66</sup>

There is a considerable overlap between trespass and conversion. In cases of asportation, where goods are taken away, both trespass and conversion will lie. This was stated categorically in the compendious case of *Wilbrahim v Snow*:<sup>67</sup>

Whenever trespass for taking goods will lie; that is, where they are taken wrongfully, trover will also lie; for one may qualify but not increase a tort. ...But the converse of the proposition does not hold; for trover may often be brought where trespass cannot; as where goods are lent, or delivered to another to keep, and he refuses to return them on demand, trespass does not lie, but the proper remedy is trover.

The reason that asportation is conversion as well as trespass is that the removal or taking away of another's goods is evidence of the necessary assumption of dominion over them which is required to establish conversion. Where a trespass is committed by an act which is less than asportation, whether conversion is also committed will depend upon whether the necessary assumption of dominion is present. In other words, one who directly or physically interferes with goods may, by doing so, manifest an unjustified assumption of a right to possession which suffices to constitute conversion. Thus, trespassory conduct may be no more than the mode in a particular case in which conversion is also committed, and there is no logical or necessary connection between the two torts.

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<sup>59</sup> *Penfolds Wines Pty Ltd v Elliott* (1946) CLR 204, 214

<sup>60</sup> *ibid*

<sup>61</sup> *Fouldes v Willoughby* (1841) 8 M & W 538 (example of scratching the panel of a carriage)

<sup>62</sup> *Kirk v Gregory* (1876) 1 Ex D 55

<sup>63</sup> *Police v Krupinski* [1994] DCR 12

<sup>64</sup> *Hamps v Darby* [1948] 2 KB 311 (shooting at homing pigeons)

<sup>65</sup> *Farmer v Hunt* (1610) 1 Brownl & Golds 220; 123 ER 766

<sup>66</sup> *Manton v Brocklebank* [1923] 2 KB 212. Presumably training the animal to do the act would render the owner liable in trespass.

<sup>67</sup> (1669) 2 Wms Saunders 47; 85 ER 624, 642-3



Whether a mere touching or contact with goods constitutes trespass if no damage ensues is doubtful. The House of Lords has held that trespass is constituted whether or not damage is caused to the goods or to the plaintiff,<sup>68</sup> and it has been argued that this is a necessary rule on the ground that if trespass were not actionable *per se* it would be impossible to prevent, for example, the touching of works in art galleries and museums. There is also English authority to the effect that, in general, any handling of the goods of another without permission is tortious.<sup>69</sup> In New Zealand, however, Adams J in *Everitt v Martin*<sup>70</sup> considered it to be “questionable law” that trespass, even if it were to include only intentional interference, could be actionable without damage to goods; but the matter being in doubt, he hesitated to be “the first to hold that there is a right of action for the mere touching of another’s goods without damage or asportation”. The question was touched on but also left open in *Wilson v New Brighton Panelbeaters Ltd.*<sup>71</sup> There is Australian<sup>72</sup> and Canadian<sup>73</sup> authority to the effect that intentional interference which results in no harm is not actionable. The matter must be regarded as being as yet unsettled.

However, it is clear that the fact that a defendant acted without moral fault is no defence to a claim in trespass. A defendant may be liable even though he or she honestly believes the act in question is justified and has no idea of the plaintiff’s interest in the goods. A striking example of such a case is *Wilson v New Brighton Panelbeaters Ltd.*<sup>74</sup> The respondent tow truck operator was taken in by a hoax phone call, in which it was asked to collect a car from one address and tow it to another. The respondent in good faith delivered the car as requested. The unknown person who took delivery of it paid the respondent for the towing and he and the car were not seen again. The appellant car owner sued the respondent in negligence, trespass and conversion. Tipping J held that the respondent’s absence of fault and honest belief that its actions were lawful were no defence. Nor was its lack of negligence a legal justification for the trespass. Tipping J stated that tow truck operators, like auctioneers, deal with the goods of others and so act at their peril; it is one of the risks of their profession that they may be liable if it turns out that their interference with goods is not legally justified. An honest mistake of law or fact does not protect them and it makes no

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<sup>68</sup> *Leitch & Co v Leydon* [1931] A C 90, 106

<sup>69</sup> *R v Inland Revenue Commissioners ex p Rosminster Ltd* [1980] A C 952, 1011, cited in *Wilson v New Brighton Panelbeaters Ltd*

<sup>70</sup> [1953] NZLR 298, 302-303

<sup>71</sup> [1989] 1 NZLR 74

<sup>72</sup> *Wilson v Marshall* [1982] Tas R 287

<sup>73</sup> *384238 Ontario Ltd v R* (1984) 8 DLR (4th) 67

<sup>74</sup> [1989] 1 NZLR 74

difference that they do not have even an inkling that they are violating another's rights. This principle is absolute, and covers not only the case where the defendant does not know of the plaintiff's interest in the goods, but also the case where the defendant could not in the circumstances have discovered it.<sup>75</sup>

It has not always been entirely clear whether trespass can be committed by an unintended or involuntary act. Some very old cases may perhaps be read as ambiguous,<sup>76</sup> and some academic writers have disagreed with each other on the point.<sup>77</sup> The Courts in New Zealand have not decisively ruled on the question. For example, in *Everitt v Martin*<sup>78</sup> it was held that a casual and unintended brushing of a coat against another's car, resulting in no damage to the car, was not trespass. Whether the decision would have been different had damage been caused is not apparent from the judgment and the point was left open. Other New Zealand cases have raised the issue but have not been required to deal with it directly.<sup>79</sup> However it now seems beyond argument from English authority that intention is a requirement of the tort. In the most considered case on the issue, *National Coal Board v J E Evans & Co (Cardiff) Ltd*<sup>80</sup> the Court of Appeal held that trespass was an intentional tort and that an inadvertent act could not constitute trespass. Trespass was therefore not committed when contractors, in the course of excavating a trench, struck and damaged an unsuspected cable. The Court of Appeal held that conduct which was neither wilful nor negligent could not be trespass, and the contractors had no liability for their involuntary and accidental act. The Court observed that some old cases, if read literally, could perhaps be interpreted otherwise, but that the weight of authorities made it clear that trespass could not be committed by a person who was, like the contractors, entirely without fault.

The principle stated in the *National Coal Board* case (which was not cited in the New Zealand cases mentioned above) no doubt explains why there are today few cases involving claims of trespass to goods. If trespass were a tort which could be committed inadvertently and accidentally, and without fault, it would be easily established and so more widely pleaded; it would, for example, doubtless be the preferred action for damage resulting from road accidents. However this is not so, and negligence is seen as the appropriate action in

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<sup>75</sup> *Marfani and Co Ltd v Midland Bank Ltd* [1968] 1 WLR 956, 970-971, per Diplock LJ

<sup>76</sup> These cases were reviewed in *National Coal Board v J E Evans & Co (Cardiff) Ltd* [1951] 2 KB 861 (CA).

<sup>77</sup> For example Fleming, 9<sup>th</sup> edn, 1998, p 59 (“[t]respass to chattels is now primarily a wrong of *intentional* interference, now that inadvertent damage has long ago become the exclusive concern of negligence”); cf Fridman *Torts* 1990, p 144 (“mere inadvertent damage will support an action for trespass”).

<sup>78</sup> [1953] NZLR 298

<sup>79</sup> As examples, see *Mayfair Ltd v Pears* [1987] 1 NZLR 459 (CA) and *Wilson v New Brighton Panelbeaters Ltd* [1989] 1 NZLR 74.

<sup>80</sup> [1951] 2 KB 861

such cases.<sup>81</sup> Negligence, having developed from the action on the case, requires proof of fault; and as trespass requires (on the authority of the *National Coal Board* case) that the defendant must have acted wilfully or negligently, there is little to be gained from the plaintiff's point of view by bringing a claim in trespass. Negligence and trespass have, in some respects, coalesced or, perhaps put more accurately, negligence has grown to such an extent that it has subsumed and dominated trespass so far as negligent conduct is involved. Trespass, as we have seen, requires a direct physical interference with goods, which negligence does not; and the plaintiff, as discussed below, had to show such interference with his or her actual possession. Negligence, as it developed from case, was not subject to these restrictions, and so could extend to damage which was not of this narrow kind. Because it covered a wider field, negligence could include not only physical damage to the goods themselves, but also other damage caused indirectly, and consequential losses. In addition, negligence was not limited to a plaintiff who had been in actual possession at the time the wrongful act was done, but was open to a plaintiff claiming on the basis of an entitlement to possession. In consequence modern lawyers have perhaps turned their attention to the ascendant tort of negligence, and trespass has correspondingly diminished in importance.

It is also, perhaps, possible to discern a general trend in the history of the law of torts towards the requirement of fault on the part of defendants, and a judicial reluctance to impose strict liability.<sup>82</sup> The growth of the law of negligence has involved a recognition and refinement of this principle, and trespass reflects it also. So the Court of Appeal in the *National Coal Board* case<sup>83</sup> referred to *Holmes v Mather*,<sup>84</sup> which concerned a highway accident in which the defendant had been injured by the plaintiff's runaway horses. There was held to be no liability on the part of the defendant, for his conduct was neither wilful nor negligent. Bramwell B said:<sup>85</sup>

For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid ... if the act that does an injury is an act of direct force vi et armis, trespass is the proper remedy (if there is any remedy) where the act is wrongful, either as being wilful or as being the result of negligence. Where the act is

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<sup>81</sup> Winfield and Goodhart (1933) 49 LQR 359 describes the history of the two actions, the writers having asked themselves why highway collisions are not treated as cases of trespass.

<sup>82</sup> The tendency to restrict *Rylands v Fletcher* actions also illustrates this.

<sup>83</sup> p 875, per Cohen LJ

<sup>84</sup> (1875) LR 10 Ex 261

<sup>85</sup> *ibid*, p 267

not wrongful for either of these reasons, no action is maintainable, though trespass would be the proper form of action if it were wrongful.

From this opinion, expressed in 1875, to Lord Atkin's neighbour principle is but a short step.

The question then arises: is there any place today for the continued existence of trespass as a separate tort, or is the field now well covered by negligence? It seems that the answer to this question depends upon whether a deliberate act causing damage to goods may be categorised as negligence, or not. As we have seen, many acts of trespass also constitute conversion, provided the elements of both torts are established. Thus the defendant in *Wilson v New Brighton Panelbeaters Ltd*<sup>86</sup> was guilty of trespass, for its act of towing the plaintiff's car away was an asportation which interfered with the plaintiff's actual possession; and it also committed conversion, for the asportation constituted a usurpation of the plaintiff's possessory title. There is therefore no need for a separate trespass action where interference with the plaintiff's possessory title is involved. By contrast, conduct which causes direct damage to the goods but which does not amount to the assumption of a possessory right is not conversion, but may be negligence, depending on the circumstances.

In consequence, it seems that the only acts of trespass which may not fall into the ambit of either conversion or negligence are deliberate acts of damage which do not have the effect of interfering with the plaintiff's possessory title. This small field could perhaps be covered by adopting one of two possibilities: first, an act of deliberate damage could be labelled conversion, because the act of deliberately causing damage arguably amounts to a usurpation of a possessory right, just as asportation does; or second, the tort of negligence could include deliberate conduct resulting in damage to goods.

It is suggested that the former possibility, that is, deeming an act of deliberate damage to be conversion, is undesirable. It involves a degree of artificiality, and would impose strict liability for conduct which, *ex hypothesi*, does not constitute an assumption of dominion over goods and so does not interfere with the plaintiff's possessory title. To deem deliberate physical damage as conversion would in effect require a re-definition of the essential elements of the tort, and a stretching of its parameters.

The latter course, being to treat deliberate conduct as negligence, is preferable, if any change is to be made. Arguably, there is no reason to consider the presence or absence of

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<sup>86</sup> [1989] 1 NZLR 74

intention on the part of a defendant as being a relevant element when goods are intentionally damaged. Rather, negligence looks at duties owed and the standard of conduct required in particular contexts, and pays little attention to the moral dimension in determining liability. Just as a person who causes damage by, for example, negligent driving, is not excused because he hoped or thought his conduct would not result in damage, it is arguable that the existence of a hope or intention to cause damage should be equally irrelevant. What matters is whether a driver has breached a duty owed to another road user by failing to meet the requisite standard of care, thereby causing damage. If these elements are established, a driver should not escape liability in negligence by asserting that he intended to cause the collision which resulted in the plaintiff's loss. There seems, however, no authority directly on the point, although in *Gray v Motor Accident Commission*<sup>87</sup> a driver who had deliberately driven his car at the plaintiff, intending maliciously to run him down, was held by the High Court of Australia to be liable in negligence for the bodily injury caused to the plaintiff. However, the question of whether the driver, having acted deliberately, could be liable in negligence was not raised, but was apparently accepted *sub silentio*. In an analogous context, and more recently, the House of Lords in *A v Hoare*<sup>88</sup> held that an intentional assault was, for the purposes of the English Limitation Act, covered by the formula applicable to negligence.

Despite these points, it seems that the law has yet to produce any clear authority that an intentional act of damage to goods may constitute negligence. It must of course be acknowledged that the elements of negligence, involving breach of duty and foreseeability, may arguably be simply inapt in the context of intentional or wilful actions. A deliberate act of damage may be regarded generally as more blameworthy than such an inadvertent act; and a person who does a deliberate act may reasonably be supposed to intend the consequences of it. There are therefore good reasons for contending that intentional trespass should be actionable *per se* and so treated differently from conduct which has unintended results.

Whether trespass should remain as a separate tort is discussed further in the last chapter of this work.

### 2.2.2 *The plaintiff's interest*

Trespass is a wrong to actual possession. The plaintiff must (with the few exceptions described below) be the possessor of the goods at the time of the interference which is complained of. If there is no infringement or invasion of actual possession, there can be no

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<sup>87</sup> (1998) 196 CLR 1

<sup>88</sup> [2008] 2 All ER 1

trespass. The point is well illustrated in *Penfolds Wines Pty Ltd v Elliott*.<sup>89</sup> The appellant winemaker sold its wine in bottles embossed with its name. It was made clear to the appellant's customers that the appellant retained ownership of the bottles and that the customers were obtaining possession of them only to enable them to buy and consume the wine. The respondent, a hotelkeeper, sold wine to various people by filling from his bulk supply of wine bottles which the buyers brought to him. Some of these bottles were owned by the appellant. The appellant, wishing to prevent the respondent from using its bottles in this way, applied unsuccessfully for an injunction to restrain an alleged trespass to its goods. On appeal, the High Court of Australia affirmed the decision to refuse the injunction. It was held that the facts disclosed no wrong to the possession of the appellant. The respondent had come into possession of the bottles without trespass, for the customers had delivered possession of the bottles to him. The appellant's possession was never infringed or invaded. The fact that the appellant was the owner of the bottles and was thereby entitled to their possession did not give them a right to maintain an action of trespass; it was the person actually in possession, rather than one entitled to possession, against whom trespass could be committed.

There are some exceptions to the rule that the plaintiff must be in actual possession at the time of the interference.<sup>90</sup> A trustee yet to take possession may sue although the goods are in the actual possession of the beneficiary;<sup>91</sup> as may an executor or administrator if the goods of the deceased are interfered with before probate or letters of administration are granted.<sup>92</sup> The owner of a franchise to take wreck or treasure trove who has yet to seize the goods may maintain an action in the case of unlawful interference by another.<sup>93</sup>

Where bailed goods are interfered with by a third person, it depends on the nature of the bailment whether the person regarded as having possession and so the ability to sue in trespass is the bailor or the bailee.<sup>94</sup> If the bailment is for a fixed time and for consideration the person with possession for this purpose is the bailee. This is because the terms of the bailment are such that the bailor has no right to the possession of the goods.<sup>95</sup> Indeed, the bailor in such circumstances may himself or herself commit a trespass by interfering with the

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<sup>89</sup> (1946) 74 CLR 204

<sup>90</sup> It has been suggested that these are examples of constructive possession rather than true exceptions to the rule: see Fridman, *Torts*, 1990 at 145.

<sup>91</sup> *White v Morris* (1852) 11 C B 1015; 138 ER 778, *Barker v Furlong* [1891] 2 Ch 172

<sup>92</sup> *Tharpe v Stallward* (1843) 5 Man & G 760

<sup>93</sup> *Bailiffs of Dunwich v Sterry* (1831) 1 B & Ad 831

<sup>94</sup> For more detailed consideration of wrongful interference with bailed goods, see Palmer *Bailment* 2<sup>nd</sup> edn, 1991.

<sup>95</sup> The owner may, however, sue in respect of his or her reversionary proprietary interest in the goods: *East West Corp v DKBS AF 1912 A/S* [2003] 3 WLR 916. Reversionary interests are discussed in ch 5.2.

goods while they are in the bailee's possession, even though the bailor is the owner of them. It is otherwise in the case of a simple bailment at will; in such a case either the bailor or the bailee may sue. Such a bailment requires privity between the parties, so it is not enough for this rule to apply that one person has merely come to have possession of the goods of another.<sup>96</sup>

It seems that the bailee who claims against the trespasser will be entitled to recover the full loss which is caused by the trespass, although the bailee must account to the bailor for any amount recovered which exceeds the bailee's own interest in the goods.<sup>97</sup>

### 2.2.3 Remedies for trespass

In considering damages for trespass, questions of foreseeability do not arise, it being irrelevant that the loss was not intended, or was not the natural or probable result of the trespass. The sole question is whether or not the loss claimed has resulted from the trespass.<sup>98</sup> Where goods are taken away or destroyed and so lost to the plaintiff, the amount recoverable is their value.<sup>99</sup> However, damages are not limited to the value of the goods, but may include other losses as well. For example, in *Wilson v Lombank Ltd*<sup>100</sup> a car was wrongfully removed from the forecourt of a garage where it had been left after repairs had been carried out. The trespasser was liable for the full value of the car together with the cost of repairs.

If the goods are not totally destroyed or lost, but have been damaged, the measure of damages is the cost of their diminution in value, which is usually calculated by reference to the cost of repair. So in *Pargiter v Alexander*,<sup>101</sup> the defendant took away the plaintiff's yacht which suffered damage in the nature of wear and tear, accentuated by the exposed position in which it had been moored by the defendant. The depreciation in value of the yacht was assessed according to the evidence which was provided as to the cost of the repairs required to restore the yacht to its former state. Damages may also be awarded for upset and distress, as may exemplary damages in a proper case, such as when the defendant has acted in contumelious disregard of the plaintiff's rights<sup>102</sup> or in a high handed manner.<sup>103</sup>

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<sup>96</sup> *Penfolds Wines Pty Ltd v Elliott* [1946] C L R 204

<sup>97</sup> *The Winkfield* [1902] P 42

<sup>98</sup> *Wilson v New Brighton Panelbeaters Ltd* [1989] 1 NZLR 74, 80-81

<sup>99</sup> *ibid*

<sup>100</sup> [1963] 1 WLR 1294

<sup>101</sup> (1995) 5 Tas R 158

<sup>102</sup> *Jamieson's Tow & Salvage Ltd v Murray* [1984] 2 NZLR 144 (appellant towed away car with owner sitting inside, damaging the car in the process)

<sup>103</sup> *Pargiter v Alexander* (1995) 5 Tas R 158, 168 (defendant's acts in attempting to ensure that the plaintiff could not locate the property and would be permanently deprived of it "outrageous")

Injunctive relief is available where the interference with goods is carried out in a systematic way or to a substantial effect. However, if there is no threat of repetition of the conduct complained of, an injunction will not be an appropriate remedy.<sup>104</sup>

### 2.3 Negligence

An action in negligence for loss or damage to goods may be available in an appropriate case. It is not entirely clear whether a plaintiff in a negligence action must establish a proprietary or possessory interest in the goods which are the subject matter of the action, or whether the interest may be one which is not so limited. In England, the rule is that one who has neither ownership nor a right to possession of goods may not sue a third party in negligence for damage to the goods. So in *Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon*<sup>105</sup> it was held that the prospective buyer under an agreement to buy goods could not claim in negligence against a third party who damaged the goods. The prospective buyer had neither ownership nor a possessory right in the goods at the time they were damaged, and so lacked the interest required to sue in negligence. Whether this is the rule in New Zealand is perhaps doubtful, and the case of *Williams v Attorney-General*<sup>106</sup> may suggest that it is not. In that case, a yacht was forfeited to the Crown because it had been used for smuggling drugs by a third party. On application by its owner, who had not been involved in the smuggling, the Crown eventually waived the forfeiture and returned the yacht to him. The condition of the yacht had deteriorated during the period of forfeiture and the owner sued the Crown in negligence for its loss in value. Although ownership of the yacht had been vested in the Crown at the time the damage occurred, a majority of the Court of Appeal upheld the view of the High Court that the Crown owed a duty of care to the owner and that he should be compensated for the damage to the yacht. The legislation governing forfeiture<sup>107</sup> required the Crown to place seized goods in a secure place and relieved its officers of liability only in respect of actions taken with reasonable care. Thus, the Crown was obliged to have regard to the interest of the person who was ultimately entitled to the goods, the owner, who, in this case, had asserted his interest prior to the forfeiture and made known his concern about the security of the yacht.

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<sup>104</sup> *Penfolds Wines Pty Ltd v Elliott* [1946] 74 CLR 204. The injunction was refused in the circumstances of the case, there being no trespass shown and the goods in question being handled only rarely and casually.

<sup>105</sup> *Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon* [1986] 1 AC 785, 809, per Lord Brandon of Oakbrook

<sup>106</sup> [1990] 1 NZLR 646 (CA)

<sup>107</sup> The Customs Act 1996



It is suggested that the decision in *Williams v A-G* is justified on the basis of statutory interpretation. The Crown's ability to remove the owner's existing property right was created and carefully defined by statute and, in the absence of such legislation, the owner's interest in the goods would have continued uninterrupted. The statute clearly required the Crown to take care of the goods because of the possibility that the forfeiture would eventually come to an end. The Crown thus had to have regard to the interest of the person to whom the goods might subsequently be transferred, and to that end take reasonable care of the goods during the period of forfeiture. The case can thus be distinguished from *The Aliakmon*, in which the parties' rights under a sales contract were in issue, and no proprietary or possessory right in the goods ever vested in the prospective purchaser. The Court of Appeal in *Williams v Attorney-General* distinguished *The Aliakmon*, and there does not appear to be any case in New Zealand in which the rule applied in it has been rejected.

It is suggested that the principle as stated in *The Aliakmon* is soundly based so far as the claim relates to damage to the goods themselves and their resulting loss in value. Whether financial loss to the plaintiff which results more broadly from damage to property owned or possessed by another should be recoverable is a different question.<sup>108</sup> It may be argued that this issue can more readily be addressed by considerations of proximity, rather than by the application of a rigid rule as to the interest of the plaintiff in the property.

Negligence is of course concerned with compensation for a wrong, and fault on the part of the defendant must be established. As conversion and detinue are torts of strict liability, there may be little reason to bring a negligence claim when liability in these other torts can be proved. The relationship between negligence and trespass has been mentioned above, and will be considered further in ch 9.

## 2.4 Bailment

The possibility that bailment might be a cause of action *sui generis* was proposed in *Yearworth v North Bristol NHS Trust*.<sup>109</sup> The case concerned the rights of six men who, being at risk of infertility because of forthcoming chemotherapy, produced semen which was frozen and stored by the Trust for possible future use. The Trust failed to maintain the storage facility correctly and allowed the semen to thaw, thereby destroying it. The men brought an action in negligence against the Trust. Having found that the sperm of the men was property

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<sup>108</sup> The relevant case law is reviewed in *The Law of Torts in New Zealand*, 5<sup>th</sup> edn, 2009.

<sup>109</sup> [2009] EWCA Civ 37. *Yearworth* is also discussed in ch 3, in the context of whether the products or parts of the human body are property which can be the subject of conversion.

such as could found an action in negligence, the Court went on to consider the question of damages for their claimed mental distress and psychiatric injury. To succeed, the men would, the Court said, have had to prove that the distress or injury was a foreseeable result of the Trust's breach of duty. Whether this was in itself sufficient was doubtful, for the authorities, for policy reasons, had made distinctions between cases in which a victim suffered direct physical injury as a result of negligence, or was a secondary victim who had observed, or learned of, an event and so suffered foreseeable psychiatric injury.<sup>110</sup> The Court held that it was unnecessary to deal with that distinction, and went to consider whether, independently of an action in tort, the men might have a cause of action in bailment. This was because, said the Court, the measure of damages could be more favourable in bailment than in tort, the bailment measure being more akin to breach of contract than to tort.

The Court held that there had existed a bailment between the men and the Trust. Not only did the Trust owe the duty owed by every gratuitous bailee, but it had extended a specific promise to the men. The arrangement was not a commercial one but was designed to give peace of mind to the men, who wished to preserve their ability to become fathers despite an imminent threat to their natural fertility. In consequence, the men were entitled to damages for mental distress and psychiatric injury foreseeably consequent upon the Trust's breach. In this context, treating the breach of bailment equivalent to a breach of contract meant that the Court was not required to consider the policy distinctions mentioned above which might curtail an award of damages in tort. Proof of foreseeable damage caused by the Trust's breach sufficed, as it would have if a contract had in fact existed between the men and the Trust.

In considering the basis for damages, the Court said it was not persuaded that liability must lie in tort in the case of breach of a gratuitous bailment. Rather, it considered bailment to be *sui generis* and that, where a bailee had broken a promise, such as one relating to the place or manner of storage of goods, the measure of damages might be more akin to that referable to contract than to tort. The Court cited no authority for this except the suggestion, advanced "with hesitation and with virtually no supporting authority",<sup>111</sup> in *Palmer on Bailment*,<sup>112</sup> as well as Professor Palmer's commentary in *Halsbury's Laws of England*.<sup>113</sup>

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<sup>110</sup> Cases dealing with these issues which were cited in *Yearworth* include *Attia v British Gas* [1988] 1 QB 304, *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 and *Rothwell v Chemical and Insulating Co Ltd* [2008] 1 AC 281.

<sup>111</sup> para [48]

<sup>112</sup> 2<sup>nd</sup> ed (1991) 44, pp 79-80

<sup>113</sup> 4<sup>th</sup> ed, vol 12(1), para 1093

Whether there is any foundation for the Court's approach to bailment is certainly very questionable. *Palmer on Bailment* cites<sup>114</sup> *Building & Civil Engineering Holidays Scheme Management Ltd v Post Office*<sup>115</sup> as providing "some evidence of a special principle for the assessment of damages which flow from a breach of bailment". In that case, Lord Denning MR stated that an action against a bailee might be brought, not as an action in contract, nor in tort, but as an action on its own, *sui generis*, arising out of the possession had by the bailee of the goods".<sup>116</sup> However, Lord Denning goes on to say that a bailee is liable for lost or damaged goods unless he proves that the loss or damage occurred without fault on his part, but that he cannot recover indirect or consequential damages because those can only be recovered in cases of "contracts proper", where notice of special circumstances is brought home.<sup>117</sup> Clearly, Lord Denning MR did not consider that the distinction between tort and contract damages could be ignored in the case of a gratuitous bailment.

Two cases<sup>118</sup> are cited by Professor Palmer for the proposition that if a bailee has breached a duty additional to those imposed by the common law, such as a particular promise, the bailor's action is normally characterised as one in contract and damages are assessed accordingly. However, in each of the cases cited, the parties were in fact in a contractual relationship and actions in contract were under consideration. Indeed, Professor Palmer goes on to observe that in general, "questions of damage in bailment cases have fallen to be decided simply according to whether the action is in contract or in tort".<sup>119</sup>

Thus, it seems that the views advanced by the Court of Appeal are novel, and do not appear to have been directly recognised or endorsed judicially. Clearly, the Court of Appeal considered that the men in *Yearworth* deserved compensation for what had happened, and was concerned that the policy restrictions on awards of damages in negligence for consequential loss might preclude their receiving it. However, it is suggested that it was perhaps not necessary for the Court to hold that damages on a contractual basis could be available for breach of a gratuitous bailment. The approach of the Court is further complicated by the seemingly additional requirement that damages in contract, rather than in

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<sup>114</sup> p 78

<sup>115</sup> [1966] 1 QB 247, 261-262

<sup>116</sup> p 261. Lord Denning MR gives as authorities for this proposition *Winfield on the Province of the Law of Tort*, p 100, Fifoot's *History of the Common Law*, p 24, and *Midland Silicones v Scrutton* [1962] AC 446, in which Lord Denning MR dissented from the majority.

<sup>117</sup> pp 261-262

<sup>118</sup> The examples cited are: *The Heron II* [1969] 1 AC 350 (HL) and *H Parsons Livestock (Ltd) v Uttley Ingham & Co Ltd* [1978] QB 791, in which the measure of damages for breach of contract generally is discussed. In *Lilley v Doubleday* (1881) 7 QBD 510 (also mentioned by Professor Palmer in this discussion) a bailee was held to be in breach of his contract of bailment and liable for the value of the goods.

<sup>119</sup> p 78

tort, would be available if a particular promise made by a bailee had been broken. Bailees in general undertake obligations, whether express, implied, or pursuant to statute, and the terms of bailments will vary according to their particular purposes and arrangements. It may therefore be difficult to recognise or classify a promise as being one which is over and above the “normal” obligations owed by a bailee.

*Yearworth* was an English case. Thus, a further possibility might have been that, if damages for negligence were not available, the law of conversion could have been considered as an alternative. If conversion were applicable to the case, the problems inherent in negligence could possibly be avoided.

As described above, the tort of detinue was abolished by s 2(1) of the Torts (Interference with Goods) Act 1977. The reason for the abolition, which followed a recommendation by the Law Reform Committee,<sup>120</sup> was that conversion and detinue overlapped to such an extent that there was no merit in retaining detinue as a separate tort. The only circumstance identified by the Committee in which detinue would lie but conversion would not was the case in which a bailee, in breach of his duty, allowed goods to be lost or destroyed. Therefore, s 2(2) of the Act provides that an action in conversion lies in these circumstances.

On the facts of *Yearworth*, it is likely that the Trust, as a bailee, would have been liable in detinue, had detinue not been abolished; and it seems that the case is one to which s 2(2) would have applied. The Trust admitted that it was in breach its duty to take reasonable care of the samples. Accordingly, the Trust was a bailee which, in breach of its duty, allowed goods to be destroyed and so was within the wording of s 2(2).<sup>121</sup> A claim in conversion could therefore have been brought by the men. The question of what damages might have been available would of course have required consideration but might have presented fewer difficulties than were presented by the negligence claim.<sup>122</sup> However, the possibility that conversion might be an available cause of action was apparently not raised or considered by the Court.

In *Yearworth*, the Court found that the men arranged for the storage of their sperm for the very purpose of ensuring their peace of mind and to preserve their ability to father children. It would seem clearly foreseeable, and even inevitable, that the loss of their

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<sup>120</sup> *Conversion and Detinue*, 18<sup>th</sup> Report, Cmnd 4774, 1971

<sup>121</sup> Because a bailee must be in breach of duty before his or her loss or destruction of the goods is deemed to be conversion under s 2(2), the incident of strict liability which normally attaches to conversion will not generally apply where s 2(2) covers the case.

<sup>122</sup> The availability of consequential damages in conversion is discussed in ch 8.3.

sperm could occasion mental distress or psychiatric injury. An award of consequential damages in such circumstances would be, it is submitted, entirely justified under a conversion claim. Further, if damages in negligence would have been precluded by policy considerations, the law of negligence in this context may well be seen as unnecessarily restrictive. It is difficult to see why the distinction between primary and secondary victims, which appears to be the source of some confusion in English law, should prevent the recovery of damages for mental distress or psychiatric injury in circumstances such as those in *Yearworth*. The men involved could not accurately or realistically be described as secondary victims; their property which was destroyed was not commonplace replaceable items or ordinary chattels, but the produce of their bodies, unique to themselves, and with the special value to them that it had the potential to enable them to achieve fatherhood.

It is suggested that the need to base damages in *Yearworth* upon bailment is questionable, and that compensation ought to have been available in conversion (the case being decided under English law) or in negligence. In New Zealand, the tort of detinue would have been available to the men.

## Chapter 3 Property capable of being converted

### 3.1 Specific personal property

Only specific personal property capable of being possessed may be the subject of conversion.<sup>123</sup> In this context the word “specific” means simply “identified” or “ascertained”. Property which is not identified or ascertained cannot be converted for the same reason that it cannot be sold; a person who asserts an interest in goods must be able to state precisely the goods in which his or her interest is claimed to be vested. This rule rests less on legal rules than on logic; it is “in the nature of things”<sup>124</sup> that such identification is necessary. The plaintiff in a conversion claim must be able to point to the goods in question and say, in effect, “Those are the goods in which my possessory interest has been usurped.”<sup>125</sup>

Land may not be converted,<sup>126</sup> nor fixtures which are permanently attached to the land, as such items are regarded as part of the land itself.<sup>127</sup> However items which are temporarily affixed to the land and intended to remain as fixtures may be converted,<sup>128</sup> as may severed items once severance from the land has occurred. It is therefore possible to convert joinery which has been detached from a building,<sup>129</sup> timber, provided it has been felled<sup>130</sup> and shingle which has been obtained from land by excavation.<sup>131</sup>

Money in the form of currency cannot be converted.<sup>132</sup> This is because money, as currency, cannot be recovered *in specie*.<sup>133</sup> However a particular cache<sup>134</sup> or specific

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<sup>123</sup> The Torts (Interference with Goods) Act 1977 (UK) defines goods, unless the context otherwise requires, as including “all chattels personal other than things in action and money”, a definition which is extracted from the definition of “goods” in the Sale of Goods Act 1893 (UK), which was a codification of the common law. The expression was re-enacted in the Sale of Goods Act 1979 (UK). The New Zealand Sale of Goods Act 1908 also includes this wording as part of the definition of “goods” in s 2.

<sup>124</sup> *Re Goldcorp Exchange Ltd* [1994] 2 All ER 806, 814, (PC) per Lord Mustill, citing Lord Blackburn’s *Treatise on the Effect of the Contract of Sale*, 1845, 122-123

<sup>125</sup> Just as a plaintiff claiming that property in goods has passed to him or her in a contract of sale must be able to say “Those are my goods”: *Karlshamns Oljefabriker v Eastport Navigation Corp, The Elafi* [1982] 1 All ER 208, 215, per Mustill J.

<sup>126</sup> *Re Kostiuk* [2002] 8 WWR 457 (BCCA)

<sup>127</sup> *Cutler v Oceanside Developments Ltd* [2009] DCR 645

<sup>128</sup> *Sala v Manitoba* [2001] 10 WWR 574 (hunting lodge held to be a chattel)

<sup>129</sup> *Whenuapai Joinery (1988) Ltd v Trust Bank Central Ltd* [1994] 1 NZLR 406 (CA)

<sup>130</sup> *Macklow Bros v Frear* (1913) 33 NZLR 264, *Joseph Reid Pty Ltd v Schultz* [1949] SR (NSW) 231

<sup>131</sup> *Blenheim Borough and Wairau River Board v British Pavements (Canterbury) Ltd* [1940] NZLR 564

<sup>132</sup> *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548

<sup>133</sup> *Money World New Zealand 2000 Ltd v KVB Kunlun New Zealand Ltd* [2006] 1 NZLR 381. For the same reason, money is not “goods” for the purposes of the Sale of Goods Act 1908.

<sup>134</sup> *Tamworth Industries Ltd v A-G* [1991] 3 NZLR 616 (CA) (hidden box and paper bags full of cash, allegedly proceeds of drug dealing)

container of money,<sup>135</sup> fund,<sup>136</sup> or banknote before it has been paid away as currency<sup>137</sup> may be converted, as may a coin taken not as currency but as a curiosity.<sup>138</sup>

Animals may be converted provided they are capable of being possessed.<sup>139</sup> Animals which are normally tame (*domitae naturae*) are, by their nature, of this kind. It is therefore possible to maintain a civil action for the loss of a horse, dog or other domestic animal.<sup>140</sup> In addition, at common law a person may obtain a qualified property in an animal of a kind which is normally wild (such animals being *ferae naturae*) by taking the animal into his or her possession and using art or industry to tame or confine it. Animals such as deer, hares, rabbits, doves, pheasants, partridges, hawks and fish come into this category. The qualified property obtained in such an animal depends solely upon the retention of possession, and is lost if the animal escapes or reverts to its wild state.<sup>141</sup> So in *Kearry v Pattinson*<sup>142</sup> it was held that a person who had hived bees had no right when they swarmed to follow them on to another's land, for when they got there they once more became *ferae naturae* and were the property of no one until they are again hived. This was said to be the rule regarding all wild creatures which were reduced into possession.<sup>143</sup> If no possession or control is taken over the animal, the owner of land upon which a wild animal is present acquires no property in it. Therefore, said Blackstone of bees, "Though a swarm lights upon my tree, I have no more property in them till I have hived them, than I have in the birds which make their nests thereon; and therefore if another hives them, he shall be their proprietor".<sup>144</sup> A qualification to this is that animals which tend to return after being at large (having *animus revertendi*), such as homing pigeons or hawks, are not regarded as having resumed their previous wild state when they are outside the actual control or possession of their owner. So in *Hamps v Darby*<sup>145</sup> the plaintiff could maintain an action against the defendant for shooting the plaintiff's

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<sup>135</sup> *Jackson v Anderson* (1811) 4 Taunt 24; 128 ER 23 (barrel of coins)

<sup>136</sup> *Toronto-Dominion Bank v Carotenuto* (1998) 154 DLR (4<sup>th</sup>) 627 (BCCA)

<sup>137</sup> *Miller v Race* (1758) 1 Burr 452; 97 ER 398

<sup>138</sup> *Moss v Hancock* [1899] 2 QB 111

<sup>139</sup> *Hamps v Darby* [1948] 2 KB 311 (CA)

<sup>140</sup> *ibid*, p 320

<sup>141</sup> For the purposes of theft under the Crimes Act 1961, a distinction is made between wild animals which are commonly found in a state of natural liberty in New Zealand, and those which are not: s 218. Animals of the latter kind (such as circus lions) are capable of being stolen even if they have escaped from confinement, but the former class can be stolen only if they remain in confinement or are being pursued upon escaping.

<sup>142</sup> [1939] 1 KB 471 (CA)

<sup>143</sup> Per Goddard LJ pp 480 - 481, citing Blackstone, ii, 4<sup>th</sup> edn, p 392

<sup>144</sup> *ibid*

<sup>145</sup> *ibid*

pigeons when the pigeons were away from the plaintiff's dovecote and were damaging crops on the defendant's land.

Paper documents such as private letters may be the subject of conversion,<sup>146</sup> as may, more broadly, "documents" such as files, artwork and videotapes. Although the real value of an item of this kind is generally the information or material contained in it rather than the object itself, the person with the possessory right in the object may sue in conversion, even if copyright is vested in a third person.<sup>147</sup>

In the case of documents which evidence valuable rights, the value of the converted article lies not in the piece of paper itself, but in the right which is disclosed on its face. Documents of title, negotiable instruments, share certificates, guarantees, insurance policies, and bonds are examples of such documents. Because the conversion of a document of this kind results in a loss quite unrelated to the intrinsic value of the physical paper, the law adopts the principle, in assessing damages, that the worth of the document is its face value.<sup>148</sup> Banknotes do not come into this category; they are not regarded as securities or documents for debts but, once paid away, are treated as having the currency of money. In consequence, conversion does not lie for a banknote, or its face value, against a person who has taken it for valuable consideration.<sup>149</sup>

### 3.2 Intangible property

An interesting question today is whether this fiction can or should be extended to choses in action generally, or whether it is confined to cases where a tangible document of the kind mentioned above exists. The possibility that choses in action may themselves be converted has long been denied, for the reason that they are, by definition, incapable of being possessed and are enforceable only by legal action. As described above, the tort of conversion required assertions of goods lost by their possessor and found by the defendant. The use of such concepts indicated that conversion must relate to property of a tangible and movable kind. Of course all common law actions have their roots in the past and their precedents are formed through historical influences, and conversion is no different from other torts in this respect. However, the extent to which the courts should be prepared to depart from precedent and whether there are good reasons for doing so are questions which must constantly be

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<sup>146</sup> *Thurston v Charles* (1905) 21 TLR 659 (private letter taken and read)

<sup>147</sup> *SSC & B: Lintas NZ Ltd v Murphy* [1986] 2 NZLR 436

<sup>148</sup> This is well established and there is ample authority for it: *Dairy Containers Ltd v NZI Bank Ltd* [1995] 2 NZLR 30, 108.

<sup>149</sup> *Miller v Race* (1758) 1 Burr 452; 97 ER 398



considered. Should the ambit of the tort of conversion be extended to choses in action? If so, should the law stop there, or should it go on to envelop other kinds of intangible property, such as domain names, computer data, and other intellectual property?<sup>150</sup> It appears that there is movement to that effect in some jurisdictions, although such a change was recently narrowly rejected in the United Kingdom in *OBG Ltd v Allan*.<sup>151</sup> The issue has yet to come before the New Zealand courts.

In *OBG Ltd v Allan*, the House of Lords confronted directly the question of whether a chose in action could be the subject of conversion and considered the associated principles in some depth. In essence, the facts were that OBG Ltd and an associated company (the claimants) had got into financial difficulties, and an unsecured creditor appointed receivers. The receivers took control of the claimants' businesses and terminated, settled or otherwise dealt with, their contracts. The claimants after this went into liquidation. They then brought proceedings against the receivers, alleging that the receivers had been invalidly appointed and had caused the claimants loss by wrongfully interfering with their contractual relations and by converting their contracts. The trial Judge held that the receivers' appointment was invalid and that, had they not been appointed, the claimants' liquidators would in fact have obtained more profitable results in dealing with the contracts than those achieved by the receivers. However he dismissed the claim for conversion on the ground that the contracts, being choses in action and not tangible goods, could not be the subject of conversion. The Court of Appeal unanimously upheld this view. Peter Gibson LJ observed that it was historically "obvious" that a chose in action could not be converted because conversion derived from trover, which required averments of goods lost by their possessor and found by the defendant. Convenient though it might be to find invalidly appointed receivers liable in conversion for their wrongful dealings with choses in action, it was not open to the court to invent such a tort.<sup>152</sup> He considered that Canadian authorities which had been cited in argument as supporting a contrary view were of little assistance. Carnwath LJ agreed with that view, and further observed that, as the Torts (Interference with Goods) Act 1977 (UK) had largely codified the

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<sup>150</sup> Some piecemeal legislation may be peripherally relevant to these questions. An amendment to the Crimes Act in 2003 enabled intangible property to be the subject of theft; S 219; and see, for example, *Police v Davies* [2007] DCR 147 (theft of internet usage).and computer software is defined as goods in the Fair Trading Act 1986, s 2(1), the Sale of Goods Act 1908, s 2(1), and the Consumer Guarantees Act 1993, s 2(1). Although copyright is stated to be a "property right" in the Copyright Act 1994, s 14(1), it is no longer the subject of conversion damages, as it was under its predecessor, the 1962 Act. The question of where copyright in material might lie is irrelevant to the allocation of rights to the material itself under the Personal Property Securities Act 1993: *Viacom Global (Netherlands) BV v Scene One Entertainment Ltd (In Rec)* [2009] NZCA] 437.

<sup>151</sup> [2008] 1 AC 1

<sup>152</sup> [2005] 2 WLR 1174, 1190

law and expressly excluded choses in action from its definition of “goods”, a judicial extension of the law of conversion to cover choses in action would be “difficult to justify”.<sup>153</sup> On appeal to the House of Lords, the majority of the sharply divided House rejected the claimants’ arguments, and affirmed the longstanding rule that only tangible goods capable of being physically possessed could be converted.

The majority held that the very nature of conversion precluded its application to choses in action. Lord Hoffmann, with whom Lord Walker and Lord Brown agreed, observed that conversion was historically a tort which related only to tangible chattels. There was no authority to the contrary in English law. The extension of conversion, and hence strict liability, into the area of economic loss would be an extraordinary step, the law having always been wary of imposing any kind of liability for purely economic loss. Parliament had modified the law of conversion by various statutes to provide, for example, exceptions to the *nemo dat* principle, and to provide protection for bankers and receivers against strict liability in some circumstances. But such protections had never been enacted to cover dealings other than those concerning tangible chattels, because it would never have occurred to Parliament that strict liability could apply to any other kinds of property. Although there were United States cases which supported the application of conversion to intangible property, these formed part of the “profligate extension of tort law” which had taken place in that country. The most remarkable of these cases, said Lord Hoffmann, was *Kremen v Online Classifieds Inc*,<sup>154</sup> in which it had been held that an internet domain name was subject to conversion. Clearly a domain name was property, but the notion that it could be subject to the strict liability tort of conversion was foreign to English law.

Lord Hoffmann accepted that the common law had long recognised that documents, such as cheques, guarantees, insurance policies and other instruments, could be converted, and the measure of damages was generally held to be the face value of the particular document. Some North American cases had held that the application of this principle amounted to allowing what was in substance the conversion of a debt or other chose in action because the tangible property involved was a mere piece of paper of no worth. In response to this, Lord Hoffman said that the document cases had developed to fill a gap in the law where the true owner of a converted document could not sue a person who unwittingly but wrongfully took possession of the document and paid away money on the faith of it. This was

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<sup>153</sup> p 1211

<sup>154</sup> (2003) 337 F 3d 1024

because the owner of the document did not own any specific item of property to which the document related. A customer of a bank, for example, did not own a specific fund or currency, but was a creditor of the bank. In the case of the misappropriation of the customer's cheque, the customer could not sue the bank which took possession of the cheque and paid away the sum stated on it, for the customer did not own the money which was paid away. The courts surmounted the difficulty by treating the conversion as of the cheque, and its value the money received under it. Such cases were themselves anomalous, and could not be used as a base for erecting a more comprehensive system of strict liability for interference with choses in action. Lord Brown concurred, observing that it was one thing for the law to impose strict liability for the conversion of a valuable document, but quite another to impose it upon a person who wrongly and unknowingly asserted a right to a chose in action which belonged to somebody else. There was a logical distinction between the two cases.

Lord Walker considered that despite the "powerful case" for the contrary view made by Lord Nicholls, the extension of conversion to choses in action by the House of Lords would be a drastic reshaping of the tort which would be inconsistent with the Torts (Interference with Goods) Act 1977 (UK). The House was not in a position to assess the far-reaching consequences of such a reform which, if it were to occur, should more properly come from Parliament.

The minority (Lord Nicholls of Birkenhead and Baroness Hale of Richmond) were in favour of extending conversion to cover at least the misappropriation of contractual rights. Lord Nicholls considered that, as the need for tangibility had arisen from the historical need to plead that goods were lost and found, it should be acknowledged that it was based upon a fiction, and the fiction should therefore be abandoned. A legal fiction was, by its nature, a pretence. In reality, he stated, the law had already crossed the boundary between tangibles and intangibles in the document cases, in which a piece of paper was treated as a token which had the value of the rights recorded on it. This was, in effect, to pile fiction upon fiction. Why should the law have extended conversion to cover intangible rights which were represented, or recorded, in a document, but not otherwise? The better approach today would be to abandon the requirement of the piece of paper, and to seek to identify the intangible property rights which were already, as a matter of reality, protected by conversion. The common characteristic of these property rights was, in the view of Lord Nicholls, that they were contractual rights. He considered that the existing legislation which had been enacted on the assumption that it covered only tangible property did not inhibit the Courts from holding that

choses in possession could be converted. Parliament could not have been intended to prevent the courts from developing the common law where justice required it.

Baroness Hale also considered that there existed no reason in the context of conversion to make a distinction between choses in action and choses in possession. A purchase of shares, for example, was an acquisition of property just as much as a purchase of a coat; both entailed proprietary interests which could be usurped, and the law should extend a proprietary right to protect them both. Baroness Hale agreed that the necessity for a physical piece of paper or token representing a contractual right, as required in the document cases, should be abandoned. Like Lord Nicholls, Baroness Hale saw it as desirable that the law of conversion should continue to be developed by the courts as it had in the past; the law had been modified, but not codified by legislation, and further organic development of the common law should not be precluded by legislative reform.

Neither Lord Nicholls nor Baroness Hale went so far as to propose in *OBG v Allan* that the law of conversion should be extended beyond contractual rights to other forms of intangible interests, such as intellectual property, computer records and data. Such interests raised formidable questions which would need to be answered when they arose. The case under consideration involved contractual rights only. The law of conversion imposed strict liability upon invalidly appointed receivers for their unauthorised dealings in land and goods,<sup>155</sup> and the minority saw no reason to make a distinction between such physical property and the contractual interests over which the receivers had taken control and subsequently mishandled.

As was observed in both the Court of Appeal and the House of Lords in *OBG v Allan*, the issue of tangibility has been considered in other common law jurisdictions. In Canada, for example, receivers have been held liable for their wrongful handling of the intangible assets of companies.<sup>156</sup> These Canadian cases were cited by the minority in the House of Lords as supporting the view that the law should be extended. By contrast, the Court of Appeal and the majority in the House of Lords considered the Canadian cases unhelpful and lacking in analysis.<sup>157</sup> Certainly there is nothing to indicate in the cited cases that the question of tangibility was raised or disputed; the judgments contain no discussion of the matter and it

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<sup>155</sup> See, for a New Zealand example, *Len Vidgen Ski & Leisure Ltd v Timaru Marine Supplies (1982) Ltd* [1986] 1 NZLR 349, in which receivers who sold goods which were subject to a *Romalpa* clause and so were not owned by the company in receivership were liable to the owners in conversion for the proceeds of the sales.

<sup>156</sup> *McLachlan v Canadian Imperial Bank of Commerce* (1987) 13 BCLR (2d) 300, affd (1987) 57 DLR (4<sup>th</sup>) 687, *Bradshaw Construction Ltd v Bank of Nova Scotia* [1993] 1 WWR 596, *Royal Bank of Canada v W Got & Associates Electric Ltd* (1994) 150 AR 93 affd (1997) 196 AR 241 (ACA), affd [1999] 3 SCR 408 (SCC)

<sup>157</sup> See, in particular, the judgments of Peter Gibson LJ, p 1190 and Lord Hoffmann, p 953.

doubtful whether they can be regarded as approving the application of conversion to intangible interests.

Where property interests other than contractual rights have been considered, there have been differing judicial approaches. In the United States, as Lord Hoffman described, an internet domain name has been held to be property which could be converted. In Australia, the New South Wales Supreme Court took a different view in *Hoath v Connect Internet Services*,<sup>158</sup> holding that a domain name could not be the subject of a conversion action. The Court adhered to the traditional rule that there could be no conversion of intangible property or rights unless the defendant had interfered with a document which embodied or evidenced the rights in question. However the North American cases were subsequently further considered in *Telecom Vanuatu Ltd v Optus Networks Pty Ltd*,<sup>159</sup> in which a first instance judge refused to strike out a claim that a right to control of a range of Vanuatu telephone numbers had been converted. The Court considered that there was binding authority that the tort of conversion did not extend to intangible property, but there was a reasonable possibility that an appellate court might develop the law and hold that conversion should not be so limited. In Canada, the Saskatchewan Court of Queen's Bench in *Haug v Saskatchewan*<sup>160</sup> concluded that the unauthorised use by a government agency of personal information relating to the plaintiff could amount to conversion. This was said in the absence of full argument and with "considerable hesitation" but the Court nevertheless declined to hold that the plaintiff's claim did not disclose a reasonable cause of action.

Some strong arguments for extending conversion to intangible rights are put forward in *OBG Ltd v Allen*. It may be that, in the future, the benefit of hindsight may reveal them as foreshadowing a change in the law, in the way that dissenting judgments frequently do. Clearly the line has already been decidedly crossed in the United States; in Canada, claims in conversion for contractual rights have been allowed, albeit *sub silentio*; and in both Canada and Australia there are judicial hints that conversion may be applied to other kinds of intangible property rights when suitable occasions arise. Despite all this, it must of course be borne in mind that there exist good reasons for not allowing conversion actions in cases of interference with intangible interests.

First, it is suggested that the document cases do not support an extension of conversion to intangibles, and cannot be treated as instances of such an extension having

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<sup>158</sup> 69 IPR 62

<sup>159</sup> [2005] NSWSC 951

<sup>160</sup> [2006] 2 WWR 516

already occurred. Conversion by definition has always applied to physical goods and, as described above, it protects possessory rights. Possession itself is a physical fact, and a right to possession is a right to maintain possession of tangible property. In some circumstances, the fact of physical possession may in itself suffice to confer a right to possession; for example, a finder of goods is entitled to keep them if no better right is asserted.<sup>161</sup> However it is doubtful whether such principles can be extended to choses in action. No one would suggest that a finder of a cheque would acquire, by the mere act of taking possession of it, a right to enforce payment of it; nor would a finder of a document evidencing a contract between others be able to enforce any rights due under it. Although the true owner might suffer the loss of the value the document represents if it is wrongfully taken or withheld, it does not follow that the finder acquires the contractual right which it evidences. It is one thing to say that the owner of a document which has been wrongfully removed or dealt with by another may claim the losses which in fact flow from such removal or dealing; it is quite another to suggest that the wrongdoer acquires any rights under the document. The law relating to the document cases reflect the reality that the loss of a document may result in the loss of valuable rights which are recorded in it. This was particularly so in the past, before modern communications and electronic record-keeping rendered physical paper documents of less importance than they were. It is suggested that the reason that the rules relating to conversion have developed in the way they have is that they reflect the realities of the handling of goods and the consequences of a wrongful assumption of physical control over them.

Further, to extend the law as Lord Nicholls suggests would cut a swathe across economic torts as they now stand. This may, ultimately, prove to be no bad thing, and it may be that the law should take a more liberal approach to such torts, even to the extent of making tortfeasors strictly liable. However, at present the law does not adopt this approach; rather, it is guarded and restricted in this context, as the decisions relating to the other causes of action in *OBG* itself indicate. It is difficult to see the logic in requiring for liability an intention on the part of a person who wrongfully interferes in the contractual relations of others while at the same time allowing the same conduct to be subject to the strict liability tort of conversion. For this reason, it could be argued that there is more justification to be found in doing the opposite of what the minority in *OBG* propose; that is, the argument may be stronger for refusing to allow conversion to apply to contractual rights than it is for other intangible

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<sup>161</sup> See the classic case of *Armory v Delamirie* (1721) 1 Stra 505; 93 ER 664 and the many cases which have affirmed it. Finders are discussed in ch 5.

property, such as intellectual property interests which are not necessarily the subject of contractual relations between others.

Lord Nicholls in his judgment posed the question: why should receivers be strictly liable for their unauthorised dealings with the tangible property of companies, but not for the intangible property? One possible answer to this may be suggested. Generally speaking, when a receiver sells the tangible property in the form of land and chattels of a company, and the sale is properly done, the sale should realise a sum of money equivalent to the market value of the property sold. In place of the assets themselves, the receivers will have in their hands their money value, and the financial position of the company will remain unchanged. This is so even if the receiver's appointment proves to be invalid. The sale of tangible assets should not affect the value of the company, whether or not the sale constitutes conversion because the receiver lacked authority to sell. For this reason, absent any unique or special features of the goods, the law treats conversion as a forced sale and the tortfeasor has an option to pay the value of the goods rather than returning them. By contrast, the handling of contractual rights and intangibles may involve the making of decisions relating to the operation of the company. Such decisions may or may not yield profitable results, and may require the taking of risks and the exercise of judgment in circumstances of considerable uncertainty. It would place a heavy burden on a receiver to impose strict liability for decisions honestly taken which do not achieve hoped-for outcomes, and the potential for liability would be extensive, uncertain in scope and difficult of assessment.

If, or when, the New Zealand courts have to face this issue, they will have a considerable body of case law from other jurisdictions to provide assistance. Adoption of the minority view in *OBG v Allan* respecting choses in action would mark a major change in the common law, as would a decision to go further and allow that other intangible property rights, such as information or domain names, may be converted. Clearly the effects of decisions of this kind on economic torts and on the tort of conversion itself would require careful consideration. It may perhaps be that such an extensive reform, if it is needed, would be best undertaken by Parliament after close attention has been paid to the possible consequences which are at this stage, it is suggested, difficult to predict.<sup>162</sup>

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<sup>162</sup> Provision for "conversion damages" was included in the Copyright Act 1962 (repealed), but omitted in the 1994 Act because of the difficulties in awarding such damages: *Wham-o MFG Co v Lincoln Industries* [1984] 1 NZLR 641 (CA), *Crystal Industries v Alwinco Products Ltd* [1985] 1 NZLR 716 (HC & CA), *Brintons Ltd v Feltex Furnishings of New Zealand (no 2)* [1991] 2 NZLR 683, *Lakeland Steel Products Ltd v Stevens* [1996] 2 NZLR 749.

### 3.3 The human body

A further difficult, and developing, issue is that of the status of the human body and its parts so far as property rights are concerned. It is a well established common law rule that no one may own or have the right to possess the living body of another person. Not only does the common law refuse to recognise property rights in human beings, the assumption of such rights by, for example, detaining or trafficking in other persons, is generally punishable by the criminal law, as being kidnapping or slavery. Nor, indeed, does a person own or possess his own body, or any part of it.<sup>163</sup>

It follows from this general rule that no one may own a human corpse,<sup>164</sup> the reason being that the occurrence of death cannot engender or trigger property rights which had not existed when the person had been alive. Further, it may be seen as sacrilegious to do other than bury a dead body and let it remain buried; and public health requires that bodies should be speedily buried, and not be subject to competing claims.<sup>165</sup> Thus, although an administrator or executor of the estate of a deceased person has a right of possession or control of the body of the deceased, this is merely for the limited purpose of carrying out the obligation to ensure its proper disposal,<sup>166</sup> no further property right is involved.<sup>167</sup> Generally speaking, this principle applies equally to parts of dead bodies.<sup>168</sup> So, for example, in *Re Organ Retention Group Litigation*<sup>169</sup> it was held that the parents of deceased children upon whom post-mortems had been conducted could not maintain an action for wrongful interference in respect of organs that had been removed, retained and disposed of without their knowledge and consent.

The principle stated above is displaced if a body or body part is treated or worked upon and its character is thereby so altered that it ceases to be a corpse and becomes an item of property. The application of dissection or preservation techniques for the purpose of creating an object for display, or for teaching purposes, may have this effect.<sup>170</sup> In *Doodeward*

<sup>163</sup> A person's limbs are his body, and they may not be the subject of property rights: *R v Bentham* [2005] 1 WLR 1057. The issue of whether body parts should be saleable is reviewed by George (2005) 7 UTS Law Review 11.

<sup>164</sup> *R v Kelly* [1999] QB 621 (CA)

<sup>165</sup> These reasons are stated in *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37 [31], citing Blackstone ii pp 428-9. The place of these reasons in modern law was questioned in *Doodeward v Spence* (1908) 6 CLR 406, particularly by Griffith CJ.

<sup>166</sup> For a review of the law relating to executors' rights and obligations in dealing with deceased persons, and the relation of the common law to Maori custom, see *Clarke v Takamore* [2009] BCL 675.

<sup>167</sup> *Calma v Sesar* (1992) 196 FLR 446 (SC), *Gray v R* (2001) 117 A Crim R 22 Qld SC), *Dobson v North Tyneside Health Authority* [1997] 1 WLR 596 (CA)

<sup>168</sup> For a detailed discussion of this topic, see Magnusson, 'Proprietary Rights in Human Tissue' in N Palmer and E McKendrick (eds), *Interests in Goods* 2<sup>nd</sup> ed, London, LLP, 1998.

<sup>169</sup> [2005] 2 WLR 358

<sup>170</sup> *R v Kelly* [1999] QB 621, 630-631 (CA), per Rose LJ



*vSpence*,<sup>171</sup> for example, it was held that a preserved fetus, kept for scientific interest, lost its character as a corpse and become property because of the input of skill and labour involved. It could therefore be the subject of a claim in detinue. In effect, such an item is no longer seen as an individual human being, but an object, or curiosity, and its possession is not an affront to human decency, or a risk to public health. It has been held that a urine sample, provided to the police for alcohol testing purposes, may be stolen by the person who produced it;<sup>172</sup> and hair (which is often sold for the production of wigs, for example)<sup>173</sup> may also be the subject of theft.<sup>174</sup> By contrast, in *Dobson v North Tyneside Health Authority*<sup>175</sup> a brain fixed in paraffin by a pathologist did not come into this category, and no property right in it could be asserted. Clearly, it is difficult to draw the line in these cases, and element of pragmatism may creep into the law concerning them. For example, it may be argued that certain body parts, although not altered in substance by the application of skill or labour to them, are not intended to be kept and are in effect abandoned. Such items as nail clippings, excised tissue and amputated limbs could be regarded in this way.<sup>176</sup> This is perhaps an approach based on simple realism, of the kind found in the opinion of Higgins J in his strong dissenting judgment in *Doodeward v Spence*. Higgins J considered the principle that there could be no property in a human body to be absolute. Although acknowledging that such items as mummies, pathological specimens, skulls and bones were in fact treated as property, Higgins J stated that the reasons for this were essentially practical: the individual items were not identifiable, and no one had any interest in challenging the practice or putting the law in motion. The law of dead bodies was therefore “winked at” by medical science.<sup>177</sup>

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<sup>171</sup> (1908) 6 CLR 406

<sup>172</sup> *R v Welsh* [1974] RTR 478 (CA)

<sup>173</sup> Although hair is included as “human tissue” in the Human Tissue Act 2008, it is excluded from the general prohibition on trading in human tissue if it is for use in wigs or other hair-pieces: s 56(3)(c).

<sup>174</sup> *R v Herbert* (1960) 25 J Cr Law 163

<sup>175</sup> [1997] 1 WLR 596

<sup>176</sup> This was suggested in argument by counsel in *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37.

<sup>177</sup> p 423. The principle of *Doodeward v Spence* appears to be recognised in s 32(9)(c) of the Human Tissue Act 2004 (UK), which provides that the statutory prohibition on commercial dealing in human material intended for transplantation does not apply to “material which is the subject of property because of an application of human skill”. It was suggested in *Yearworth* (ibid, [38]) that this subsection might fortify the view that the common law treats body parts as property when they have been subject to the application of skill which changes their attributes. In New Zealand, the prohibition in the Human Tissue Act 2008 on trading in human tissue excludes products derived from human tissue and processed human tissue samples if they are intended for use in research, quality control, or as a diagnostic product; human hair for use in wigs and hair-pieces; and human tissue that is, or is part of a controlled drug or a medicine (other than a medicine that is a blood clotting factor, blood corpuscles, or whole blood). Neither Act applies to human embryos or gametes, which are covered by the Human Fertilisation and Embryology Act 1990 (UK) and the Human Assisted Reproductive Technology Act 2004 respectively. Although both Acts regulate the collection and use of human tissue, neither has any direct application to the law of conversion or interests in property.

An express and clear recognition that it is preferable to confront, rather than wink at, the law emerged in *Yearworth v North Bristol NHS Trust*.<sup>178</sup> Unlike the cases discussed above, *Yearworth* concerned material produced by a living human body. As described above,<sup>179</sup> semen which had been produced by men about to undergo chemotherapy was frozen by a hospital for which the defendant Trust was responsible, but the semen was destroyed in consequence of the hospital's failure to store it correctly. The men alleged that the Trust was liable in negligence, which required them to establish that they had suffered loss of property in which they had a proprietary or possessory interest. Thus, the Court had to consider whether such property rights existed in parts or products derived from the bodies of living human beings.

The Court of Appeal in *Yearworth* considered two Californian authorities as significant. In *Moore v Regents of the University of California*,<sup>180</sup> a majority of the Supreme Court of California held that conversion did not lie for body parts which had been removed from the body of a consenting living patient by a physician who then proceeded to use cells from them for a potentially lucrative research purpose which had not been disclosed to the patient. The majority observed that no court had ever in a reported decision imposed liability in conversion for the use of human cells in medical research, and that to do so would impose a tort duty on scientists to investigate the consensual pedigree of each human cell sample, which would have implications for medical research of importance to all society. The policy concerns involved were very different from those applicable to the usual ownership disputes in which the tort of conversion arose; and in any event patients had other causes of action, based on the fiduciary relationships involved, of protecting their rights. If the law of conversion were to be extended, it should be done by legislation. The minority considered that this was not a typical case in which organs had been removed from a patient who intended to abandon them; rather, the patient in question had had a right to determine to what use his body parts would be put after their removal, and this right could and should be protected by conventional principles of conversion. By contrast, in *Hecht v Superior Court of Los Angeles County*<sup>181</sup> the second Californian case referred to in *Yearworth*, the Court of Appeal held that property rights could exist, and so be disposed of by will to the testator's girlfriend, in sperm which had been deposited in a sperm bank by the testator shortly before he died. The Court held that the testator had had, at the time of his death, an interest in the

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<sup>178</sup> [2009] EWCA Civ 37

<sup>179</sup> ch 2.4

<sup>180</sup> 793 P 2d 479 (Cal 1990)

<sup>181</sup> (1993) 20 Cal Rptr 2d 275

nature of ownership of the sperm, to the extent that he had decision making authority as to the use of it for reproduction. This interest was sufficient to constitute property for probate purposes. The Court of Appeal in *Yearworth* considered that *Hecht*, involving the ownership of stored sperm for the purpose of directing its use following death, was a step further than the one the men in *Yearworth* were inviting the Court to take.

In *Yearworth*, the Court observed that it would have had no difficulty in finding that the preserved sperm had been subjected to a process involving work and skill which had changed its character. Thus, the easiest course would have been to apply the *Doodeward v Spence* principle to decide the case. However, the Court observed that the common law should not develop on such a principle, which was itself an exception to a rule, and did not provide a solid foundation. Rather, the law should look to develop a broader basis for decisions in this context. Developments in medical science now required a re-analysis of the common law's treatment and approach to the issue of parts or products of living human beings.

From this broader stance, the Court held that, for the purposes of their claims in negligence, the men had ownership of the sperm which they had produced. They alone had generated it from their bodies, with the sole object that it might later be used for their benefit. Although their ability to use it was to some extent controlled by legislation, it could not be used without their consent. Their negative control over it was absolute, and at any time any one of them could have ordered the destruction of his sperm. Although the hospital had a duty to store it, it had no rights in respect of it; the only people with any rights in relation to the sperm were the men themselves. Further, there was a precise correlation between the rights of the men in relation to its future use, and the hospital's breach of duty in precluding its future use.

The Court of Appeal made it clear that its decision and the reasoning involved were confined to cases involving products of living human bodies intended for use by the persons whose bodies had produced them. Clearly, this intention on the part of each man in producing and storing the sperm was central to the Court's decision. The Court did not discuss whether different considerations might apply to cases in which the body products were intended to be used by other persons, such as donated products, where different claims might be raised, whether by donors or donees.

To an observer, it is apparent that the jurisprudence in this morally charged area, impelled by scientific developments, will require principled and carefully analysed legal development. The articulation of those principles is, it is suggested, likely to become more, rather than less, difficult as technological advances continue to be made. The principles of torts involving

interference with chattels do not, as has been judicially stated,<sup>182</sup> sit easily with the many and complex social attitudes and beliefs which exist in relation to the human body and its parts. The issues will doubtless continue to challenge lawmakers.

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<sup>182</sup> In *Moore v Regents of the University of California* 793 P 2d 479 (Cal 1990), for example, the patient had a cause of action against his physician for breach of fiduciary duty and lack of informed consent.

## Chapter 4 The nature of conversion

### 4.1. The meaning of “conversion”

Conversion is so called because the essential feature of the tort is the denial by the defendant of the possessory interest or title of the plaintiff in the goods. The defendant is said to convert the goods to his or her own use by manifesting an assertion of rights or dominion over the goods which is inconsistent with the the rights of the plaintiff. It is this conduct by the defendant which is inconsistent or incompatible with a recognition of the plaintiff’s continuing rights in the goods which lies at the heart of conversion.<sup>183</sup> The tort was well described in the rhetorical question asked by Holt C J in the early eighteenth century: What is conversion but assuming upon one’s self the property and right of disposing of another’s goods?<sup>184</sup> More recently, in *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)*<sup>185</sup> the essential features of the tort were described as being three: first, the defendant’s conduct is inconsistent with the rights of the owner or other person entitled to possession; second, that conduct is deliberate; and third, the conduct is so extensive an encroachment on the rights of the owner or other person as to exclude him or her from use and possession of the goods.

The pleading that the defendant “converted the goods to his own use” is not a requirement additional to that of usurpation by the defendant of the plaintiff’s possessory right. It is not necessary the defendant be shown to have obtained some personal benefit to himself or herself, or assumed dominion over them for person acquisition. Rather, the defendant’s act of unjustifiably asserting dominion over the goods amounts in itself to converting them to his own use. So, as Salmond has pointed out,<sup>186</sup> it is not the case that every conversion involves both a denial of the plaintiff’s possessory right and the setting up of an adverse claim on behalf of the defendant, or of a third party; the denial, or usurpation, of the plaintiff’s right itself suffices for conversion. In *Hiort v Bott*<sup>187</sup> it was said that the declaration that the defendant “converted to his own use” the goods in question did not mean that the defendant consumed the goods himself, for “if a man gave a quantity of another person’s wine to a friend to drink, and the friend drank it, that would no doubt be as much a

<sup>183</sup> *Marshall v Dibble* [1920] NZLR 497

<sup>184</sup> *Baldwin v Cole* (1705) 6 Mod 212; 87 ER 964

<sup>185</sup> [2002] 2 AC 883, 1084 (HL), per Lord Nicholls of Birkenhead; cited in *Marcq v Christie Manson & Woods Ltd (trading as Christie’s)* [2003] 3 All ER 561, 566 (CA)

<sup>186</sup> (1905) 21 LQR 43, 53

<sup>187</sup> LR 9 Ex 86, 89, per Bramwell B

conversion of the wine as if he drank it himself”. In that case, a quantity of barley had mistakenly been made deliverable to the defendant, who had never ordered such goods. The defendant was then deceived into endorsing a delivery order by a fraudster, who told the defendant that the purpose of the endorsement was to enable the barley to be returned to its rightful owner, the plaintiff. The defendant was liable in conversion for dealing with the goods in this way, although his sole purpose had been to return the barley to the hands of its true owner. His assumption of control over it was sufficient: “a person who deals with the property in this way does so at his peril, and if by means of it a fraud upon the owner is accomplished, he is responsible”.<sup>188</sup> Thus, the manifestation or assertion of rights or dominion over goods which is inconsistent with the plaintiff’s rights itself constitutes the conduct whereby the defendant converts the goods to his own use.<sup>189</sup>

The conversion in effect deprives the plaintiff of his or her interest in the goods. For this reason, the measure of damages for conversion is generally the value of the goods themselves, with the result that judgment for the plaintiff in such a case, once satisfied, operates as effectively a forced sale.<sup>190</sup> Because conversion is essentially concerned with interference with the plaintiff’s possessory right or title, acts which do not constitute such interference but merely cause damage do not amount to conversion. Trespass or negligence should be considered the more appropriate actions in such cases.<sup>191</sup>

Conversion involves an intentional wrong, which means that the defendant must intend to do the act which constitutes the denial of the plaintiff’s rights. The conduct must therefore be deliberate and not accidental.<sup>192</sup> The defendant’s intention is taken to include also the natural and probable consequences of those actions which are intended in fact,<sup>193</sup> even if such consequences may have been unintended and even undesired.<sup>194</sup> However, once this intent is established, liability is generally strict and conversion may be committed with no moral fault or dishonest intention on the part of the defendant.<sup>195</sup> It is therefore not necessary to prove blameworthy conduct which goes beyond the act which is inconsistent

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<sup>188</sup> *ibid*, p 92, per Cleasby B

<sup>189</sup> *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, 1104 (HL), per Lord Steyn

<sup>190</sup> This is discussed further in ch 7.1.

<sup>191</sup> *ibid*, p 1084, per Lord Nicholls of Birkenhead

<sup>192</sup> *ibid*

<sup>193</sup> *ibid*, p 1088

<sup>194</sup> *Moorgate Mercantile Co Ltd v Finch* [1962] 1 QB 701 (CA), in which the borrower of a car who used it for smuggling was liable in conversion to the owner when the car was forfeited and sold by the Customs and Excise authorities, it being inevitable that such forfeiture and loss to the owner would result if the smuggling was found out. The case is noted (1963) 79 LQR 9.

<sup>195</sup> There are some exceptions to this strict liability: see *Central Acceptance Ltd v Smith Hughes & Robertson* [1992] 3 NZLR 413, 416

with the plaintiff's right of possession.<sup>196</sup> The defendant need not know that he or she is acting in violation of the plaintiff's rights and may be acting in the honest belief that his or her actions are lawful. It does not matter that the defendant could not by the exercise of any reasonable care have known of the plaintiff's interest in the goods; the duty is absolute and the defendant acts at his or her peril.<sup>197</sup> The intention that is required is to do the act itself, not to challenge the plaintiff's rights.<sup>198</sup> For this reason, one who innocently purchases goods from another in the genuine belief that the seller has a right to sell may be liable in conversion, as may anyone in a previous or subsequent chain of equally innocent buyers and sellers;<sup>199</sup> by definition, each person in a series of conversions wrongfully excludes the owner from possession of his or her goods.<sup>200</sup> It follows that the person who innocently hands over goods to the wrong person in the mistaken belief that he or she is delivering the goods to the true owner may be similarly liable.<sup>201</sup>

Conversion may be committed by one who has not, and has never had, actual possession of the goods.<sup>202</sup> Physical possession or physical dealing with goods is not a necessary element of conversion and the act complained of may be committed constructively. For example, it may be a constructive taking to sign an order authorising delivery of goods to another;<sup>203</sup> to take property by way of an assignment;<sup>204</sup> or to give orders which result in goods being transferred.<sup>205</sup> The invalid appointment by a bank of a receiver who dealt with the debtor company's assets has been held to be an act of conversion by the bank;<sup>206</sup> and the licensee of software, property in which remained in the licensor, committed conversion by purporting to give to another an option to purchase the software.<sup>207</sup> The ratification of another's act may itself be a conversion, as where one person adopts the purchase by another of goods which, unknown to the person ratifying, the seller had no authority to sell.<sup>208</sup>

<sup>196</sup> *Bank of Montreal v Ernst & Young Inc* (2002) 220 DLR (4<sup>th</sup>) 193 (SCC)

<sup>197</sup> *Marfani & Co v Midland Bank* [1968] 1 WLR 956 (CA), *Unisys Canada Inc v Imperial Optical Co* (1998) 43 CCLT (2d) 286, affd (2000) 49 CCLT (2d) 237 (Ont CA)

<sup>198</sup> *Helson v McKenzies (Cuba Street) Ltd* [195] NZLR 878 (SC & CA), *Wilson v New Brighton Panelbeaters Ltd* [1989] 1 NZLR 74, *Central Acceptance Ltd v Smith Hughes & Robertson* [1992] 3 NZLR 413 (CA)

<sup>199</sup> *Elwin v O'Regan and Maxwell* [1971] NZLR 1124. The exceptions to this general rule are discussed below.

<sup>200</sup> *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, 1093 (HL)

<sup>201</sup> *Helson v McKenzies (Cuba Street) Ltd* [1950] NZLR 878 (SC & CA)

<sup>202</sup> *Douglas Valley Finance Co Ltd v S Hughes (Hirers) Ltd* [1969] 1 QB 738, *Unisys Canada Inc v Imperial Optical Co* (1998) 43 CCLT (2d) 286, affd (2000) 49 CCLT (2d) 237 (Ont CA)

<sup>203</sup> *Hiort v Bott* LR 9 Ex 86, *Union Credit Bank v Mersey Docks and Harbour Board* [1899] 2 QB 205

<sup>204</sup> *M'Combie v Davies* (1805) 6 East 538; 102 ER 1393

<sup>205</sup> *Van Oppen v Tredegars* (1921) 37 TLR 504

<sup>206</sup> *Royal Bank v W Got & Associates Electric Ltd* (1999) 73 Alta LR (3d) 1 (SCC)

<sup>207</sup> *Unisys Canada Inc v Imperial Optical Co* (1998) 43 CCLT (2d) 286, affd (2000) 49 CCLT (2d) 237 (Ont CA)

<sup>208</sup> *Hilbery v Hatton* (1864) 2 H & C 82

Taking possession of premises in which goods are situated may be regarded as a taking of the goods themselves if the circumstances show that there was an intention to deprive the plaintiff of his or her rights;<sup>209</sup> as may, at least in some circumstances, preventing access to land to the owner of goods which are on the land.<sup>210</sup>

Because it is necessary that the defendant's act should amount to a wrongful interference with the plaintiff's goods, the plaintiff's own act of voluntarily delivering goods will not constitute conversion. For this reason in *Bank of Montreal v Ernst & Young Inc*<sup>211</sup> a bank was held not to be guilty of conversion in its handling of a cheque. In that case, a person who was the sole shareholder and directing mind of two companies altered a cheque payable to the first company by adding the name of the second, and deposited the altered cheque in the second company's bank account. The Supreme Court of Canada held that the bank was not liable to the receiver of the first company. A bank's liability in conversion, it was held, was predicated upon finding that the cheque had been paid to someone other than the rightful holder, and also that the rightful holder had not authorised the payment. The first corporation, having acted through its sole shareholder and directing mind, had authorised the bank to deposit the cheque into the account of the second company. The bank had therefore not wrongfully interfered with the first corporation's cheque, having not dealt with it in a manner which was inconsistent with the directions of the first corporation.

The principle that the plaintiff's own act of voluntarily delivering the goods cannot constitute conversion applies even where the delivery has been obtained by fraud. For example, in *Toronto-Dominion Bank v Carotenuto*<sup>212</sup> the appellant bank had been induced by the fraud of a third party to issue bank drafts to the innocent respondents, who deposited the drafts to their accounts. The third party had falsely assured the bank that he would make funds available to the bank to cover the amounts in question. The bank's claim that the respondents had converted the drafts was unsuccessful, it being held that the bank had intended both that the drafts should be given to the respondents and that they should be honoured. There was no wrongful dealing with the drafts by the respondents, who had received the funds in accordance with the intentions of the bank.

## 4.2 Acts of conversion

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<sup>209</sup> *Thorogood v Robinson* (1845) 6 QB 769

<sup>210</sup> *Oakley v Lister* [1931] 1 KB 148, noted (1931) 47 LQR 168. Conversion of goods by exclusion of their owner is discussed further in ch 4.2.3.

<sup>211</sup> (2002) 220 DLR (4<sup>th</sup>) 193 (SCC)

<sup>212</sup> (1998) 154 DLR (4<sup>th</sup>) 627 (BCCA)



The tort of conversion may be committed in different ways. The unauthorised taking, detaining, misuse or disposal of goods may amount to conversion, as may receiving them. These will be considered separately below. It should of course be borne in mind that to constitute conversion the particular act of interference in each case must deny the plaintiff's rights or amount to an assertion of dominion or control by the defendant over the goods which is inconsistent with the plaintiff's own rights. This denial of the plaintiff's rights is the common feature of each of the circumstances described. It follows that the categories outlined below are somewhat arbitrarily chosen and titled; in reality they are all simply examples of conduct of the kind which constitutes conversion.

#### 4.2.1 *Conversion by taking possession*

The unjustified removal or taking away of goods for the defendant's own purposes, such purposes being inconsistent with the owner's use and possession of the goods, is conversion. In *SSC & B: Lintas New Zealand v Murphy*,<sup>213</sup> for example, the defendants left their employment with an advertising agency, taking with them office files, client contact reports, library records and material used in the preparation of advertisements. Their object was to further their own commercial interests by setting up a rival business. This was held to be an act of conversion. Theft of course is conversion, but it is not necessary for conversion that the person taking the goods should intend to claim ownership of the goods or to keep the goods for himself or herself.<sup>214</sup> It is sufficient to assert a right to take goods in circumstances where no right exists. For example, to take possession of goods to obtain or assert a lien to which the taker is not entitled is conversion;<sup>215</sup> as is the unjustified removal of a vehicle with the intention of holding it until storage charges and removal costs are paid.<sup>216</sup>

If the necessary intention to assert dominion is lacking, no conversion is committed because the mere act of taking possession is not in itself sufficient.<sup>217</sup> In consequence, it seems that simply moving goods from one place to another is not an act of conversion (although it may be trespass) provided there is no intent to take possession of them or to assert dominion over them in defiance of the person entitled to their possession. The well

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<sup>213</sup> [1986] 2 NZLR 436

<sup>214</sup> *Thompson v Cameron* [2000] BCL 258

<sup>215</sup> *United Plastics Ltd v Reliance Electric NZ Ltd* [1977] 2 NZLR 125

<sup>216</sup> *Wellington City v Singh* [1971] NZLR 1025

<sup>217</sup> *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, 1084 (HL)

known case of *Fouldes v Willoughby*<sup>218</sup> is often cited in support of this principle, though whether the case itself was a correct application of it is questionable. In *Fouldes v Willoughby* the defendant ferryman, who had taken the plaintiff and his horses on board his boat, wished to remove the plaintiff from the boat because of the plaintiff's misconduct. Hoping that the plaintiff would follow them, the defendant turned the plaintiff's horses loose on the shore. This act was held to be the simple removal of the horses for a purpose wholly unconnected with any denial of the right of the plaintiff to the possession or use of them. As the defendant had asserted no claim over the horses, conversion would not lie. The Court considered that the defendant's conduct in meddling with the horses was trespass, but that there was no intention to interfere with the owner's dominion over them.

*Fouldes v Willoughby* may be criticised on the ground that the Court failed to recognise that a wrongful removal or taking of goods was, in itself, an act of conversion,<sup>219</sup> being an assumption of possession which was adverse to the owner, who was thereby deprived of his right to use them as he wished. The fact that the ferryman did not intend to keep the horses for himself, but released them, should have made no difference. This principle was confirmed a century later in the *Kuwait Airways* case, where it was said to be clear that both a taking and a detention were actual conversions, if there were no lawful justification for them, and that there was no distinction to be drawn between them.<sup>220</sup>

However, even if the decision in *Fouldes v Willoughby* is open to question, the proposition stated in it, that merely taking possession of goods is not necessarily conversion, is undoubtedly correct. For example, it is not conversion to take possession of found goods.<sup>221</sup> This is because the possessor is asserting no right which is adverse to that of the owner, who may recover possession of the goods whenever he or she wishes. By contrast, as discussed below, conversion is committed if the possessor refuses the owner's demand for return of the goods, for at that point, the possession becomes adverse to the owner.

It is not necessary that the defendant should intend to retain permanent possession of the goods at the time that they are taken, a temporary purpose being sufficient provided the necessary inconsistency with the plaintiff's rights is present.<sup>222</sup> So in *Aitken Agencies Ltd v*

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<sup>218</sup> (1841) 8 M & W 540; 151 ER 1153

<sup>219</sup> Salmond in (1905) 21 LQR 43, 52-53 criticises *Fouldes v Willoughby* as being "one decision which is in conflict with the proposition that every wrongful taking of a chattel amounts to a conversion of it".

<sup>220</sup> at [52]

<sup>221</sup> Finders are discussed further in ch 5.4.

<sup>222</sup> "A conversion, which has once taken place, cannot be cured: therefore if A. take B.'s horse and ride him, and afterwards deliver him to B., yet trover will lie and the re-delivery will go only in mitigation of damages": *Wilbrahim v Snow* (1669) 2 Wms Saund 47; 85 ER 624, 634, citing *Countess of Rutlands Case* 1 Rol. Abr. 5 (L) pl. 1 and *Wyatt v Blades* (1813) 3 Camp 396; 170 ER 1423.

*Richardson*<sup>223</sup> the defendant took a van from the owner's possession for the purpose of going for a joyride, thereby intending to exercise a temporary dominion over it. This was held to be conversion. In that case, the van was damaged and the defendant did not return it to the owner, who later recovered it from the police station. However, it is conversion even if the defendant intends at the time of taking to return the goods after he has used them and in fact does so; although the return of the goods must be taken into account in assessing damages, it is not a bar to liability. It will therefore be readily apparent that what must be proved for the crime of theft may be very different from the proof necessary for the tort of conversion, for theft generally requires an intention to permanently deprive the owner of the property or any interest in it.<sup>224</sup> This point was discussed by the High Court in *Thompson v Cameron*.<sup>225</sup> In that case, the defendant had entered what had previously been her matrimonial home and removed chattels which she alleged were matrimonial property. Included amongst the property taken were items which in fact belonged to the plaintiff, the new occupant of the home. The police declined to prosecute for theft and the plaintiff sued in conversion for the value of the property. In her decision, the District Court Judge made remarks which indicated that the plaintiff would be in effect required to establish that the crime of theft had been committed. On appeal, the High Court, citing *Aitken Agencies Ltd v Richardson*, held that the District Court had erred in this respect and the element of permanency inherent in a finding of theft did not have to be established in the tort of conversion.

#### 4.2.2 Conversion by detaining

Conversion may arise where a defendant who has lawfully obtained possession of goods is shown to have an intention to keep them as against the plaintiff who has an immediate right to possession.<sup>226</sup> Detention constitutes conversion only when it is adverse to the person claiming possession, so the person detaining the goods must show an intention to keep them in defiance of the claimant.<sup>227</sup> The defendant's intention, again, is all important; one who innocently comes into possession of the goods of another, not having been the original taker, does not commit conversion, for there is no direct interference in such a case. He or she is a

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<sup>223</sup> [1967] NZLR 65

<sup>224</sup> Theft is defined in the Crimes Act 1961, s 219.

<sup>225</sup> [2000] BCL 258

<sup>226</sup> *Cuff v Broadlands Finance Ltd* [1987] 2 NZLR 343, 346 (CA)

<sup>227</sup> *Marshall v Dibble* [1920] NZLR 497, *Helson v McKenzies (Cuba Street) Ltd* [1950] NZLR 878, 919 (SC & CA) (“[c]ustody, warehousing, or keeping an article found are not incompatible with the right of the true owner”)

mere custodian of the goods unless and until he or she does some act in relation to the goods which amounts to an assertion of dominion which is inconsistent with the plaintiff's rights. Simple retention does not in itself amount to such conduct. So in *Marshall v Dibble*,<sup>228</sup> the respondent was a clerk employed by a club, whose duties included receiving and signing for registered letters addressed to club members. The respondent received possession of one such letter from a postman, and placed it in a pigeonhole, in accordance with his usual practice. The letter, containing items of value, was stolen. The argument that the clerk was liable in conversion failed, it being held that the letter was kept, not for some purpose adverse to the club member to whom the letter was addressed, but, to the contrary, it was being held on his behalf ready for delivery whenever he should request it. For the same reason, retaining custody of an article found on one's premises for the purpose of ascertaining the identity of the true owner and restoring it is not conversion.<sup>229</sup>

However, an unqualified and unjustified refusal to return the goods once an unequivocal demand is made for them does generally constitute evidence of an assertion of dominion, and proof that such a demand and a refusal have taken place is one method of establishing conversion by detention.<sup>230</sup> It is not, however, always unlawful to refuse to deliver up goods immediately that demand is made, for the person detaining the goods is entitled to take adequate time to inquire into the rights of the person claiming the goods. This is because the withholding of the goods whilst making such an inquiry is not a conversion of the goods to the use of the person holding the goods or a denial of the claimant's interests; rather, the detention is for the purpose of ascertaining that the claimant is justified in demanding them.<sup>231</sup> Such a refusal may be regarded as not unqualified and may be justified even if persisted in and carried to extreme lengths, provided the reason for the refusal was uncertainty that the claimant was genuinely entitled to the goods.<sup>232</sup> Similarly, it has been held that goods which have been lawfully seized by the police may be retained for the time necessary for any investigation or prosecution; however, on the expiry of this time, continued retention will not be justified and a refusal by the police to return the goods to the person having at the time of seizure the possessory title will be wrongful.<sup>233</sup>

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<sup>228</sup> [1920] NZLR 497

<sup>229</sup> *Helson v McKenzies (Cuba Street) Ltd* [1950] NZLR 878 (SC & CA)

<sup>230</sup> *Cuff v Broadlands Finance Ltd* [1987] 2 NZLR 343, 346 (CA), *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, 1085 (HL)

<sup>231</sup> *E E McCurdy Ltd v Postmaster-General* [1959] NZLR 553

<sup>232</sup> *Helson v McKenzies (Cuba Street) Ltd* [1950] NZLR 878, 919 (SC & CA) per Gresson J

<sup>233</sup> *Field v Sullivan* [1923] VLR 70, *Flack v Chairperson, National Crime Authority* (1997) 150 ALR 153 (FCA), *Webb v Chief Constable of Merseyside* [2000] 1 All ER 209 (CA), *Costello v Chief Constable of Derbyshire Constabulary* [2001] 2 Lloyd's Rep 216 (CA). These cases are discussed further in ch 5.4.

An act which puts it out of the power of the defendant to return the goods is also an example of conduct inconsistent with the plaintiff's rights, and will give rise to an action for conversion by detaining goods. Parting with goods or handing them over to another may have this effect. So in *Wilson v New Brighton Panelbeaters*,<sup>234</sup> the facts of which have been outlined above, it was held that even if the tow truck operator's act of taking possession of the plaintiff's vehicle had not been a conversion by taking and so not unlawful, conversion was committed when the operator delivered the vehicle to the hoax phone caller, thereby making the return of the vehicle to the plaintiff impossible. A sale or other wrongful disposal may have the same effect.<sup>235</sup> This is discussed below.

#### 4.2.3 Conversion by exclusion of another

Clearly, the physical handling of goods by taking, destroying, or unjustifiably detaining them in defiance of the person entitled to them is conduct which amounts to conversion, as is the transfer, or disposition, of goods without the authority to do so. In such circumstances, a finding of conversion will generally be straightforward enough. However, where there has been an unjustified assertion of a right to possession or control of goods, but no physical dealing with them has occurred, it is not always clear whether conversion is committed or not.

The problem is illustrated by *Club Cruise Entertainment and Travelling Services Europe BV v Department for Transport*.<sup>236</sup> The case concerned a cruise ship, the Van Gogh, which arrived in the port of Harwich. Outbreaks of novovirus had previously occurred in the ship, and a process of cleaning and sanitation was undertaken in the port. During this process, the ship was inspected by the defendant's officials, including Captain Rudge, a principal surveyor from the Maritime Coastguard Agency (MCA), an agency of the defendant. He issued a detention notice to the Master of the Van Gogh, prohibiting her from going to sea or on a voyage until the MCA released her. The ground stated for the detention was that the ship failed to comply with statutory requirements. Two days later, after a re-inspection, Captain Rudge lifted the detention order and released the ship. The validity of the notice was subsequently challenged by the plaintiff shipowner and Flaux J, in a trial of preliminary issues, held that the notice was defective for non-conformity with the relevant regulations,

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<sup>234</sup> [1989] 1 NZLR 74

<sup>235</sup> *Elwin v O'Regan & Maxwell* [1971] NZLR 1124, *Harris v Lombard NZ Ltd* [1974] 2 NZLR 161

<sup>236</sup> [2008] EWHC 2794 (Comm)

and thus invalid. As a result, there had existed no statutory power or other authority on the part of Captain Rudge to detain the Van Gogh.

The plaintiff shipowner claimed that the defendant was liable in conversion for the unjustified detention. In searching for a definition of conversion, Flaux J cited *Kuwait Airways Corp v Iraqi Airways Co*,<sup>237</sup> in which Lord Nicholls of Birkenhead had said that conversion could be committed by depriving a person of his goods, but that this did not mean that the wrongdoer must actually take the goods away. For the purposes of conversion, a person was equally deprived of possession when he was excluded from possession, or possession was withheld from him by the wrongdoer. Flaux J also cited a dictum of Lord Steyn in the *Kuwait Airways Corp* case<sup>238</sup> to the effect that where a defendant manifested an assertion of rights or dominion over the goods which was inconsistent with the rights of the plaintiff, he would convert the goods to his own use; and Lord Hoffmann's observation in the same case that conversion existed to protect proprietary or possessory rights in property, and was committed by an act inconsistent with those rights.<sup>239</sup>

Having regard to these principles, Flaux J observed that the authorities indicated a distinction between cases in which the wrongdoer had taken possession of the goods, and those where he had not. In particular, he cited Kelly CB in *England v Cowley*:<sup>240</sup>

Apart from mere dicta, no case, so far as I am aware, can be found where a man not in possession of the property has been liable in trover unless he has absolutely denied the plaintiff's right, although, if in possession of the property, any dealing with it, inconsistent with the true owner's rights, would be a conversion. A limited interference with the plaintiff's property, where all along the plaintiff is himself in possession, does not constitute conversion.

In *England v Cowley*, the plaintiff had been entitled under a bill of sale to seize furniture belonging to a tenant of the defendant. At the same time, the tenant was in arrears with her rent and the defendant, as her landlord, intended to distrain. The plaintiff arrived to take possession of the goods in the evening, at an hour when the exercise of distraint by the defendant would have been unlawful. The defendant, in order to prevent the plaintiff from removing the furniture and to preserve it *in situ* so that he could distrain the following day,

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<sup>237</sup> [2002] 2 AC 883, 1084

<sup>238</sup> p 1104

<sup>239</sup> p 1106

<sup>240</sup> (1873) LR 8 Exch 126, 131

refused to allow the plaintiff access to the goods, and stationed a policeman outside to prevent the plaintiff from removing them. The plaintiff contended that he had been excluded from possession of the furniture which he had been entitled to take, and that this constituted conversion. The majority of the Court <sup>241</sup> considered that the defendant had not committed conversion. The defendant had not taken physical possession of the furniture nor deprived the plaintiff of it; he had merely threatened that he would not allow the plaintiff to remove it. Pollock B considered that the plaintiff should have resisted the threat, and asserted his rights to take the goods to which he was entitled. Bramwell B and Kelly CB held that to establish conversion where the defendant had not taken physical possession of goods, the plaintiff must show that his possession had not just been interfered with in some way, but altogether, so that he had been completely deprived of it. A limited interference, where the plaintiff still retains possession, was not conversion. In his dissenting judgment, Martin B considered that the plaintiff was not bound to resist the defendant's threats and risk violence; rather, he had been deprived by the defendant of the power over his goods to which he was entitled, and this conduct constituted conversion.

Observing that *England v Cowley* had been cited with approval in *Oakley v Lister*, <sup>242</sup> Flaux J concluded that the principle which emerged from the cases was that for a person not in possession of goods to commit the tort of conversion, there must be a dealing or purported dealing with the goods which either denied absolutely the right of the true owner or which involved the assertion of a right which was inconsistent with the true owner's right. Flaux J considered that the conduct of Captain Rudge could not be characterised as dealing or purported dealing with the Van Gogh, but even if it was, the critical element of the tort by someone not in possession was missing. The detention notice did not absolutely deny the right of the owner; and there was no assertion of a right which was inconsistent with the owner's right. A defendant in possession had to assert dominion over the goods, which meant some right which only an owner had. Here, there was no assumption of ownership or of dominion over the ship; the intention of the notice was merely to prevent the owner from using the ship in its proposed next cruise for a short period of time. There was not a sufficient encroachment on the claimant's rights to amount to conversion, and the conduct was only a lesser act of interference by Captain Rudge, whose position was analogous to that of the landlord in *England v Cowley*.

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<sup>241</sup> Pollock and Bramwell BB, and Kelly CB

<sup>242</sup> [1931] 1 KB 148 (CA)

As Flaux J pointed out, a line must be drawn somewhere. Accepting that this must be so, observers may differ as to where the line should be placed and whether it was drawn in the right place by Flaux J so as to exclude Captain Rudge. After all, stated simply, the action of Captain Rudge in serving the detention notice prevented the claimant from exercising its right to use its own ship as it wished. Why should this not constitute conversion?

It may be helpful to examine more closely the rule which was stated by Kelly CB in *England v Cowley*, to the effect that a person not in possession of property is liable in conversion only if he absolutely denies the plaintiff's right and that a "limited interference" where the plaintiff himself is in possession is not conversion. This principle was cited by Flaux J as a reason for his decision. What is the reason for the existence of such a principle?

It is suggested that the rule is not intended to mean that whether conversion has been committed is a question of degree, or seriousness, of encroachment in a particular case. Rather, it is suggested that in many cases where a defendant has no possession of goods, and purports to deal with them without authority, the reason that this does not constitute conversion is that the conduct does not in fact result in any disturbance of the plaintiff's possessory interest in the goods. For example, as discussed below, it is clear that merely purporting to sell or otherwise dispose of goods will not always amount to conversion as the act which is done may leave the plaintiff's rights of both possession and property unaffected. Such an approach is in accord with what Salmond referred to as "the essence of the matter";<sup>243</sup> that is, that conversion is committed if the defendant converts to his own use, or wrongfully deprives the plaintiff of the use and possession of the plaintiff's goods. Thus, any wilful interference with a chattel, done without lawful justification, which deprives the person entitled to it of its use and possession constitutes conversion. Bearing this in mind, a case where the plaintiff retains possession of his or her own goods while the defendant purports ineffectually to deal with them, is not conversion because the defendant's conduct results in no interference with the plaintiff's possession at all. It is simply devoid of any practical or legal effect. By contrast, if a purported but invalid dealing is undertaken by the defendant, and the plaintiff's goods are physically transferred pursuant to it, the defendant's act constitutes conversion because the plaintiff is deprived of possession of the goods. It is irrelevant whether the defendant's act is a purported sale, lease, or simply an asportation;

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<sup>243</sup> Salmond (1905) 21 LQR 43. Salmond points out that this definition was used in the Common Law Procedure Act 1852 (15 & 16 Vict c 76), which was intended to bring the form of the action of conversion "into harmony with its true scope and purpose by the abolition of the old fictitious allegations of loss and finding".



what matters is that the defendant has, without authority, usurped the possession to which the plaintiff is entitled. The tort of conversion exists to protect possessory rights.

Looked at from this point of view, it is suggested that, to take an act outside the realm of conversion, a “limited interference” or an “insufficiently serious encroachment” cannot mean one which may be categorised as partial, or temporary, or causes only minor damage to the plaintiff; rather, it must be one which does not achieve its intended purpose and so does not interfere with the plaintiff’s possessory right at all. To find otherwise would mean that whether conversion has been committed would be a question of degree, involving questions of what period of time would suffice to render an exclusion an act of conversion. But it has never been the law that conversion requires a complete, or permanent, exclusion of the owner from possession,<sup>244</sup> and it is suggested that there is no reason that such a rule should be imposed as an additional requirement in cases where the defendant does not have actual possession of the goods in question. Nor, it is suggested, does *England v Cowley* require it. Rather, the majority of the Judges in that case imply that the reason that the defendant landlord was not liable in conversion was that no interference with the plaintiff’s possession had occurred. The plaintiff could have ignored the defendant’s admonition not to remove the goods and should simply have taken them. In other words, the defendant’s conduct had no legal or practical effect on the plaintiff’s right to possession of the goods, and the defendant’s action was, legally speaking, a nullity.

By contrast, an apparently valid statutory notice served by an official is not a nullity. The recipient of it is not free to ignore it and, unless or until the notice is acknowledged to be invalid or declared to be so by a judicial process, he would disobey it at his peril. In the case of the *Van Gogh*, the notice in question was not flagrantly invalid and the only reasonable course was for the shipowner to comply with it. There was no concession of invalidity by the Ministry, and it was not until the decision of Flaux J was made that the notice was established as defective and therefore invalid. In consequence, there had been at the time no justification for the detention of the ship, and the shipowner’s possessory right had been unlawfully interfered with. The fact that Captain Rudge had not physically taken possession of the ship or prevented the owner or crew from going on board, but had ordered that it should remain in port, did not remove the fact of that interference, for the shipowner was unable to use its own ship as it wished. Captain Rudge had assumed dominion over the ship by detaining it, and thereby excluded the owner from its intended use of it. In the context of conversion,

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<sup>244</sup> The point is discussed above, ch 4.2.1.

“depriving” an owner of possession does not mean that the wrongdoer must physically remove the goods or take them away; “an owner is equally deprived of possession when he is excluded from possession, or possession is withheld from him by the wrongdoer”.<sup>245</sup> The deprivation of use of the ship was real, and financial loss resulted.

It must also be borne in mind that a defendant, to commit conversion, must intend to do the act which constitutes the denial of the plaintiff’s rights. The conduct must be deliberate, not accidental, and the defendant’s intention in doing the act relating to the goods in question may well be relevant in establishing the necessary assumption of dominion over them.<sup>246</sup> An act which is committed for some other purpose, but has the merely incidental effect of excluding an owner from the use or possession of his goods, will not be conversion because the necessary exercise of dominion over the goods in question is not present. Were it otherwise, a person who unlawfully blocked egress from a theatre might commit conversion because every theatre patron was unable to reach his vehicle or obtain the goods in his house; and every kidnapping case would necessarily entail conversion of all the goods belonging to the victim. In such cases, there is no conversion because there is no assumption of dominion over any specific goods. The wrongdoer’s detention is of the owner, not of his goods.

It is of course possible to imagine many and varied circumstances in which people are prevented by the interference of others from obtaining or using their own goods. Some hypothetical judicial suggestions have been stated to illustrate the limits of conversion as a suitable action in all such cases. Suppose, suggested Bramwell B in *England v Cowley*,<sup>247</sup> one were to hinder a man intent on fighting a duel from removing his pistol from a drawer; or refuse to allow a man on horseback to take a particular direction and make him turn back; or prevent a man from pawning his watch. Could it be that a claim in conversion would lie for the pistol, horse or watch? Or, posited Kelly CB,<sup>248</sup> if someone were to interfere to prevent the owner of a bed from removing it from under an ill person who was lying on it, would such an act be conversion of the bed? Would it be conversion, asked Rolfe B in *Fouldes v Willoughby*,<sup>249</sup> to wave one’s hands or crack a whip and so frighten a horse that it jumped from a boat into the water?

The point of these hypothetical questions is, of course, to indicate that not every act which affects another’s use or possession of his or her own goods constitutes conversion.

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<sup>245</sup> *Kuwait Airways Corp v Iraqi Airways Co* (Nos 4 & 5) [2002] 2 AC 883, 1084 (HL)

<sup>246</sup> *ibid*

<sup>247</sup> pp 129-30

<sup>248</sup> p 131

<sup>249</sup> (1841) 3 M & W 540, 550; 151 ER 1153, 1157. The case is discussed above, ch 4.2.1.

Each of the questions is intended to illustrate a *reductio ad absurdum*, and a negative answer to each is clearly expected. However, it is suggested that the answer in each case might well be in the affirmative, depending upon the intention of the defendant in each case. In the case of the pistol in the drawer and the ill person upon the bed, the acts of intermeddling might well constitute conversion, but that the protection from danger of life or property is a good defence.<sup>250</sup> The defendant in the case of the diverted horseman is not assuming dominion over the horse, but is purporting to control the freedom of movement of its rider.<sup>251</sup> His conduct is not directed at assuming dominion over the horse. If one were to prevent another from pawning his watch, the question of whether the act constituted conversion would depend upon the nature and associated intention of the particular act. It is suggested that the hypothetical case posited in *Fouldes v Willoughby* of frightening a horse so that it jumped into the water might indeed be conversion, for such an act would be a usurpation of the owner's right to use his horse as he wished.

Returning to the case of the Van Gogh, it is clear that the object of Captain Rudge in serving a detention notice was to prevent the ship from leaving port. In consequence, his well-intended conduct could, it is suggested, have amounted to conversion. His notice was directed towards the ship, and his expressed intention was to detain it. By asserting an unauthorised dominion over the ship, he assumed to himself a right of disposition of it, a right which was not vested in him, but in the claimant shipowner.

The case of the Van Gogh may be contrasted with another case concerning a vessel, *Kitano v Commonwealth of Australia*,<sup>252</sup> which also concerned an invalid notice. The plaintiff was one co-owner of an ocean-going yacht which had arrived in Darwin from Japan. Against the plaintiff's wishes, the Australian Customs authorities issued a certificate of clearance to another co-owner, thereby enabling that co-owner to sail the yacht out of Darwin. The certificate did not comply with the relevant regulations and the plaintiff alleged that the Customs authorities had converted the yacht by deliberately doing a wrongful act which resulted in the yacht's removal from his possession. The High Court held that the issue of the invalid certificate was not an act of conversion. The certificate was a declaration that the yacht was lawfully entitled to leave; the issuing of it was not a dealing with the yacht in a manner inconsistent with the rights of the plaintiff as a co-owner, nor a denial of his rights in

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<sup>250</sup> *Cresswell v Sirl* [1948] 1 KB 241 (CA), *Hamps v Darby* [1948] 2 KB 311 (CA), *Dehn v Attorney-General* [1988] 2 NZLR 564.

<sup>251</sup> In *Thorogood v Robinson* (1845) 6 QB 769; 115 ER 290 it was held that the defendant's act of turning off his land servants sent to remove their master's goods from the land was not conversion of the goods, for the defendant was entitled to turn the servants off.

<sup>252</sup> (1974) 129 CLR 151

the yacht. Nor did the certificate have the effect of delivering possession to the plaintiff's co-owner who sailed the yacht out of Darwin, for he had had possession of the yacht at the time the certificate was issued. This last point is significant for, unlike the owner in the Van Gogh case, who was deprived of the possession and use of his ship, the plaintiff was not ousted from possession by the Customs authorities. Rather, the yacht was already in the possession of the plaintiff's co-owner who, by virtue of his co-ownership, was entitled to, and had, possession of it. The ship was removed by the co-owner, not by the Customs authorities, who had merely stated (albeit incorrectly) that its removal from port would comply with the applicable regulations.

It is clear that the precise limits of conversion where an owner is prevented from possessing or using his or her goods are not easy to define. It is suggested that, in each case, the fundamental nature of the tort and the interests it protects must be borne in mind in considering whether exclusionary conduct amounts to conversion.

#### 4.2.4 *Conversion by using and misusing*

A finding that a defendant has committed the tort of conversion is, in effect, tantamount to forcing a sale of the goods which have been converted upon the defendant and, for this reason, the usual measure of damages is the value of the goods themselves.<sup>253</sup> The converted goods are then vested in the defendant. This is consistent, of course, with the notion that, having converted the goods to his or her own use, the defendant has acted in defiance of the plaintiff's rights. This should be borne in mind when considering the circumstances in which the use of another's goods constitutes conversion, for it follows that not every act of user of another's goods will come into this category.

Where one person simply makes use of the goods of another and no harm results to the goods, it will depend on the circumstances whether conversion is committed. It has been suggested that cases in which the unauthorised use or handling of goods is merely trivial and harmless may not be conversion. In *Penfolds Wines Pty Ltd v Elliott*,<sup>254</sup> the case in which a hotel keeper filled from his supply of bulk wine bottles belonging to the appellant, the refusal of an injunction to prevent the conduct continuing was upheld by a majority of the High Court of Australia. However, this was because the majority considered an injunction was not an appropriate remedy in the circumstances. Three of the five judges (Latham CJ, Williams

<sup>253</sup> This is discussed further below in the context of remedies, ch 7.1.

<sup>254</sup> (1946) 74 CLR 204

and McTiernan JJ) considered that conversion had been committed, while the other two of the judges (Dixon and Starke JJ) were of the view that no tort had been committed at all. However McTiernan J took the view that an injunction was not an appropriate remedy in the circumstances, with the result that the injunction was not granted.<sup>255</sup> It is suggested that this is really a case of the majority taking a different view of the facts in the particular circumstances, rather than disagreeing as to the legal principles involved. The dictum of Dixon J to the effect that no conversion could be committed where “there is no act, and no intent, inconsistent with the appellants’ right to possession and nothing to impair or destroy it”<sup>256</sup> is, it is suggested, correct and not contradicted by the findings of the individual judges. It is also supported by the logic inherent in the nature of the tort of conversion itself. Previous authority also justifies the opinion of Dixon J. For example, the view of Holt C J that conversion requires the assumption upon oneself of property and right of disposing of another’s goods<sup>257</sup> is to the same effect; and Lord Abinger C B in *Fouldes v Willoughby*<sup>258</sup> said that if the ferryman in that case had, rather than simply putting the plaintiff’s horses ashore had thrown them into the water so that they drowned, conversion would have been committed. It is therefore suggested that the reason that mere using or handling of another’s goods is unlikely to be conversion is not that the conduct complained of is trivial; rather, such conduct is perhaps unlikely to amount to a denial of the plaintiff’s possessory rights.

The total wilful destruction of the goods is conversion. This is because the act of destruction means that the plaintiff can no longer possess or use the goods, or exercise his or her rights over them. Acts short of complete physical destruction may also have this result and so constitute conversion if the goods thereby lose their identity and become, in effect, something else. For example, to drink another’s wine is to convert it, as is to add water to it, for the character of the wine has been destroyed and it cannot be restored to the plaintiff in its original form.<sup>259</sup> For the same reason, wilful conduct which results in the loss of the goods is conversion, as where the owners lost their interest in a car when the borrower of it used it for smuggling, with the result that it was seized by Customs officials, then confiscated and sold.<sup>260</sup>

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<sup>255</sup> The ratio decidendi of the case is not easy to find: see Paton and Sawyer (1956) 63 LQR 461, 469, where the views of the individual judges are set out in tabular form.

<sup>256</sup> (1946) 74 CLR 204, 224

<sup>257</sup> *Baldwin v Cole* (1705) 6 Mod 212; 87 ER 964

<sup>258</sup> (1841) 8 M & W 540, 547

<sup>259</sup> *Richardson v Atkinson* (1723) 1 Str 576; 93 ER 710

<sup>260</sup> *Moorgate Mercantile Co Ltd v Finch* [1962] 1 QB 701

However, an act which falls short of this but simply causes damage to goods is generally not conversion, provided the goods continue to exist as such.<sup>261</sup> Where goods are damaged, the more appropriate possible actions are trespass or negligence, depending on whether the damage was done intentionally or not. This distinction is significant as far as the availability of remedies is concerned for the measure of damages in conversion is generally the value of the chattel. By contrast, if the action is brought in trespass or negligence in respect of damaged goods, the amount recoverable will generally be the loss in value of the goods which is caused by the damage, or the cost of repair.

#### 4.2.5 *Conversion by transfer to another*

The unauthorised disposal or transfer of goods may in some circumstances constitute conversion. The question of whether a disposal, or purported disposal, of goods constitutes a conversion of them is decided not so much by labelling the act itself as, for example a sale, a pledge, a gift, a delivery, or anything else, but by examining the effect of the transaction upon the plaintiff's interests. A person who purports to deal with the goods of another may or may not effect some alteration in the legal interests in the goods; in some circumstances a transaction done without authority may be effective in law, and in others it may have no validity at all. Therefore such transactions as a purported sale, gift, pledge or hire may or may not be conversions. The question cannot be answered without considering whether the facts of the particular case reveal the necessary denial of the plaintiff's interests. Again, the essential feature is the assumption of dominion over goods in such a way as to deprive the plaintiff of his or her rights in the goods.

It follows that the mere physical delivery or transfer of goods, although done with no intention of effecting any alteration in property rights or interests, may be conversion if the person to whom the goods are delivered is not entitled to them. So in *Helson v McKenzies (Cuba Street) Ltd*<sup>262</sup> the appellant customer of the respondent department store who had inadvertently left her handbag on the counter in the store sued the respondent in conversion when the respondent's employee handed the handbag to a stranger who had claimed it. It was held that the respondent's act in handing over the bag without any attempt to check the claimant's entitlement to it was a denial of the appellant's title. The crucial question was whether or not anything was done which was incompatible with the appellant's right of

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<sup>261</sup> *Simmons v Lillystone* (1853) 8 Ex 431

<sup>262</sup> [1950] NZLR 878 (SC & CA)

dominion as owner; and assuming to dispose of the bag to one who was not the true owner was such an act. Again, the principle is that one who interferes with another's goods does so at his or her peril, and if there proves to be no lawful justification for the act, the liability in conversion is the same as if he or she had fraudulently misappropriated the goods.<sup>263</sup> *Helson v McKenzies (Cuba Street) Ltd* may be contrasted with *Marcq v Christie Manson & Woods Ltd (trading as Christie's)*,<sup>264</sup> where the defendant auctioneers innocently took possession of a stolen painting from a person who purported to authorise the auctioneers to sell it. The auctioneers unsuccessfully attempted to do so, and then returned it to the person from whom they had received it. The auctioneers were held not liable in conversion to the true owner of the painting, on the ground that they had acted only ministerially. The fact that they had intended to sell the painting did not amount to conversion, for it was their actions which mattered; although a sale and delivery would have been conversion, the way in which they had in fact handled the goods was not.

It is difficult to distinguish the cases of *Helson* and *Marcq*, and it is suggested that the reasoning adopted in *Helson* is preferable as being consistent with the principles which underlie the tort of conversion. It is clear that every person in a series through whose hands goods pass may successively convert them; liability is not confined to the original taker and it is irrelevant that a person in the series may have innocently received the goods from a thief.<sup>265</sup> What matters is that the owner or other person entitled to possession is wrongfully excluded from possession by each person in the chain. If this basic principle is borne in mind, it is difficult to see why the auctioneers did not commit conversion when they took possession of the painting with the intention of selling it; or why conversion was not committed when they handed the painting to the person from whom they had originally received it, himself a person whose actions were also effective to exclude the owner from possession.<sup>266</sup>

Whether or not the decision in *Marcq* is correct on its facts, it is clear that merely purporting to sell goods will not always amount to conversion as the act which is done may leave the plaintiff's rights of both possession and property unaffected.<sup>267</sup> For example, it is not usually conversion to purport to sell another's goods to a third party unless the goods are

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<sup>263</sup> *ibid*, pp 917-919; *Wilson v New Brighton Panelbeaters Ltd* [1989] 1 NZLR 74, 79

<sup>264</sup> [2003] 3 All ER 561 (CA)

<sup>265</sup> This point is made in *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, 1093 per Lord Nicholls of Birkenhead.

<sup>266</sup> The decision perhaps reflects a perceived need to offer auctioneers special protection.

<sup>267</sup> However, note that there are statutory exceptions (discussed in ch 6) to the rule that a person without authority to sell cannot effect a sale of another's goods.

actually delivered, for in such a case the plaintiff loses neither possession of, nor property in, the goods. The purported sale is simply a nullity; as Bigham J said of a broker's unauthorised sale in *Edelstein v Schuler & Co*<sup>268</sup> it is "a void act ... [i]t divests the true owner of no right and it does not physically interfere with his control or possession of the goods". However, if the goods are delivered to the third party, it may be otherwise: "But if in addition to negotiating a sale the broker meddles with the goods themselves and hands them to the buyer with the object and intention of transferring to the buyer the property and possession in pursuance of the unauthorized sale, then he makes himself liable in trover to the true owner, for he is guilty of an act in relation to the goods themselves which is inconsistent with the rights of the true owner." Here, it is suggested, the party delivering the goods is liable in conversion, not because of the purported sale (which is no more than the reason for the delivery) but because of the delivery itself. The purported sale in such a case does not affect the owner's rights of property at all; rather, it is the delivery which has interfered with the owner's rights of possession by depriving him or her of the ability to exercise his or her possessory rights over the goods. This approach is supported by *Smith v Bridgend CBC*.<sup>269</sup> In that case, a company owned equipment which was on Council land. The Council purported to pass title to the equipment to a third party and to allow the third party to remove it. Subsequently the third party removed the equipment and the Council was held to have converted it. The case was explained in *Marcq v Christie Manson & Woods Ltd (trading as Christie's)*<sup>270</sup> as illustrating that the Council's action of purporting to transfer title and allow removal did not itself amount to conversion; rather, the conversion occurred when the third party acted on the Council's consent and removed the equipment.

#### 4.2.6 Conversion by receiving

The act of receiving goods belonging to another may be conversion provided the act amounts to an assertion of dominion over the goods which is inconsistent with the owner's rights. For this reason, it is possible for innocent purchasers of goods to be liable in conversion unless they are protected by any of the exceptions to the *nemo dat* rules outlined below. A typical case of this kind is *Elwin v O'Regan*.<sup>271</sup> A finance company transferred possession of a car which it owned to a customer. The customer then purported to sell it to an innocent purchaser, who sold it; it was then on sold twice, the

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<sup>268</sup> [1902] 2 KB 144, 156

<sup>269</sup> [2002] 1 AC 336 (HL)

<sup>270</sup> [2003] 3 All ER 561, 570 (CA)

<sup>271</sup> [1971] NZLR 1125



second sale being to the plaintiff. A year later, it was taken from his possession by the defendant agent of a finance company. The plaintiff claimed that the defendant had converted the car, a claim which could succeed only if he had received good title to the car under his purchase. The Court found that the finance company's agreement with its customer was a hire coupled with an option to purchase,<sup>272</sup> and not an agreement to sell.<sup>273</sup> In consequence, there was no exception to the rule that one who lacks title cannot confer title, and no ownership could pass from the customer to anyone else. The repossession of the car was justified and the plaintiff could not succeed in his conversion action.

There is, however, some authority for the proposition that the mere innocent receipt of goods without notice of the plaintiff's title does not amount to conversion. For example, in *Spackman v Foster*<sup>274</sup> title deeds belonging to the plaintiff were pledged with the defendant by a fraudster, the defendant pledgee taking the deeds in good faith. It was held that the receipt of the deeds pursuant to the pledge was not an act of conversion on the part of the pledgee, he having no knowledge of the plaintiff's interest in the deeds. This case and others to like effect<sup>275</sup> are of doubtful authority, it not being easy, as stated by Salmond J in *Nash v Barnes*,<sup>276</sup> to reconcile with other authorities "any such exemption of innocent recipients from the rigour of the law of trover and conversion". More recent cases, such as *Wilson v New Brighton Panelbeaters Ltd*<sup>277</sup> appear to regard as settled the principle that knowledge of the plaintiff's interests on the part of the defendant is irrelevant, provided the act in question amounts to a denial of those interests. It is submitted that this view is now clearly good law.

The involuntary receipt of goods is not in itself conversion. A person may come into possession of the goods of another without any positive act on his or her part such as by having goods thrust upon him or her. In such a case, unless the recipient interferes with the goods in such a manner as to deny the owner's rights in them, conversion will not be committed. This principle is now found in statutory form with respect to unsolicited goods; a recipient of unsolicited goods is not, in the absence of any agreement to the

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<sup>272</sup> As in *Helby v Matthews* [1895] AC 471

<sup>273</sup> If the transaction had been an agreement to sell, the customer would have gained title under s 27(2) of the Sale of Goods Act 1908, the "buyer in possession" exception. This is described further in ch 6.5.2.

<sup>274</sup> (1883) 11 QBD 99

<sup>275</sup> For example *Miller v Dell* [1891] 1 QB 468, *Union Credit Bank v Mersey Docks and Harbour Board* [1899] 2 QB 205

<sup>276</sup> [1922] NZLR 303, 311

<sup>277</sup> [1989] 1 NZLR 74

contrary, bound to pay for them unless he or she does some act in relation to them which is inconsistent with the ownership of the sender.<sup>278</sup>

Statutory protection against liability for conversion exists for recipients of goods in certain cases. As described below, exceptions to the *nemo dat* rule provide shelter in some cases for those who deal with the goods of others. Bankers who in good faith and without negligence collect payment of a cheque are protected from claims in conversion.<sup>279</sup> Recipients of unsolicited goods acquire the rights of ownership and so immunity from claims by the sender after the goods have remained in the recipient's possession for three months or, if the recipient has given the sender notice to collect the goods, 30 days.<sup>280</sup> A person who has done work on a chattel but remains unpaid for two months after payment is due may enforce the lien by selling the goods at auction.<sup>281</sup>

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<sup>278</sup> Unsolicited Goods and Services Act 1975, s 6

<sup>279</sup> Section 5 Cheques Act 1960. For the application of this statutory defence, see for example *Thackwell v Barclays Bank plc* [1986] 1 All ER 676, *Dairy Containers Ltd v NZI Bank Ltd* [1995] 2 NZLR 30, *The Honourable Society of the Middle Temple v Lloyds Bank plc* [1999] 1 All ER (Comm) 193, noted at [1999] CLJ 278, *Bank of Montreal v Ernst & Young Inc* 220 DLR (4<sup>th</sup>) 193 (SCC), *Architects of Wine Ltd v Barclays Bank plc* [2007] 1 Lloyd's Rep 55, *NIML Ltd v Man Financial Australia Ltd* (2007) 15 VR 156 (SCV).

<sup>280</sup> Unsolicited Goods and Services Act 1975, s 3

<sup>281</sup> Wages Protection and Contractors' Liens Act Repeal Act 1987, s 3

## Chapter 5 The plaintiff's interest

### 5.1 Possessory interests

Conversion protects possession. A possessory title may be established by proving either *de facto* possession or the immediate right to possession.<sup>282</sup> In this context, *de facto* possession, meaning effective physical control as evidenced by some outward act, is a question of fact;<sup>283</sup> and, provided it is coupled with the manifest intention of sole and exclusive dominion over the chattel in question, always constitutes possession in law.<sup>284</sup> Such possession is not just evidence in support of ownership; rather, a possessory title is as good as ownership against all the world except for the true owner.<sup>285</sup> Thus the person with *de facto* possession, having *animus possidendi*, is generally entitled to use the goods and exclude others from them. In consequence, even a thief has a possessory title, albeit a frail one, which may be recognised in the absence of a better claim.<sup>286</sup> Whether or not there exists a right to immediate possession may be a more legally complex question, but it is clear that the existence of this right confers a right to sue in conversion.<sup>287</sup> The facts constituting possession generate rights as truly as do the facts which constitute ownership, although the rights of a mere possessor are less extensive than those of an owner: "A complete title consists of: possession, the right of possession and the right of property ... and invests the owner with the three incidents of free and exclusive enjoyment, free disposition, and indeterminate duration."<sup>288</sup>

Thus, no one but a person who has actual, *de facto* possession, or the immediate right to possession, of the goods at the time they are converted may bring an action in conversion. Because it is possession and not ownership which is protected, it is not necessary to show ownership to establish a right to sue, although of course an owner who is also in possession of the goods has such a right. The right, however, is not a consequence of ownership, but of

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<sup>282</sup> This was stated to be the "ordinary" and "quite unexceptionable" statement of the law by Wilmer LJ in *Irving v National Provincial Bank Ltd* [1962] 2 QB 73, 82. See also *Graham v Peat* (1801) 1 East 244, *Jeffries v Great Western Ry Co* (1856) 25 LJQB 107, *Glenwood Lumber Co Ltd v Phillips* [1904] AC 405, *Eastern Construction Co v National Trust Co* [1914] AC 197, *Daniel v Rogers* [1918] 2 KB 228, *Harris v Lombard NZ Ltd* [1974] 2 NZLR 161.

<sup>283</sup> *Balmoral Supermarket Ltd v Bank of New Zealand* [1974] 2 NZLR 155

<sup>284</sup> Pollock *An Essay on Possession in the Common Law*, Clarendon Press, Oxford, 1888, p 20

<sup>285</sup> *Flack v Chairperson, National Crime Authority* (1997) 150 ALR 153, 156 (FCA)

<sup>286</sup> *Parker v British Airways* [1982] 1 All ER 834, 837, per Donaldson LJ

<sup>287</sup> The issue is discussed by Palmer in *Possessory Title* in ed Palmer and McKendrick *Interests in Goods*, 2<sup>nd</sup> edn, LLP, 1998.

<sup>288</sup> 2 Black Comm 199

possession,<sup>289</sup> which is a right included in uncurtailed ownership. Hence, it is true to say both that possession is a root of title, and that possession follows title.<sup>290</sup>

Why the law protects possession is an interesting question, for it is not immediately obvious why mediaeval law should have developed in this way. Doubtless, as Pollock and Maitland suggest,<sup>291</sup> there are various possible explanations. One argument is that protecting possession tends to ensure that the peace is kept by making self-help unlawful; the law shields the possessor, not because his own right justifies it, but because the interference with his possession by another may involve or encourage violence or disturbance. Hence, protection of a possessory right in property promotes the protection of the person, and allows individuals to enjoy quiet possession of their property. A second explanation is that it is (or perhaps was) easier to prove possession than ownership. If a rightful owner, for example, were to be ousted from his property, to require that he immediately prove ownership, rather than possession, to recover it would be too burdensome. Given that rights of ownership and possession may be in different people, the right which is the easier of the two to establish ought to suffice for proof. The inherent risk that the application of this principle may, at least temporarily, also protect those with wrongful possession is simply unavoidable. Thus, say Pollock and Maitland, the law recognised in a practical way that rights are relative; “[o]ne story is good until another is told. One ownership is valid until another is proved.”<sup>292</sup>

Thus, the principle that a non-owner of goods may sue in conversion is of respectable antiquity, having developed in mediaeval jurisprudence and being repeatedly endorsed until today. A famous example is the seventeenth century case of *Wilbraham v Snow*<sup>293</sup> where it was held that a sheriff who had seized goods in execution of a writ of *feri facias* could maintain an action of trover against the defendant, a person who had taken the goods from him. The sheriff had a right of possession under the writ and so was entitled to the return of the goods from the defendant. The entitlement to possession was a special property in the goods which the sheriff could assert against the defendant who had wrongfully converted the goods to his own use. What was necessary was that the plaintiff in each case should be considered to have, legally speaking, a sufficient property or interest in the goods which were

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<sup>289</sup> *Harris v Lombard NZ Ltd* [1974] 2 NZLR 161

<sup>290</sup> These concepts are discussed in detail in Pollock *Possession in the Common Law*, 1888.

<sup>291</sup> *History of English Law*, ii, 1923, 40

<sup>292</sup> Theories of possession are discussed in detail in Pollock and Maitland *History of English Law*, ii, 1923, 40-47.

<sup>293</sup> (1669) Hil 20 & 21 of King Charles the 2d, Roll 1540. This case and many others are the subject of an extensive commentary in 2 Wms Saund 47; 85 ER 624

the subject of the claim, such property or interest being derived from the plaintiff's possession or right to possess.

Case law indicates that it is not necessary that the plaintiff's possession or right to possession should derive from a contractual relationship, such as a hire or carriage of goods, or be based upon legal justification such as a writ, as occurred in *Wilbraham v Snow*. A mere general bailment which gives the plaintiff possession of the goods with the consent of the owner is sufficient. So a borrower may sue in conversion.<sup>294</sup> In *Sutton v Buck*,<sup>295</sup> a case decided in 1810, a "purchaser" who took possession of a ship under an invalid sale was similarly entitled. In that case, the owner of a stranded ship sold the ship as she lay to the plaintiff, who paid the purchase price. In fact the sale was not registered as required by legislation and the sale was void. The plaintiff expended time and money in attempting to refloat the ship. His efforts were unsuccessful and the ship broke up. Parts of the wreck drifted onto the land of a manor, the defendant bailiff of which took them and refused to return them to the plaintiff. The defendant argued that the plaintiff, not being the owner of the ship, did not have a sufficient title in the ship to maintain trover. The Court held that the plaintiff had been in possession of the ship with the consent of the owner, who had intended to transfer it to the plaintiff; and the fact of the plaintiff's possession was enough to defeat any right claimed by the defendant. The plaintiff's right to possession derived from the true owner and it made no difference that the purported sale had not resulted in property in the ship passing to the plaintiff. The position would have been the same had the owner made a gift of the ship to the plaintiff, said Mansfield CJ:<sup>296</sup>

If [the owner] had said I give, or I abandon the ship to you, and the Plaintiff had said, I will endeavour to save her, and had laid out great sums of money, and failed, might a stranger come and take possession of a part? It would be a monstrous thing to say that he could do so.

Lawrence J colourfully agreed that the defendant was not entitled to keep the pieces of the wreck as against the plaintiff:<sup>297</sup>

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<sup>294</sup> *Wilbraham v Snow*, p 628

<sup>295</sup> (1810) 2 Taunt 303; 127 ER 1094

<sup>296</sup> p 308; 1094

<sup>297</sup> p 313

See to what length that argument would go! We should have lords of manors going on board vessels and saying, “Here is a crew on board, but I know not the owner, and I will therefore break the ship to pieces.” All would be violence and outrage.

This concern to avoid a free-for-all is echoed in many cases<sup>298</sup> and is said to be one of the reasons that the law protects a possessory title. It has been suggested that such protection is necessary for public peace and security and is “an extension of that protection which the law throws around the person”.<sup>299</sup>

A further reason for according protection to a mere possessory title is sometimes stated to be the presumption that a title goes with possession. Sir Frederick Pollock, in his famous essay on possession, stated that there exists a rule that “[p]ossession in fact is prima facie evidence of possession in law;”<sup>300</sup> and Collins MR said in *The Winkfield*<sup>301</sup> that “the presumption of law is that the person who has possession has the property”. This presumption in most cases no doubt accords with reality; and it has the advantage of protecting a possessor of a chattel from having constantly to prove title to it.

A conversion action will not be available to a person who lacks actual possession or an immediate right to it, but who has only a deferred or conditional contractual right to possession. So in *Leigh and Sullivan Ltd v Aliakmon Shipping Ltd, The Aliakmon*<sup>302</sup> it was held that buyers of goods which were damaged during sea transit before property in the goods had passed to them could not sue the shipowners in tort. The buyers had agreed to buy, but had not bought, the goods at the time the damage was done, and they therefore had no proprietary interest in them; and they had no right to immediate possession of the goods at the relevant time. The buyers’ contractual rights to obtain property in the goods in the future did not suffice to allow them to sue. By contrast, in *Karlshamns Oljefabriker v East Navigation Corp, The Elafi*<sup>303</sup> property in the goods being carried had passed to the buyers while the ship was at sea, and the buyers could sue the shipowners in tort for damage which occurred at their port of destination.

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<sup>298</sup> For example, *Parker v British Airways Board* [1982] 1 QB 1004, 1010, per Donaldson LJ.

<sup>299</sup> See Landon Pollock’s *Law of Torts* Stevens & Sons Ltd, 1951, p 280, citing *Rogers v Spence* (1844) 13 M & W 571; 153 ER 239.

<sup>300</sup> Pollock, *An Essay on Possession in the Common Law*, 1888, p 20

<sup>301</sup> [1902] P 42, 55

<sup>302</sup> [1986] AC 785. This case is discussed by Palmer in ch 3 *Interests in Goods* 2<sup>nd</sup> edn, Palmer and McKendrick eds, LLP, London, 1998.

<sup>303</sup> [1982] 1 All ER 208

An equitable interest in goods, without more, is not a sufficient interest to found a claim in conversion. Although an opinion to the contrary was stated in *International Factors Ltd v Rodriguez*,<sup>304</sup> it is suggested that this cannot be taken as a reliable authority. In that case, an agreement was made that cheques handed to the defendant company by third parties would be held in trust for the plaintiffs and immediately handed to them. In breach of the agreement, the defendants paid cheques into its own bank account. It was held that the trust in favour of the plaintiffs gave them a sufficient proprietary right to sue in conversion, the authority for this being stated by Sir David Cairns and Bridge LJ to be *Healey v Healey*.<sup>305</sup> However, Buckley LJ observed that the agreement that the cheques should be handed on to the plaintiffs gave them an immediate right to possession of them sufficient to support a conversion action; and whether or not an enforceable trust arose when the defendant took possession of cheques, the plaintiffs had been entitled to demand immediate delivery of them to themselves. Thus, the plaintiffs had in any event a right to immediate possession, a right which would, without more, permit a conversion action. Further doubt is cast upon *International Factors Ltd v Rodriguez* by an examination of *Healey v Healey*. In that case, a husband had assigned chattels to trustees to be held for his wife under a marriage settlement, the chattels to be held free of the control of the husband. The wife was permitted to maintain an action against her husband for wrongfully detaining the chattels, despite the objection of the husband that the trustees were not parties to the action. The Court held that the only title required by the wife was the right to immediate possession of the property, a right which she had under the settlement. Thus, the case does not support the proposition that an equitable title, without more, founds a claim for detention of goods. Subsequently in *Leigh and Silavan Ltd v Aliamon Shipping Co Ltd, The Aliakmon*<sup>306</sup> Lord Brandon of Oakbrook stated (obiter, because the plaintiff was found to have no equitable interest in the goods in question) that an action for negligence in respect of damaged goods was not available to a person with no more than an equitable interest. A person with both a possessory and an equitable interest, such as the plaintiff in *Healey v Healey* could sue in negligence, but the entitlement was based on the possessory, rather than the equitable, right. This view was adopted in *MCC Proceeds Inc v Lehman Bros International (Europe)*,<sup>307</sup> where Mummery LJ stated that a person with an equitable interest had no title to sue in conversion unless he could also show actual possession or an immediate right to it; and that the fusion of law and equity by the

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<sup>304</sup> [1979] 1 QB 351 (CA)

<sup>305</sup> [1915] 1 KB 938

<sup>306</sup> [1986] 1 AC 785, 812 (HL)

<sup>307</sup> [1998] 4 All ER 675, 691 (CA)

Supreme Court of Judicature Acts had not altered this fundamental common law rule. *Healey v Healey* and *International Factors Ltd v Rodriguez* were distinguished in the case, which was subsequently followed in *London Borough of Hounslow v Jenkins*.<sup>308</sup>

Thus, it was right in *International Factors Ltd v Rodriguez* to permit the plaintiffs to sue in conversion, but only because they were entitled in any event to immediate possession of the cheques. It was therefore not necessary for the Court to consider the nature of their equitable interest, or to hold that such an interest sufficed for their claim. Equally, it is not necessary to consider whether a plaintiff has a legal interest in goods, or any other interest at all apart from a possessory one, in allowing a claim in conversion to be brought. Conversion deals with wrongful interference with possession. Thus, a plaintiff may have a legal or equitable interest in goods; or be in *de facto* possession of goods as, for example, a hirer, a borrower, a finder, or even a thief; but the existence or otherwise of these interests or facts is relevant only in explaining or evidencing the possessory right which conversion protects. However, the nature of the particular interest is very relevant in ranking interests which exist in disputed goods.

In cases where rights of ownership and possession are vested exclusively in different people, the right to sue in conversion for interference with possession will be with the person who has the possessory interest in the goods and the owner will be excluded. A bailment for a fixed term comes into this category, for, until the expiry of the term, the owner is not entitled to possession of the goods. It is therefore the bailee who has the right to sue in conversion for damage done to his or her possessory interest in such a case. This extends to the possibility that the bailee may even sue the bailor if it is the bailor who infringes the bailee's right to possession of the goods.<sup>309</sup> Where goods are taken on hire purchase, for example, the seller has no right to possession of the goods as long as the buyer makes no default in payments, and the seller who wrongfully repossesses goods in such circumstances may be liable in conversion to the buyer, even though the goods are in fact the seller's own property.<sup>310</sup> A mortgagee who has the right to immediate possession of chattels is entitled to bring an action for conversion of chattels; in *Whenuapai Joinery (1988) Ltd v Trust Bank Central Ltd*<sup>311</sup> such a mortgagee bank was successful in its claim in conversion for the value of joinery in the mortgaged property, the joinery having been removed by the seller who had retained title to it

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<sup>308</sup> [2004] EWHC 315

<sup>309</sup> *Flack v Chairperson, National Crime Authority* (1997) 150 ALR 153, 156 (FCA); and see the cases concerning the rights of finders of goods in which this principle is consistently maintained.

<sup>310</sup> *ibid*

<sup>311</sup> [1994] 1 NZLR 406 (CA)



under a *Romalpa* clause. Similarly, in cases where an unpaid seller has a lien, or right to retain possession, over goods until payment is made the unpaid seller is the person with the right to sue in conversion notwithstanding that property in the goods may have passed to the buyer. Again, this is because the unpaid seller has, by virtue of the lien, the right to possession of the goods and therefore the right to exclude the buyer from possession of them until payment is made.<sup>312</sup> An unpaid artificer is similarly entitled to retain possession of the goods to the exclusion of the owner.<sup>313</sup>

If, however, the bailment is one which does not exclude the bailor from possession, such as a simple bailment at will, either the bailor or the bailee may be able to sue in conversion a third person who interferes with possession of the goods.<sup>314</sup> This is because the bailor in such a case has an immediate right to possession of the goods, because a bailment at will is one which, by its nature, may be terminated at any time. So in *Manders v Williams*<sup>315</sup> casks of porter were delivered by the plaintiff brewers to a customer, the arrangement being that the casks would be returned to the owner when they were empty. The defendant sheriff seized and sold a number of the casks while they were lying empty, but still unreturned, in the customer's cellar. The plaintiffs sued the sheriff in conversion. It was held that the plaintiffs were entitled to succeed because, once the casks had been emptied, the customer became a bailee of them during pleasure, and the rights of property and possession in them reverted to the plaintiffs who were, accordingly, entitled to recover their value from the sheriff. The principle was also applied in *Jelks v Hayward*<sup>316</sup> in which the owners of furniture which had been taken on hire with an option to purchase were held entitled to sue in conversion when the furniture was seized by a bailiff from the hirer, because the agreement provided that if the furniture were to be seized, the owners had the right to determine the hiring immediately and retake possession of it. Similarly, in hire purchase cases, once the seller has acquired a right to repossess goods in consequence of a breach of the hire purchase contract by the buyer, the seller is entitled to sue a third party in conversion. So in *North Central Wagon and Finance Co Ltd v Graham*<sup>317</sup> a buyer who took a car on hire purchase

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<sup>312</sup> *Bolwell Fibreglass P/L v Foley* [1984] VR 97

<sup>313</sup> *Bolwell Fibreglass P/L v Foley* [1984] VR 161. The lien is enforceable by a sale of the goods in accordance with the Wages Protection and Contractors' Liens Act Repeal Act 1987, s 3.

<sup>314</sup> *O'Sullivan v Williams* [1992] 3 All ER 385. The rights of bailor and bailee in such cases are described as concurrent: *North Central Wagon and Finance Co Ltd v Graham* [1950] 1 All ER 780 (CA). It may be that a bailee has not merely a right, but a duty, to recover converted goods: *Dorico Investments Ltd v Weyerhaeuser Canada Ltd* (1999) 73 Alta LR (3d) 30.

<sup>315</sup> (1849) 3 Ex 339; 154 E R 1242

<sup>316</sup> [1905] 2 KB 460

<sup>317</sup> [1950] 1 All ER 580 (CA)

from the plaintiffs fell into arrears with his payments. The agreement permitted the plaintiffs to repossess the car in such circumstances. The buyer, without the knowledge of the plaintiffs and in breach of his obligations, instructed an auctioneer to sell the car. The plaintiffs were held to be entitled to seek damages from the auctioneer in conversion, having acquired a right to immediate possession once the default in payments had occurred.

It is apparent that a possessory interest in goods may suffice for a claim in conversion or detinue even where the goods in question are tainted by an illegal origin in which the claimant has an involvement. In *Tamworth Industries Ltd v A-G*<sup>318</sup> a lessee company claimed to be entitled to a sum of money, apparently the proceeds of drug dealing, found by police on the leased premises. The court held, obiter, that the authorities indicated that in the absence of a statutory power of forfeiture the claimant might succeed in its claim even if it were shown (as it was not in the particular case) that he had been implicated in the illegal dealing.<sup>319</sup>

In *Bliss v Attorney-General*,<sup>320</sup> William Young J suggested that a “public conscience” test could apply where a claim in tort was brought by a thief in relation to stolen goods. In *Bliss*, by contrast with *Tamworth*, it appeared that the plaintiff had stolen some of the goods in question. The plaintiff had been acquitted in criminal proceedings of theft of kauri fitches, and the police returned the fitches to him after his trial. He then sought damages from the police, alleging that their negligent manner of storing the fitches had damaged them. William Young J found that, on a civil standard of proof, the plaintiff had stolen some of the fitches, and the police raised the argument that the principle *ex turpi causa non oritur actio* should apply so as to prevent a claim in tort by a thief in relation to stolen goods. William Young J held that there was no authority on the point binding on him; it might depend on the circumstances of the case and, in particular, whether it would be an affront to the “public conscience” to grant the plaintiff relief because the court would thereby appear to assist or encourage illegal conduct.<sup>321</sup> He considered that there was no distinction between cases of negligence, trespass or conversion in this context. With some hesitation, he held that the *ex turpi causa* defence was not open to the police for three essentially policy reasons: the police had chosen to return the fitches to the plaintiff after the trial; regardless of the true ownership

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<sup>318</sup> [1991] 3 NZLR 616

<sup>319</sup> However, the court went on to suggest (at 627) that in such cases it might be appropriate to apply s 199(3)(a) of the Summary Proceedings Act 1957, which permits the disbursement of moneys seized by the police in such a way as the Court thinks proper. The Proceeds of Crime Act 1991, which came into force on 1 July 1992, now provides for the confiscation and forfeiture of the proceeds of serious crimes.

<sup>320</sup> [2009] NZAR 672

<sup>321</sup> *Thackwell v Barclays Bank plc* [1986] 1 All ER 676

of the fitches, the police had a duty to look after them; and the true owners of the fitches had made no claim to them.

A similar policy approach was adopted in the Australian case of *Flack v Chairperson, National Crime Authority*<sup>322</sup> in which the Federal Court of Australia, in holding that the occupier of a dwelling house was entitled to the return of a large sum of money which the police had found and seized while searching the house, indicated that the result might have been different had there been evidence that the money was the proceeds of crime. The grounds suggested for this were either that the return of the money would constitute an ingredient of the offence of receiving or possessing money which might reasonably be suspected of being the proceeds of crime,<sup>323</sup> or that the court would not lend its process for a criminal purpose or to assist illegal conduct. In *Flack* there was nothing to indicate that the money had been obtained from criminal activity, and the fact that there was no evidence of ownership of the money did not lead to the conclusion that it was the proceeds of crime. Accordingly, the court ordered that the police should deliver up the money to the occupier.

English authority, however, has denied the existence of any “public conscience” test in this context,<sup>324</sup> and has adopted a similar approach to that taken in New Zealand in *Tamworth Industries Ltd v A-G*. In *Webb v Chief Constable of Merseyside*<sup>325</sup> the Court of Appeal held that the police were not entitled to retain sums of money which they had lawfully seized from the claimants and suspected to be the proceeds of illegal drug dealing. The claimants had not been convicted of such offences, and the Court noted that there existed no statutory authority to permit the police to expropriate property from a person who had not been convicted of any crime in relation to it. Even if the claimant had been so convicted, the police could not retain the money in the absence of statutory authority. The case was followed in *Costello v Chief Constable of Derbyshire Constabulary*, which is discussed below.<sup>326</sup>

## 5.2 Reversionary interests

Owners of goods do not, of course, always retain possession of them. Goods are bailed by their owners in a wide variety of transactions, whether under contracts or simple loans

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<sup>322</sup> (1997) 150 ALR 153 (FCA)

<sup>323</sup> Pursuant to the Proceeds of Crime Act 1987 (Cth), s 82

<sup>324</sup> *Tinsley v Milligan* [1994] 1 AC 340 (HL) which, although described as “in some ways a difficult and controversial decision”, was affirmed as laying down the present state of the law in *Stone & Rolls Ltd v Moore Stephens* [2009] 2 Lloyd’s Rep 537, 562 (HL), per Lord Walker of Gestingthorpe.

<sup>325</sup> [2000] 1 All ER 209 (CA)

<sup>326</sup> [2001] 2 Lloyd’s Rep 216 (CA). *Costello* is discussed further in the context of finders and thieves, ch 5.4.

unsupported by consideration. In consequence ownership of the goods remains with the owner, and a possessory right is vested in the bailee. What happens if the goods are unlawfully interfered with by a third person while they are in the bailee's possession? The legal rights available to owners of bailed goods are not straightforward, as a comparison of the following simple sets of hypothetical facts indicates.

Let us suppose that a car owner lends his car to his friend for a month. While it is in the possession of the friend, the car is taken and destroyed by a stranger. The law permits either the owner or the friend to sue the stranger in the tort of conversion; either may recover the full value of the car. If the stranger does not destroy the car, but returns it, the owner or the friend may similarly claim in conversion for losses incurred in consequence of being deprived of its use. If the stranger does not convert the car, but damages it by carelessly colliding with it, the owner or the friend may claim damages in negligence from the stranger. Should the stranger deliberately scratch the car as he passes by, the friend may sue the stranger in trespass, but the owner may not.

In the second case, the owner accepts a payment of \$1 from his friend for the use of the car for the month. The supposed events just described occur the day before the month ends. Whether the car is returned or destroyed by the stranger, or whether it is damaged deliberately or negligently, the friend alone may sue the stranger in conversion, trespass or negligence. None of these actions is open to the owner. As we have seen, in cases where rights of ownership and possession are vested exclusively in different people, the right to sue in conversion, trespass or negligence is in the person who has the requisite possessory interest in the goods and the owner, having only a proprietary interest, will be excluded.

The bailee who sues a third party for wrongful interference with the goods is entitled to recover the value of the goods or their diminution in value from the third party, regardless of whether the bailee has suffered any loss or has any liability to the bailor in respect of the damaged or lost goods. This was once a doubtful proposition, as some nineteenth century cases reveal. For example, in *Rooth v Wilson*,<sup>327</sup> the plaintiff, who was in possession for a night of another's horse, turned it into a field where it fell and died because of the failure of the defendant, a neighbour, to repair a fence. The plaintiff claimed the value of the horse and the defendant objected that he lacked sufficient property in it to do so. The Court allowed the plaintiff to maintain his suit, seemingly not simply because he was in possession of the horse, but because he was potentially liable to the owner of the horse for negligently turning it loose

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<sup>327</sup> (1817) 1 B & Ald 59; 106 ER 22

in a dangerous area. Lord Ellenborough CJ said that the plaintiff had shown a degree of negligence sufficient to render him liable to the bailor, and such liability was sufficient to allow the plaintiff to maintain the action. Bayley J was of the same view: “the plaintiff by receiving the horse becomes accountable”. The other two judges simply stated that the action was a possessory one, and was maintainable.

The view of Lord Ellenborough was echoed in a later case by Wills J in *Claridge v South Staffordshire Tramway Co.*<sup>328</sup> In that case a horse, which had been delivered by its owner into the possession of the plaintiff auctioneer, was injured in consequence of being frightened by the defendants’ steamcar, which was being driven at an excessive speed. Here, the auctioneer was under no liability to the owner of the horse, the injury being caused solely by the defendants’ negligence. It was held that the auctioneer could not claim the loss in value of the horse. Hawkins J rejected the argument that the auctioneer’s possession alone sufficed for the action, saying:<sup>329</sup>

It is true that if a man is in possession of a chattel, and his possession is interfered with, he may maintain an action, but only for the injury sustained by himself. The right to bring an action is one thing; the measure of the damages recoverable in such action is another. And here the plaintiff suffered no loss at all ... If both the bailee and the bailor have suffered damage by the wrongful act of a third party, I think that each may bring a separate action for the loss sustained by himself. I cannot understand why a bailee should be allowed to recover damages beyond the extent of his own loss simply because he happened to be in possession.

Wills J agreed:<sup>330</sup>

A physical interference with possession is a wrong for which undoubtedly a bailee may sue: but it is quite another thing to say that he may recover in such action as if he were the owner. It has been argued that the bailee may recover as trustee for the bailor; but for that proposition there is no authority: it is certainly repugnant to good sense; and there is certainly no case in which a bailee has recovered damages under such circumstances and has been made to account for an unascertained portion of them to his bailor.

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<sup>328</sup> [1892] 1 QB 422

<sup>329</sup> *ibid*, 423-424.

<sup>330</sup> *Ibid*, 424-425

It is apparent from the above two cases that the right of a bailee to sue a stranger for interference with the bailed goods was regarded by some of the judges as linked with the obligations owed by the bailee to the bailor, the owner of the goods. Whether the bailee in *Rooth* would have been able to sue if he had not himself been negligent is not clear, for two of the four judges, unlike Lord Ellenborough and Bayley J, did not mention the point. However it is clear that the bailee's lack of negligence in *Claridge* was the reason that he was not entitled to maintain an action against the third party; he was not exposed to liability to his bailor, and so was regarded by the Court as having suffered no loss.

*Claridge* was overruled by the Court of Appeal in *The Winkfield*.<sup>331</sup> In that case, mail was lost when two ships collided at sea and the Postmaster-General, who was regarded as a bailee with custody of the mail at the relevant time, sued the shipowners in negligence. The court at first instance treated the claim as one by a bailee with no liability to his bailor, and dismissed the claim on the ground that *Claridge* was conclusive. On appeal, Collins MR stated that the authorities bearing against *Claridge* had not been fully considered by the Court in that case, and the case had been decided upon "very scanty materials".<sup>332</sup> Reviewing the history of the issue, Collins MR observed that the preponderance of authority supported the principle that possession in itself sufficed to allow a bailee to sue, and the relationship between the bailee and his or her bailor was of no relevance to the third party wrongdoer. It had been long established that a finder of goods, by virtue of no more than his possession of them, could maintain an action for interference with them by a third party,<sup>333</sup> and there was no reason why this should not apply equally to a bailee. This was because "the person who has possession has the property",<sup>334</sup> and so a general bailment conferred a title sufficient to sue.<sup>335</sup>

After an elaborate review of the authorities, Collins MR considered the "root principle" to be clearly established:

[A]s against a wrongdoer, possession is title. The chattel that has been converted or damaged is deemed to be the chattel of the possessor and of no other, and therefore its loss or deterioration is his loss, and to him, if he demands it, it must be recouped. His

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<sup>331</sup> [1902] P 42

<sup>332</sup> *ibid*, p 61

<sup>333</sup> (1722) *Armory v Delamirie* 1 Stra 504; 93 Eng Rep 664

<sup>334</sup> Collins MR cited *Jeffries v Great Western Ry Co* (1856) E & B 802; 119 ER 680.

<sup>335</sup> Other cases cited included *Sutton v Buck* (1810) 2 Taunt 303, 127 ER 294, *Wilbrahim v Snow* (1669) 2 Wms Saund 47; 85 ER 624 and the commentary to it; *Burton v Hughes* (1824) 2 Bing 173; 130 ER 272, *Swire v Leach* (1865) 18 CB (NS) 683; 141 ER 531, *Turner v Hardcastle* (1862) 11 CB (NS) 683; 142 ER 964, *Meux v Great Eastern Ry Co* [1895] 2 QB 387.

obligation to account to the bailor is really not ad rem in the discussion. It only comes in after he has carried his legal position to its logical consequence against a wrongdoer, and serves to soothe a mind disconcerted by the notion that a person who is not himself the complete owner should be entitled to receive back the full value of the chattel converted or destroyed .... As between bailor and bailee the real interests of each must be inquired into, and, as the bailee has to account for the thing bailed, so he must account for that which has become its equivalent and now represents it. What he has received above his own interest he has received to the use of his bailor. The wrongdoer, having once paid full damages to the bailee, has an answer to any action by the bailor. The liability by the bailee to account is also well established.<sup>336</sup>

Although a bailee has the requisite possessory title to sue for interference with goods, that right is exclusive to the bailee only if the bailor had no right to regain possession of the goods at the time the unlawful interference occurred. If the bailment is at will, the bailor by definition has the right to possession of the goods at any time, although actual possession is with the bailee. In such circumstances, bailor and bailee have concurrent rights to sue a third party who wrongfully interferes with the goods, although they cannot both, of course, recover for the same loss. So in *O'Sullivan v Williams*,<sup>337</sup> the Court of Appeal held that if the bailor owner sued, the settlement of those proceedings precluded a claim by the bailee. In that case a parked car, which was in the possession of the owner's girlfriend who had borrowed it while the owner was away, was irreparably damaged by the third party defendant's negligence. The owner claimed from the defendant the value of the car and compensation for loss of use, and this claim was settled. Subsequently, the owner's girlfriend, the bailee, commenced proceedings against the defendant for nervous shock (she having been upset and off work for two days in consequence of having witnessed the event causing the damage) and for loss of use of the car and inconvenience. The nervous shock claim was dismissed but the loss of use was allowed. On appeal, it was held that there could be no action by the bailee for

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<sup>336</sup> pp 60-61. This principle was accepted as correct in *NZ Securities & Finance Ltd v Wrightcars Ltd* [1976] 1 NZLR 77, but not applied in the particular case because the bailee was a rogue who had sold to the plaintiff a vehicle which he had fraudulently obtained from the defendant; the plaintiff received good title from the rogue and leased the vehicle back to him.. When the defendant wrongfully repossessed the vehicle and sold it, the plaintiff was entitled to recover in conversion only the amount outstanding under its lease, and not the market price for which the defendant had sold it. Otherwise, the plaintiff would have had to account to the rogue, which the Court considered would have been an absurd result.

<sup>337</sup> [1992] RTR 402

loss of use because the bailor owner had settled the matter. Citing *Nicholls v Bastard*,<sup>338</sup> Fox LJ said:<sup>339</sup>

There cannot be separate claims by the bailor and the bailee arising from loss or damage to the chattel. If the bailor recovers damages and the bailee has some interest in the property enforceable against the bailor, then the bailor must account appropriately to the bailee ... No doubt the car owner would be accountable to the car user in respect of her interest in the car, but since she had no enforceable interest in the car and her user was merely permissive and wholly at the will of the car owner, I would suppose she was not entitled to recover anything from him ... The use of the car by the car owner includes whatever use he chose to permit the car user to make of the car.

Thus, the bailee could not proceed with her action for loss of use because this was the same cause of action which had been settled by the bailor. The Court observed that, although her nervous shock claim had failed, she had nevertheless been entitled to proceed with it, it being a different cause of action.

The principle stated in *O'Sullivan v Williams* is, it is suggested, unexceptionable. As Fox LJ pointed out, any other rule would expose the defendant to several actions founded on the same cause of action by people who had limited interests in the same goods.<sup>340</sup> Whether the bailor or the bailee had the actual use of it, there could be only one loss of use claim.

Therefore, in a bailment at will, such as a simple loan, both bailor and bailee have possessory rights in the goods and concurrent rights to sue a wrongdoer, even though they cannot both undertake the same cause of action. Similarly, once the right to repossess goods sold on hire purchase arises in consequence of the buyer's default, the seller is entitled to sue a third party in conversion. So in *North Central Wagon and Finance Co Ltd v Graham*<sup>341</sup> the plaintiff sellers became entitled to repossess a car under a hire purchase agreement, the buyer being in arrears with payments. The buyer, without the knowledge of the plaintiffs and in breach of his obligations, instructed an auctioneer to sell the car. The plaintiffs were held to be entitled to seek damages from the auctioneer in conversion, having acquired a right to

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<sup>338</sup> (1853) 2 CM & R 659; 150 ER 279

<sup>339</sup> p 405

<sup>340</sup> p 406

<sup>341</sup> [1950] 1 All ER 580 (CA)



immediate possession once the default in payments had occurred. Apart from agreements of this kind, a bailment may be determined by operation of law, as when a hirer or carrier of goods breaches the bailment by wrongfully delivering them to a third person. In such cases, the immediate right of possession at once reverts in the bailor owner, who may sue in conversion either the bailee or the person to whom the bailee has delivered the goods.<sup>342</sup> However, unless or until the owner has recovered the right to possession of the goods, he or she will be unable to sue the wrongdoer. Of course as soon as the owner lawfully regains actual possession of goods from a bailee, the exclusive entitlement to sue in conversion, trespass or negligence will also revert to the owner.

The question then arises: if an owner of goods grants exclusive possession of them to another, and a third party then interferes with the goods to the owner's detriment by, for example, damaging, destroying or stealing them, what civil remedies are available to the owner against the third party? In such cases the owner cannot base a claim upon any possessory right, for it is not the owner, but the bailee, who is entitled to possession. What is the nature of the owner's rights in such circumstances?

Although an owner excluded from possession is precluded from suing in the particular torts described above, he or she may sue for damage to the reversionary interest which he or she retains in the goods. A straightforward New Zealand example is *Checker Taxicab Co Ltd v Stone*.<sup>343</sup> In that case, a taxi which the driver had hired from its owner was damaged in a collision with a third party. It was held that the owner could sue the third party for the damage done to his taxi. Herdman J observed that it was clear that an action in conversion would not lie for damage to a chattel which was out on loan, but an action for permanent injury done to it while the owner's right to possession of it was suspended could be maintained by the owner.

The distinction between a possessory and a reversionary interest is important when the recovery of damages is under consideration. We have seen that, because a bailee is regarded as having complete title vis-à-vis a stranger, the bailee may sue to recover the whole value of the goods. By contrast, the holder of only a reversionary interest may recover no more than his or her actual loss. This may cause practical difficulties, as illustrated by the recent New Zealand case of *Cameron v Phelps*.<sup>344</sup> In that case, the owner of a gold screening machine had agreed to sell it for ten ounces of gold (worth at the time about \$6,000) under a

<sup>342</sup> *Cooper v Willomatt* (1845) 1 CB 672; 135 ER 706, *Wyld v Pickford* (1841) 8 M & W 443; 151 ER 1113

<sup>343</sup> [1930] NZLR 169

<sup>344</sup> HC, Christchurch, CIV 2008-409-002648, Fogarty J, 25 March 2009

contract containing a reservation of property clause. The purchasers permitted the defendants, who were involved in a gold mining enterprise with the purchasers, to take possession of the machine, and the defendants spent considerable time and money in modifying it for use in the enterprise. The enterprise came to an end and the defendants, who had retained possession of the machine, sold it for \$30,000. The owner, who had received no payment from the purchasers, claimed in the District Court that the defendants had converted the machine, and sought damages from them. The District Court held that the plaintiff had not been entitled to possession of the machine at the time it was sold by the defendants, and so could not maintain an action in conversion. The value of the plaintiff's reversionary interest was held to be ten ounces of gold, because this was the consideration to be provided under the agreement to sell, and so the only loss suffered by the plaintiff. On appeal, Fogarty J held that the District Court had erred in finding that the plaintiff had no possessory interest in the machine; rather, because the purchasers had defaulted in payment, the plaintiff had been entitled under the reservation of property clause to recover possession of it at the time the defendants converted the machine. The plaintiff thus had the requisite possessory interest to sue in conversion and was entitled, under the normal rule, to the market value of the goods at the date of the conversion, which was held to be \$30,000.

Clearly, the question of whether the plaintiff in *Cameron v Phelps* had a possessory or a reversionary interest in the machine was very relevant to the amount of damages he could recover. He could recover the entire value of the machine because entitlement to possession of it had reverted to him at the time it was converted by the defendants. If, however, there had been a specified period of time agreed in the reservation of property clause, and that time had not expired at the date the goods were wrongfully sold by the defendants, the plaintiff would not have had a right to retake possession at the date of that sale. The right to possession would still have been solely with the purchasers, who alone would have been able to sue the defendants in conversion.

In England, the general rule that a possessory interest is required by a plaintiff in an action in conversion, trespass or negligence has also recently been affirmed by the Court of Appeal in *HSBC Rail (UK) Ltd v Network Rail Infrastructure Ltd*.<sup>345</sup> The plaintiff HSBC was the owner of railway carriages which it leased to the Great North Eastern Railway (GNER). GNER ran the carriages on tracks owned and operated by the defendant, Network Rail (Network). One of the rails shattered, causing a derailment. Two carriages were total

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<sup>345</sup> [2006] 1 All ER 343

losses; the damage to others was repaired. The costs involved were paid by the insurer of GNER and HSBC; the insurer paid GNER for the repair costs incurred by GNER and, at the request of GNER, paid HSBC the value of the destroyed carriages. The insurer brought subrogated proceedings in negligence in the name of HSBC against Network. Network's defence that HSBC was a reversioner and had suffered no damage to its reversionary interest was accepted by the trial judge. The Court of Appeal upheld this, holding that the real loss had been suffered by GNER, which had had possession of the carriages, but which had been indemnified by the insurer for the repair costs. HSBC, having been compensated for the two lost carriages, had suffered no damage to its reversionary interest. Generally speaking, a claimant could seek compensation for its own loss, not for loss suffered by another; and HSBC, having no more than a bare proprietary interest, had suffered no loss.

In *HSBC*, the Court of Appeal made it clear that if the negligence of Network had had the effect of depriving HSBC either temporarily or permanently of the benefit of its reversionary interest by destroying, seriously damaging or wrongfully disposing of title to the carriages to another, HSBC would have had a good cause of action. Here, such actual damage had not been shown and there was accordingly no permanent damage to the reversionary interest of HSBC. Therefore, on the facts, HSBC could not have succeeded. Longmore LJ, delivering the judgment of the Court, pointed this out:<sup>346</sup>

I would therefore reject HSBC's contention that it is entitled to recover the value of the unrepairable carriages and the cost of repairing the carriages which have been repaired; that is because HSBC's reversionary interest has, as a matter of fact, not been damaged. To that extent I would uphold the decision of the judge not because no cause of action ever accrued but because, apart from insurance considerations, HSBC has, in fact, suffered no loss.

Despite this dictum, the Court of Appeal affirmed the rule that an owner with no possessory right to goods has no title to sue in trespass, negligence or conversion. Citing the authorities in which the rule developed as well as academic commentators,<sup>347</sup> Longmore LJ stated the principle to be that an action for reversionary injury would lie in respect of any act which would, but for the problem of the claimant's lack of title to sue, amount to trespass,

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<sup>346</sup> *ibid*, 352.

<sup>347</sup> In reviewing the authorities, the Court referred extensively to Tettenborn [1994] CLJ 326, and to *Clerk & Lindell on Torts* 18<sup>th</sup> edn, 2000, para 14-143, also written by Professor Tettenborn.

negligence or conversion if the claimant were temporarily or permanently deprived of his interest.<sup>348</sup>

Thus, the position appears to be that an owner out of possession may sue if he or she can establish actual damage but the cause of action cannot be conversion, trespass or negligence because the necessary possessory title is lacking. Nevertheless, the dictum of Longmore LJ above indicates that the action (which was framed in negligence) would have succeeded if HSBC had in fact proved damage to its reversionary interest and was thereby out of pocket.

In other words, the owner may sue *as if* he were founding an action on one of the relevant nominate torts, but may not directly base a claim on these torts. If this is correct, the owner's action is essentially derivative, or parasitic, for it depends upon establishing that some other, nominate, tort has been committed against another person, presumably the bailee.<sup>349</sup> This reasoning implies that the elements of the action for reversionary damage are the same as those of the individual torts of conversion, trespass or negligence.

The same general approach was adopted by Tettenborn,<sup>350</sup> whose article describing the difficulties inherent in this area of law was cited by the Court of Appeal in *HSBC*. Tettenborn raises for discussion the possibility that, to avoid the problems stated above, the law might simplify the matter and simply say that reversionary damage should be one tort encompassing the three nominate torts of conversion, trespass and negligence. Nevertheless, Tettenborn goes on to conclude that the "single tort" theory should be rejected because of the distinctions inherent in the torts themselves: trespass and conversion do not require fault on the part of the defendant, but negligence does; and the nominate torts, as individually defined, deal with different kinds of acts and interferences and so vary in the elements which must be proved. Therefore, Tettenborn considers that the distinctions among the torts remains "highly relevant" and that liability for damage to a reversionary interest will arise only if the defendant's act would have amounted to conversion, negligence or trespass proper.<sup>351</sup>

The view shared by Tettenborn and the Court in *HSBC* which holds that a claim for reversionary damage depends upon proving the commission of one of the underlying torts of

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<sup>348</sup> p 350

<sup>349</sup> Compare the view expressed in *Street on Torts*, 12<sup>th</sup> edn, 2007, p 281: "Presumably, the act complained of must be wrongful in the sense that it is one which, had the claimant had possession of the chattel (or the immediate right to it), it would have grounded a suit in trespass, or conversion."

<sup>350</sup> [1994] CLJ 326

<sup>351</sup> *ibid*, 331

conversion, trespass or negligence is open to criticism. In particular, it fails to give due weight to the relevant historical background, which reveals that an action for reversionary damage is not an indirect or derivative way of suing in conversion, trespass or negligence. Some repetition relating to the development of these torts is necessary here.

It is essential to bear in mind that an action for reversionary damage developed as an action on the case. As described above, the action on the case arose as an action for wrongs which fell outside the specific, nominate, existing forms of action. These old forms had over centuries become very rigid; the appropriate writs were formulaic and a claim could succeed only if the particular conduct complained of fell precisely within the compass of the appropriate writ. The form of the writs dictated substance, so if an alleged wrong could not be brought within the wording of a particular writ, an action was precluded.

The earliest of these actions relating to interference with goods was trespass, which was available where the defendant had caused damage in a forcible and direct or immediate manner. Trespass therefore was of narrow scope and did not cover indirect or consequential damage. A frequently cited dictum of Fortescue J in *Reynolds v Clarke*<sup>352</sup> describes this limitation in the analogous context of trespass to the person:

If a man throws a log into the highway, and in that act it hits me, I may maintain trespass, because it is an immediate wrong; but if as it lies there, I tumble over it, and receive an injury I must bring an action upon the case; because it is only prejudicial in consequence.

Further, the Courts have tended to require that conduct amounting to trespass be wilful or negligent, and to exclude unwitting or accidental acts from its ambit. The history of trespass was reviewed in *National Coal Board v J E Evans & Co*,<sup>353</sup> in which the Court of Appeal considered that the authorities were clear that an act which was neither deliberate nor negligent could not constitute trespass. As suggested above, this judicial reluctance to find liability in the absence of fault no doubt explains the fact that there are today few significant cases involving trespass. The law of negligence has now expanded to cover much, if not all, of the same field; and trespass has accordingly declined in significance.

Conversion developed as a result of the narrowness of trespass, so as to cover claims for damage resulting from conduct which was not necessarily direct, immediate or forcible.

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<sup>352</sup> (1725) 1 Strange 634, 636; 93 ER 747, 748

<sup>353</sup> [1951] 2 KB 861 (CA)

However, as both trespass and conversion required that the plaintiff have a possessory interest in the damaged goods, dispossessed owners were excluded from both these actions.

These lacunae in the law were filled by the development of actions on the case, which enabled claims to be brought outside the rigid categories of trespass and conversion. In an action on the case, damages could be claimed for indirect or consequential damage, thus bypassing the restrictive requirements of trespass; and an owner out of possession could claim for damage to a reversionary interest, and so avoid the need for the possessory right which conversion and trespass required. Further, the action on the case differed from conversion in that conversion, being a tort of strict liability, required no proof of fault. Case also differed from trespass, which was wrongful in itself because of its directness and associated use of force, and so was actionable *per se* without proof of damage. By contrast, actual damage had to be proved in an action on the case. Thus began the evolution of the modern law of negligence, of which the action on the case was the progenitor.

Therefore, the action on the case, by its very nature, did not require proof that some other, underlying, nominate, tort had been committed; rather, it arose because the existing categories of action were closed and rigidly defined, so that redress for other wrongs had to be sought outside them. If this is borne in mind, there seems no reason to accept the views of Tettenborn and the Court in *HSBC* that success in an action for reversionary damage by a bailor requires that conversion, trespass or negligence be established as having been committed by a third party as against a bailee. Rather, the actions differ in their nature, which is why they developed separately in the first place.

The old and rigid forms of action have of course long been abolished, and today civil procedure is much simpler and more flexible than it was. Despite this, some unnecessary rigidity persists, including the historical emphasis on possession and relative disregard of ownership. This narrow focus, despite the modern development of electronic registers of security interests consequent on the widespread provision of credit, remains current today and continues to justify the rule that possession alone is title as against a wrongdoer.

The good reasons which underlie the protection of possession clearly retain their cogency. However there seems no reason to hold that, merely because the bailee was given for the sake of convenience the right to sue, that the bailee's right should be exclusive. Rather, the reasons which may be used to support a bailee's title to sue apply equally to a

bailor. Despite this, in rejecting the argument that bailor and bailee should equally be entitled to sue, Longmore LJ said in *HSBC*:<sup>354</sup>

The reason why the bailee can recover the full value of goods from a tortfeasor who damages or destroys them is .... [a]s between bailee and stranger possession gives title – that is not a limited interest but absolute and complete ownership ...[b]y contrast the bailor who does not have possession (or the immediate right to possession) does only have a limited interest and he has no other quality which can give him absolute and complete ownership. It would thus be anomalous to give a bailor with a limited interest the right to recover the full value of the goods. In cases where the bailor has not been compensated (eg because his bailor is unwilling or unable to repair or replace the goods) the bailor will have suffered a real loss and will be compensated accordingly.

By way of comment, it may be said that the words “as between bailee and stranger” deserve greater emphasis here. It is certainly true that a bailee is regarded as having “absolute and complete ownership” as between him and a stranger. However, it is not necessary for the law to go so far as to say that the bailee has absolute and complete ownership for any other purpose. The bailee does not in reality become the owner of the goods, but has a limited, possessory, interest in them, an interest which confers standing to sue in conversion, trespass or negligence as if the possessor had complete ownership. This deemed legal status does not alter the fact that the bailee does not have ownership as against the bailor, whose proprietary interest in the goods continues throughout the bailment. The bailor’s interest during that time is also a limited one, being shorn of the right to possession. However, the law at present accords to the holder of only one of these limited interests the right to protect his title in an action of conversion, trespass or negligence, but denies it to the holder of the other, complementary, interest in the same goods. There seems no reason to maintain this rule which, it is suggested, continues to exist for no defensible reason.

The idea that actions for reversionary damage to goods are unnecessary is not new. More than a century ago, Salmond wrote:<sup>355</sup>

The difference between a present and a reversionary interest may be very material with reference to the measure of damages, but it is irrelevant with respect to the nature of the injury committed. If a reversionary owner can show that he has been deprived

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<sup>354</sup> p 364

<sup>355</sup> “Observations on Trover and Conversion” (1905) 21 LQR 43, 53.

of his property by the unlawful interference of the defendant, he has a good cause of action against him, and there is no subsisting reason why we should call the wrong so suffered by him by any other name than that of conversion.

The same argument applies, it is suggested, to trespass and negligence. Salmond's view was endorsed and extended when reform of the law relating to interference with goods was considered in England in 1971. The Law Reform Committee said:<sup>356</sup>

With this view we agree and we consider that the remedy for wrongful interference should be open not only to a plaintiff who had, at the material time, actual possession or an immediate right to possession of the chattel, but also to a plaintiff who claims any other interest, whether present or future, possessory or proprietary (but not being an equitable interest), in a chattel, provided that he can show that he has suffered damage in respect of his interest by reason of the wrongful act complained of, and on the basis that he shall in no case recover damages in excess of the loss suffered by reason of such act.

The Law Reform Commission of British Columbia adopted the same stance in 1992. Advocating a single statutory tort devised to deal with wrongful interference with goods, the Commission stated:<sup>357</sup>

From this position, it follows that anyone with an interest in the property, who has suffered loss as a result of another's actions, should be entitled to a remedy under the new statutory tort. ... The need to distinguish between the kinds of interests a plaintiff may have (actual possession, a right to possession, future or residual rights, interrupted possession, or proprietary rights) arises only when the court must choose an appropriate remedy.... Nothing is accomplished by distinguishing between classes of interest to determine who can bring the action. The nature of the interest will determine the remedy, not the route by which the claim is brought before the court.

A similar approach was proposed by counsel in *HSBC*, but rejected by the Court. Longmore LJ said:<sup>358</sup>

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<sup>356</sup> Law Reform Committee, Eighteenth Report (Conversion and Detinue), Cmnd 4774. Although the Torts (Interference with Goods) Act 1977 was enacted in consequence of this report, it did not include the proposed reform relating to reversionary interests.

<sup>357</sup> Report on Wrongful Interference with Goods LRC 127

<sup>358</sup> p 352



[C]ounsel further submitted that if the bailee in possession can sue for the full value of the goods and can be accountable to the owner to the extent that he (the bailee) has suffered no loss, it would be a modest and sensible extension to the law to grant the bailor/owner of the goods a similar right to sue for the value of the goods, likewise being accountable to his bailee to the extent that the loss is that of the bailee. The law would then have a pleasing symmetry. ....Attractively as the argument is deployed, I cannot accept it.

A possible response to this statement is that it really begs the question, in that it denies the adequacy of the bailor's title because the common law, for reasons of convenience, has allocated a right to sue to the bailee. It is suggested that it might be more accurate to say that as between bailee and stranger, the bailee is *deemed* to have absolute and complete ownership of goods for the purposes of certain legal proceedings relating to interference with them, and the bailor for these purposes is regarded as having no interest in the goods at all. This is of course a fiction; the reality is that bailor and bailee each has a limited and different interest in the same goods. It is arguable that the law should recognise this reality and permit the bailor to sue directly in conversion, trespass or negligence. The law now overlooks the fact that the bailee was deemed to have a complete title for only a limited purpose, and fallaciously reasons that, because the bailee is deemed to have complete title vis-a vis a stranger, the title must equally be regarded as real, total and exclusive with respect to the bailor. It is suggested that such use of the bailee's fictional title to bar the bailor from a claim against a stranger is to turn the law on its head.

It is of course the case, as stated by Tettenborn and by the Court in *HSBC* that the torts of conversion, trespass and negligence have different elements and purposes, as described above. However, the difficulty which arises in cases of reversionary damage is not the varying nature of the torts themselves, but the standing of the reversioner to sue. This problem, it is submitted, would be better solved by relaxing the threshold requirement that the only interest protected by the three nominate torts be a possessory one. Rather than confining the interest in this way, it is suggested that the right to sue in conversion, trespass and negligence should be extended to holders of interests in goods which are not merely possessory, but also proprietary. Such a step would retain and recognise the essential features of the torts, but allow an owner to sue directly in each of them. Rather than requiring an owner to prove the commission of a nominate tort *as if* the tort were the cause of action, it is

a more realistic and direct approach to allow the owner to found his or her action on the particular tort itself.

If the law were changed as suggested above, it is not apparent that any party involved would be prejudiced. Rather, maintenance of the current position may operate to the prejudice of both bailor and bailee of goods. This is because the owner, as the law now stands, may recover only the loss which he has actually incurred and must prove fault on the part of the defendant. By contrast, the bailee may recover the full value of the goods in a claim in conversion, a tort involving strict liability. If the value of the goods exceeds the value of the bailee's interest in them, which will often be the case, the bailee must account to the bailor for the difference.<sup>359</sup> If standing to do so were accorded to the bailor, the bailor could equally recover the full amount in the appropriate action, and be required to account to the bailee for any damage done to the bailee's interest. Such a course (involving the "pleasing symmetry" which was rejected by the Court in *HSBC*) could benefit both bailor and bailee by avoiding duplication of actions. It would not appear to disadvantage the defendant wrongdoer in any way, for the wrongdoer would not be worse off if the plaintiff were the bailor rather than the bailee of the converted or damaged goods.

Further, as noted above, the bailor can sue in any event if the bailment is at will, and this appears to present no difficulty to the law. Both bailor and bailee have concurrent possessory interests in the goods in such a case, the former being based upon immediate entitlement to possession, the latter upon actual possession. Therefore either may claim damages from a wrongdoer for loss or destruction of the goods. The recovery of damages by one of them operates as full satisfaction as against the wrongdoer,<sup>360</sup> and the successful claimant must then account to his bailor or bailee, as the case may be, for any damage done to his or her interest in the goods.

At present, the bailee with an exclusive right to possession and so the sole right to sue ultimately retains in any event no more than the value of his own interest in the goods. Although the bailee may obtain from the wrongdoer the entire value of the lost or damaged goods, the bailee may retain as against the bailor only damages resulting from the wrongful interference with his possessory interest in them. The value of this will of course vary according to the terms of the bailment, but the value of the respective possessory interests of bailor and bailee must be assessed. If both are able to sue because the bailment is at will, no

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<sup>359</sup> *Hepburn v A Tomlinson (Hauliers) Ltd* [1966] AC 451 (HL)

<sup>360</sup> *O'Sullivan v Williams* [1992] RTR 402, 405 (CA). per Fox LJ, citing *Nicholls v Bastard* (1835) 2 CrM & R 659; 150 ER 279

double recovery for damage to their respective possessory interests results, for the bailor's right to possession includes the right to make what use of his property he wishes, including allowing possession to the bailee.<sup>361</sup> Damage caused to a proprietary interest, regardless of whether it is recovered by bailee or bailor, is suffered only by the bailor and so will be recoverable by him either from the wrongdoer directly, or from the bailee who has recovered the entire value of the goods from the wrongdoer. Ultimately, in a bailment at will, whether bailor or bailee is the plaintiff, the entire value of the loss or damage is recoverable by either, and they have reciprocal obligations to account.

Thus, it seems that there is no difficulty of a practical kind in allowing bailor and bailee to sue a third party in conversion, trespass or negligence in a bailment at will. Rather, the impediment to allowing both to sue when the bailor is excluded from possession appears to be merely theoretical, and no disadvantage would occur if the rule were abandoned.

As the law now stands, if a wrongdoer's act of conversion occurs, say, the day before the expiry of a fixed term bailment, the bailee may sue the wrongdoer, but the bailor may not. If the conversion occurs the day after the bailment term ends, and the bailee has continued in possession, either bailor or bailee may bring a conversion action. Either party to a simple bailment at will may sue. In consequence, the parting with possession of goods immediately alters the legal protection afforded by the law to take action against those who interfere with them, but only if consideration is provided.

As has been pointed out in another context, fine distinctions do no good to the law.<sup>362</sup> It may be commented that this is particularly so if the distinctions in question serve no useful purpose but are merely historical relics. An owner's rights should not depend upon whether damage occurs the day before or the day after a fixed term bailment expires and becomes a bailment at will; or whether consideration had been provided by the bailee to the bailor in exchange for possession of the goods. These matters, although of relevance to the bailor and bailee, are of no moment to the defendant who has wrongfully interfered with the goods. Simplification of the law would obviate the necessity to establish, before allowing the owner of goods to claim in conversion, whether he or she also had an entitlement to possession of them at the relevant time.

It is therefore suggested that that the law should be reformed as follows. First, a bare proprietary interest should suffice for standing for a conversion action. The tort of conversion

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<sup>361</sup> *ibid*, 406

<sup>362</sup> *Lewis v Averay* [1972] 1 QB 198, 206 (CA), per Denning LJ

is concerned with the protection of property interests, not with physical damage to goods, and for that reason is a tort of strict liability. Usurpation of a possessory interest, being an interference with a right of property, is conversion; equally, interference with a proprietary right should come into the same category and be similarly protected. This would put holders of limited interests in goods on the same footing, with the same rights to sue wrongdoers, and with reciprocal obligations to account to each other for damages recovered beyond the value of the individual interest involved. If this were done, there would be no need for an owner to sue for damage to his or her reversionary interest which, in any event, is an action which requires proof of fault and therefore differs from an action in conversion.

Second, it should be recognised that the action on the case is as superfluous and anachronistic in cases involving physical damage to goods as it is in conversion. The law of negligence, having grown out of the action on the case, has now enveloped and devoured the roots which originally nurtured it. Where damage to goods is done, negligence, like the action on the case, requires that fault be established on the part of the defendant, as well as proof of damage. Provided the holders of possessory interests and proprietary interests are equally accorded standing to sue in negligence, there is no reason to maintain the separate actions of case and negligence.

In conclusion, if we return to the hypothetical facts stated at the beginning of this part, or consider again the facts of *Cameron v Phelps* and the finely balanced position of the plaintiff owner of the gold screening machine in that case, it seems clear that the current law requires reform. If, as is contended here, there is no practical or legal impediment to allowing an owner out of possession to sue in conversion, trespass or negligence, the law should permit him or her to do so. The present restrictive rules can be explained by an examination of their historical development, but their continued existence today cannot be justified. A more realistic, simple and direct approach can only benefit the law.

### **5.3 Co-ownership**

It is not necessary that a person be the sole owner or possessor of goods in order to maintain an action against a wrongdoer for interference with them. Co-ownership or co-possession is sufficient for the purpose. In a case where a person has a joint or common interest in goods of the kind necessary to support the particular action, that person is entitled to bring an action for the whole value of the goods. So in *Cuff v Broadlands Finance Ltd*,<sup>363</sup>

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<sup>363</sup> [1987] 2 NZLR 343 (CA)

it was held that one of two people, both of whom had co-ownership and co-possession of a boat, was entitled to maintain an action for conversion of it. Similarly, in *Kitano v Commonwealth of Australia*<sup>364</sup> the plaintiff, one co-owner of a yacht, was entitled to maintain an action against Customs officials who issued an invalid certificate which enabled the other co-owners to sail the yacht away against the plaintiff's wishes.<sup>365</sup>

A possessory right, whether based on a joint tenancy or a tenancy in common, is single and exclusive, and there is not a plurality of rights in either case. "Physical possession is exclusive, or it is nothing."<sup>366</sup> Thus, if co-owners grant *de facto* possession of the goods to one of their number, that person holds the goods both on behalf of the others and for himself. The possessory right in the co-owned goods is a single one, whether it is exercised in fact by all the co-owners, or by one or more as agents for the others. This reflects the principle that there cannot exist two equal adverse rights at the same time in the same goods. Joint tenants have both single possession and a single joint right to possess, but tenants in common have a single possession with several rights to possess.<sup>367</sup> Each tenant in common is therefore entitled to the use and enjoyment of the property in the ordinary way.

### 5.3.1 Conversion by a co-owner

A co-owner may convert the jointly owned property. Actions which fall short of the removal or destruction of a co-owner's rights in the goods are not necessarily tortious, for co-owners are each entitled to make reasonable use of the goods. This accords with the rule that co-ownership carries with it the right to possession of the goods. So in *Fennings v Lord Grenville*<sup>368</sup> one tenant in common of a whale had its fat and blubber turned into oil. Conversion did not lie, because the very purpose of capturing a whale was to turn it into oil. Similarly, the act of making hay out of a crop of grass by a co-owner was not conversion in *Jacobs v Seward*, where Lord Hatherley said:<sup>369</sup>

As long as the tenant in common is confining his use of that property to its legitimate purpose trover will not lie against him. But the moment he steps from the legitimate

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<sup>364</sup> (1974) 129 CLR 151 (HCA)

<sup>365</sup> The action was unsuccessful on the facts, but the right of the plaintiff to maintain it was accepted by the Court.

<sup>366</sup> Pollock, *Possession in the Common Law*, 1888, p 21. Pollock cites the Roman maxim: *Plures eandem rem in solidum possidere non possunt*.

<sup>367</sup> *ibid*, p 27

<sup>368</sup> (1808) 1 Taunt 241; 127 ER 825

<sup>369</sup> (1871-72) LR 5 HL 464, 475

use to that which is illegitimate .... as by disposing absolutely of the common property as if the one partner had been the sole owner, trover will lie.

Where the nature of goods is altered by the act of a co-owner which is consistent with the ordinary and reasonable use of the goods, co-ownership will continue in the resulting goods. So in *Fennings v Lord Grenville* the oil produced by the whale was co-owned by the parties just as, said Mansfield CJ,<sup>370</sup> the co-owners of wheat which had been ground by one of them would together own the resulting flour. An act within the ordinary use of the property, but which yields one co-owner a disproportionate profit is not conversion, but is dealt with by an action in account.<sup>371</sup>

As no co-owner is entitled to exclude the others, an act which can be justified only on the ground of exclusive possession is conversion, for it effectively ousts a co-owner from his or her ability to use or enjoy the goods. So in *Baker v Barclays Bank Ltd*<sup>372</sup> a partner who delivered partnership cheques to be paid into an account which was not a partnership account was held to have converted the cheques. Although he was entitled to possession of them, his paying them into another account was an assumption of a right of exclusive possession, which he did not have.

At common law, there once existed a limitation on the right of one co-owner to sue another in the case where an unauthorised co-owner purported to sell and deliver the goods but the circumstances were such that property in the goods did not pass to the buyer. The reason was that the plaintiff's property was regarded as not having been destroyed in such a case; because the innocent co-owner was entitled to recover the property, his or her interest was unaffected by the purported sale. A co-owner could sue only for the destruction of the common property or its disposal rendering it impossible for him or her to take or use the property or its proceeds. This rule was anomalous for, as between strangers, an owner could sue in conversion a person who wrongfully purported to sell and delivered goods, even if title in them did not pass to the purchaser. The owner was not obliged to follow the goods into the hands of the purchaser, but could elect to seek damages in conversion from the person who wrongfully transferred them. The distinction was removed by the Court of Appeal in *Coleman v Harvey*<sup>373</sup> on the ground that it rested on a historical basis which was no longer sustainable; and that "[p]opulation growth, increased industrialisation, the ease of transport,

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<sup>370</sup> p 247; 828

<sup>371</sup> *Jacobs v Seward* (1871-72) LR 5 HL 464

<sup>372</sup> [1955] 1 WLR 822, 827, per Devlin J

<sup>373</sup> [1989] 1 NZLR 723

and the very increase in the variety of tangible goods all indicate that if the circumstances in which one co-owner may sue another in conversion are limited in the way suggested in many of the earlier cases he will, as often as not, have no remedy at all".<sup>374</sup> In *Coleman v Harvey* the respondent was a co-owner of silver ingots which were unlawfully sold by his co-owner to unknown buyers. Whether the silver continued to exist in its original form after the sale was unknown. It was held that the selling of the silver constituted conversion because the respondent's right to possession with his co-owner had been effectively removed from him; from his point of view, the silver might as well have been destroyed and his title to it had effectively disappeared. Such circumstances were held to justify the respondent's claim in conversion.

An agreement made by co-owners may also displace the usual rule that they are all entitled to the use and possession of the goods. So in *Nyberg v Handelaar*<sup>375</sup> two co-owners agreed that one of them was to have exclusive possession of a box. Subsequently, the other was given possession of the box for a particular purpose, whereupon he took the box and pledged it with a third party. It was held that this improper pledge immediately restored the first co-owner's right to immediate possession, with the result that the pledgee was guilty of conversion.

It is a general rule at common law that co-owned property can be divided only by the consent of the owners or by a legal proceeding, at least as far as the common property embraces several things of different qualities or values, or consists of a single object which cannot be divided without destroying its character or identity.<sup>376</sup> It seems, however, that where property is in its nature severable, in common bulk, and of the same quality, each co-owner is entitled to sever and appropriate his or her share if it can be determined by measurement or weight without the consent of any other co-owner; and in such a case the act of severance will not amount to conversion. This was stated in *Re Gillie*<sup>377</sup> to be the

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<sup>374</sup> Per Somers J, 731. The matter has been settled in England by the passage of the Torts (Interference with Goods) Act 1977, s10, which provides that co-ownership is no defence to an action in conversion or trespass to goods where the defendant (a) destroys the goods, or disposes of the goods in a way giving a good title to the entire property in the goods or otherwise does anything equivalent to the destruction of the other's interest in the goods, or (b) purports to dispose of the goods in a way which would give a good title to the entire property in the goods if he was acting with the authority of all co-owners. Subsection 10(1)(a) is expressed to be a restatement of existing law. It is the second limb of this provision (subs 10(1)(b)) which effected the alteration in the law which has now been achieved in New Zealand by *Coleman v Harvey*. For a discussion of the previous common law of conversion as between co-owners, see Derham, (1952) 68 LQR 507.

<sup>375</sup> [1892] 2 QB 202

<sup>376</sup> See *Hostick v New Zealand Railway and Locomotive Society Waikato Branch Inc* [2006] NZAR 609 for the application of the statutory power to divide chattels (in this case a railway locomotive) under the Property Law Act 1952, s 143 (repealed). The Property Law Act 2007, s 339 has replaced that provision.

<sup>377</sup> *Re Gillie* (1998) 150 ALR 110 (FCA)

appropriate rule. In that case, it was held that a herd of cattle could not lawfully be unilaterally severed by a co-owner, because the cattle taken were of varying quality. For the same reason, the unilateral action of one co-owner in severing a flock of spring lambs has been held to be conversion.<sup>378</sup>

### 5.3.2 Mixtures

Where the goods of two parties are combined, but the constituent parts belonging to each party continue to be identifiable and do not change their nature, the owners do not, unless otherwise agreed, lose their title to their separate contributions. So if articles of furniture belonging to different owners are thrown together, each simply continues to own his or her constituent part.<sup>379</sup> By contrast, both legal and practical difficulties arise when goods are mixed into a whole and the constituent parts cannot in practice be identified. This may occur in cases where the parts do not alter their character, but nevertheless cannot in practice be identified or separated as, for example, where wheat belonging to different owners is combined into a bulk, or sheep into a herd; or where fluids of an identical kind, such as oil or wine, are mixed so as to create a larger inseparable quantity. Goods may also be mixed so as to lose their character by becoming the ingredients of a new and different substance, such as when different metals are melted and combined. A further complication arises if the mixing is not consensual, but results from the wrongful unwanted act of one of the contributors. In such a case an essentially penal decision may be made that the innocent party is entitled to the entirety of the mixed goods as against the wrongdoer. The purpose of this is to guard against fraud.<sup>380</sup> A finding that the parties are tenants in common is likely in the case of impliedly consensual or accidental mixing.<sup>381</sup>

The common law has been much influenced by Roman law in this area, and Roman principles are repeatedly cited in mixing cases.<sup>382</sup> These principles are not straightforward as the facts of cases shift and questions of degree as well as the intentions of the respective

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<sup>378</sup> *Kelly v Lang* (1954) 62 NW 2d 770

<sup>379</sup> *Colwill v Reeves* (1811) 2 Camp 576; 170 ER 1257

<sup>380</sup> This issue, and the law of mixtures generally, is extensively discussed by Staughton J in *Indian Oil Corp v Greenstone Shipping Co SA, The Pyptianna* [1988] QB 345.

<sup>381</sup> *Re Stapylton Fletcher Ltd* [1995] 1 All ER 192

<sup>382</sup> The concepts of *accessio* (goods losing their identity by becoming part of a larger item); *commixtio* (goods retaining their individuality although mixed with others, so that ownership is unaltered in the constituent parts); and *confusio* (goods fusing together inseparably) are frequently referred to. In practice, these distinctions may be difficult to make and to apply; for example granular and similar fungible mixtures were treated as *commixtio*, rather than *confusio* because the goods theoretically continued unaltered in character, despite the impossibility of segregation of the owner's contributions. The Personal Property Securities Act 1999 provides for priority of security interests in accessions (ss 78-81) and processed and commingled goods (ss 82-86).



parties are taken into account. It has been suggested that the common law is now evolving to the pragmatic position that the general solution to inextricable mixing should be that the respective contributors become tenants in common of the whole.<sup>383</sup> This was the view of Lord Moulton in *Sandeman & Sons v Tyzack and Branfoot Steamship Co Ltd*<sup>384</sup> who observed that the decisions of the Courts in cases concerning accidental mixing and ownership had been “little more than instances of cutting the Gordian knot – reasonable adjustments of the rights of parties in cases where complete justice was impracticable of attainment”. In *Indian Oil Corp Ltd v Greenstone Shipping SA, The Ypatianna*,<sup>385</sup> a case involving the wrongful mixing of oil, Staughton J observed that in the absence of binding authority he should apply the rule which justice required:

This is that where B wrongfully mixes the goods of A with goods of his own, which are substantially of the same nature and quality, and they cannot in practice be separated, the mixture is held in common and A is entitled to receive out of it a quantity equal to that of his goods which went into the mixture, any doubt as to that quantity being resolved in favour of A.

Cooke P cited this dictum approvingly in *Coleman v Harvey*,<sup>386</sup> and went on to say that the same rule should apply to a consensual refining such as occurred in that case, at least where the evidence did not indicate an intention to part with ownership from the start.

The simple *prima facie* position that the owners of goods which become inextricably mixed ought to become tenants in common of the whole has much to recommend it. This view is fortified by the apparent willingness of the law in England and the United States, as well as in other jurisdictions, to recognise the possibility of the transfer of interests in unascertained goods which are part of an identified bulk.<sup>387</sup> Such legislation has yet to be enacted in New Zealand.<sup>388</sup>

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<sup>383</sup> The law and its Roman origins are reviewed by P Birks, “Mixtures” in *Interests in Goods* Palmer and McKendrick (eds), 2<sup>nd</sup> edn, LLP, London, 1998, 227, in which the author suggests that English law is moving towards a general rule of co-ownership of mixed goods, whether they are fluid or granular, and regardless of whether the mixing is voluntary or not.

<sup>384</sup> [1913] AC 680, 695

<sup>385</sup> [1987] 3 All ER 893

<sup>386</sup> [1989] 1 NZLR 723, 726-7

<sup>387</sup> English law now allows ownership to pass in goods which are part of a bulk, provided that the bulk itself is specific and the buyer has made payment. The holders of such interests are tenants in common of the bulk, the extent of their undivided shares being such share as the quantity of goods which has been paid for and due to the buyer bears to to the quantity of goods in the bulk: Sale of Goods Act 1979 (UK), s 20A. The consent of co-owners to dealings by the others in such goods is deemed: s 20B. Article 2-105 of the Uniform Commercial

It has been pointed out that the common law approach which holds that damages are generally an adequate remedy for the conversion or detention of goods, and denies an absolute and unqualified right of their return to the dispossessed owner, has the result that problems associated with alterations and mixtures rarely arise. Rather, in disputes of this nature, the common law tends to allocate possession to the person who in justice is considered to be entitled to it, and awards damages to compensate the other.<sup>389</sup> The simplicity and practicality of this approach has much to recommend it.<sup>390</sup>

#### 5.4 Finders and thieves

In certain circumstances the law has seen competing claims made to goods by persons who do not own them and come into possession of them without the consent or knowledge of the owner of them. Such claims may be made, typically, where goods which have been lost by their owner are found by someone who takes possession of them; or where goods have been stolen and are in the possession of the thief or a person who has received or taken them from the thief. In such cases, of course, the proprietary title of the owner remains paramount but, in the absence of an owner to assert such a claim, the question of entitlement to found or stolen goods may be disputed by other parties who have taken possession of the goods, dealt with them in some way or had some relation to them. In such disputes, legal proceedings, usually in conversion, may be undertaken by the plaintiff with the purpose of establishing an interest in the goods sufficient to prevail over any claimed interest of the defendant.<sup>391</sup>

##### 5.4.1 Finders

In a case where the true owner of found goods is unknown, any entitlement to such goods on the part of some other person must, *ex hypothesi*, rest on a possessory, rather than a proprietary, right. A finder of goods may claim a possessory title to the found goods, derived from the mere fact of possession. In such circumstances the finder is not purporting to have derived any title from the true owner, but is asserting his or her claim purely on the basis of the fact of having come into possession, or being entitled to possession, of the goods. Any

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Code provides that an undivided share in an identified bulk of fungible goods is sufficiently identified to be sold, and buyer and seller become owners in common according to their respective proportions.

<sup>388</sup> S 18 of the Sale of Goods Act 1908 provides that property in unascertained goods cannot pass. The parties cannot contract to the contrary: *Re Goldcorp Exchange Ltd* [1992] 2 All ER 806 (PC).

<sup>389</sup> *Nash v Barnes* [1922] NZLR 303, 308

<sup>390</sup> This is discussed further in the context of specific restitution, ch 7.2.

<sup>391</sup> Although detinue has been abolished in the United Kingdom, it continues to exist in New Zealand and could be a possible action in such cases.

such title will of course give way to that of the true owner or other person with a superior title.<sup>392</sup> Therefore, a typical circumstance in which competing claims to found goods may arise is where the goods subsequently find their way into the hands of some other person, and the finder wishes to recover them. In such a case, the finder, having lost physical possession of the goods, must show that he or she has a right to immediate possession of them. The authorities indicate that such a possessory title of a finder may in some circumstances prevail over that of a subsequent possessor of the goods.

The *locus classicus* of this principle in relation to finders is of course the famous eighteenth century case of *Armory v Delamirie*.<sup>393</sup> The plaintiff was a chimney-sweeper's boy who found a jewel and handed it to the apprentice of the defendant, a goldsmith, for the purpose of ascertaining what the jewel was. The apprentice removed the stones from the jewel and refused to return them to the boy. In an action in conversion against the defendant, it was held that the boy was entitled to succeed. This was because the boy, as a finder, acquired a possessory title which enabled him to keep the jewel as against anyone but the true owner; the true owner could not be found, and the defendant, being a wrongdoer, was not entitled to keep the jewel as against the boy. The boy's interest in the jewel, although based upon nothing more than the fact of having taken the jewel into his possession upon finding it, prevailed over that asserted by the wrongdoing defendant. The plaintiff boy had, of course, come into possession of the jewel lawfully. He was a "true finder";<sup>394</sup> that is, he was an innocent finder of goods which had been genuinely lost and had not obtained the jewel by dishonest means.

*Armory v Delamirie* has been cited in numerous cases in many jurisdictions; and the principle is beyond argument that the finder of a chattel, although he or she does not acquire ownership, obtains such property as enables him or her to keep the chattel against all but the rightful owner (or other with a superior title).<sup>395</sup> Thus, the finder is not divested of his right if the goods subsequently come into the *de facto* possession of another, even with the concurrence of the finder. This occurred in *Armory v Delamirie* itself, where it was held that the jeweller's *de facto* possession did not divest the boy of his previously acquired right to the

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<sup>392</sup> Thus the saying that "finding is keeping" is "a dangerous half-truth, which needs a good deal of expansion and qualification to make it square with the law": Rogers *Winfield and Jolowicz on Tort*, 17<sup>th</sup> edn, p 768.

<sup>393</sup> (1722) 5 Stra 505; 93 E R 664.

<sup>394</sup> In the sense used in, for example, *Bird v Fort Frances* [1949] 2 DLR 791

<sup>395</sup> See, as examples, the finders cases cited in *Parker v British Airways* [1982] 1 QB 1004 (CA), *Field v Sullivan* [1923] VLR 70 (SCV), *Bird v Fort Frances* [1949] 2 DLR 791 (Ont HC), *Byrne v Hoare* [1965] Qd R 135 (FCA), *Tamworth Industries Ltd v A-G* [1988] 1 NZLR 296, *Waverley Borough Council v Fletcher* [1995] 4 All ER 756 (CA), *Trachuk v Olinek* [1996] 4 WWR 137 (Alta QB), *Thomas v A-G for Canada* [2006] 12 WWR 742.

jewel. The same result was reached in *Thomas v A-G for Canada*.<sup>396</sup> In that case, the plaintiff, while retrieving mail from his post office box opened, without having looked at it, a packet which was addressed to another box number and which contained a large amount of cash. The plaintiff took the money to the police, who could not find its true owner and suspected that the money was the proceeds of criminal activity. It was held that the plaintiff had a possessory title which was not lost when he handed the money to the police so that it might be returned to its rightful owner; he understood that the money would be returned to him if the owner could not be found, and had no intention to surrender his title to the police. In consequence, his continuing prior entitlement prevailed over the subsequent *de facto* possession of the police.

By contrast to cases in which the contest is between finders of goods and subsequent possessors of them, rival claimants may be persons who assert, because of some relationship or connection with the chattel or the place where it was found, a pre-existing right superior to that of the finder. Typically, this category comprises those who occupy the land upon which the chattel is found, who assert the existence of a right established prior to the finding or uncovering of the goods. Such claims must result in a ranking of the interests of the rival claimants; the question is whether the land occupant has a possessory interest which is superior to that of the finder. Generally speaking, the cases tend to show that the occupier of the land will prevail over the finder where the found chattel was attached to or embedded in the land. Where the chattel is not attached but is on the land, the occupier who has, before the finding, manifested an intention to exercise control over the land and the things which may be on it will have a better right to the chattel than that of the finder.<sup>397</sup> This is because the interest which the occupier is regarded as having in the goods is taken to have existed before the act of “finding” occurred. If the landholder is unaware of the presence of the goods in or on the land, the necessary *animus possidendi* exists by virtue of the fact that the goods form part of the land or are under the control he or she exerts over the land and things on it. The fact that the “finder” takes possession of such goods therefore does not divest the landowner or his or her superior title. In other words, to be a “finder”, a person must come into possession of goods at a time when no one else had possession of them.<sup>398</sup>

Thus, consistently with this general rule, an honest finder may succeed against the occupier of land where no such intention to control has been manifested. So in the well

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<sup>396</sup> [2006] 12 WWR 742 (Alta QB)

<sup>397</sup> See the rules listed by Donaldson LJ in *Parker v British Airways*, pp 1017-18, *Tamworth Industries Ltd v A-G* [1991] 3 NZLR 616; *Waverley Borough Council v Fletcher* [1995] 4 All ER 756 (CA).

<sup>398</sup> *Grafstein v Holme* (1958) 12 DLR (2d) 727 (OCA)

known case of *Parker v British Airways*<sup>399</sup> the plaintiff, Mr Parker, who found a lost bracelet lying on the floor in an airport lounge, was held to be entitled to it as against the airline which had failed to demonstrate any intention to search for, or take control of, property which might be lost on its premises.

In *Trachuk v Olinek*,<sup>400</sup> a distinction was drawn between lost chattels which are found on private land (“true finder cases”) and chattels which have been intentionally placed or secreted on or in private land and which are subsequently uncovered (“recovery cases”). In that case, the defendants, who unearthed an apparently deliberately concealed cache of money eighteen inches under ground upon which they were working, asserted their right to keep the money as against the plaintiff, a farmer who claimed to be the occupant of the land. Gallant J observed that losing something meant casually and involuntarily parting with it, which was not the same as putting something carefully and voluntarily in an intended place. The general rule that a finder of lost property was entitled to it as against all the world except the true owner did not apply in the latter case; rather, the recoverer of the property could acquire a possessory title only subject to the rights of the occupier of the land. However the defendants succeeded in the case, because the plaintiff, being unable to prove the requisite facts relating to control and the exclusion of others, was unable to establish that he was the occupier of the land.

These rules concerning finders are entirely in accordance with the established principles concerning possessory rights which are described above.<sup>401</sup> More questionable is the application of these principles to cases concerning stolen goods, to which we now turn.

#### 5.4.2 *Thieves*

It has been said in a number of authoritative contexts that a wrongdoer may acquire a possessory title in goods which he or she has unlawfully taken into his or her possession. If possession is in fact taken it is regarded as possession in law whether the physical control or dominion is acquired dishonestly or innocently. One who takes a chattel from its owner acquires, legally speaking, possession of the chattel, even though the very act of taking possession of it, or retaining it, may constitute a wrong. In such a case, the possessor’s title of course does not prevail over that of the owner. However in the absence of the owner, or anyone else with a better title, the possessory title of the wrongdoer may be the best, or only,

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<sup>399</sup> [1982] 1 QB 1004 (CA)

<sup>400</sup> [1996] 4 WWR 137 (Alta QB)

<sup>401</sup> ch 5

interest shown to exist in the chattel. For this reason, in *Parker*, Donaldson LJ said, citing the Ontario case of *Bird v Fort Frances*<sup>402</sup> that a dishonest finder “probably has some title, albeit a frail one because of the need to avoid a free-for-all”;<sup>403</sup> and that “[t]he finder of a chattel acquires very limited rights over it if he takes it into his care and control with dishonest intent or in the course of trespassing.”<sup>404</sup> This is consistent with Pollock’s observation that it would be “manifestly inconvenient to leave property to be scrambled for in the absence or indifference of the true owner”.<sup>405</sup>

The general principle that the dishonest acquisition of goods does not preclude the right to assert a possessory title has been stated in a number of cases.<sup>406</sup> In the New Zealand case of *Tamworth v A-G*<sup>407</sup> the issue was the entitlement to a cache of money which was found beneath the floorboards of a disused building by police during the execution of a search warrant. Cannabis and evidence of drug dealing was found on the same land. The sole director of the company which had occupied the land denied all knowledge of the money and the cannabis, and was acquitted on the charges which were brought relating to cannabis dealing. Some years later, he claimed to be entitled as occupier of the building to the money which had been found. It was held that the right the police had previously had to seize the money as a potential exhibit gave them, once the charges had been disposed of, no further right higher than that of a finder of lost or abandoned property who had taken it in his or her care and control. The right of an occupier who had manifested an intention to exercise control over the land would prevail over such a finder, and the claimant had failed to prove such an intention. Accordingly, his case failed. However, Eichelbaum CJ observed that if a claimant could establish a claim to lost chattels in such circumstances, he would be entitled, in the absence of a statutory order of forfeiture, to succeed even if he had been implicated in an

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<sup>402</sup> [1949] 2 DLR 791

<sup>403</sup> p 1009. Thus, a thief with possession may be able in some circumstances to sue if the goods are negligently damaged: *Bliss v Attorney-General* [2009] NZAR 672.

<sup>404</sup> p 1017. See also the authorities cited in *Bird v Fort Francis* [1949] 2 DLR 791, 795), *Field v Sullivan* [1923] VLR 01 (FCA), *Irving v National Provincial Bank Ltd* [1962] 2 QB 73 (CA); *Tamworth Industries Ltd v A-G* [1991] 3 NZLR 616. A finder of goods which have been lost but not abandoned may still steal them. If a finder knows the owner could be found by taking reasonable steps, but decides to appropriate the goods, the finder will be guilty of theft: *R v Oram* (1908) 27 NZLR 955. There cannot be a theft of abandoned goods: *R v Schmidt* CA 237/02, 21 October 2002; and a bona fide belief that goods have been abandoned is a defence to theft: *R v White* (1912) 7 Cr App R 266 (CA), *Hibbert v McKiernan* [1948] 2 KB 142, *Williams v Phillips* (1957) 41 Cr App R 5.

<sup>405</sup> *Possession in the Common Law*, 1888, 23

<sup>406</sup> The principle is sometimes referred to as “the *Bowmakers* principle” because the distinction between a claim based upon proprietary or possessory rights and one based upon contractual rights was discussed in *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65 (CA). See also *Gordon v Chief Commissioner of Metropolitan Police* [1910] 2 KB 1080.

<sup>407</sup> [1991] 3 NZLR 616

illegal contract or dealing from which the lost chattel had been derived. This point had been previously stated by a majority of the Court of Appeal in *R v Collis*,<sup>408</sup> a case in which there was no doubt or ambiguity as to the origin of the money which was in dispute. Collis had been convicted of possession of cannabis for supply and after his conviction acknowledged that the money which the police had taken as evidence was the proceeds of drug dealing. No forfeiture order was made however,<sup>409</sup> and Collis was held to be entitled, as against the police, to have the money returned to him. Hardie Boys J observed that the case presented “a dilemma of conscience”, but its resolution required the application of legal rather than moral principle. Collis was able to show the requisite proprietary interest in the money, and the fact that the interest had been acquired through an illegal transaction did not operate to give a better title to the police. The maxim *ex turpi causa non oritur actio* did not apply, for Collis’s cause of action did not depend upon establishing or pleading the illegality for its success.

Similar reasoning was applied in *Webb v Chief Constable of Merseyside Police*,<sup>410</sup> in which two appeals were heard. In both cases, the police had seized money from the claimants on suspicion that it had been obtained from drug trafficking. The claimants were not prosecuted to conviction and sought return of the money from the police. As against one of the claimants, W, it was held to be established on the balance of probabilities that the money was the proceeds of drug dealing and that W could not recover it because he had obtained it illegally. The police, on appeal, accepted that their statutory power to retain the money had expired, but contended that it would be contrary to public policy to allow W to keep it. In the second case it was contended that the two claimants (who were not shown to be drug dealers) could recover the money even if it were the proceeds of drug dealing. The Court of Appeal held that, in both cases, the police had no statutory right to retain the money, which should be returned to the respective claimants. To hold otherwise would amount to allowing the expropriation without statutory authority by the police of money belonging to an individual who had not been convicted of an offence in relation to it. Citing *Tinsley v Milligan*<sup>411</sup> the Court of Appeal held that there was no test of public interest, or affront to public conscience, to preclude an order for the return of the money to the claimants, even if their initial acquisition of it had been tainted with illegality. No illegal agreement was being enforced and the applicants were not required to rely on their own illegality to establish their case.

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<sup>408</sup> [1990] 2 NZLR 287 (CA)

<sup>409</sup> The money had not been obtained “in the course of or consequent upon” the possession offence, as required by s 23(3) of the Misuse of Drugs Act 1975.

<sup>410</sup> [2000] QB 427

<sup>411</sup> [1994] 1 AC 340 (HL). This case was said in *Stone & Rolls Ltd v Moore Stephens* [2009] 2 Lloyd’s Rep 537, 562 (HL) to lay down the present law.

The principles stated in *Tinsley v Milligan* and *Webb* as well as the observations of Donaldson LJ in *Parker* to the effect that a dishonest finder has some title were also cited in *Costello v Chief Constable of Derbyshire Constabulary*.<sup>412</sup> *Costello* however differed from the cases cited above in that the claimant was found in civil proceedings to have either stolen the goods in question himself or to have received them knowing that they were stolen. In that case, the police had lawfully seized from the claimant, C, a car in the belief that it had been stolen. No criminal proceedings were brought against C and the statutory purposes for which the police held the car were then exhausted. The police refused to return the car to C, contending that the car was stolen and that C was aware of that. C's claim against the police for wrongful detention of the car and damages was unsuccessful at first instance, the judge holding that C was aware that the car was stolen and was therefore not entitled to maintain a claim to it. C's appeal was successful. The Court of Appeal considered that the trial judge's finding that the car was stolen and that C knew it was "hardly surprising", and that he had been fully entitled to reach that conclusion which was not open to question on the appeal. However, the Court of Appeal held that C was entitled to the return of the car from the police and to damages for its unlawful detention by the police after the date the statutory justification to hold it had passed. C had a possessory title to the car which was deserving of protection, and this was so whether or not the car had been obtained lawfully or by theft or other unlawful means. The other party to the proceedings, the police, could not show a better title, their entitlement to possession conferred by statute having expired.

The Court of Appeal in *Costello* cited *Webb* as authority for three propositions.<sup>413</sup> First, the fact of possession of a chattel gives a possessory title which the possessor may rely on regardless of whether possession was obtained unlawfully or under an illegal transaction; the possessor's claim can be defeated only by proof of a superior title. Second, in the case of competing claims, titles are relative and the party with the stronger title, no matter how frail, is entitled to succeed. Third, the statutory power of the police to seize or retain property does not confer on the police any permanent entitlement to retain it; the right of the police is limited and their obligation to return property to its "owner" is unaffected by any perceived public policy consideration that the fruits of crime ought to be withheld from a criminal.

These propositions are, it is suggested, clearly unexceptionable. However it is suggested that the decision in *Costello* does not necessarily follow from the law as stated in this way, and that the authorities cited in the judgments in *Costello* (including *Webb*) do not

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<sup>412</sup> [2001] 3 All ER 150 (CA)

<sup>413</sup> per Lightman J, 157



support the decision which was made by the Court. Principal amongst these authorities were *Buckley v Gross*<sup>414</sup> and *Field v Sullivan*.<sup>415</sup>

First, the Court in *Costello* considered and extensively quoted *Buckley v Gross*. In that case, tallow which had been in a warehouse melted and flowed into a river where it was unlawfully picked up by a person who sold it to the plaintiff, who, the court found, unlawfully or feloniously received it. The police took possession of the tallow from the plaintiff, an act which the court held to be legally justified in the circumstances. Neither the plaintiff nor the person from whom he had bought the tallow was convicted in criminal proceedings, but a court order which allowed the police to detain it for twelve months and then sell it if no true owner were ascertained was validly made. The tallow having become a nuisance, the police sold it within a few days to the defendants. The plaintiff brought proceedings in conversion against the defendants in respect of the tallow. The Court of Appeal held that the court order had the effect of depriving the claimant of any entitlement to the tallow based upon an asserted possessory title. Cockburn CJ stated:<sup>416</sup>

The plaintiff, who had nothing but bare naked possession (which would have been sufficient against a wrongdoer) had it taken out of him by virtue of this enactment. As against the plaintiff, therefore, the defendant derives title, not from a wrongdoer, but from a person selling under authority of the justice, whether rightly or not is of no consequence. I wholly disagree with the doctrine of the plaintiff's counsel, that if the policeman did anything ultra vires, that would re-vest the possession of this tallow in the plaintiff. He had no title beyond what mere possession gave, and so soon as the goods were taken from him by force of law, there was a break in the chain of that possession.

Compton J was of the same opinion:<sup>417</sup>

I agree with my Lord Chief Justice that where possession is lawfully divested out of a man, and the property is ultimately converted by a person who does not claim through an original wrong-doer, the party whose possession was so divested had no property at the time of the conversion. Here, in my mind, the plaintiff's possession was gone.

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<sup>414</sup> (1863) 3 B & S 566; 122 ER 213

<sup>415</sup> [1923] VLR 70

<sup>416</sup> pp 572-573; 215-216

<sup>417</sup> p 573; 216

The goods were properly taken from him, and there is no such doctrine as that it will re-invest in him in the manner contended for; otherwise every person who is the possessor of goods at any time, however short, may bring an action against any person afterwards found in possession of them, however he may have come by it. That would be pressing too far the doctrine of sufficient title against a wrongdoer.

Blackburn J said:<sup>418</sup>

I do not wish to question the doctrine laid down in several cases, that possession of personal property is sufficient title against a wrong doer; nor that it is no answer to the plaintiff in such a case to say that there is a third person who could lawfully take the chattel from him; and I do not know that it makes any difference whether the goods had been feloniously taken or not. But assuming that to be the law, the plaintiff has not brought himself within it ... [T]here can be no doubt that property the ownership of which was known as this was did not belong to the persons who picked it up ... [T]he constable was justified in taking it into his possession ... [T]he possession [of the police] was the possession of the true owner and not of the wrong doer, whose possession was terminated by their taking possession. It is therefore not necessary to consider whether the sale of the tallow to the defendants by the police was right or wrong.

*Buckley v Gross* had previously been considered by the Supreme Court of Victoria in *Field v Sullivan*,<sup>419</sup> a case which was cited with approval in both *Webb* and *Costello*. In *Field v Sullivan*, the police lawfully took from the plaintiff possession of goods which they suspected had been stolen. The plaintiff was discharged in subsequent criminal proceedings relating to the goods and sought their return from the police. The plaintiff succeeded. There was nothing to indicate that the goods were not the property of the plaintiff or that they belonged to any third person. Macfarlan J, with whom Cussen J agreed, said:

The true position, in my opinion, is as follows: - If A is in possession of goods, he is *prima facie* in lawful possession of them and *prima facie* has the right to that possession; in the absence of any evidence to the contrary, in any proceedings that

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<sup>418</sup> pp 574-576; 216-217

<sup>419</sup> [1923] VLR 70

possession is proof of ownership; but that possession may be divested out of him, either lawfully or unlawfully. If unlawfully, his right of possession remains ... [I]f the divesting is lawful, A's right of possession may be destroyed entirely or may be merely suspended or temporarily divested ... [S]o where the law permits them to be seized or detained for a certain time, or for a certain purpose, or until a certain event, A's right to possession is vested in, or A's right to possession is displaced by, the right of possession in the person authorised to seize them or detain them for the period during which he is so authorised. In other words, A's property and right to possession are made subject to the right of the police or other person seizing under the authority of the law to detain them during the period during which the detention is authorised; when that time expires, and no lawful order has been made for their disposition, his right to possession, if nothing more appears, again operates. I say "if nothing more appears" for it may appear by evidence that A never had a right of possession, as in *Buckley v Gross*, and that therefore there was no suspended right of possession to revive or again operate .... In the case of seizure under authority of law, *prima facie*, when B's right of detention is ended, the only person entitled to possession is A, from whom B lawfully took them. If, however, it appears that A (at the time when B, acting under authority of law, so took possession of them), was in unlawful possession of them, and therefore was not entitled to possession of them, that *prima facie* presumption is rebutted, and there is nothing in principle or in reason to prevent B in an action by A from setting up that A was not entitled to them.

In *Field v Sullivan*, there being nothing to rebut the presumption that the plaintiff was the owner of the goods, the plaintiff was entitled to possession of them after the authority of the police to retain them was exhausted. Macfarlan J explained *Buckley v Gross* in this narrow way:

The real decision in *Buckley v Gross*, in my opinion, goes no further than this: Where A has feloniously or unlawfully taken possession of goods shown to be the property of a third person, who is known, and that possession has been divested out of A by a lawful seizure by the police, followed by an order of a magistrate made under statutory power, the goods are held by the police for the true owner, and if the police wrongfully (that is, without the authority of the true owner) dispose of the goods to C, the only person who can complain is the true owner.

It is suggested that the decision in *Costello* does not follow from, and is not consistent with, the authorities cited; and nor does it accord with the principles relating to possessory title which are discussed above. The reason for this, it is submitted, is that in *Costello* the principle that a thief has a possessory interest was applied without a full examination or analysis of the precise nature of the interest. As discussed above, a sufficient possessory right to succeed in conversion may be based upon either the fact of physical possession or the right to immediate possession. The judgments in *Costello* do not sufficiently distinguish these two possible circumstances but tend to the view that the fact of previous physical possession, albeit unlawful, suffices to confer a right to immediate possession. In consequence, the effect of *Costello* is to place thieves and knowing receivers of stolen goods in the same position, legally speaking, as honest finders; and the interests of those who have proprietary interests in goods, although obtained by unlawful transactions, are similarly conflated. This result cannot be right.

#### 5.4.3 *Finders and thieves distinguished*

It is suggested that the possessory interest of a thief is different in nature from that of an honest finder, and that this is apparent from an examination of the authorities. It must be borne in mind that the law protects *de facto* possession because it is an indicator of a right to possess. In the case of an honest finder of a chattel, the appearance of a right to possess it accords with the reality of the position, for such a person obtains not only the physical possession of it, but also, in the absence of a better title in a third party being shown, the right to possess it. For this reason the finder who loses, or hands over for a limited purpose, physical possession, as in *Armory v Delamirie* and *Parker v British Airways*, will be entitled to recover the goods for the reason that he or she is the person, as against a wrongdoer, who has the better right to immediate possession. The finder's physical possession was originally obtained lawfully and that right is not broken by the intercession of a wrongdoer.

By contrast, the possessory title of a thief or knowing receiver of stolen goods is based upon no more than the physical fact of possession. The appearance does not match the reality, and the thief, although in fact in possession of the goods, has no other right to possess them. Such a title has been judicially described, as stated above, as "some title, albeit a frail

one because of the need to avoid a free-for-all”;<sup>420</sup> and “bare naked possession”.<sup>421</sup> It is suggested that the possessory title of a thief is so described because the thief at no time acquired a right to possession of the stolen goods, and the only basis upon which any title can be asserted is that of physical possession. Once that is lost to a person who obtains lawful possession of the goods in question, there remains no foundation for the thief to claim a right to regain possession or any other residual interest in the goods. This view, it is submitted, is supported by the dictum of Compton J in *Buckley v Gross*.<sup>422</sup>

It is clearly established that possession alone is sufficient to maintain trover or trespass against a wrong doer who takes property from a person having possession of it. It is not clear, however, that the plaintiff ... was a finder of it within the principle of *Armory v Delamirie* and other cases. I think, on the evidence and the inferences to be fairly drawn from it, that he is more in the position of a person who has unlawfully or feloniously, perhaps the latter, obtained possession of it, whereas I look on the term finder in those cases to mean an innocent finder. This action must be founded on possession; here the possession was divested out of the plaintiff, and he cannot revert to a right of property to re-establish it.

Apart from the fact that a court order was made in respect of the tallow, it is submitted that the facts of *Buckley v Gross* are essentially the same as those of *Costello*. In *Costello*, it was found as a fact in civil proceedings that the goods were stolen, and that C was aware of that. C, as a knowing receiver, was by definition one who had unlawfully come into possession of the goods. Nevertheless, as the authorities cited above indicate, this would suffice to give C a possessory title, derived from the fact of his possession, which would be good as against a wrongdoer. However, once C had lost possession of the car to the police, who took it pursuant to statutory authority, C’s claim should, it is suggested, have succeeded only if he had been able to show a right to immediate possession. Having lost possession of the car, he was in the same position as the plaintiff in *Buckley v Gross*, of whom it was said:<sup>423</sup>

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<sup>420</sup> *Parker v British Airways* [1982] 1 QB 1004, 109, per Donaldson LJ, citing *Bird v Fort Frances* [1949] 2 DLR 791

<sup>421</sup> *Buckley v Gross* (1863) 3 B & S 566, 572; 122 ER 213, 215 per Cockburn CJ

<sup>422</sup> pp 573; 216. See also *Wilbraham v Snow* (1669) 2 Wms Saund 47; 85 ER 624, in which it is said that, in the absence of physical possession, a stranger or wrongdoer cannot acquire sufficient property in the goods to maintain trover.

<sup>423</sup> p 573; 216, per Cockburn CJ

He had no title beyond what mere possession gave and, so soon as the goods were taken from him by force of law, there was a break in the chain of that possession.

On this reasoning, the fact that the statutory purposes for which the police held the car in *Costello* were exhausted is simply irrelevant. The police had gained possession lawfully and were, at the point their statutory powers expired, in possession of the goods. C's "bare, naked" physical possession, the only possible ground for his claim, had gone; and there was no right to immediate possession or other right, proprietary or possessory, which could revive to defeat the possessory title of the police.

The Court in *Costello*, although citing *Buckley v Gross* as authority for the decision which was reached, and approving the narrow ratio of it which was stated in *Field v Sullivan*, did not fully explain the precise nature of C's title which it found to exist; and the ground upon which C was held to have a possessory title once he had lost physical possession is not entirely clear. Lightman J, with whom Robert Walker and Keene LJ agreed, cited *Buckley v Gross* as authority for the principle that a wrongdoer in possession is entitled to possession as against a wrongdoer, and observed that there might be some moral disinclination to recognise the entitlement of a thief. However, he said:<sup>424</sup>

“ ... such a disinclination and public policy do not afford a sufficient ground to deprive a possessor of such recognition and protection. This conclusion is in accord with that long ago reached by the courts that even a thief is entitled to the protection of the criminal law against the theft from him of that which he has himself stolen ...”

This statement is of course unexceptionable. However, the Court seems to have regarded the police as being in the position of a wrongdoer once their statutory purposes had expired. Such a view is, it is suggested, to beg the very question to be determined. It may be argued that, in an inquiry into entitlement, there is no reason why the police should be in a different legal position from anyone else. In the circumstance that any person lawfully removes possession of a chattel from one whose only interest in it, as in the case of a thief, was the fact of mere possession, no statutory authority would be required for that other person's physical possession to defeat any claim of the thief. The thief's previous physical possession cannot, in such a case, defeat the possessory title obtained by the other in consequence of his or her

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<sup>424</sup> p 164

present *de facto* possession. The only interest the thief had has gone and there remains no residual basis upon which the thief may claim. The thief is merely one who, in the past, was previously in possession.

Further, it must be remembered that the tort of conversion involves an unlawful dealing with the plaintiff's goods by asserting dominion over them in a manner inconsistent with the plaintiff's rights.<sup>425</sup> What is the right of a thief once the goods have lawfully been removed from him or her? It is submitted that the thief in such circumstances has no right or interest in the goods at all. Pollock, while observing that mere physical possession may suffice for an action in conversion, says:<sup>426</sup>

If however a mere actual possession of a thing acquired wrongfully or existing without right is once lawfully divested [sic], and the thing comes lawfully into the possession of another person, the former possessor cannot recover it from him, for wherever a plaintiff has to rely on a right to possession as distinguished from actual possession he must prove his right or the defendant may disprove it.

By contrast with a thief, an honest finder obtains not only the *de facto* possession which the law protects against a wrongdoer, but also the right to immediate possession. Such a right is of course defeasible by one who can show a better right; but in the absence of such a person, an honest finder will be able to recover goods taken from him or her. This is because the right to immediate possession will remain in the finder despite his or her loss of physical possession.<sup>427</sup> For this reason, the chimney sweep's boy in *Armory v Delamirie* succeeded against the jeweller who took the jewel into his possession, for the jeweller was intending to retain it in defiance of the boy's right to possession of it. Any right the jeweller had in the jewel could have stemmed only from the boy himself, for the jeweller had had no rights in it before the boy handed it to him. The jeweller therefore took the jewel subject to the rights of the boy. The jeweller could have succeeded only if the boy had acquired no rights in the jewel by his acts of finding and taking possession of it; if that had been so, the court would then have been faced with two claimants, neither of whom had any proprietary rights, but one of whom had *de facto* possession. However the boy, as an honest finder had acquired both *de*

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<sup>425</sup> *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 & 5)* [2002] 2 AC 883 (CA & HL), *Wilson v New Brighton Panelbeaters Ltd* [1989] 1 NZLR 74

<sup>426</sup> *An Essay on Possession in the Common Law*, 1888, 148

<sup>427</sup> See the cases on finding cited above, and *Wilbraham v Snow* (1669) 2 Wms Saund 47; 85 ER 624, which hold that a special property arises simply out of lawful possession.

*facto* possession and a right to possession of the jewel by the time he handed it to the jeweller. Similarly, when Mr Parker handed the bracelet to British Airways it was no longer lost and they accepted it on terms that it would be returned to him if the owner were not found.<sup>428</sup> British Airways could have succeeded only by establishing that it had rights in the goods immediately before Mr Parker found it, which, of course, it was unable to do. Therefore the wrongdoing jeweller's physical possession of the jewel did not, of itself, confer a right to immediate possession, which remained with the boy; and Mr Parker had a similar right as against British Airways.

The police in *Costello*, it is suggested, did not derive their possession from C, or subject to any possessory right of C. The police took possession of the car pursuant to statutory authority and did not derive their possessory title from C at all. At the point C lost physical possession of the car, the police obtained both *de facto* possession of it as well as a right to possession under statute. After the statutory right had expired, the police remained in *de facto* possession, which had been obtained lawfully. C at the point had no remaining right or interest in the car. It is submitted that this view is supported by the statement of Donaldson LJ in *Parker*<sup>429</sup> that, if goods are dishonestly taken, a subsequent honest taker is likely to have a superior title.

Accordingly, it is suggested that the view stated in *Field v Sullivan*, and which was accepted by the Court in *Costello*, to the effect that *Buckley v Gross* was confined to cases in which the goods in question were transferred to a third party pursuant to statute, is neither strictly accurate nor necessary. The Court in *Buckley v Gross* of course emphasised the fact that the tallow had been lawfully removed from the claimant and sold by the police pursuant to statute, and that the effect of that was to deprive the claimant of what had been no more than his bare possession. However, it is suggested that the reasoning of the Court in *Buckley v Gross* would have led the Court to the same result even if the statutory order vesting the right to sell the tallow in the police had not been made, for the Court found that the police had been justified in taking possession of the tallow in the first place from the plaintiff who had unlawfully received it. The defendant in *Buckley v Gross* was not the police, but the person to whom the police sold the tallow, and his title was said to be unquestionable as a result of the court order permitting the police to sell. However, it is submitted that even if no court order had been made, the plaintiff would have succeeded against a person who purchased the tallow from the police; or against the police if the police had retained it without

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<sup>428</sup> [1982] 1 QB 1004, 1008 (CA) per Donaldson LJ

<sup>429</sup> p 837



selling it. This is supported by the views expressed by all three judges in *Buckley v Gross* to the effect that the plaintiff's possessory title was removed once the goods were lawfully taken from his possession. So, Cockburn CJ observed that the plaintiff had no title beyond mere possession and "so soon as the goods were taken from him by force of law" the possession was broken; and Compton J said that the plaintiff's possession had gone by virtue of the fact that "the goods were properly taken from him". Blackburn J went further, saying it was not necessary to consider whether the sale of the tallow by the police to the defendant was right or wrong, for the plaintiff's possession was terminated when the police took possession.

These dicta indicate that the court order enabling the police to sell the tallow was not crucial to the result of *Buckley v Gross*. That order was made after the police had justifiably taken possession of the goods. Thus, at the point the court made its order, the plaintiff had already lost the only interest he could have claimed in the tallow and the possessory interest in it was already vested in the police. If that is correct, the statement in *Field v Sullivan* to the effect that where A's unlawful possession of goods has been divested out of A by a lawful seizure by the police, followed by an order of a magistrate made under statutory power the only person who could complain was the true owner is unnecessarily restrictive. In such circumstances, A loses his or her title at the time of the lawful seizure by the police (or any other person) and the court order made later is simply irrelevant to A's position. The divesting occurs by the lawful removal of possession from A, and not by the court order.

It is also suggested therefore that the decision in *Field v Sullivan* would have been the same without the unnecessary adoption in that case of the narrow and confining interpretation of *Buckley v Gross*. Unlike the plaintiff in *Buckley v Gross*, the claimant in *Field v Sullivan* was not shown to have stolen the goods or received them unlawfully. Therefore the presumption that the claimant's actual possession was a *prima facie* indicator of a right to possess was not displaced; and the police would in any event have been obliged for that reason to return the goods to her. This appears to be implicit in the reasoning of the Court in *Field v Sullivan*, in which it was said (as quoted above):

A's property and right to possession are made subject to the right of the police or other person seizing under the authority of the law to detain them during the period during which the detention is authorised; when that time expires, and no lawful order has been made for their disposition, his right to possession, if nothing more appears, again operates. I say "if nothing more appears" for it may appear by evidence that A never had a right of possession, as in *Buckley v Gross*, and that therefore there was no

suspended right of possession to revive or again operate .... In the case of seizure under authority of law, *prima facie*, when B' s right of detention is ended, the only person entitled to possession is A, from whom B lawfully took them. If, however, it appears that A (at the time when B, acting under authority of law, so took possession of them), was in unlawful possession of them, and therefore was not entitled to possession of them, that *prima facie* presumption is rebutted, and there is nothing in principle or in reason to prevent B in an action by A from setting up that A was not entitled to them.

It was not suggested in *Field v Sullivan* that any court order would have been necessary to enable the police to succeed against a thief once the goods were lawfully in the possession of the police. Rather, it was made clear that if A had never had a right of possession, A could have had no continuing interest in the goods once physical possession of them had passed lawfully to the police. It is therefore suggested that the reliance by the Court of Appeal in *Costello* on authorities concerning finders was misplaced and that *Buckley v Gross* and *Field v Sullivan* were inappropriately applied. The interests of thieves in stolen goods and of honest finders in found goods are essentially different and the case did not fully distinguish these interests. *Costello* appears to have been the first case in which a thief or knowing receiver of stolen goods has succeeded in a claim against a defendant whose obtaining of the disputed goods was lawful;<sup>430</sup> and it is submitted that the authorities discussed above do not support this result.

#### 5.4.4 *Thieves and parties to unlawful transactions distinguished*

It may also be posited that the cases cited in *Costello* concerning title to goods obtained by unlawful contracts, such as the drug dealing in *Webb*, are similarly inapplicable. The proceeds of a sale of drugs, whether the sale is lawful or not, are vested in the seller. So the plaintiffs in *Webb* and *Tamworth*, whether convicted or not of dealing, each obtained a proprietary title to the money which they received; and the fact that the money might have been tainted with an illegal origin could not of itself operate to alter the ownership of it. As owners of the money, the plaintiffs could be divested of it only pursuant to legislation which permitted its removal or forfeiture. The title of a drug dealer to his or her money is therefore not a mere possessory one; the dealer also has a proprietary right. Accordingly, the removal

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<sup>430</sup> “No court has ever allowed an admitted, or even a clearly proved, thief without a claim of right to recover, and it seems improbable that one ever will.”: Prosser, *Handbook of the Law of Torts*, 1971, p 94.

of the money from the alleged dealers, whether by the police or anyone else, could not lawfully be effected without statutory authority, and the fact that the police took physical possession of their money could not of itself operate to divest the dealers of their proprietary interest in it.

The thief or receiver of stolen goods has, by contrast and by definition, no such proprietary right in the stolen property. As described above, his or her weak possessory title survives only as long as the goods remain in his or her physical possession. Accordingly, the circumstances in *Webb* may be viewed as essentially different from those of *Costello*. Although the central issue in *Webb* was one of entitlement to money derived from drug dealing, the question for the Court was in reality whether there was some principle of law or public interest which would justify the police in retaining money which belonged to a plaintiff but which had been illegally obtained by him or her. The issue was essentially one relating to forfeiture of goods, and not title. The question was therefore not the same as that before the Court in *Costello*, which was required to determine which of two asserted possessory titles should prevail in circumstances where no proprietary rights were established or claimed. No question of unjustified expropriation by the police could arise in *Costello* for C, having lost his possessory interest, had no longer had any title or interest which could be the subject of any such expropriation. He thus had no interest in the goods at all to which legal protection could or should have been extended, and the Court failed to recognise that this was so.

In conclusion, it may be said that the well-established principle that physical possession is sufficient title to sue in conversion has been consistently and aptly applied to finders of goods which belong to unknown owners. The cases on finders entirely accord with that principle and the reasons for it. However it is submitted that the decision in *Costello* actually contravenes the principle. By placing on the same footing thieves, honest finders and those with proprietary interests tainted with illegality, the Court in effect accorded to a past, merely physical and unlawful possession (that of the thief) priority over a present and lawfully obtained possession (that of the police). Such a finding, it is suggested, subverts rather than supports the principle that physical possession merits protection as against a wrongdoer.

The decision in *Costello* also runs counter to the desirable policy that wrongdoers should not be assisted or encouraged by the law. It is surely preferable that legal principle operates to vest the right to retain stolen goods in the police, rather than in a person known to have been implicated in the theft of them. A court order, albeit made regretfully, which

delivers stolen goods back to a thief or receiver is certainly an unfortunate determination of a dispute over competing rights in the goods.

## Chapter 6 Unauthorised dispositions of goods: title

### 6.1 General rule as to dispositions

It is impossible to discuss the subject of conversion without considering the law relating to dispositions of goods which are made by persons who have no right to sell them. How the law allocates title in such circumstances must be examined before it can be determined who may sue or be sued in conversion. Where property in the goods is vested is fundamental to the question of where liability in conversion may lie, for the law of conversion is inextricably linked with the law relating to interests in goods. It has long been recognised that a conversion action is essentially one of property.<sup>431</sup>

The question of how to deal with unauthorised sales of goods has been a perpetual and thorny one for judges and legislators. What should be done when an innocent person buys goods from one who, events prove, did not own them and lacked authority to sell them? Should the law protect the original true owner, from whom the goods had been stolen or converted, or should the law treat the unauthorised sale to the innocent third party as valid, thereby depriving the original owner of his or her title?

The problem was famously stated in 1949 by Lord Denning in this way:<sup>432</sup>

In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title.

A sale of goods is, by definition, a transfer of property in the goods by the seller to the buyer in exchange for the buyer's payment of the purchase price.<sup>433</sup> If property in the goods is not passed because the seller has no title to pass or no authority to sell, no sale can be validly effected. It is not sufficient merely to transfer the physical goods themselves for that is no more than a transfer of possession. To constitute a sale, a transaction must transfer ownership. In consequence, it has long been axiomatic that the basic rule for sales carried out without authority is that expressed in the maxim *nemo dat quod non habet*: no one may give

<sup>431</sup> Lord Mansfield, for example, said that trover was “in form a tort, but in substance an action to try property ... An action of trover is not now *ex maleficio*, though it is so in form; but it is founded on property ... In substance trover is an action of property”: *Hambly v Trott* (1776) 1 Cowp 371, 374; 98 ER 1136, 1137.

<sup>432</sup> *Bishopsgate Motor Finance Corp Ltd v Transport Brakes Ltd* [1949] 1 KB 322, 336-337

<sup>433</sup> Sale of Goods Act 1908, s 3(1)

what he or she does not have. A person with no title to goods, and no authority to sell them, cannot pass to a purchaser a good title because he or she has no title to transfer. In other words, the effect of the *nemo dat* rule is that the property rights of the true owner prevail over those of a buyer; and the result is that the true owner retains his or her title to the goods. The *nemo dat* rule follows as a matter of logic from the principle that the inherent nature of a sale of goods is a transfer of ownership of them from (or through, if the seller is an agent for the owner) the seller to the buyer.

Over time, the common law developed exceptions to the *nemo dat* rule. It was recognised in the common law, and in subsequent legislation, that at least some innocent third parties who bought goods in the honest belief that the seller was entitled to sell them ought to be protected.

In New Zealand, the *nemo dat* rule has been altered considerably by the passage of the Personal Property Securities Act 1999. In consequence, the question must be asked whether the *nemo dat* principle in reality continues to hold sway; or whether the law has now moved so far towards protecting the innocent buyer that the “rule” in fact has now itself become an exception to current general legal principles. Have the exceptions to the rule increased so as to destroy the rule itself?

## 6.2 Warranty of title as between seller and buyer

There is no question today that a party who sells goods is deemed to warrant that he or she has the right to do so. This however was not always the case. The common law in its early days paid less attention to chattels than it did to land,<sup>434</sup> and was slow to imply terms into contracts for the sale of goods. This was largely because merchants and traders used their own courts, in which the law merchant was applied, and thereby avoided the delays and expense of actions in the common law courts. In consequence, no substantial body of law relating to sale of goods began to evolve in the common law courts until the eighteenth century.<sup>435</sup> A further reason was that the early common law generally required a buyer of goods who alleged a lack of title on the part of the seller to prove either deceit or an express warranty inducing the contract. These were essentially actions in tort rather than in contract.

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<sup>434</sup> See, for accounts of the development of the early common law relating to sales of goods, Baker *The Oxford History of the Laws of England*, VI, p 727, Ibbetson (1991) 107 LQR 480 and Milsom (1961) 77 LQR 257.

<sup>435</sup> For an outline of this evolution, see Scrutton “General Survey of the History of the Law Merchant” in *The Elements of Mercantile Law*, 1891, 4-16.

The growth of *assumpsit* laid the foundation for claims under contract of sale, and by the seventeenth century it was possible to claim for breach of warranty on the basis of the contract of sale itself. However the law was still dominated by the principle of *caveat emptor* and generally resisted the implication of any warranty in a sale of goods in the absence of an express promise or affirmation made by the seller. Nevertheless, over the next two centuries the courts gradually, albeit inconsistently, moved towards imposing implied duties on sellers of goods. Obligations relating to quality of goods were recognised first.<sup>436</sup> This was particularly so in the sales of unascertained goods, for the buyers in such cases were assumed generally to have relied more heavily upon sellers than did buyers upon sellers of specific goods. Thus it was eventually judicially recognised that a purchaser could not be supposed to buy goods, as was colourfully expressed, “to lay them on a dunghill”.<sup>437</sup>

That the law in the nineteenth century had for some time been leaning towards the general implication of a warranty of title is apparent from the 1849 case of *Morley v Attenborough*.<sup>438</sup> A person who had hired a harp pledged it with the defendant pawnbroker, who had no knowledge that the person pledging it had no right or title to do so. The defendant subsequently sold the harp to the plaintiff at public auction, no express warranty of title being given. The original hirers, upon discovering the harp in the plaintiff’s possession, sought its recovery from him; and he, having surrendered it to them, sought the return of the purchase price and associated costs from the pawnbroker. The pawnbroker argued that there existed in the circumstances no express or implied warranty of title in the sale of the harp to the plaintiff. Observing that it was “very remarkable” that the law should admit of any doubt on the matter, Parke B considered the authorities and concluded that in the case of unascertained goods which are to be conveyed after the making of the agreement, it would probably be implied that the parties intended that a good title to the subject matter should afterwards be transferred; unless goods which the party could enjoy as his own and make full use of were delivered, the contract would not be performed. However, in the case of a specific chattel, if nothing were said about title, the position would be otherwise.<sup>439</sup>

“[T]he result of the older authorities is, that there is by the law of England no warranty of title in the actual contract of sale, any more than there is of quality. The

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<sup>436</sup> See Mitchell (2001) 117 LQR 645.

<sup>437</sup> *Gardiner v Gray* (1815) 4 Camp 144, 145; 171 ER 46, 47, per Lord Ellenborough

<sup>438</sup> (1849) 3 Ex Ch 500; 154 ER 943

<sup>439</sup> pp 509-510; 947

rule of caveat emptor applies to both; but if the vendor knew that he had no title, and concealed that fact, he was always responsible to the purchaser as for a fraud.

However Parke B went on to observe that, although the older authorities were strong to show that no warranty of title was implied in a mere sale, a different notion appeared to have been gaining ground in recent times.<sup>440</sup> Moreover, if a warranty were affirmed in fact, the vendor would be liable; and the affirmation by a vendor in possession had long been treated as equivalent to a warranty.<sup>441</sup> However no warranty as to title would be imported into the sale in the absence of fraud or an express warranty or its equivalent. Where no fraud or express warranty existed, the declarations or conduct of the parties would be looked at in each case to see if a warranty should be implied. Usage of trade could raise such an inference, for the very nature of the trade in question might be understood to engage that the buyer should enjoy that which was bought, as against all persons. If goods were bought in a shop, for example, there would be no doubt that the shopkeeper would be considered as warranting that those who purchased would have a good title to the goods purchased. However, no such implication arose, it was held, where the item in question in the case, the harp, had been sold as a forfeited pledge. The pawnbroker could be taken as undertaking no more than that the harp was a pledge and irredeemable, and that he was not cognisant of any defect in title to it. Although the plaintiff might have recovered on the basis of a total failure of consideration in such circumstances, that point had not been argued and so was not decided.

It will be apparent from this case that the rule that no warranty of title would generally be implied into a sale of goods had been significantly eroded by exceptions. Thus in *Sims v Marryat*<sup>442</sup> Lord Campbell remarked that the rule was “beset with so many exceptions that they well nigh eat it up”, an observation with which the Court in the subsequent case of *Eichholz v Bannister*<sup>443</sup> agreed. In that case, goods which had been bought by the plaintiff from the defendant shopkeeper proved to have been stolen. The plaintiff succeeded on an action for money for money had and received against the shopkeeper, on the basis that the consideration for his payment had totally failed. Erle CJ accepted that there was nothing in *Morley v Attenborough* to militate against the plaintiff’s action; rather, that case supported the

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<sup>440</sup> *ibid.* Parke B cited the statement of Blackstone : “In contracts for sale it is constantly understood that the seller undertakes that the commodity he sells is his own”; and Wooddson in Lectures, ii, p 415, who went so far as to assert that the rule of caveat emptor was “exploded altogether”, a view which Parke B considered unwarranted by authority.

<sup>441</sup> *Ibid.* Parke B cited Lord Holt in *Medina v Stoughton* 1 Salk 210; 91 ER 188 and *Pasley v Freeman* (1789) 3 TR 51; 100 ER 450 in support of this.

<sup>442</sup> (1851) 17 QB 281, 291

<sup>443</sup> (1864) 17 CBNS 708; 144 ER 284



plaintiff's argument. The act of the defendant of selling goods in a public shop was a representation to all the world that what he was selling was his own property. Erle CJ stated:<sup>444</sup>

I consider it to be clear upon the antient authorities that, if the vendor of a chattel by word or conduct gives the purchaser to understand that he is the owner, that tacit representation forms part of the contract, and that, if he is not the owner, his contract is broken.

The Court considered in *Eichholz v Bannister* that the circumstances in *Morley v Attenborough* were such that no warranty could have been implied. Erle CJ said:

I am in possession of a horse or other chattel: I neither affirm or deny that I am the owner: if you choose to take it as it is, without more, caveat emptor: you have no remedy, though it should turn out that I have no title. Where that is the whole of the transaction, it may be that there is no warranty of title. Such seems to have been the principle on which *Morley v Attenborough* was decided. The pawnbroker, when he sells an unredeemed pledge, virtually says, - I have under the provisions of the statute ... a right to sell. If you choose to buy the article, it is at your own peril.

Byles J considered the argument that no implied warranty of title existed to be "barren ground";<sup>445</sup> and Keating J considered the distinction between sales in a shop and sales elsewhere to be "very fine."<sup>446</sup> He said:

If a man professes to sell without any qualification out of a shop, it is not easy to see why that should not have the same operation as a sale in the shop. It is not necessary, however, to decide that question now.

From this, it was an easy step to the rule which was eventually codified in the Sale of Goods Act 1893 (UK). In New Zealand, the Sale of Goods Act 1895 contained the identical provision, which was re-enacted in the Sale of Goods Act 1908:

**Section 14 Implied undertaking as to title, etc –**

In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is –

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<sup>444</sup> *ibid.*, 721; 289

<sup>445</sup> p 724; 290

<sup>446</sup> p 725; 290

- (a) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass:
- (b) An implied warranty that the buyer shall have and enjoy quiet possession of the goods:
- (c) An implied warranty that the goods are free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

It is of course open to the parties to a contract governed by the Sale of Goods Act 1908 to contract out of the provisions of that Act. In the case of a contract to which the Consumer Guarantees Act 1993 applies<sup>447</sup> however, the position is different; contracting out is generally<sup>448</sup> not possible, and it is an offence to purport to do so. The protection respecting title given to consumers by the Consumer Guarantees Act 1993 is expressed thus:

**Section 5. Guarantees as to title –**

- (1) Subject to s 41 of this Act, the following guarantees apply where goods are supplied to a consumer:
  - (a) That the supplier has a right to sell the goods; and
  - (b) That the goods are free from any undisclosed security; and
  - (c) That the consumer has the right to undisturbed possession of the goods ....

The guarantee conferred by s 5(1)(c) may be varied as further described in s 5 where the supply of goods is a hire purchase agreement or a security or term of the agreement in which the consumer has received oral advice and a written copy of the agreement. The expression “right to sell” in s 5(1)(a) is defined as meaning “a right to dispose of the ownership of the goods to the consumer at the time when that ownership is to pass”.

The above provisions make it clear that today the law implies into all sales of goods a warranty of title unless (as is possible only in the case of non-consumer sales) the parties

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<sup>447</sup> Contracts to which the Consumer Guarantees Act 1993 applies are those which are for the provision in trade of goods or services to “consumers”. A “consumer” is defined as a person who acquires goods or services or a kind ordinarily acquired for personal, domestic or household use or consumption and who does not acquire them for resupplying in trade, consuming them in the course of a process of production or manufacture, or, in the case of goods, repairing or treating in trade other goods or fixtures on land: s 2.

<sup>448</sup> Contracting out is permitted in two limited circumstances: where the goods or services are provided for the purpose of a business (s 43) and where repairs and spare parts are required by the manufacturer to be reasonably available for a reasonable time under s 12 (s 42).

have expressly or impliedly agreed that no such warranty is intended. Cases of this exceptional kind are hard to find and there appear to be few circumstances which give rise to an implication that there is no warranty of title. This is perhaps not surprising, for a finding that title is not warranted may be seen as undermining the very contract of sale which, by definition, has as its purpose a passing of property in the goods in question. However, as observed above, *Morley v Attenborough* itself was described by Erle CJ in *Eichholz v Bannister* as an example of such a case. A further example, decided after the passage of the Sale of Goods Act 1893 (UK), is *Payne v Elsdon*.<sup>449</sup> In that case an auctioneer sold by auction to the plaintiff a piano which had been seized under a distress warrant for arrears of rent. The distress warrant proved to be invalid and the piano was recovered by the true owner from the plaintiff, who then sued the auctioneer for breach of the warranty of title provided the Sale of Goods Act. It was held that no such warranty was implied in the case; the plaintiff had been aware that the sale was under a distress warrant and the auctioneer was not taken to have warranted the validity of it.

It is therefore suggested that it is a matter of both principle and logic that the law developed a warranty of title in sales of goods. The implication of a warranty of title, both at common law and as codified in the Sale of Goods Act, reflects the gradual move away from the *caveat emptor* principle as described above to the protection of the innocent buyer. Just as no buyer expects to receive goods of a quality so low that they must be laid on a dunghill, a buyer does not expect to purchase goods only to find that he or she has no title to them. If no title passes, there is no sale and in consequence a total failure of consideration as far as the would-be buyer is concerned.

Generally speaking, the act of a person who purports to transfer goods under an unauthorised sale is tortious, as is that of the person who receives the goods from him or her with the intention of acquiring the rights of a purchaser. The conduct of both amounts to an exercise of dominion over the goods which is inconsistent with the possessory rights of the owner, and each will therefore be liable to the owner in conversion.<sup>450</sup> It is clear that every person in a series through whose hands goods pass may successively convert them; liability is not confined to the original taker and it is irrelevant that a person in the series may have innocently received the goods from a thief or other person with no right to deal with the

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<sup>449</sup> (1900) TLR 161

<sup>450</sup> The tort of detinue continues to exist in New Zealand.

goods.<sup>451</sup> What matters for liability is that the owner (or other person entitled to possession if there is such a person) is wrongfully excluded from possession by each person in the chain of buyers. Because conversion can be committed unwittingly, the buyer's good faith and lack of knowledge of the seller's defect in title will afford no protection to the buyer as against the owner's claim in conversion. The buyer will have to return the goods to the owner or, if the buyer either retains them or has on sold them, pay their value to the owner, as well as any associated damages. A buyer will of course have recourse as against the seller from whom he or she bought the goods, on the basis of a breach of warranty of title under s 14 of the Sale of Goods Act, or of a total failure of consideration.<sup>452</sup> Such recourse however may be of little avail to the buyer especially if, as frequently happens, the seller has acted dishonestly and is evasive, or is insolvent. The buyer in such circumstances will have to bear the loss unless he or she is able to provide a defence against the owner which establishes that the owner is caught by an exception to the *nemo dat* rule.

### 6.3 Exceptions to the *nemo dat* rule

Where a transaction falls into an exception to the *nemo dat* rule, the original owner of the goods loses his or her title, which becomes vested in the innocent third party. The common thread in these exceptions is the principle that where the original owner has done something to create the appearance that the person selling the goods has the right to sell, the owner's title to the goods is liable to be lost to an innocent third party who is deceived by the appearance so created. The innocent buyer who is misled in this way and is thus unaware of the seller's true lack of authority to sell may be viewed as more deserving of protection than is the owner whose conduct has brought the situation about; and in consequence the owner, who has caused the buyer to act to his or her detriment, may be estopped, or precluded, from denying the seller's authority to sell. In such a case, title will vest in the innocent buyer despite lack of any title or authority to sell on the part of the seller.

The exceptions to the *nemo dat* rule which were codified in England in the nineteenth century (in the Factors Acts and the Sale of Goods Act 1893) were adopted in New Zealand and now find their place in the Sale of Goods Act 1908 and the Mercantile Law Act 1908. These statutory provisions represented for a century the compromise that the law had reached in settling the struggle for supremacy between the rights of the true owners of goods and

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<sup>451</sup> This point is made in *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, 1093 per Lord Nicholls of Birkenhead.

<sup>452</sup> The Sale of Goods Act, s 55, preserves this possibility.

those of innocent third parties. In New Zealand, the enactment of the Personal Property Securities Act 1999 has further encroached on the *nemo dat* rule.

The current law relating to each of these aspects will be outlined (in broad summary) in turn and the (in some cases, far reaching) effect of the Personal Property Securities Act 1999 upon each of them will be considered.

#### 6.4 Estoppel generally

Under s 23(1) of the Sale of Goods Act 1908, the owner of goods may be precluded by his conduct from denying the seller's right to sell. In effect, if the owner of goods has by his or her conduct led an innocent buyer to believe that the seller from whom he buys has the right to sell the goods, the owner may be bound by the seller's acts. The state of mind of the seller is irrelevant in cases where estoppel operates. Whether the seller has acted fraudulently by selling the goods or has honestly mistaken the limits of his or her authority will not affect the question of where title is allocated as between owner and buyer. The focus of the inquiry is on the conduct of these two parties; that of the owner must have been such as to create the required appearance of authority in the seller, and the buyer must have been acting in good faith, in that he or she was genuinely deceived by appearances and so lacked knowledge of the seller's lack of authority.

Generally, an estoppel of this kind requires conduct on the part of the owner which amounts to a representation that the seller has a right to sell,<sup>453</sup> and some positive words or conduct, creating the appearance of authority on the seller's part, are necessary.<sup>454</sup> Carelessness in the handling of one's own goods does not normally come into this category for, as a rule, the courts tend to hold that there is no general duty to look after one's own goods. So, "[i]f a person leaves a watch or a ring on a seat in the park or on a table at a café, and it ultimately gets into the hands of a *bona fide* purchaser, it is no answer to the true owner to say that it was his carelessness, and nothing else, that enabled the finder to pass it off as his own";<sup>455</sup> "the owner of property is entitled to be careless with it if he likes, and even extreme

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<sup>453</sup> See, for example, *NZ Securities & Finance Ltd v Wrightcars Ltd* [1976] 1 NZLR 77.

<sup>454</sup> *Mercantile Bank of India Ltd v Central Bank of India Ltd* [1938] AC 287 (giving of possession of railway receipts to enable possession to be taken of goods not a representation that the recipient of the receipts entitled to dispose of the goods); cf *NZ Securities & Finance Ltd v Wrightcars Ltd* [1976] 1 NZLR 77, where the conduct of the owner of goods amounted to a representation that the seller was entitled to sell.

<sup>455</sup> *Farquharson Bros v King & Co* [1902] AC 325, 336

carelessness with his own property will not preclude him from recovering it from a person who has bought it from someone who dishonestly purported to sell it”.<sup>456</sup>

Thus, carelessness may be undesirable but it does not necessarily entail legal responsibility. The point was made by Lord Wilberforce:

“It may be fair to say that the law at the present time is readier to find a duty of care on the part of property owners towards persons into whose hands that property may come than it was one hundred years ago, or at least to protect people who innocently, but without title, acquire possession of the property of another. But the very fact that statutory protection of such persons, though generous, is limited to given cases (Sales of Goods Act 1893, section 21(1), the Factors Act 1889, Hire Purchase Act 1964, section 27 protecting private but not trade buyers) should warn us that there remain situations in which the owner’s right to recover his property from innocent persons remains, and that the duty of care should not be stretched so widely as to make it a universal duty on the part of property owners to safeguard others against loss.”<sup>457</sup>

Even where a duty of care is found to be owed by an owner to a subsequent purchaser, the issues of breach of the duty and causation of the resulting loss may be difficult for the innocent buyer to surmount. So, for example, in *Mercantile Credit Co Ltd v Hamblin*<sup>458</sup> a car owner intended to mortgage her car and gave to a dealer signed forms for that purpose. The dealer dishonestly used the forms to sell the car to a finance company, which claimed that it was entitled to ownership of the car on the ground of the owner’s negligence in providing blank forms to the dealer. It was held that although the owner owed a duty of care to anyone who might be deceived by the forms and purchase from the dealer, she had not breached that duty, it not being unreasonable to trust the dealer. Further, the cause of the loss was the dealer’s fraud, not the owner’s conduct.

It follows that the act of simply giving possession of one’s goods to another does not generally give rise to an estoppel against the owner if that other disposes of the goods to a

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<sup>456</sup> *Moorgate Mercantile Co Ltd v Twitchings* [[1977] AC 890, 925, per Lord Fraser of Tullybelton. The Torts (Interference with Goods) Act 1977 (UK) provides that contributory negligence is no defence in proceedings founded on conversion, or on intentional trespass to goods: s 11(1). This has been described as a “very silly piece of legislation” by Weir *A Casebook on Tort*, 2000, p 511. In New Zealand, contributory negligence has been allowed in a conversion claim: *Helson v McKenzies (Cuba Street) Ltd* [1950] NZLR 878 (SC & CA), but this did not affect the question of title to the converted goods. Contributory negligence is discussed further in ch 8.3.

<sup>457</sup> *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890, 903-4, per Lord Wilberforce

<sup>458</sup> [1965] 2 QB 242

third party. Such conduct does not in itself amount to a representation or holding out to the world that the person to whom possession of goods has been given has a right to deal with them. The famous and broad proposition, stated in the eighteenth century, that “wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it”<sup>459</sup> has received a narrow construction.<sup>460</sup> Although it may be said that giving possession of goods to another, or placing another in a position whereby he or she may obtain possession of goods is conduct which “enables” that other to sell them, such conduct is not, without more, enough for an estoppel. Rather, something must be done by the owner which amounts to a representation to the third party who claims to have been misled that the person in possession of the goods was entitled to sell them. Thus, the law accorded priority to the true owner of goods by giving “particular sanctity” to the *nemo dat* rule and requiring the innocent third party to establish that the owner had invested the intermediary with the right to deal with the goods as his own.<sup>461</sup>

Despite these general propositions, the law gradually recognised that in certain circumstances the mere consenting by an owner to possession of goods by another did constitute conduct sufficient to raise an estoppel against the owner if that other disposed of the goods to an innocent third party. These modifications to the *nemo dat* rule which developed were to a large extent occasioned by the growth of commerce in the eighteenth and nineteenth centuries and the associated use of agents. English law had long before this recognised the concept of title to goods as a legal abstraction which could be separated from factual or physical possession; and title to goods could pass in accordance with the intention of the parties regardless of whether delivery were effected or not.<sup>462</sup> In consequence, interests in goods could be transferred independently from any change in possession of the goods, a fact which was greatly advantageous at a time of considerable commercial activity and trade. However, as far as unauthorised dealings with goods were concerned, disadvantages were also present, for possession was neither a necessary nor a sufficient condition for the existence of a right to transfer a proprietary interest in goods. So, in 1880, Lord Blackburn observed in considering the background to the Factors Acts (UK) and the extension of their provisions to other countries, that “the rule ... that no man could confer a greater title than he himself had, has been found in modern practice to be inconvenient to its

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<sup>459</sup> *Lickbarrow v Mason* (1787) 2 TR 63; 1 RR 425

<sup>460</sup> See *Farquharson Bros v King & Co* [1902] AC 325 and the cases cited in Lord Lindley’s judgment.

<sup>461</sup> *Wilton v Commonwealth Trading Bank* [1973] 2 NSWLR 644, 666

<sup>462</sup> Baker, *The Oxford History of the Laws of England*, vi, 2003, p 739 describes this process.

full extent in commercial transactions, especially since the practice of advancing money upon the security of goods and merchandise came to be so important as it is”.<sup>463</sup> Thus, exceptions to the rule were created in which certain acts by owners of goods were deemed, of themselves, to preclude owners from denying the seller’s authority where an unauthorised sale to an innocent third party had occurred.

These particular instances of conduct were defined by reference to the identity of the person to whom the owner gave possession of the goods. The mere fact of voluntarily putting one’s property into the hands of certain classes of people was deemed, in itself, to clothe those persons with the appearance of authority to sell and to amount to a representation of such a right. Where an owner gave possession of goods to such persons, he or she was treated by the law as having misled a third party who bought the goods by creating the appearance of a right to deal with the goods. It made no difference that the owner had given no actual authority to sell or might have expressly forbidden it; the giving of possession in itself sufficed to bring about a misleading appearance of authority to sell.

## **6.5 Particular instances of estoppel**

### *6.5.1 Dispositions by mercantile agents*

The Mercantile Law Act 1908 states the law in New Zealand relating to the effect of unauthorised dispositions of goods by mercantile agents. That Act replaced the Mercantile Law Act 1880, which had drawn on the various Factors Acts which were successively enacted in the UK,<sup>464</sup> and which culminated in the Factors Act 1889 (UK). The latter Act is still in force.

A mercantile agent is defined as “an agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods”.<sup>465</sup> The expression “mercantile agent” is not given a restricted meaning,<sup>466</sup> and a person may even be constituted a mercantile agent by a single transaction.<sup>467</sup>

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<sup>463</sup> *City Bank v Barrow* (1880) 5 App Cas 664, 677

<sup>464</sup> Factors Acts were enacted in 1823, 1825, 1842 and 1877.

<sup>465</sup> Mercantile Law Act 1908, s 2

<sup>466</sup> *Davey v Paine Bros* [1954] NZLR 1122

<sup>467</sup> *Paris v Goodwin* [1954] NZLR 823



Section 3 of the Mercantile Law Act 1908 provides that where a mercantile agent is in possession of goods with the consent of the owner, the owner of the goods is bound by any unauthorised disposition of the goods made by the mercantile agent to an innocent third party who has no notice of the mercantile agent's lack of authority. This is because the act of placing goods in the possession of one whose business is dealing in goods is treated as tantamount to a representation to others that the mercantile agent has a right to deal with the goods. An outsider may be deceived by the appearance created by the owner's giving possession of the goods to the mercantile agent, and the owner, having clothed the agent with the appearance of authority, must bear the resulting loss if the agent disposes of the goods to one who has been misled by appearances.

These provisions in the Mercantile Law Act 1908 encapsulate the way in which the law had developed under the Factors Acts. The history of these Acts, and how they modified the common law, is extensively described in *Cole v North Western Bank*<sup>468</sup> by Lord Blackburn. Lord Blackburn subsequently said in *City Bank v Barrow*<sup>469</sup> that his judgment in *Cole v North Western Bank* was one "which I have not the slightest reason to suppose to be impeachable in any way whatever"; and the legislature and the Courts in New Zealand have adopted the principles stated in those cases.

At common law, a factor was regarded as being authorised, or having the appearance of being authorised, to sell goods entrusted to him or her, but not to pawn or pledge them.<sup>470</sup> In consequence, a transaction of pledge or pawn was ineffective to transfer an interest in the goods, even to a bona fide recipient. This rule was altered by the Factors Act of 1842, which broadened the range of transactions which were deemed to be within a factor's ostensible authority to perform. Further, at common law the possession of a bill of lading or other document of title to goods had once conferred on the holder no greater rights than did possession of the goods themselves. The 1825 Factors Act altered the law in this respect by giving to a possessor of such a document a power to sell or pledge the goods to a *bona fide* buyer or pledgee.

In interpreting this exception to the *nemo dat* rule the courts have, in evaluating the position of the innocent purchaser of goods as against the true owner, emphasised the importance of appearances as created by the owner's conduct. Because possession of goods

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<sup>468</sup> (1874-75) LR 10 CP 354

<sup>469</sup> (1880) 5 App Cas 664, 677

<sup>470</sup> *M'Combie v Davies* (1805) 7 East 5; 103 ER 3

gives to a factor or mercantile agent the appearance of the right to deal with them, the true owner must have entrusted the factor or mercantile agent with possession of the goods. Where possession of the goods was obtained by the agent's trickery or misrepresentation, the courts once took the view that no genuine consent had been given by the owner, whose title was protected against the purchaser from the fraudulent agent. This is no longer correct and it has long been held that, provided the owner has given the possession voluntarily, it does not matter that the consent was obtained by the agent's trickery or fraud. What is essential is that the owner transfer possession in fact of his or her own volition. This was stated in the 1862 case of *Sheppard v Union Bank of London*<sup>471</sup> and is now a well established principle.<sup>472</sup> The consent of the owner is presumed in the absence of evidence to the contrary.<sup>473</sup>

The mere entrusting of the goods by their owner to a mercantile agent is not effective to validate an unauthorised disposition to an innocent third party unless the factor or mercantile agent receives possession of them as an agent. An unauthorised disposition by a person who happens to be a mercantile agent, but who is entrusted with goods in a different capacity, will not divest the owner of his or her interest in the goods. This was decided in *Monk v Whittenbury*,<sup>474</sup> a decision which, Lord Blackburn said in 1875, "had never been questioned".<sup>475</sup> In *Monk v Whittenbury*, the owner of flour delivered possession of a wharfinger, who received it in that capacity, and then sold it without authority to an innocent purchaser. Although the wharfinger was also in the habit of acting as a flour broker, it was held that the purchaser was not protected by any exception to the *nemo dat* rule. Similarly, in *Cole v North Western Bank*,<sup>476</sup> it was held that the purported pledge of goods by a warehouse keeper with whom the goods had been deposited as such was not valid, even though he was also a broker and was usually employed to sell goods. This principle has been consistently approved in many cases.<sup>477</sup>

Section 3 of the Mercantile Law Act 1908 validates a sale, pledge, or "other disposition" which is made by the agent when acting in the ordinary course of business of a mercantile agent. To constitute a "disposition", the particular transaction must affect the

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<sup>471</sup> (1862) 7 H & N 661; 158 ER 635

<sup>472</sup> For example, *Folkes v King* [1923] 1 KB 282, *Pearson v Rose and Young Ltd* [1951] 1 KB 275, *Paris v Goodwin* [1954] NZLR 823, *Davey v Paine Bros* [1954] NZLR 1122

<sup>473</sup> Mercantile Law Act 1908, s 3(4)

<sup>474</sup> (1831) 2 B & Ad 484; 109 ER 1222

<sup>475</sup> *Cole v North Western Bank* (1875) LR 10 CP 354

<sup>476</sup> *ibid*

<sup>477</sup> For example, *Astley Industrial Trust Ltd v Miller* [1968] 2 All ER 36, *Roache v Australian Mercantile Land and Finance Co Ltd (No 2)* [1966] 1 NSWLR 384, *McManus v Eastern Ford Sales Ltd* (1981) 128 DLR (3d)

interests of the parties to it in the goods.<sup>478</sup> A mere transfer of possession, without more, does not come into this category, and it therefore seems (although s 3 does not expressly say so) that consideration for the transfer of the goods from agent to third party will be needed if the third party is to be protected. This is supported by s 6, which defines the consideration which is necessary for a “sale, pledge, or other disposition” under the applicable Part of the Act.

There has been much litigation, not confined to this context, concerning the phrase “ordinary course of business”. The High Court considered the meaning of it within s 3 in *Ceres Orchard Partnership v Fiatagri Australia Pty Ltd*,<sup>479</sup> where the question was whether the particular transaction was of a kind which was ordinarily performed during the course of business, or whether it was sufficient that it simply be performed during the ordinary flow of the business. Barker J considered that New Zealand and Australian authority favoured the latter interpretation. Provided a transaction was performed as part of the undistinguished common flow of the particular business, it would be within the “ordinary course of business”, even though it might be an unusual transaction. Accordingly, the expression was not confined to what was done ordinarily in the particular business in question. Such an interpretation is, it is suggested, entirely consistent with the purpose of s 3. To adopt the narrower view that the disposition of the goods must be of a kind which the mercantile agent ordinarily undertakes could defeat the object of allocating loss to the owner; and it is the owner’s conduct, not that of the mercantile agent, which provides the justification for allocating title to the third party.

### 6.5.2 *Sellers and buyers in possession*

The reason for the existence of the s 27 provisions is essentially the same as that which underlies the mercantile agent exception; the owner of goods who has created the false impression that another has a right to dispose of them ought to bear the loss as against an innocent and deceived third party. It is the owner in such a case who has allowed ownership and possession to be separated, and so enabled the occurrence of the loss.

Like the mercantile agent exception to the *nemo dat* rule, the statutory exceptions relating to sellers and buyers in possession derive from the English Factors Act 1889 (UK) and the 1893 Sale of Goods Act. The protection given to purchasers from sellers in possession was first provided in statutory form by the Factors Act 1877 (UK). This was

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<sup>478</sup> *Worcester Works Finance Ltd v Cooden Engineering Co Ltd* [1971] 3 All ER 708 (CA)

<sup>479</sup> [1995] 1 NZLR 112

passed in response to the decision in *Johnson v Credit Lyonnais Co*<sup>480</sup> (1877) 3 CPD 32,<sup>481</sup> in which an owner of goods who had left in the hands of the seller the documents of title to them, and failed to ensure that the sale to him had been recorded by the company in whose custody they were, was not estopped from maintaining his title as against an innocent purchaser. In recognition of the inadequacy of the common law relating to estoppel in such a situation, the 1877 Act afforded priority to the second purchaser. The same Act conferred a similar limited protection to buyers in possession, but only as far as documents of title were concerned. The Factors Act 1889 (UK), extended this, and consolidated the law into its current form. In New Zealand, the seller and buyer exceptions to the *nemo dat* rule were adopted in the 1895 Sale of Goods Act, and are now found in s 27 of the Sale of Goods Act 1908.<sup>482</sup>

(i) Sellers in possession

Pursuant to s 27(1) of the Sale of Goods Act, if a person who has bought goods leaves them in the possession<sup>483</sup> of the seller, the seller in possession who then delivers or transfers the goods to an innocent third party under a sale, pledge, or other disposition may confer a good title on the third party. So, as a typical example, in *Siggelkow v Gibbs*<sup>484</sup> a person who had bought a car left it with the seller for storage, and allowed the seller to retain the ownership papers. The seller dishonestly sold the car to a third party some eleven months later. The High Court held that the third party obtained title, for he had been deceived by the seller's physical possession of the car and ownership papers; the owner had consented to the arrangement, thereby conferring the trappings of ownership on the seller.

An essential feature of this exception to the *nemo dat* rule is that the seller remain in continuous possession of the goods after the goods have been sold to the first purchaser until the second transaction occurs. This is because it is the fact of continued possession which creates this erroneous impression that the seller's right to dispose of the goods remains unaltered; and it is the buyer, the new owner, who has created this impression by leaving the

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<sup>480</sup> (1877) 2 CPD 224; affd (1877) 3 CPD 32

<sup>481</sup> This is discussed by Lord Pearce in *Pacific Motor Auctions Pty Ltd v Motor Credits (Hire Finance) Ltd* [1965] AC 867 (PC)

<sup>482</sup> *Siggelkow v Gibbs* [1990] 3 NZLR 503 and *Pacific Motor Auctions Pty Ltd v Motor Credits (Hire Finance) Ltd*, *ibid*, each contains an outline of the history of, and reasons for, the rules set out in s 27.

<sup>483</sup> Possession in this context may be constructive: *Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* (1987) 163 CLR 236 (HCA), *Michael Gerson (Leasing) Ltd v Wilkinson* [2000] 3 WLR 1645 (CA).

<sup>484</sup> [1990] 3 NZLR 503

goods in the seller's hands. A break in the continuity of the seller's possession will therefore destroy the protection otherwise accorded to the second purchaser. So, for example, in *Mitchell v Jones*<sup>485</sup> a person who had sold a horse and delivered it to the buyer subsequently regained possession of it under a lease. He then sold it to an innocent third party. The Court of Appeal held that this innocent second buyer did not obtain title to the horse, for the seller's transfer of possession of the horse after the sale to the first buyer had broken the necessary continuity of possession. The fact that the seller had later received it back did not convert him into a seller in possession under s 27(1). This was so, even though s 27(1) covers the case where a seller has sold goods "or is" in possession of them. The Court explained these words as covering the case where a seller had not possession of the goods at the time the sale was effected, but came into his hands afterwards; in such circumstances, a sale to a second, innocent, purchaser would be valid.<sup>486</sup> In such circumstances, the vital appearance of ownership remains unaltered.

For the same reason, the legal capacity in which the seller continues in possession of the goods is irrelevant, provided possession of them is retained in fact. Some early judicial statements suggested that the seller in possession exception would not apply where a seller held the goods after the sale as a bailee under a new arrangement, rather than as a seller who had still to deliver the goods.<sup>487</sup> This is not the law today; and modern authorities make it clear that the purpose for which the seller retains the goods, whether under a lease, hire purchase, or any other bailment, is unimportant.<sup>488</sup> In all cases where goods have been sold, title must, by definition, have passed to the buyer. The buyer who leaves such goods in the seller's hands is therefore granting a possessory interest only to the seller; and the precise nature of, or reason for, that interest does not affect the ability of the seller in possession to give a good title to a third party who is unaware that the interest exists.

#### (ii) Buyer in possession

Section 27(2) of the Sale of Goods Act provides that if a person who has bought or agreed to buy goods obtains possession of them with the consent of the seller, the buyer may give a good title to an innocent third party. The reason that this rule exists is the same as that for the seller in possession rule; an innocent stranger, unaware of any transaction having

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<sup>485</sup> (1905) 24 NZLR 932

<sup>486</sup> This case was described as "rightly decided" in *Pacific Motor Auctions Pty Ltd v Motor Credits (Hire Finance) Ltd* [1965] AC 867, 884 (PC), per Lord Pearce.

<sup>487</sup> For example, *Staffs Motor Guarantee Ltd v British Waggon Co Ltd* [1934] 2 KB 305

<sup>488</sup> *Pacific Motor Auctions Pty Ltd v Motor Credits (Hire Finance) Ltd* [1965] AC 867 (PC)

taken place between buyer and seller, may observe where possession of the goods lies and is taken to be entitled to assume that possession and a right to sell are both vested in the buyer in such circumstances.<sup>489</sup>

Where the section operates, it gives effect to the disposition of the goods to the third party as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner”. In some cases, the courts have construed this wording to mean that, for a third party to obtain title from a buyer in possession, the latter must be, or behave as though he were, a mercantile agent.<sup>490</sup> Such a construction presents obvious difficulties and, even if it continues to be the law in England, it has not been adopted in New Zealand. This was made clear in *Jeffcot v Andrew Motors Ltd*,<sup>491</sup> in which the Court of Appeal held that it was a “quite unsound” argument that the buyer in possession must be, or conduct himself as, an agent; rather, the purpose of s 27(2) was to deem the particular disposition to the third party to be effective in the same way as one made by a mercantile agent would be in the circumstances. The words “as if” of course support this construction. The Factors Acts of 1877 and 1889 were passed because the previous law had afforded protection to the innocent third party in the case of dispositions by mercantile agents, but not otherwise; this was recognised as inadequate and, as described above, the Acts in consequence extended the *nemo dat* exceptions to include buyers and sellers in possession. The Acts would have achieved nothing if these people, as well as being buyers or sellers in possession, were also required to be mercantile agents.

It has been observed that the wording of s 27(2) is infelicitous because, if it were applied literally, it could enable a person who purchased goods from a thief or from some other person who had not bought or agreed to buy goods from their owner to transfer title to them to subsequent innocent purchasers. This was discussed in detail in the leading New Zealand case of *Elwin v O'Regan and Maxwell*.<sup>492</sup> In that case, a bailee who had obtained possession of a car pursuant to an option to purchase it from its owner sold the car to a finance company which had no knowledge of the bailee's lack of right to sell. The finance company then sold it to M, who in turn sold it to the plaintiff, these purchasers being equally

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<sup>489</sup> See *Elwin v O'Regan and Maxwell* [1971] NZLR 1125 and *National Employers' Mutual General Insurance Assoc Ltd* [1987] 3 All ER 385 (CA); affd [1988] 2 All ER 425 (HL) for a detailed consideration and interpretation of s 27(2); and Ahdar “The Buyer in Possession Exception to the *Nemo Dat* Rule Revisited” (1989) 4 *Canta LR* 149 for a discussion of these and other relevant cases.

<sup>490</sup> See, for example, *Oppenheimer v Attenborough & Son* [1908] 1 KB 221.

<sup>491</sup> [1960] NZLR 721, 729

<sup>492</sup> [1971] NZLR 1124

as innocent as the finance company. The original owner sought its return from the plaintiff. The plaintiff argued that the wording of s 27(2) protected him, because the person from whom he had purchased the car had been in possession of it with the consent of the finance company which had sold it to her. The High Court did not accept this contention. Acknowledging that a literal reading of the subsection might yield this result, Beattie J held that it was nevertheless contrary to principle and could not be right. The finance company had never had title to the car at all; in consequence, its consent to M's possession of it under a purported sale was ineffective to validate the supposed sale of it by M to the plaintiff. The subsection had to be read so as to require that the relevant consent to a buyer's possession must derive from the owner of the goods. Accordingly, it was held that the original owner had not lost ownership of the car. The bailee's sale did not vest title in the purchaser from him, and a title could not simply spring into existence as a result of a chain of purported sales subsequently taking place. Despite the hardship caused to the three innocent subsequent purchasers, the *nemo dat* rule was held applicable and the original owner was entitled to recover the vehicle.

*Elwin v O'Regan and Maxwell* was accepted by the House of Lords as being correctly decided in *National Employers Mutual General Insurance Assoc Ltd v Jones*.<sup>493</sup> In that case, a vehicle which had been stolen from its owner passed through the hands of a number of innocent people in a chain of sales and resales. The House of Lords held that no title could be created or passed by the thief and the original owner had not been divested of her title. Such a finding is, it is submitted, consistent with longstanding legal principle and a simple application of the *nemo dat* rule.

## 6.6 Sale under a voidable title

Section 25 of the Sale of Goods Act provides that if the owner sells to a buyer in circumstances which render the contract voidable, and the buyer has onsold the goods to a third party acting in good faith before the original owner avoids the title, the third party will obtain a good title. Commonly, a buyer's fraud may be the reason that he or she obtains a title which is voidable by the seller; for example, a dishonest "rogue" buyer may deliberately give the seller a bad cheque for the goods, knowing that the cheque will be dishonoured. In such a case, the title which is passed from seller to rogue is a real one, but is voidable for fraud at the

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<sup>493</sup> [1988] 2 All ER 425

option of the seller. If the seller does not act to exercise this option to avoid before an innocent third party gives value for the goods the seller loses any right to do so, and the title which the rogue has passed to the third party does not revert to the original seller, but remains vested in the third party.<sup>494</sup> Thus, the principle set out in s 25 does not constitute an exception to the *nemo dat* rule to enable title to pass when otherwise it would not; rather, s 25 covers the circumstances in which the title which has passed to a buyer under a contract of sale may be avoided. Section 25 deals with divesting, rather than vesting, of title.

The application of s 25 to “rogue” cases of the kind described above has caused great difficulties, particularly where the rogue has adopted a false identity or has impersonated some other, real, person to obtain goods under a fraudulent purchase. In these circumstances, case law reveals two distinct lines of reasoning adopted by the Courts. In some cases the Courts have held the original contract between seller and rogue to be void at the outset on the ground that the original seller was offering to sell only to the particular named individual whom the rogue purported to be; therefore, the rogue impersonator was not a person capable of accepting the offer and no contract could come into existence. Identity, according to this view, is crucial.<sup>495</sup> Where this reasoning is adopted, the contract between seller and rogue is treated as void, rather than voidable for fraud; section 25 therefore does not apply and no title can pass to the third party. By contrast, other cases have taken the more robust view that the original seller simply intends to sell to the person in front of him, whomever he or she might be; although the seller may have been mistaken as to an attribute, namely the creditworthiness, of that person, a contract, albeit a voidable one, is regarded as having come into existence between the parties who dealt with each other.<sup>496</sup> The case law was reviewed by the House of Lords in the recent case of *Shogun Finance Ltd v Hudson*,<sup>497</sup> in which the former, “void” approach was adopted by a majority. In that case, a rogue had dishonestly obtained a driving licence belonging to one Patel, and forged Patel’s signature in a hire purchase agreement made with the claimant finance company. Before entering the agreement, the finance company checked Patel’s name and address against the electoral register, checked his status with regard to any judgments or bankruptcy and his credit rating, and compared the signature provided by the rogue with that on Patel’s licence. After taking possession of the car, the rogue sold it to an innocent third party, from whom the finance company sought its

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<sup>494</sup> *Jeffcott v Andrew Motors* [1960] NZLR 721 (SC & CA)

<sup>495</sup> For example, *Ingram v Little* [1961] 1 QB 31 (CA)

<sup>496</sup> For example, *Lewis v Averay* [1972] 1 QB 198 (CA)

<sup>497</sup> [2004] 1 All ER 215 (HL), discussed by McLauchlan (2004) 10 NZBLQ 189



return. It was held by the majority that no hire purchase agreement existed between the rogue and the finance company, which was entitled to recover the car. This was because the only supposed debtor was Patel, who was specifically identified in the agreement. The finance company intended to deal with no one but Patel and for that reason had taken steps to check his credit worthiness. His identity was essential. By contrast, the minority judges took the view that the case law in “rogue” cases was in disarray as a result of a series of decisions based on sterile and fine distinctions as to “identity” and “attributes”; and considered that fairness and simplicity generally required that the person who parted with goods to a rogue ought to bear any resulting loss.

It is suggested that *Shogun Finance Ltd* itself does little to clarify the law, and that the majority opinions are not more convincing than those of the minority. Suggestions have been made in the past that some kind of apportionment between innocent parties in “rogue” cases would be desirable.<sup>498</sup> This would at least cut the Gordian knot, although whether it would achieve fairer results in particular cases is questionable. It is suggested that the minority view in *Shogun Finance Ltd*, that is, that the loss in “rogue” cases ought to be borne by the person who voluntarily hands his or her goods over to the rogue, has much to recommend it; and that such an approach would have some affinity with the general principles underlying the exceptions to the *nemo dat* rules.<sup>499</sup> Without the adoption of a broad and consistent approach of this kind, it seems that the law will remain in its present “unsatisfactory and unprincipled state”.<sup>500</sup>

Where a rogue has a title which is voidable for fraud, the rogue’s further sale or other disposition of the goods does not constitute conversion. This is because the rogue is the owner of the goods and is not acting adversely to the title of the original seller, or anyone else, in selling them. The original seller in such a case may claim the price of the goods from the rogue and costs or damages associated with the rogue’s misrepresentation or fraud, but a conversion action will not lie.

In New Zealand, s 8 of the Contractual Mistakes Act 1977 may be of significance in “rogue” cases. It is arguable that a contract between a seller and a rogue is covered by the Act and that it may afford protection to a third party who buys the goods from the rogue. Under s 6(1)(a), a Court may grant relief to a party to a contract if the party was influenced in his

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<sup>498</sup> See, for example, *Ingram v Little* [1961] 1 QB 31, 73 (CA) per Devlin LJ; and the Twelfth Report of the Law Reform Committee on the Transfer of Title To Chattels, 1966, Cmnd 2958.

<sup>499</sup> See Lord Nicholls of Birkenhead in *Shogun Finance Ltd*, p 226.

<sup>500</sup> *ibid*, p 225

decision to enter the contract by a mistake that was material to him, and the existence of the mistake was known to the other party. In these cases, the seller is doubtless materially influenced by his belief in the identity of the rogue, who knows of that mistaken belief.

The Act confers a wide discretion on the Court in granting relief to a party to a contract entered into under a mistake. Possible orders include: a declaration that the contract is valid in whole or in part; cancellation or variation of the contract; restitution; compensation; or the vesting of any property that was the subject of the contract in any party.<sup>501</sup> However, these powers are limited by s 8(1), which provides:

### **8 Rights of third persons not affected**

(1) Nothing in any order made under this Act shall invalidate –

(a) Any disposition of property by a party to a mistaken contract for valuable consideration; or

(b) Any disposition of property made by or through a person who became entitled to the property under a disposition to which paragraph (a) of this subsection applies

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if the person to whom the disposition was made was not a party to the mistaken contract and had not at the time of the disposition notice that the property was the subject of, or the whole or part of the consideration, for, a mistaken contract and otherwise acts in good faith.

It may be that this subsection operates to secure the position of the innocent third party who has bought goods from a rogue.<sup>502</sup> However, it is also arguable that it protects only the third party to whom property has already passed, by barring any order under the Act from disturbing those existing rights. On this view, the third party does not acquire any title under s 8; the acquisition of title still depends upon s 25 of the Sale of Goods Act but, once that section covers the case, the innocent third party cannot be divested of his property by any order made under the Contractual Mistakes Act. This view is supported by the language of s 8, which refers to the “rights” of third persons being unaffected, and states that no disposition of property to an innocent third party should be ‘invalidated’. This wording perhaps indicates

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<sup>501</sup> s 7

<sup>502</sup> See the views of McLauchlan (1983) 10 NZULR 199.

that s 8 confers no rights on third parties; rather, it prevents the possible disturbance by the discretionary regime of the Contractual Mistakes Act of already established rights and valid dispositions of property.

### 6.7 Reservation of title

It is open to the parties to a sale of goods to provide that the seller retains ownership of the goods until such time as payment is made.<sup>503</sup> This rule has been used to advantage by sellers of goods in arrangements incorporating reservation of title<sup>504</sup> clauses. These clauses are inserted into contracts for the purpose of protecting unpaid sellers of goods from the effects of the possible insolvency of buyers. In such cases, the seller usually stipulates that property in the goods should remain in him or her until the goods are paid for in full, the intention being that, should the buyer become insolvent, the seller will be able to recover the goods themselves (the goods still being the property of the seller) rather than being forced to undertake the often futile procedure of suing an insolvent buyer for the purchase price. A reservation of title clause may therefore be a useful device for a seller.

As between buyer and seller a reservation of title clause will generally be effective according to its terms where no other party is involved.<sup>505</sup> However, where a third party has acquired an interest in the goods, this will not necessarily be so. This is because a reservation of title clause is a “security interest” under the Personal Property Securities Act 1999.<sup>506</sup> In consequence, if the buyer on-sells the goods or grants some other interest in them to a third party, the respective interests of the original seller and the third party in the goods or their proceeds will be determined by the regime of the PPSA. A seller of goods subject to a reservation of title clause should therefore recognise the importance of protecting his or her interest in the goods pursuant to the PPSA. If this is not done, the seller will run the risk that

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<sup>503</sup> Sale of Goods Act 1908, s 21

<sup>504</sup> These clauses are often called *Romalpa* clauses after the case of *Aluminium Industrie Vaasen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676 (QBD & CA).

<sup>505</sup> PPSA, s 35. A liquidator of the buyer is not a third party in this context: *Dunphy v Sleepyhead Manufacturing Ltd* [2007] 3 NZLR 602 (CA). In the case of reservation of title or other security in a contract covered by the Consumer Guarantees Act 1993, oral advice must be given to the consumer as to the way in which his or her right to undisturbed possession of the goods could be affected, sufficient to enable a reasonable consumer to understand the general nature and effect of it; and a written copy of the agreement or part containing the clause must be provided also. Receipt of both must be acknowledged in writing by the consumer.

<sup>506</sup> PPSA, s 17(3)

his or her interest in the goods may be defeated by the interest of a third party.<sup>507</sup> The effect of the PPSA on title to goods is discussed further below.

### **6.8 Title to stolen goods: s 26(1) of the Sale of Goods Act 1908**

A straightforward application of the *nemo dat* rule makes it clear that a person who has simply taken goods from their owner without authority cannot transfer a good title to them. In such circumstances, no exception to the *nemo dat* rule applies; the taker has acquired nothing more than mere unjustified possession of the goods, and obtains no proprietary interest in them. Accordingly, the taker cannot transfer ownership of the goods to a subsequent buyer and, no matter how long the chain of subsequent buyers may be, no title springs into existence.<sup>508</sup> So, “[i]f my goods go from me without my will, I can recover them from the hundredth hand, however clean it may be”.<sup>509</sup> The Courts have consistently interpreted the Sale of Goods Act in accordance with this principle, and rejected any reading of the Act which might yield a contrary result.<sup>510</sup>

Generally speaking, as far as title is concerned, it makes no difference whether a person has taken the goods from their owner with a dishonest intention such that the taking amounts to stealing, or whether the taker has acted in good faith by, for example, removing the goods by mistake. The principles applicable to goods which are stolen by a simple taking apply equally to goods which are removed from their owner in good faith, but without authority. Dishonesty is of course necessary for a taking of goods to constitute theft but, as described above, this is not a requirement for the strict liability tort of conversion. Where an unauthorised taking of goods is done honestly, such as in the case of a mistake as to the identity or ownership of the goods, the taker will not be able to confer a good title on a third party unless an exception to the *nemo dat* rule is applicable. It may be possible to establish an estoppel against an owner who has, for example, carelessly enabled the mistake to occur but, as described above, this is not easy to do, for the law does not readily impose obligations upon owners to safeguard their own goods. In consequence, the honesty or otherwise of the unauthorised remover of goods is generally in itself irrelevant in deciding whether title passes to a third party, unless it is a factor in establishing that an exception to the *nemo dat* rule applies in the particular case.

<sup>507</sup> This is described by Hawes (2001) 9 Insolv LJ 28.

<sup>508</sup> The effect of the Limitation Act 1950 on title to converted goods is discussed further below.

<sup>509</sup> Pollock and Maitland *The History of English Law*, ii, 1911

<sup>510</sup> *Elwin v O'Regan and Maxwell* [1971] NZLR 1125, *National Employers' Mutual General Insurance Assoc v Jones* [1988] 2 All ER 425 (HL)

However, because special provision relating to title to stolen goods is made in s 26 of the Sale of Goods Act 1908, some discussion about this section is necessary. In this context, and to determine whether s 26(1) applies, the honesty or otherwise of the taker of the goods and the circumstances of the taking must be considered. The background to s 26 is as follows.

In the past, there existed a rule, known as market overt, which provided an exception to the principle that a person who simply took the goods from their owner could not give a good title to a subsequent buyer. This ancient rule<sup>511</sup> protected the honest buyer of goods in an established, recognised open or public market or fair, even if the goods had been stolen. Thus the original owner of the goods, from whom they had been taken, could not claim their return or damages for conversion from a person who had bought them *bona fide* in a market overt; and such a buyer could validly onsell the goods. The rule promoted commercial activity by encouraging the confidence and security of buyers in purchasing goods in such open markets. However it was hedged about with fine distinctions and anomalies relating to the criteria of time and place which had to be established in order to prove the existence of a market overt. For example, the sale had to be in ordinary business hours between sunrise and sunset, so that sales at night were excluded;<sup>512</sup> the concept of market overt differed according to whether the sale occurred in London or in the country;<sup>513</sup> and the entire transaction had to take place in the open market.<sup>514</sup>

The law of market overt was reviewed by the English Law Reform Committee in 1966. In its report,<sup>515</sup> the Committee declined to propose a general rule that an innocent purchaser of goods should always be protected; rather, it advocated the extension of the law of market overt to all shops, whether in London or not, and recommended that a person who bought in good faith at retail premises or by auction should obtain a good title. This would of course, if implemented, have removed country fairs and markets from the ambit of market overt.

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<sup>511</sup> The long history of the rule is described by Murray, 9 ICLQ 24, where the writer suggests it dates back to 2200 BC, and reviews the place of it in many jurisdictions. The rule was part of the law merchant and was adopted by the common law in the 14<sup>th</sup> or 15<sup>th</sup> century. For the history of the rule in English law, see Pease 8 Columbia LR 375. It did not apply in Scotland or Wales, and was not recognised in the United States ((1928) 27 Michigan LR 218), but was adopted by statute in jurisdictions which enacted the equivalent of s 22 of the Sale of Goods Act 1893 (UK).

<sup>512</sup> *Reid v Metropolitan Police Commissioner* [1973] QB 551 (CA)

<sup>513</sup> A market overt was a market designated in particular country towns, on particular days, by charter or prescription, or established by custom in a defined area. In London, all shops open to the public were market overt during ordinary hours of business.

<sup>514</sup> *Crane v London Dock Co* (1864) B & S 313; 122 ER 847

<sup>515</sup> The Twelfth Report of the Law Reform Committee on the Transfer of Title to Chattels, Cmnd 2958. For contemporary comments on the report, see (1966) 29 MLR 431 and 541, by Diamond and Atiyah respectively. The latter is severely critical of the Committee's report and the lack of evidence for the opinions expressed in it.

However the proposals of the Committee were not adopted, and the law relating to market overt remained unchanged in England until it was abolished in its entirety in 1995.<sup>516</sup>

In New Zealand, the law relating to market overt was once stated in s 24 of the Sale of Goods Act 1908, but was abolished in 1961. Section 24 now states definitively that “[t]he law relating to market overt shall not apply in New Zealand”.

The market overt rule was displaced if the person who had stolen the goods was subsequently convicted of their theft.<sup>517</sup> Where this occurred, the original owner from whom the goods had been stolen could then reclaim them from the person into whose hands they had come, even if a good title had previously passed to the buyer in a market overt. Such a policy encouraged the private prosecution of offenders, as well as providing some protection to those whose goods had been stolen.<sup>518</sup> In New Zealand, this rule remains in force today in s 26(1) of the Sale of Goods Act 1908,<sup>519</sup> which reads:

### **26 Revesting of property in stolen goods on conviction of offender**

(1) Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise.

This provision applies only to cases of theft,<sup>520</sup> for the section further provides:

(2) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to theft, the property in such goods shall not revest in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender.

Despite s 26(1), if the circumstances of the theft happen to be covered by one of the exceptions to the *nemo dat* rule, the owner from whom the goods were stolen will lose his or

<sup>516</sup> The rule was abolished in England by the Sale of Goods (Amendment) Act 1994.

<sup>517</sup> The rule dated back to 21 Hen VIII c li.

<sup>518</sup> *Reid v Metropolitan Police Commissioner* [1973] 2 All ER 97

<sup>519</sup> The equivalent provision in s 24(2) of the Sale of Goods Act 1893 was repealed by Schedule 3, Part III of the Theft Act 1968 (UK), which stated: “Notwithstanding any enactment to the contrary, where property has been stolen or obtained by fraud or other wrongful means, the title to that or any other property shall not be affected by reason only of the conviction of the offender.”

<sup>520</sup> “Theft” is defined in the Crimes Act 1961, s 219.

her title to a *bona fide* purchaser from the convicted thief. In other words, the exceptions to the *nemo dat* rule prevail over the rule stated in s 26(1). This is because, by contrast with the position where a thief has simply taken the goods from the owner, the original owner of the goods will have done some act of the kind provided in the statutory exceptions to enable the theft to be committed, such as leaving the goods in the possession of a buyer or seller in possession. This was decided in *Siggelkow v Gibbs*,<sup>521</sup> in which the High Court had to determine the rightful owner of a car where the car had been sold but left by the buyer in the seller's possession after the sale, the seller having agreed to store it for a time. The seller sold the car to an innocent third party. The seller was convicted of theft in the District Court. In these circumstances, the seller was not only a thief but also a seller in possession and so within one of the exceptions to the *nemo dat* rule. It was held by the High Court that the right of the innocent third party to the protection of the statutory exception prevailed over the right of the buyer under s 26(1) to recover his stolen goods. The case is not authority for the proposition that a thief can confer a good title; rather, it decides that a disposal of goods which, although unauthorised, nevertheless is effective to give a good title because it comes within a statutory exception to the *nemo dat* rule is not invalidated if the unauthorised disposal also happens to constitute theft.

The scope of s 26(1) today, given the repeal of the market overt rule, is unclear. Indeed it is arguable that, given the decision in *Siggelkow v Gibbs*, it may have no practical application at all.

The difficulty with s 26(1) is that it assumes, by providing that property in the stolen goods "reverts" in the owner upon conviction of the thief, that the owner had been divested of his or her title in the first place, either by the theft itself or by some subsequent dealing with the goods. Clearly, before the repeal of the law of market overt in 1961, the owner of stolen goods would have lost his title to an innocent purchaser in market overt, and s 26(1) in such a case would have been necessary to validate a reversion of property in the goods to the original owner upon conviction of the thief. However, the market overt rule no longer exists, and it is not apparent that there remain today any circumstances in which an owner of stolen goods is divested of his or her property in them unless an exception to the *nemo dat* rule applies. Where there is such an exception, it will prevail over s 26(1); if there is not, the theft is ineffective in any event to divest the owner of his or her property in the goods, and s 26(1) is otiose.

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<sup>521</sup> [1990] 3 NZLR 503

It has been suggested<sup>522</sup> that the “property” which reverts in the owner under s 26(1) is a limited, or possessory, title. However the word “property” is defined in s 2 of the Sale of Goods Act 1908 as meaning “the general property in goods, and not merely a special property”; and, in any event, it would not be necessary to enact that the owner’s right to possession of goods stolen from him or her “reverts” upon conviction of the thief. The theft of goods does not remove the owner’s right to possession of them as against the thief or any subsequent recipient of the goods.

Possibly the only context in which s 26(1) may have any significance today is that of limitation. Under s 5 of the Limitation Act 1950, where goods have been converted or wrongfully detained and, before the owner recovers possession of them, a further conversion or wrongful detention takes place, an action in conversion or detinue must be brought within six years of the original conversion or wrongful detention. If the action is not commenced within the six year period, the action is barred and the owner’s title is extinguished.<sup>523</sup> This general rule is stated not to affect s 26(1) which has, in consequence, no time limit on its operation.<sup>524</sup>

In its proposals to reform the law of limitation, the Law Commission recommended the repeal of s 26(1).<sup>525</sup> The effect of such a repeal would be to place on a uniform footing the limitation rules for actions in conversion or detinue, and the allocation of title in such cases would not differ according to whether the tortfeasor happens to have also been convicted of theft or not. Despite this recommendation, the current Limitation Bill 2009 preserves s 26(1).<sup>526</sup> This may be unimportant for if it is correct, as suggested above, that s 26(1) is in fact a dead letter, the law of limitation which applies to it is similarly of no significance.

## 6.9 Effect of *nemo dat* exceptions

When title to goods is established, the judgment binds not only the parties to the proceedings, but also their privies as far as future dealings with the goods are concerned.<sup>527</sup> In

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<sup>522</sup> *Gault on Commercial Law* SG 26.07, <http://www.brookersonline.co.nz>

<sup>523</sup> Once six years have elapsed, no claim survives that can be revived by a subsequent acknowledgement of the claimant’s interest in goods: *George v Marven* [2002] DCR 828.

<sup>524</sup> Limitation Act 1950, s 5(3)

<sup>525</sup> See cl 31(5) of the draft Limitation Defences Bill, published for consultation 12 December 2007.

<sup>526</sup> Cl 28(4) of the Bill provides that its provisions relating to extinguishment of title in the context of limitation do not limit or affect s 26(1) of the Sale of Goods Act.

<sup>527</sup> A judgment determining where title to goods lies binds others who are not parties to the proceedings only in respect of transactions relating to the goods occurring after the judgment is obtained: *Powell v Wiltshire* [2004] 3 All ER 235 (CA).



consequence, a judgment which finds an exception to the *nemo dat* rule operates to confer a good title on the innocent purchaser and the title, in relation to that purchase and any subsequent transactions, is one which is valid as against all the world. Although the basis for the exceptions is generally described as a form of estoppel, the effect of the statutory exceptions is not merely to estop the true owner, as between him or her and the innocent purchaser, from denying the innocent third party's title; rather, the innocent purchaser in reality acquires a better title than the seller had. Thus, the title is real and not merely metaphorical by estoppel and so is good, not only as against the original owner, but as against anyone else.<sup>528</sup> In consequence, the innocent purchaser is able to deal freely with the goods in accordance with the title that he or she has obtained, as may anyone who subsequently takes the goods from him or her. This principle is sometimes described as "sheltering", because subsequent takers of the goods can shelter under the title acquired by the innocent purchaser.

It follows of course from this that the person who takes goods from someone with no authority to deal with them will not be committing conversion if one of the exceptions to the *nemo dat* rule is established as applying to the particular case. However, (subject to the Limitation Act 1950) the person who has first sold or disposed of the goods without authority will not be protected from a claim in conversion by the original owner of the goods who has suffered loss as a result of the transaction, it being the unauthorised seller who has caused the owner's loss.<sup>529</sup> Further, there is pre-Sale of Goods Act authority that if the unauthorised seller should eventually obtain the goods again after they have passed through the ownership of others, the unauthorised seller will not be entitled to retain them against the original owner.<sup>530</sup> Whether this latter principle would today be upheld is not clear; it would perhaps be difficult to establish that it has survived the current statutory language.

## 6.10 Personal property securities

### 6.10.1 Scheme of the PPSA

We turn now to examine the effect of the Personal Property Securities Act 1999 ("the PPSA") on the principles outlined above relating to dispositions of goods without title. The

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<sup>528</sup> *Eastern Distributors Ltd v Goldring* [1957] 2 QB 600, 611 (CA)

<sup>529</sup> *NZ Securities & Finance Ltd v Wrightcars Ltd* [1976] 1 NZLR 77

<sup>530</sup> 2 Bl Comm 450

rules and exceptions relating to the *nemo dat* regime which are described above do not apply to goods which are subject to security interests under the PPSA. This Act, which came into force on 1 May 2002, established a far reaching and comprehensive system relating to security interests in personal property, including the creation and enforceability of security interests, the determination of priority among security interests and between security interests and other interests and the enforcement of security interests. The Act provides for the operation of an electronic register of security interests and deals with the method and effect of registration of those interests. The PPSA repealed and replaced a considerable amount of other legislation, principal among which was the Chattels Transfer Act 1924, the Motor Vehicle Securities Act 1989 and the Companies (Registration of Charges) Act 1993. The result was a scheme of uniform rules for all security interests in personal property.

The origins of the PPSA are North American. Its source is the legislation enacted in the Canadian provinces, which in turn derives from art 9 of the United States Uniform Commercial Code. Although the principles of the PPSA generally follow the Canadian Acts upon which it is based, the PPSA is not identical to any one of them. However the drafting of the PPSA is in many respects the same or similar to one or more of the Canadian statutes, and Canadian jurisprudence must generally be looked to when the PPSA requires interpretation.

Personal property which is subject to a security interest under the PPSA is referred to in the Act as “collateral”.<sup>531</sup> Clearly, as the intention of the PPSA is to do away with the need for distinctions amongst secured transactions and to place them on a uniform footing, the question of whether an interest in collateral is a security interest within the meaning of the PPSA is one of substance rather than form.<sup>532</sup> The concept is defined thus in the PPSA:  
Section 17 Meaning of “security interest”

- (1) In this Act, unless the context otherwise requires, the term security interest—
- (a) Means an interest in personal property created or provided for by a transaction that in substance secures payment or performance of an obligation, without regard to—
    - (i) The form of the transaction; and
    - (ii) The identity of the person who has title to the collateral; and
  - (b) Includes an interest created or provided for by a transfer of an account receivable or chattel paper, a lease for a term of more than 1 year, and a

<sup>531</sup> PPSA, s 16(1)

<sup>532</sup> Thus the legal forms by which security is obtained are largely irrelevant: *Waller v New Zealand Bloodstock Ltd* [2006] 3 NZLR 629; *J S Brookesbank & Co (Australasia) Ltd v EXFTX Ltd* [2009] NZCA 122.

commercial consignment (whether or not the transfer, lease, or consignment secures payment or performance of an obligation).

(2) A person who is obligated under an account receivable may take a security interest in the account receivable under which that person is obligated.

(3) Without limiting subsection (1), and to avoid doubt, this Act applies to a fixed charge, floating charge, chattel mortgage, conditional sale agreement (including an agreement to sell subject to retention of title), hire purchase agreement, pledge, security trust deed, trust receipt, consignment, lease, an assignment, or a flawed asset arrangement, that secures payment or performance of an obligation.

This wide ranging definition includes many of the kinds of transactions which affect title to goods and to which the rules discussed above have been applicable. In consequence, the effect of the PPSA on the traditional rules relating to sales without title, as described above, is extensive and very significant.<sup>533</sup> The PPSA allocates and prioritises security interests in goods in a manner which largely disregards the concept of title.

In essence, the broad scheme of the PPSA is that a secured party may, once a security interest in property has attached, perfect the security interest. The perfection then renders a security interest enforceable against third parties who may claim rights in the property.

It will be apparent that the two concepts of “attachment” and “perfection” are central to the statutory scheme, and their definitions are important. First, section 40 sets out the general rules for ascertaining when attachment occurs. A security interest attaches (unless the parties have agreed on a later time) when value is given by the secured party, the debtor has rights in the collateral and, except for the purpose of enforcing rights between the parties to the security agreement, the agreement is enforceable against third parties. A debtor to whom goods have been leased, consigned or sold under a conditional sale agreement is regarded for this purpose as having rights in goods no later than when the debtor obtains possession of them. Once attachment has occurred, the security interest may be perfected. This may be achieved either by the registering of a financing statement<sup>534</sup> respecting it, or by the secured party’s having possession (other than as a result of seizure or repossession) of the collateral.<sup>535</sup>

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<sup>533</sup> For a detailed description of all aspects of the PPSA, see Gedye, Cuming and Wood, *Personal Property Securities in New Zealand*, 2002.

<sup>534</sup> “Financing statement” means the data required or authorised by the Act to be entered in the register to effect a registration for the purposes of perfecting a security interest in collateral: PPSA, s 135.

<sup>535</sup> s 41

If a security interest exists but remains unperfected, a buyer or lessee of the collateral who gives value takes it free of the unperfected security interest.<sup>536</sup> The knowledge of the buyer in such a case is irrelevant; unlike the position under the North American schemes upon which the PPSA is based, the buyer will take the collateral as against the holder of an unperfected security interest even if the buyer knows of the existence of the security interest. However, although s 52 does not require the buyer or lessee to act “in good faith”, it is suggested that the section would not protect a buyer or lessee who acts in bad faith. Section 25 provides that obligations under security agreements must be “exercised or discharged in good faith and in accordance with reasonable standards of commercial practice”, and also states that a person does not act in bad faith merely because he or she has knowledge of the interest of some other person. In consequence, it is unlikely that s 52 would protect a sale or lease made fraudulently.

Where there exist competing security interests in goods, the detailed rules set out in Part 7 of the PPSA determine the parties’ rights. Thus, the traditional and familiar concept of allocating title to goods is largely displaced by the PPSA, which lays down its own regime for prioritising security interests.

Outside the general scheme, there are some particular instances stated in the PPSA in which buyers or lessees take goods free of other security interests, perfected or not.

First, a buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes the goods free of any security interest which the seller or lessor may have given to some other party unless the buyer or lessee knows that the sale or lease constitutes a breach of the security agreement which created the security interest.<sup>537</sup> This provision prevails over s 3 of the Mercantile Law Act and section 27 of the Sale of Goods Act, both of which are outlined above. As noted above in relation to s 3 of the Mercantile Law Act 1908, the expression “the ordinary course of business” is one which has given rise to litigation in other contexts and its meaning is not entirely clear or settled. Nevertheless it may be observed that, however it is interpreted, this provision is intended to protect the person who buys or leases goods from a trader or retailer. By contrast with the exception described in the next paragraph, however, s 53 gives such a buyer or lessee protection only against a security interest given by the seller or lessor to another party; the goods are not free of other security interests which are not of this kind.

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<sup>536</sup> s 52

<sup>537</sup> s 53

A further exception to the effect of perfection is the case of a purchase or lease of consumer goods<sup>538</sup> with a value not exceeding \$2,000. Provided the buyer or lessee gives value and has no knowledge of the security interest, the buyer or lessee will take the goods free of any security interest.<sup>539</sup> This is clearly a consumer protection measure; because “knowledge” in this context means actual knowledge,<sup>540</sup> and the registration of a financing statement does not constitute constructive notice or knowledge,<sup>541</sup> the purchaser or lessee of consumer goods under \$2,000 need not be concerned about the possibility of any existing security at all.

An exception also exists where a security interest has been perfected in respect of goods which are acquired as consumer goods or equipment and are of a kind which are required by regulations to be described by a serial number in a financing statement. If the buyer or lessee take the goods without knowledge of the security interest and the serial number is wrongly stated in the financing statement, the buyer or lessee of the incorrectly described goods will take them free of the security interest.<sup>542</sup> The reason for this provision is of course that, as between the buyer or lessee and the secured party, fairness requires that the secured party who made the error should bear any loss which results.

A further exception is provided in the case of a security interest which has been temporarily perfected.<sup>543</sup> A buyer or lessee who gives new value for the interest acquired and had no knowledge of the temporarily perfected security interest will take the goods free of that interest.

The final exception relates to motor vehicles, which are covered by Part 6 of the Act. A buyer or lessee of a motor vehicle for value takes the motor vehicle free of any security interest provided the buyer or lessee is a consumer,<sup>544</sup> is not a party to the transaction which created the security interest, and the security interest was not disclosed to the buyer or lessee in accordance with s 58(c) before the purchase or lease was completed.<sup>545</sup>

### 6.10.2 *Enforcement of security interests*

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<sup>538</sup> “Consumer goods” are those that are used or acquired for use primarily for personal, domestic or household use: s 16.

<sup>539</sup> s 54

<sup>540</sup> s 19

<sup>541</sup> s 20

<sup>542</sup> s 55

<sup>543</sup> The temporary perfection referred to may be pursuant to s 28 (collateral moved to New Zealand), s 47 (proceeds), or s 49 (negotiable document of title or returned goods).

<sup>544</sup> A “consumer” in this context is any person other than a manufacturer, wholesaler, registered trader or finance company: s 57.

<sup>545</sup> s 58

Under s 109, a secured party may take possession of and sell collateral when the debtor is in default, or when the collateral is at risk. The secured party must give notice of the pending sale to the debtor, other secured parties and any other person claiming a legally enforceable interest in the collateral.<sup>546</sup> Once the collateral is sold, all subordinate security interests in the collateral and its proceeds are extinguished;<sup>547</sup> a statement of account of the proceeds must be given to the debtor and other interested parties;<sup>548</sup> the secured party must then pay prior ranking secured parties in the appropriate order;<sup>549</sup> and any surplus is distributed first, to other secured parties according to their priority ranking, and then to any other person who has given notice that an interest is claimed.<sup>550</sup>

Rather than choosing to sell the goods as described above a secured party may, if the debtor defaults, propose to take the collateral to satisfy the obligation owed by the security agreement.<sup>551</sup> Notice of such a proposal must be given to the interested parties who have ten working days to make objections to it. In the absence of objections, the secured party is deemed to have irrevocably elected to take the collateral in satisfaction of the obligation secured by it, and may hold or dispose of it free from all rights and interests of the debtor and other interested parties.<sup>552</sup> Regardless of whether these requirements have been complied with, a purchaser for value and in good faith who buys the collateral from the secured party takes it free from any interest of the debtor, or any interest subordinate to that of the either the debtor or the secured party.<sup>553</sup>

It is clear that the rules relating to enforcement of security interests take no particular account of the position of the owner of the collateral. Although a proprietary interest, without more, may found a claim to entitlement to share in any surplus realised by a sale of the collateral, such an interest ranks below registered security interests. The debtor (who may of course be the owner of the collateral in the particular circumstances) is the only person to be ranked below those who claim interests other than registered security interests.

### 6.10.3 *Unauthorised transfers of secured goods*

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<sup>546</sup> s 114

<sup>547</sup> s 115

<sup>548</sup> s 116

<sup>549</sup> s 116A

<sup>550</sup> s 117

<sup>551</sup> s 120

<sup>552</sup> s 123

<sup>553</sup> s 124

The general rule under the PPSA is that a debtor may transfer his or her rights in collateral, even if the transfer is not authorised, or has been expressly prohibited, by the secured party. Section 87 provides:

(1) The rights of a debtor in collateral may be transferred consensually or by operation of law despite a provision in the security agreement prohibiting transfer or declaring a transfer to be a default.

(2) A transfer by the debtor does not prejudice the rights of the secured party under the agreement or otherwise, including the right to treat a prohibited transfer as an act of default.

(3) In this section, **transfer** includes a sale, the creation of a security interest, or a transfer under judgment enforcement proceedings.

Although s 87(1) refers to the “rights of a debtor in collateral” rather than simply “collateral”, it is apparent that a debtor’s unauthorised sale or other transfer of goods may effectively deprive an owner of secured goods of them or their value. The sale or transfer, despite being a breach of the debtor’s contract with the secured party, is validated by s 87; and the secured party’s rights continue, despite the unauthorised transfer, in the goods. Section 45, which states that if collateral is “dealt with or otherwise gives rise to proceeds”, the security interest continues in the collateral and also extends to the proceeds. In consequence, if the debtor sells or transfers the collateral without the consent of the secured party, the buyer will take the collateral subject to the security interest. The secured party will thus have a security interest in both the transferred collateral and the proceeds of the dealing which have been obtained by the defaulting debtor.

Any assertion of ownership will not be relevant in determining the various parties’ rights in the collateral, for these rights are prescribed exclusively by the PPSA. In consequence, as illustrated by a number of cases,<sup>554</sup> an owner of goods which are subject to a security interest may lose his or her title to a secured third party if the application of the rules of the PPSA results in the according of priority to the interest of the third party. In a competition between security interests, where ownership is vested is irrelevant, and a debtor with no proprietary title may effectively pass title to the goods to the holder of a security

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<sup>554</sup> As examples, *Graham v Portacom New Zealand Ltd* [2004] 2 NZLR 528, *Waller v New Zealand Bloodstock Ltd* [2005] 2 NZLR 549, *New Zealand Bloodstock Leasing Ltd v Jenkins* (2007) 3 NZCCLR 811

interest in them.<sup>555</sup> As stated by the Court of Appeal in *Waller v New Zealand Bloodstock Ltd*<sup>556</sup> “with respect to priority of competing security interests under the PPSA the nemo dat principle is ousted”. This was also emphasised in *Graham v Portacom New Zealand Ltd*,<sup>557</sup> in which it was held that the rights of a lessee in goods were not confined to a mere possessory interest, but could constitute a proprietary interest such that a secured creditor of the lessee could take priority over the rights of the lessor of the goods in whom legal title was vested. Citing Canadian authority,<sup>558</sup> the Court emphasised that “[t]he rights of the parties to a transaction that creates a security interest are explicitly not dependent upon either the form of the transaction or upon traditional questions of title. Rather, they are defined by the Act itself”.<sup>559</sup>

The general principles of conversion are unaffected by the PPSA. Consistently with the general rules relating to conversion, a holder of a security interest who has or recovers a right to take possession of the goods may sue in conversion anyone who wrongfully usurps the holder’s possessory interest. The holder of a security interest will have such a right to repossess goods when the debtor is in default under the security agreement, or the collateral is at risk.<sup>560</sup> So in *Cameron v Phelps*,<sup>561</sup> for example, the plaintiff, who had agreed to sell a machine under an agreement containing a reservation of property clause, was entitled to sue the defendants in conversion, the defendants having obtained possession of the machine from the buyers and then sold it. At the time the defendants sold the machine, the defendants had not paid the agreed purchase price, which would have entitled the plaintiff to retake the machine from the buyers. This entitlement to repossess upon the buyers’ default, although not acted on, sufficed to give the plaintiff the necessary possessory interest to sue in conversion. Fogarty J observed that the PPSA was a statute facilitating the registration of interests in personal property, and did not in any way replace the common law of conversion.

Despite this, the PPSA is significant in this context because it narrows considerably the range of situations in which conversion actions may be available. This is because the Act

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<sup>555</sup> *Waller v New Zealand Bloodstock Ltd* [2005] 2 NZLR 549, 569, per Allan J; affd [2006] 3 NZLR 620 (CA)

<sup>556</sup> [2006] 3 NZLR 620, 649, per Robertson and Baragwanath JJ

<sup>557</sup> [2004] 2 NZLR 528, noted by Gedye (2004) 10 NZBLQ 203.

<sup>558</sup> *R v Giffen* (1998) 155 DLR (4<sup>th</sup>) 332

<sup>559</sup> See also *Waller v New Zealand Bloodstock Ltd* [2006] 3 NZLR 629 (CA) (approving [2005] 2 NZLR 549) (noted by Hawes [2005] NZLJ 45)) and *Dunphy v Sleepyhead Manufacturing Co Ltd* [2007] 3 NZLR 602 (CA).

<sup>560</sup> PPSA, s 109. Collateral is “at risk” if the secured party has reasonable grounds to believe that the collateral has been or will be destroyed, damaged, endangered, disassembled, removed, concealed, sold, or otherwise disposed of contrary to the provisions of the security agreement.

<sup>561</sup> CIV 2008-409-002648, HC, Christchurch, Fogarty J, 25 March 2009



prescribes where the interests lie, how they are prioritised and remedies available for default. Thus, the debtor who wrongfully transfers the goods will, under s 87, successfully transfer his or her interest in the goods to the transferee, whose interest in the goods remains subservient to that of the holder of the security interest. Thus, the statutory regime resolves the competition in many cases in which rights in goods were previously open to dispute. Although the Act does not remove the right to sue in conversion for infringement of possessory rights, it nevertheless prescribes where those rights lie, and provides its own remedies for interference with them.

### **6.11 What survives of *nemo dat*?**

In light of the above outline of the *nemo dat* principle and the statutory encroachments upon it, the question must be asked: how far does the law in New Zealand today protect the owner of goods which have been the subject of unauthorised transactions?

The first point to note is that, in the absence of a statutory provision to the contrary, the *nemo dat* rule remains applicable. This continues to be stated in s 23(1) of the Sale of Goods Act 1908. However it is suggested that in practice the scope of the *nemo dat* rule has become increasingly narrow, and that there will now be few circumstances in which an owner of goods will be successful against a *bona fide* person who claims, or who has obtained, an interest in the goods derived from an unauthorised disposition of them.

Clearly, a person who has simply stolen goods by taking them, or who has removed them without authority, cannot, without more, transfer title to them. This principle has never really been doubted and it has not been affected by the passage of the PPSA or any other statutory provision which qualifies the *nemo dat* rule. Regardless of the good faith of the purchaser from the thief or person who has converted them, the *nemo dat* rule in such a case protects the owner.

Where goods are stolen or converted by one who has not simply taken them, but was already in possession of them with the consent of the owner, the question of ownership if the goods are then disposed of to a third party will be less straightforward. In such a case, the arrangement under which possession was originally obtained will continue to be all-important in determining whether the owner loses his or her title to the third party.

If an owner makes a simple gratuitous loan or transfer of possession of the goods to another (unless that other is a mercantile agent or the circumstances are such as to found estoppel against the owner) with no other associated transaction vesting any other rights apart

from mere possession of the goods in the transferee, the owner will not lose the protection of the *nemo dat* rule. The only right the recipient of goods will have in such a case is a mere possessory interest; and although the recipient may in fact transfer possession of the goods to a third party, the possessory interest which is conferred on the third party will not prevail over the owner's proprietary right. For the same reason, a finder cannot transfer to a third party a possessory title capable of defeating the owner's interest in the goods.

By contrast, where interests in goods are transferred from their owner pursuant to a contractual arrangement, the position of the owner is less likely to be protected than it is in the non-contractual circumstances described above; and certainly less likely to be protected than it would have been before the passage of the PPSA. The first question must be in such cases, whether the goods which have been disposed of were subject to a security interest held by the owner. So, for example, if consideration is given for no more than the possession of the goods, as under a lease or hire, the agreement will constitute a security interest only if the goods have been leased or hired for more than one year. Thus, should a lessee of goods dispose of them without authority, whether title to the goods will remain with the owner or not will depend upon the agreed length of the lease. If it is more than one year, the provisions of the PPSA will determine the entitlements of the competing parties in the particular case. If it is less than one year, the owner's interest will prevail, unless some exception to the *nemo dat* rule is found to exist in the circumstances.

Given the scope of the PPSA, it is suggested that very little now remains of the pre-existing body of law relating to the *nemo dat* rule and the statutory exceptions to it. The broad effect of the PPSA on these exceptions will be considered separately.

#### 6.11.1 *Mercantile agents*

The rule stated in s 3 of the Mercantile Law Act 1908, which validates an unauthorised disposition of goods to a *bona fide* third party by a mercantile agent who has been entrusted with possession of them by their owner, does not apply if the goods are subject to a perfected security interest under the PPSA. In such a case, the person taking the goods is deemed to have notice of the agent's lack of authority.

Goods are frequently delivered to mercantile agents under agreements which create security interests in the goods. A common transaction is the commercial consignment, which is deemed under the PPSA to be a security interest. This term is defined in s 16 thus:

Commercial consignment –

(a) Means a consignment where –

(i) A consignor has reserved an interest in the goods that the consignor has delivered to the consignee for the purpose of sale, lease or other disposition; and

(ii) Both the consignor and the consignee deal in the ordinary course of business in goods of that description; but

(b) Does not include an agreement under which goods are delivered to an auctioneer for the purpose of sale.

It will be apparent that, to constitute a security interest, delivery of goods to a mercantile agent under a commercial consignment must involve the conferral of authority on the agent to dispose of the goods in some way. The delivery of goods to a mercantile agent with no authority to deal with them at all is not within this definition. Accordingly, if a mercantile agent receives goods and sells them, the effectiveness of the sale against the owner will depend upon whether authority for some kind of disposition had been given and, if it had, whether the security interest thereby created had been perfected. Perfection of the security interest will protect the owner from a disposition of an unauthorised kind.

Where the mercantile agent is in possession of the goods with the consent of the owner, but no authority for any disposition at all of the goods has been conferred by the owner on the agent, the rule stated in s 3 will continue to apply, and the PPSA will not.

In addition, a delivery of goods to a mercantile agent by a person who does not deal in such goods is not a commercial consignment. In consequence, a person, not being in business, who delivers goods to a mercantile agent will lose title to them if the agent disposes of them without authority. This is because s 3 of the Mercantile Law Act 1908, and not the PPSA, will cover the case.

### 6.11.2 *Sellers in possession*

Whether a seller in possession is able to transfer title to goods to a third party will depend upon the arrangement between the original seller and the buyer. If the buyer merely leaves the goods with the seller under no more than a deferred delivery arrangement, an unauthorised sale of the goods by the seller will be effective to divest the owner of title. If, however, the arrangement between buyer and seller constitutes a security interest, the PPSA

will cover the case. So, for example, the owner of goods who sells them and retains possession of them under a lease for more than a year will be able to transfer title to a third party only if the security interest thereby created has been perfected by registration. If this has occurred, the owner will be protected as against the third party; if not, the third party will prevail. In other words, s 27(1) continues to apply unless the arrangement between seller and buyer constitutes a security interest.

### 6.11.3 *Buyers in possession*

By contrast with s 27(1), it is suggested that s 27(2) has largely been rendered otiose by the passage of the PPSA and that, although s 27(2) is expressed to apply unless the seller of goods is the holder of a security interest in them, there remains little room for the operation of the buyer in possession rule. This is because a conditional sale is a security interest under the PPSA. Section 27(2), it will be remembered, enables a person who, “having bought or agreed to buy goods” is in possession of them with the consent of the seller to transfer title to the goods to a *bona fide* purchaser. A person who has “bought” goods has obtained, by definition, title to the goods anyway, and so no issue of *nemo dat* arises; the title is vested in the buyer, who is able to transfer it. By contrast, title has yet to pass to person who has “agreed to buy” goods; the arrangement is a conditional sale, only, and title remains with the seller pending the fulfilment of the condition, the occurrence of which renders the agreement to sell a completed sale. It is this situation in which s 27(2) has its effect, for the subsection validates a sale of goods by a person who is bound to buy them but has still to acquire title. However, as a conditional sale is a security interest, the PPSA will cover all cases where title to goods has been retained by a seller who has given the buyer possession of them. Accordingly, the allocation of rights in such circumstances will be governed by the PPSA.

It may be that there is one possible circumstance in which s 27(2) may have application outside the PPSA. It might be tentatively suggested that the reference in s 27(2) to a person who has “bought” goods is not mere surplusage as some writers suggest,<sup>562</sup> but may cover the situation where a person has bought goods, but the title obtained by the buyer has subsequently been avoided by the seller. The typical case, as described above, is that of the rogue whose purchase is fraudulent. In such a case, the rogue obtains a title to the goods, albeit one which is voidable; and so can transfer it to a *bona fide* third party, as is recognised

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<sup>562</sup> For example, P Atiyah, J Adams and H MacQueen, *The Sale of Goods*, 11<sup>th</sup> edn, 2005, p 400

by s 25 of the Sale of Goods Act 1908. If, however, the seller acts to avoid the sale before any such transfer to a third party occurs, title to the goods reverts in the seller in consequence of the avoidance. Should the rogue in such circumstances continue to retain possession of the goods after being divested of his title, he or she will nevertheless be a person who has “bought” goods under s 27(2). In this position, the owner of the goods will not hold any security interest in them; the PPSA will not cover the case, and s 27(2) will enable a further valid disposition of the goods by the rogue. It was recognised by the Court of Appeal in *Jeffcot v Andrew Motors Ltd*<sup>563</sup> that a rogue may be both a buyer in possession and the holder of a voidable title to goods, and in consequence either ss 25 or 27(2) could operate to validate a disposition by the rogue to a third party. The fact that avoidance may have taken place in a particular case should not alter this reasoning.

The situation of the rogue in possession after avoidance which is suggested above would doubtless be rare in practice. Certainly the case law on s 27(2) is overwhelmingly concerned with agreements to sell of the kind which include reservation of property clauses or hire purchase transactions. In consequence, the scope of s 27(2) has been drastically curtailed by the PPSA.

All hire purchase transactions are security interests within the PPSA. Thus, the distinction between the *Helby v Matthews*<sup>564</sup> and *Lee v Butler*<sup>565</sup> kinds of cases, which once was central to an enquiry into title if a hirer wrongfully disposed of goods, is no longer relevant in this context. It will be recalled that in the former case, the transaction was in reality a hire coupled with an option to purchase, whereby the hirer was free to choose whether to complete the payments and become the purchaser, or to terminate the hire and return the goods. By contrast, in *Lee v Butler*, the agreement was a conditional sale, and the buyer was obliged under the contract to complete the purchase of the goods by making all the due payments. In consequence, a buyer under a *Lee v Butler* arrangement who wrongfully disposed of goods could confer a good title on a third party under s 27(2) of the Sale of Goods Act 1908, but the hirer in *Lee v Butler*, not being a person who had “bought or agreed to buy goods” within s 27(2), could not. The PPSA applies regardless of whether the agreement is in reality a hire coupled with an option to purchase, or whether it is an agreement to sell, for both arrangements constitute security interests.

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<sup>563</sup> [1960] NZLR 721

<sup>564</sup> [1895] AC 471

<sup>565</sup> [1893] 2 QB 318

#### 6.11.4 *Estoppel*

In the Sale of Goods Act, estoppel constitutes a broad and residual category of exceptions to the *nemo dat* rule. Estoppel is, of course, a general legal principle, applicable in many contexts, and is not confined to questions of title. In effect, s 23(1) provides that the normal *nemo dat* rule may be displaced if the owner's conduct justifies it. The additional specified statutory exceptions (mercantile agent, and buyer or seller in possession) are no more than particular instances in which estoppel is conclusively deemed to be established. Beyond these, as described above, it is difficult to establish that the carelessness of an owner in safeguarding his or her own goods should give rise to an estoppel such as to preclude the owner from denying his or her title to them.

### 6.12 Reform of the law of title

The *nemo dat* rule today is, it is suggested, no longer a prevailing principle which has a few certain prescribed exceptions. Rather, it has itself become a rule of limited application which operates to fill the small interstices where other, dominant, statutory principles do not reach. Given the very wide scope of these principles, particularly since the passage of the PPSA, the cases which fall beyond their reach are few. It may therefore be argued that the time has come to abandon the lip service which the law pays to the *nemo dat* rule. The concept that the rule is the standard principle does not reflect the reality or the policy of the current law, and thus its retention serves no useful purpose. The exceptions to the rule have effectively eaten up the rule itself.

In support of this, it must be remembered that the PPSA was enacted for the very purpose of solving the problems which arose when goods were sold without authority. The typical example was the sale to an innocent purchaser of goods which were subject to a hire purchase agreement, so that the hirer had the appearance of ownership. It was stated forty years ago in this context by Lord Wilberforce, that such cases had given rise to much litigation, as well as hardship to individuals involved. He observed that the problem was due to "the perennial failure of English law to develop a proper method of charging movable property"; and that hire purchase, although an ingenious and convenient way of financing

sales of chattels, had the effect of divorcing ownership from possession, an arrangement which lent itself “almost ideally, to fraudulent dispositions”.<sup>566</sup>

In New Zealand the PPSA has, by establishing a register of interests in movable property, provided the solution to the problem stated by Lord Wilberforce. The Act has established a statutory regime which has the benefit of conferring legal certainty in dealings with secured goods, and allows the parties involved to protect their own interests. However the scheme is complex and it is apparent that the law relating to title has not been made simpler or more comprehensible by the passage of the PPSA. It is beset now with additional and numerous fine distinctions which (to adopt Lord Denning’s language) “do no good to the law”.<sup>567</sup>

Simplicity and clarity are desirable features of legal principles, and obscurity and complexity are not. It is suggested that the law would be enhanced in the present context by the adoption of a rule that, outside the PPSA, the law should allocate title to an innocent purchaser of goods as against an owner who has voluntarily parted with possession of them to another. Such a rule would be simple and straightforward. It would also be fair, for an innocent purchaser, *ex hypothesi*, knows nothing of the previous history of the goods or their owner’s handling of them. After all, (again referring to Lord Denning<sup>568</sup>) in such a case it is the owner who has handed the goods over to another person, whether a rogue, hirer, borrower or other recipient, and so enabled that person to dispose of them under the appearance of being entitled to do so.

In this context, it is pertinent to mention the old case of *Lickbarrow v Mason*.<sup>569</sup> This case contains the famous dictum of Ashhurst J:

We may lay it down as a broad general principle, that, whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.

The case itself concerned the effect of bills of lading, and the result of it did not turn upon the proposition stated by Ashhurst J. However, the dictum has been frequently cited, albeit often for the purpose of criticising its breadth. So, for example, in *Farquharson Bros & Co v King*

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<sup>566</sup> *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890, 901 (HL)

<sup>567</sup> *Lewis v Averay* [1972] 1 QB 198, 206 (CA)

<sup>568</sup> *ibid*, p 207 (CA)

<sup>569</sup> (1787) 2 TR 63, 69; 100 ER 35, 39

& Co,<sup>570</sup> the dictum was considered in the context of a case in which a servant had stolen timber from his master and onsold it to a third party. The master sought the return of the timber from the third party. It was argued for the third party that the master had, by employing the servant, “enabled” him to commit the theft. Lord Lindley said:

In that sense, every one who has a servant enables him to steal whatever is within his reach. But if the word “enable” is used in this wide sense, it is clearly untrue to say, as Ashhurst J said in *Lickbarrow v Mason* “that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.” Such a doctrine is far too wide ...

Lord Macnaghten also favoured the plaintiff master, and objected to the use of Ashhurst J’s famous dictum as a defence for the third party:<sup>571</sup>

This defence, in my opinion, has no foundation in principle or authority. To try the principle, take a common sense case – a case which everybody understands. Nothing is better settled than this, that if a person buys a chattel and it turns out that the chattel was found by the person who professed to sell it, the true owner can recover his property ... The right of the true owner is not prejudiced or affected by his carelessness in losing the chattel, however gross it may have been. If I lose a valuable dog and find it afterwards in the possession of a gentleman who bought it from somebody whom he believed to be the owner, it is no answer to me to say that he never would have been cheated into buying the dog if I had chained it up or put a collar on it or kept it under proper control. If a person leaves a watch or a ring on a seat in the park or on a table at a café it is no answer to the true owner to say that it was his carelessness and nothing else that enabled the finder to pass it off as his own.

Lord Macnaghten went on to provide citations from *Scholfield v Lord Londesborough*,<sup>572</sup> where it was said that there existed no principle of law that the owner of goods should be

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<sup>570</sup> [1902] AC 325, 342 (HL)

<sup>571</sup> pp 335-6

<sup>572</sup> [1896] AC 514 (HL)



responsible if his or her own carelessness gave the opportunity for the commission of a crime. Lord Halsbury LC said:<sup>573</sup>

A man, for instance, does not lose his right to his property if he has unnecessarily exposed his goods, or allowed his pocket-handkerchief to hang out of his pocket, but could recover against a bona fide purchase of any article so lost, notwithstanding the fact that his conduct had to some extent assisted the thief.

Lord Watson agreed with this:<sup>574</sup>

It is not consistent with the general spirit of the law to hold innocent persons responsible for not taking measures to prevent the commission of a crime which they may have no reason to anticipate.

It would be difficult to find anything to disagree with in these examples given by Lord Macnaghten.<sup>575</sup> However, this does not alter the proposition that the principle stated in *Lickbarrow v Mason* is a good one, based on fairness and (to beg the question) robust common sense.<sup>576</sup>

The *Lickbarrow v Mason* principle can be applied in a broad manner without affecting the kinds of cases described by Lord Macnaghten. If, as proposed above, a general rule were to be adopted that an owner who voluntarily gives possession of goods to another bears the loss if that other disposes of them, that rule would not encompass Lord Macnaghten's hypothetical circumstances. Where goods are wrongfully taken, or lost, and the thief or finder disposes of the stolen or found goods, the owner cannot, and should not, be held responsible for the unauthorised disposition. In such cases, the owner has not caused the loss to the third party purchaser, but has equally been a victim of the actions of the thief or finder. A finder of goods obtains no more than a possessory title to them, and is under a continuing strict duty to

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<sup>573</sup> p 521

<sup>574</sup> p 537

<sup>575</sup> Despite this, if the decision in *Helson v McKenzies Ltd* [1950] NZLR 878 is right, contributory negligence may be raised as a defence to a claim in damages in such a case. The correctness of that case is questioned in the discussion of contributory negligence in ch 8.3.

<sup>576</sup> An analogous view in the context of whether fraud should be attributed to a principal to establish vicarious liability was adopted by the Supreme Court in *Dollars & Sense Finance Ltd v Nathan* [2008] SCNZ 30, in which the dictum from *Hern v Nichols* (1701) 1 Salk 289; 90 ER 1154 "it is more reason that he, that puts a trust and confidence in the deceiver, should be a loser, rather than a stranger" was cited with approval.

restore the goods to their owner;<sup>577</sup> and a thief has no possessory or proprietary title to goods as against anyone else with either of these rights.<sup>578</sup> No legal or moral ambiguity or complexity is involved in this position, which is doubtless generally well understood.

The same cannot be said of the person who voluntarily hands his or her goods to another. In such a case, the owner has deliberately divested himself or herself of the possession of the goods, and elected to deliver control of them to another. This, as we have seen, is the basis for the operation of the particularised exceptions to the *nemo dat* rule. The foundation of these exceptions (mercantile agents and buyers and sellers in possession) is the assumption that the separation of ownership and possession is, in the defined circumstances, particularly likely to mislead a third party as to the right to deal with the goods. This assumption may have been correct in the nineteenth century but cannot now, in today's climate of mass consumption and associated widespread credit provision, be said to be true. The separation of ownership and possession engendered by modern deferred payment transactions is so common as to be unremarkable. It is so well established and on such a scale as to be considered normal and is readily comprehended by people in all walks of life. The PPSA was enacted to deal with the consequences of this reality.

Reform of the suggested kind would require the repeal of s 23 and s 27 of the Sale of Goods Act 1908, as well as s 3 of the Mercantile Law Act 1908. These sections could be replaced by a provision which in substance states as a general rule that, subject to statutory exceptions, a person may transfer no better title than he or she has unless the transferor was in possession of the goods with the consent of their owner, and the transferee has taken the goods in good faith under a disposition for value. This would enable the innocent buyer to obtain title to the goods as against the owner who had voluntarily parted with possession of them, but would not entail that the owner from whom a thief had taken goods would lose his or her title. In effect, the rule which currently applies only to mercantile agents and sellers and buyers in possession would no longer be restricted to those categories; it would be extended to include any person into whose hands the goods had voluntarily been placed, actually or constructively, by their owner.

Given the wide scope of the PPSA, and its scheme of requiring and enabling owners to protect their goods, the abolition of the current regime relating to title in the context of

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<sup>577</sup> *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, 1105, per Lord Hoffmann

<sup>578</sup> *Buckley v Gross* (1863) 3 B & S 566; 123 Eng Rep 213

non-secured transactions would be a liberalising step. The result would be that owners who give possession of goods to others risk losing their goods, just as holders of security interests who do not protect them by registration will not be protected as against third parties. Although lawyers would perhaps lament the loss of a long standing, colourful and entertaining body of jurisprudence, the demise of the current rule would only enhance the development of the law.

## Chapter 7 Remedies for conversion

### 7.1 Damages

#### 7.1.1 Assessment of damages

The law governing the assessment of damages for conversion is flexible and depends to a considerable extent on the facts and circumstances of the individual case.<sup>579</sup> Although conversion is concerned with protecting interests in goods, no special or artificial standard of damages is applicable to it; the purpose of damages in conversion is, as with other torts, to provide just compensation for the loss which has been suffered. These principles were discussed in *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)*,<sup>580</sup> in which Lord Nicholls of Birkenhead emphasised that what the plaintiff should recover is his or her “true loss”. In *Kuwait Airways*, the House of Lords had to consider a claim for conversion of ten aircraft belonging to the Kuwait Airways Corporation (KAC). The government of Iraq had invaded Kuwait and seized the aircraft, which were then delivered to the Iraqi Airways Co (IAC), which incorporated them in its fleet and used them as its own. Four of the aircraft were then destroyed by bombing and the remaining six were evacuated to Iran, where they were impounded until KAC paid Iran a large sum for their return. KAC claimed from IAC damages for conversion of the aircraft. Lord Nicholls reviewed the essential elements of the tort of conversion and, in particular, considered the principles involved in assessing awards of damages in conversion cases.

In assessing the damages due to KAC it was held that a two-fold enquiry was necessary. The first question was whether the defendant’s wrongful conduct contributed to the loss; and, if it did, the second related to the extent of the loss for which the defendant ought to be liable.

In his discussion of the first question, causation, Lord Nicholls stated that the “but for” test was a threshold guideline principle; if the damage would have occurred without the defendant’s wrongdoing, legal liability would not normally result. The “but for” test was not, however, infallible and could be over-exclusionary as, for example, in cases where more than one wrongdoer was involved. In cases of successive conversions, as occurred in *Kuwait Airways*, the simple “but for” test could be applied, if at all, only by keeping in mind that in such cases each person in a series of conversions wrongfully excluded the owner from

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<sup>579</sup> *IBL Ltd v Coussens* [1991] 2 All ER 133, in which the Court of Appeal in the context of a decision on the Torts (Interference with Goods) Act 1977 (UK) described this flexibility. This case was cited in *Furness v Adrium Industries Pty Ltd* [1966] 1 VR 668.

<sup>580</sup> [2002] 2 AC 883 (HL)

possession of the goods. This called for a comparison between the owner's position had he or she retained the goods and the position he or she is in as a result of being deprived of the goods by the defendant. Loss which the owner would have suffered had he or she retained the goods would not be "caused" by the conversion and the defendant would not be liable for it. It was therefore held that the necessary causation was established; had KAC not been deprived of its aircraft by IAC, KAC would not have suffered the losses it was claiming. Lord Nicholls also went on to consider the question of remoteness in relation to the claimed consequential losses. This is discussed below.

With regard to damages, as was stated in *Kuwait Airways*, in many cases the loss suffered will simply be the value of the goods themselves. In this context, the principle of *restitutio in integrum* is fundamental, which means that the loss suffered by the person whose goods have been converted must be compensated by an award of money which represents the value of the goods.<sup>581</sup> Thus the normal measure of damages for conversion is the value of the goods at the date at which they were converted.<sup>582</sup> This is so even if the plaintiff is not the owner of the goods but has a possessory title only; the reason being that "modern law has retained the mediaeval axiom that possession is title against a wrongdoer ... damages are merely a substitute for such possession and must therefore be the equivalent of the chattel and amount to its full value".<sup>583</sup> Thus, a bailee relying merely on an entitlement to possession may recover more than the amount of his or her own interest in the goods. In *The Winkfield*<sup>584</sup> the Court of Appeal held that such a plaintiff could recover the entire value of the goods because, "[a]s between bailee and stranger possession gives title - that is, not a limited interest, but absolute and complete ownership, and he is entitled to receive back a complete equivalent for the whole loss or deterioration of the thing itself". In New Zealand, in *Trailways Transport Ltd v Thomas*<sup>585</sup> the principle stated in *The Winkfield* was applied and was said to apply in cases of conversion, detinue, negligence or trespass; and in *Gardiner v Metcalf*,<sup>586</sup> the Court of Appeal regarded it as applicable in both tort and contract.<sup>587</sup>

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<sup>581</sup> *Furness v Adrium Industries Pty Ltd* [1966] 1 VR 668, *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, 1090 (HL)

<sup>582</sup> *Nash v Barnes* [1922] NZLR 303, *NZ Securities & Finance Ltd v Wrightcars Ltd* [1976] 1 NZLR 77, *Gardiner v Metcalf* [1994] 2 NZLR 8 (CA). For a discussion of this "idiosyncratic" measure of damages, see Tettenborn [1993] CLJ 128.

<sup>583</sup> *Flack v Chairperson, National Crime Authority* (1997) 150 ALR 153, 157 (CA), citing Fleming, 7<sup>th</sup> ed, p 65.

<sup>584</sup> [1902] P 42, 60, per Collins MR

<sup>585</sup> 1996] 2 NZLR 443, 445

<sup>586</sup> [1994] 2 NZLR 8, 11 (CA)

<sup>587</sup> Compare the more cautious approach adopted in *Cuff v Broadlands Finance Ltd* [1987] 2 NZLR 343, 346 (CA), where the question of whether a plaintiff could recover more than the amount of his own interest in converted chattels was said, obiter, to be "perhaps a moot point".

The conversion in effect deprives the plaintiff of his or her interest in the goods. For this reason, the measure of damages for conversion is generally the value of the goods themselves, with the result that judgment for the plaintiff in such a case, once satisfied, operates as effectively a forced sale, enabling the plaintiff to say to the defendant: “You have bought yourself something.”<sup>588</sup> Thus, the plaintiff who is deprived of the interest in the goods receives their value, and the judgment for the plaintiff, once satisfied,<sup>589</sup> divests the plaintiff of his or her title to the goods and vests it in the defendant.

The principle that the normal measure of damages in conversion is the market value of the goods is consistent with the idea that the plaintiff is effectively forced to sell the goods to the defendant by virtue of the conversion. “Value” in this context generally means market value at the time and place of the loss of the goods,<sup>590</sup> and evidence will be required to establish this. If the conversion occurs as a consequence of the goods being wrongfully sold, the price for which they were sold may constitute the best evidence of market value. So in *Campbell v Dominion Breweries Ltd*<sup>591</sup> a lessor re-entered premises after they were abandoned by the lessee and, after taking possession of chattels and stock, sold them to a third party. This was done without regard to the interests of the appellant debenture holders, and was held to be conversion. The Court of Appeal held that the price at which the goods were sold should be regarded as their market value, and that this sum represented the actual loss to the appellants. Similarly in *Cameron v Phelps*,<sup>592</sup> the owner of a machine had agreed to sell it for ten ounces of gold (worth at the time about \$6,000), when the defendants converted it and sold it for \$30,000. The plaintiff was held to be entitled, under the normal rule, to recover \$30,000, being the market value of the goods at the date of the conversion. If the owner of goods had contracted to sell them to another before their conversion, that contract price may be taken to indicate market value, although this is so only if there is no other evidence of the market. So in *Gardiner v Metcalfe*<sup>593</sup> the market value of a destroyed crop was shown to be much lower than the price for which the plaintiff had contracted to sell it, and the plaintiff was permitted to recover only the lower amount. The price which the plaintiff had agreed to sell the goods for in *Cameron v Phelps* was similarly displaced by the

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<sup>588</sup> Fleming, 9<sup>th</sup> edn, p 61, citing Warren (1936) 49 Harv LR 1084 and Prosser (1957) 42 Cornell LQ 168.

<sup>589</sup> Property in the goods does not pass until the judgment is fully paid: *Ellis v John Stenning & Son* [1932] 2 Ch 81, 97.

<sup>590</sup> *Klewchuk v Switzer* (2003) 19 Alta LR (4<sup>th</sup>) 15 (ACA)

<sup>591</sup> [1994] 3 NZLR 559 (CA)

<sup>592</sup> HC, Christchurch, CIV 2008-409-002648, Fogarty J, 25 March 2009.

<sup>593</sup> *Gardiner v Metcalfe* [1994] 2 NZLR 8 (CA)

evidence that the defendants had in fact received a much higher price for the machine when they sold it.

If the converted goods are returned to the plaintiff, so that he or she has suffered only a temporary loss of them, the value of the goods is still assessed by their market value at the date of the conversion. However, credit must be given for the returned goods, which is measured by their value at their date of their return.<sup>594</sup>

The rule that damages in conversion should be the value of the goods at the date of conversion is not, however, absolute, and there are some exceptions to it.<sup>595</sup> Where the plaintiff suffers only temporary loss of his property, damages may be fixed by reference to the date the plaintiff demanded the return of the goods;<sup>596</sup> and, where a plaintiff is prevented from reselling the property, the date when he was so prevented may be used.<sup>597</sup> Where goods have been irreversibly converted, however, the rule is unlikely to be displaced for the plaintiff simply loses the property at the date of conversion.<sup>598</sup>

### 7.1.2 *Changing values*

Difficulties in assessing damages may also arise where the market value of goods either rises or falls after the date of the conversion. Logically, a rise or fall in value should not be relevant, as the goods are regarded as simply being transferred by way of a sale thrust upon the plaintiff, and the measure of damages should simply be the market price at the date the plaintiff lost his or her interest in the goods, that is, the date of the conversion. Dealings in the goods subsequent to the conversion should not normally be taken into account. This is the general rule, but it is not an inflexible one and there may be circumstances in which a plaintiff may be held entitled to recover an increase in value of the goods occurring after the conversion. In particular, in cases where the increase would have happened in any event, even if no conversion had been committed, the increase may be allowed. For example, in *Kohai v MacDonald*<sup>599</sup> the plaintiff whose sheep had been converted was held to be entitled to their increased value which resulted from their growth and the growth of the wool upon them between the dates of conversion and judgment. It seems that where the market value of

<sup>594</sup> *Trailways Transport Ltd v Thomas* [1996] 2 NZLR 443

<sup>595</sup> *BBMB Finance (Hong Kong) Ltd v Eda Holdings Ltd* [1991] 2 All ER 129 (PC)

<sup>596</sup> *Williams v Archer* (1847) 5 CB 318; 136 ER 899

<sup>597</sup> *Barrow v Arnaud* (1846) 8 QB 595; 115 ER 1000

<sup>598</sup> *BBMB Finance (Hong Kong) Ltd v Eda Holdings Ltd* [1991] 2 All ER 129 (PC)

<sup>599</sup> (1890) 9 NZLR 221

goods has risen simply as a result of inflation, the plaintiff will also be entitled to the value at the date of judgment.<sup>600</sup>

There is of course in the context of changing values the same duty on the plaintiff to mitigate losses which arises in the law of torts generally, and a plaintiff who is inactive in this respect may be regarded as to some extent the cause of his or her own loss. So in *Sachs v Miklos*<sup>601</sup> the owner of furniture stored it with the defendants, the defendants agreeing to store the furniture as an act of friendship. The parties gradually lost contact and after three years had passed, the defendants wrote to the plaintiff to tell him that they required the space occupied by the furniture and intended to sell the furniture if the plaintiff did not remove it. No reply was received from the plaintiff and at the end of a further three years, the defendants sold the furniture. This was held to be an act of conversion and the plaintiff was entitled to its value. The furniture had risen considerably in value during the period between the defendants' attempt to communicate with the plaintiff and the date of sale. The Court of Appeal held that if the plaintiff knew or ought to have known from the defendants' letters that they were intending to sell the furniture he should have taken action by removing the furniture or making his claim straight away; his inactivity in such circumstances was the true cause of his loss and he would not be entitled to recover from the defendants the increased value of the furniture.

The rule that the plaintiff ought to act when he or she knows, or ought to know, of the conversion may have particular application in cases where items are of fluctuating value and used in speculative markets. Shares, as an analogous example, come into this category; a plaintiff with knowledge of the conversion who delays in bringing an action may be seen as gambling at the defendant's expense and thereby lose any right to an increase in value which may occur.<sup>602</sup> Where a market for shares is falling, the traditional rule of assessing damages as of the date of the conversion is applied in the absence of compelling reasons to depart from the rule.<sup>603</sup> In *Stevenson Estate v Siewert*<sup>604</sup> it was said that, in choosing between the date of the commission of the tort and that of judgment, the task of the Court was to select the most fair and equitable option and that it could not be expected that perfect justice would be

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<sup>600</sup> *Egan v State Transport* (1982) 31 SASR 481. The retaking of one's own goods does not amount to ratification of unauthorised work done so as to require the owner to pay for it: *Forman & CO Pty, Ltd v The Ship "Liddesdale"* [1900] AC 190 (PC).

<sup>601</sup> [1948] 2 KB 23 (CA)

<sup>602</sup> *Asamera Oil v Sea Oil* [1979] 1 SCR 633

<sup>603</sup> *R F Fry and Associates (Pacific) Ltd v Reimer* 16 CCLT (2d) 267

<sup>604</sup> [2001] 10 WWR 401 (ACA)



rendered. Therefore, any resulting inequities should fall more heavily on the wrongdoer than on the victim.

### 7.1.3 *Improvement of goods by defendant*

Where an increase in value in converted goods is a consequence of the defendant's acts, the plaintiff will not usually be entitled to the increase.<sup>605</sup> The reason for this was explained by Salmond J in *Nash v Barnes*,<sup>606</sup> in which the owner of a car claimed damages in conversion from the defendant who had in good faith purchased the car from one who had no right to sell it. Believing the car to be his own, the defendant had spent a considerable sum on the vehicle after he purchased it, thereby increasing its value. It was held that the owner was not entitled to the improved value of the car, but was limited to its value at the date of the conversion, that is, of the unlawful sale. Salmond J was of the view that this principle should apply whether the person who outlaid the labour or expenditure on the converted goods was the original wrongdoer himself, or some other person claiming under him. Any other rule would have worked an injustice, in that the owner would have made a profit out of the injury inflicted on him; and an innocent purchaser would incur a heavier liability than the person who had unlawfully sold or stolen the goods in the first place. Similarly, where accessories have been added to converted goods after the conversion, the accessories belong to the purchaser who has added them unless they cannot practicably be identified and detached from the converted goods. So in *Thomas v Robinson*<sup>607</sup> the innocent purchaser of a converted car replaced some of the components of the car and added various accessories to it. The purchaser claimed to be entitled to the return of the items he had added to the vehicle, or compensation for their value, and succeeded on the ground the added items retained their separate identity. Only if items had been incorporated to such an extent that as a matter of practical necessity the added items and the converted goods became inextricably mixed and not detachable would the owner of the converted goods avoid having to return or pay for the added items.<sup>608</sup>

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<sup>605</sup> *Aitken v Gardiner and Watson* [1956] OR 589, 609

<sup>606</sup> [1922] NZLR 303, 311-312

<sup>607</sup> [1977] 1 NZLR 385

<sup>608</sup> For a discussion of the difficulties in assessing damages in cases where improvements have been carried out to converted goods, see D Gordon "Anomalies in the Law of Conversion" (1955) 71 LQR 346. The provisions of the Personal Property Securities Act 1999 relating to accessions, processed or commingled goods apply to transactions covered by that Act: see the PPSA, Part 7.

The difficulties of dealing with the value of improvements done by a defendant were considered by Fogarty J in *Cameron v Phelps*.<sup>609</sup> In that case, the defendants' work on the plaintiff's machine had improved its value and contributed to the high price which they received when they wrongfully sold it. Fogarty J cited *Nash v Barnes* for the general rule, but stated that it had to be read in the light of the facts of the case. It was important to consider whether the defendant had acted innocently or not. Fogarty J referred to the reasoning of Lord Denning MR in *Greenwood v Bennett*, in which an innocent purchaser of a car had effected improvements on it whilst unaware of the claim of B's company:<sup>610</sup>

We all remember the saying of Pollock CB: 'One cleans another's shoes. What can the other do but put them on?' (*Taylor v Laird* (1865) 25 LJ Ex 329 at 332). That is undoubtedly the law when the person who does the work knows, or ought to know that the property does not belong to him. He takes the risk of not being paid for his work on it. But it is very different when he honestly believes himself to be the owner of the property and does the work in that belief ... Here we have an innocent purchaser who bought the car in good faith .... and did work on it .... The law is hard enough on him when it makes him give up the car itself. It would be most unjust if Mr Bennett's company could not only take the car from him, but also the value of the improvements he has done to it – without paying for them. There is a principle at hand to meet the case. It derives from the law of restitution. Mr Bennett's company should not be allowed unjustly to enrich themselves at his expense. The court will order them, if they recover the car, or its improved value, to recompense the innocent purchaser for the work he has done on it.

The facts in *Cameron v Phelps* revealed that the defendants were not innocent possessors of the machine when they improved it. They were aware at the time they converted the machine by selling it that the plaintiff had a claim over it. Accordingly, there was no basis for equity to intervene to assist the defendants, who were not entitled to any compensation for the work they had carried out.

In England, s 6 of the Torts (Interference with Goods) Act 1977 makes express provision for allowance to be made for improvement of goods where the person who has improved the goods has done so in the mistaken but honest belief that he has title to them; or

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<sup>609</sup> HC, Christchurch, CIV 2008-409-002648, 25 March 2009

<sup>610</sup> [1972] 3 All ER 586, 589

where a person who has subsequently purported to purchase the improved goods has done so in good faith. It appears that the Court has no discretion in this matter, for the provision states that an allowance “shall be made” for the extent to which the value of the goods is attributable to the improvement. Section 6 makes no reference to improvements done by one who does not act in good faith who, presumably, is entitled to no allowance at all.

#### 7.1.4 *Stock in trade*

If converted goods are the stock in trade of the plaintiff, the measure of damages will depend on whether substitute goods are readily obtainable, for if the plaintiff can simply obtain more goods at the same price, the loss suffered will simply be the purchase price of the goods. If however, there is no such ready market, the loss will be assessed by reference to the actual cost of obtaining or manufacturing goods to replace those which have been converted.<sup>611</sup> This requires reference to the market on which substitute goods can be bought. So in *Furness v Adrium Industries Pty Ltd*<sup>612</sup> the trial judge decided that the loss ought to be assessed according to the price at which the plaintiff, a wholesaler, would have sold the goods. This was reversed on appeal, and the plaintiff was entitled only to the price he would have to pay to replace the converted goods. The wholesale market was not relevant to this, being the market upon which the plaintiff could sell the goods, not buy them. Therefore the plaintiff was entitled to their market value at the date of conversion, that value being simply the cost of replacing the goods.

#### 7.1.5 *Consequential damages*

Apart from the value of goods, the plaintiff in cases where goods have been converted may be entitled to compensation for consequential losses suffered if the damage is not too remote.<sup>613</sup> The applicable test for liability in this context may be described as not fully settled. In *Kuwait Airways Corp v Iraqi Airways Co (nos 4 and 5)*<sup>614</sup> Lord Nicholls remarked, obiter and “in the absence of clear authority”, that the choice was between confining liability for consequential loss to damage which was “foreseeable” as distinct from damage flowing “directly and naturally” from the wrongful conduct. Although in practice the two tests would usually yield the same result, the foreseeability test was likely to be the more restrictive in cases where this was not so. Lord Nicholls observed that the “prevalent view” was that the

<sup>611</sup> *J E Hall Ltd v Barclay* [1937] 3 All ER 620

<sup>612</sup> [1996] 1 VR 668

<sup>613</sup> *Klewchuk v Switzer* (2003) 19 Alta LR (4<sup>th</sup>) 15 (ACA)

<sup>614</sup> [2002] 2 AC 883, 1097 (HL)

foreseeability test applied to the torts of negligence, nuisance and *Rylands v Fletcher*; and that the less restrictive “directly and naturally” test applied to deceit, because the more culpable the defendant, the wider his or her liability should be. Conversion was a tort of strict liability, and could be committed either dishonestly or innocently, and it was inappropriate to treat all defendants alike in assessing their liability. Therefore, suggested Lord Nicholls, the restrictive test of foreseeability should be appropriate for those who acted in good faith; their liability remained strict, but would be confined to damage which could be expected to arise from the conversion. By contrast, those who acted dishonestly and knowingly converted goods should be subject to the “directly and naturally” test, as applied in the tort of deceit.

Shortly before the *Kuwait Airways* case, the Court of Appeal had applied the foreseeability test to conversion in *Saleslease Ltd v Davis*.<sup>615</sup> In that case, the defendant had obstructed the plaintiff’s removal of the plaintiff’s own goods from the defendant’s premises. This was an act of conversion on the part of the defendant which resulted in a loss to the plaintiff of a lucrative contract to lease the goods to another party. The defendant was aware of the existence of this contract. However it was held that as the plaintiff had not informed the defendant that the leasing contract was unique and that there was no possibility that the plaintiff could negotiate such a contract with anyone else on the same terms, the plaintiff was not entitled to recover the loss of the contract. In commenting on this case, Lord Nicholls noted in *Kuwait Airways*<sup>616</sup> that the foreseeability test had apparently been applied by the Court of Appeal without argument to the contrary being raised.

In Australia, dissatisfaction with the reasonable foreseeability test was expressed by the Victorian Court of Appeal in *National Australia Bank Ltd v Nemur Varity Pty Ltd*,<sup>617</sup> where it was suggested that recoverable consequential loss ought to be of a kind that should have been within the contemplation of the defendant as a likely consequence of the conversion, having regard to the defendant’s knowledge or express notice of the facts. However, this view was expressed in the context of a finding that the defendant’s liability should be in contract and not in conversion, and the defendant, although negligent, had not been dishonest. On the facts of the case, therefore, it was not necessary for the Court to determine the point. The case was decided before the House of Lords ruled in the *Kuwait Airways* case. In essence, both cases reveal a disinclination to apply the foreseeability test to consequential damages in conversion cases, at least in cases where the defendant has not been

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<sup>615</sup> [1999] 1 WLR 1664 (CA)

<sup>616</sup> p 1097

<sup>617</sup> (2002) Aust Torts R 81-645 (VSCA)

dishonest. Whether this approach will be adopted in New Zealand remains to be seen, as there appears to be as yet no New Zealand authority on the point.

Subject to this question of remoteness, the plaintiff may be able to recover the cost of hiring substitute goods if that is necessary.<sup>618</sup> Loss of profits may be recoverable if the goods are of the kind which generate income. For example, damages were awarded to a plaintiff farmer for losses suffered in respect of milk and grass when his cows were converted;<sup>619</sup> and to a carpenter whose tools had been converted for being hindered from working.<sup>620</sup>

Even where a plaintiff cannot show any actual loss of profit, general damages may be awarded for the plaintiff's loss of use, or possibility of using, the goods. The deprivation of the ability to use the goods, whether for commercial or other purposes, is itself a loss for which damages may be allowed. In this context, a person is "deprived" of possession if he or she is excluded from possession, or possession is withheld by the wrongdoer. It is not necessary that the wrongdoer himself or herself actually take the goods from the plaintiff's possession. For this reason, each person in a chain of possession of the same goods may be guilty of conversion; for each person in such a case has successively excluded the plaintiff from possession of the goods.<sup>621</sup>

In considering damages for deprivation, it is irrelevant that the plaintiff did not normally use the goods, or intended to use them for a foolish or unprofitable purpose. So in *The Mediana*<sup>622</sup> the Earl of Halsbury LC, in the context of a claim for damages for loss of services of a ship, stated that the plaintiffs should be described as having been deprived of "their vessel" and not "the use of their vessel", because "What right has a wrongdoer to consider what use you are going to make of your vessel? ... Supposing a person took away a chair out of my room and kept it for twelve months, could anybody say you had a right to diminish the damages by shewing that I did not usually sit in that chair, or that there were plenty of other chairs in the room? The proposition so nakedly stated appears to me to be absurd." Therefore, in these cases, the damages result from no more than the deprivation itself.<sup>623</sup> Further, if the wrongdoer has obtained a benefit from his or her temporary use of the

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<sup>618</sup> *Aitken Agencies Ltd v Richardson* [1967] NZLR 65 (owner of converted vehicle entitled to cost of hiring another to replace it); *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 (HL) (cost of chartering substitute aircraft)

<sup>619</sup> *Hedley v Senk* [1919] GLR 122

<sup>620</sup> *Bodley v Reynolds* (1846) 8 QB 779; 115 ER 1066

<sup>621</sup> *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, 1084 (HL)

<sup>622</sup> [1900] AC 113, 117, cited in *Finesky Holdings Pty Ltd v Minister for Transport (WA)* (2002) 26 WAR 368, 382

<sup>623</sup> *Nauru Local Government Council v NZ Seamen's Industrial Union of Workers* [1986] 1 NZLR 466, 481-482 per Somers J; followed in *Bowden v National Mutual Finance Ltd* [1992] DCR 817

goods, it seems that damages assessed by reference to the value of the benefit derived from the wrongdoing may also be payable, even if the owner has suffered no financial loss.<sup>624</sup>

In accordance with the normal rule, a plaintiff making a claim for temporary deprivation of his or her goods is obliged to mitigate the loss. In *Woods v Alberta*<sup>625</sup> for example, damages for the plaintiff's loss of use of his profit-earning trailer were limited because of his own unreasonable delay in taking steps to recover it.

#### 7.1.6 Exemplary damages

Exemplary or punitive damages are unusual, particularly in commercial cases. In cases where damages are sought for breach of contract, exemplary damages are not available at all, and the trend of overseas authority is to the same effect.<sup>626</sup>

New Zealand cases concerning exemplary damages have generally concerned matters other than property, such as personal injury, largely because of the bar imposed on compensatory claims in negligence by the accident compensation legislation.<sup>627</sup> To qualify in negligence, a defendant's behaviour must be such as to be deserving of punishment, and be "high-handed, irresponsible, or in some other respect outrageous".<sup>628</sup> Thus, exemplary damages are awarded only in restrictive circumstances, and serve the non-compensatory aim of deterrence, vindication of injured parties, and raising standards.<sup>629</sup>

In the context of wrongful removal of chattels, it was said in *Powell v Koene*<sup>630</sup> that awards of exemplary damages should be relative to the conduct complained of, but also be "modest". In that case, the first defendant obtained by providing to the Family Court a misleading and deceitful affidavit an ex parte Court order entitling her to the possession of chattels to the exclusion of the plaintiff. She was assisted in their removal and detention by the second and third defendants. Subsequently, the misleading nature of the affidavit having come to light, the Court order was discharged, and orders were made that the chattels be

<sup>624</sup> *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 WLR 883, 1094 (HL); *Finesky Holdings Pty Ltd v Minister for Transport (WA)* (2002) 26 WAR 368

<sup>625</sup> (1989) 64 DLR (4<sup>th</sup>) 544

<sup>626</sup> *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188 (CA). The Court of Appeal left open the question of whether exemplary damages would be available if the conduct constituting the breach was also tortious. Exemplary damages were not in issue in the appeal to the Supreme Court: [2007] 3 NZLR 169.

<sup>627</sup> Injury Prevention, Rehabilitation and Compensation Act 2001, s 317(1). Exemplary damages may be claimed in relation to personal injury covered by the Act under s 319. For a review of the law in this area, see S Todd (2004) 33 CLWR 255, where the question of whether there should be any place at all for exemplary damages is discussed.

<sup>628</sup> *Couch v Attorney-General* [2008] 3 NZLR 725, 735 (SC), per Elias CJ

<sup>629</sup> *ibid*

<sup>630</sup> [2003] DCR 341

delivered up and a writ of arrest against the first defendant was issued. The first defendant had gone overseas by this time, and the second and third defendants, who were aware of the circumstances, refused to deliver up the chattels or to say where they were hidden. This conduct was held to be sufficiently deserving of punishment to justify an award of exemplary damages against all three defendants. Condemnation was necessary because the Court had been misled by the first defendant into giving its order and influence, and all three defendants had persisted in conduct calculated to defeat Court orders as well as the plaintiff's rights. Thus, the condemnation related not so much to the removal of the chattels, but the behaviour of the defendants in respect to the Court and its orders.

In Canada, the Supreme Court has said that the conduct complained of must generally be deserving of punishment; it must be "malicious, oppressive and high-handed misconduct that offends the Court's sense of decency".<sup>631</sup> Only if compensatory damages do not achieve the objectives of "retribution, deterrence and denunciation" will punitive damages be awarded.<sup>632</sup> Such an approach is apparent in conversion cases. So in *Royal Bank of Canada v W Got & Associates Electric Ltd*<sup>633</sup> exemplary damages were awarded against a bank for its "egregious" conduct in its dealings with a debtor; the conduct was held to be a serious affront to the administration of justice. By contrast, it was held in *Klewchuk v Switzer*<sup>634</sup> that punitive damages should not be awarded where one partner had converted the property of another during a period when the parties, who were shrewd businessmen, were attempting to succeed in business; both parties were confused about the nature of their business relationship and no intentional wrongdoing was established.

Canadian authority also suggests that where conversion is committed by government agencies and their officials, the test applied may be more stringent than is that applicable to other citizens. It was said, obiter, in *Sala v Manitoba*<sup>635</sup> that malice is not necessary for the existence of oppressive, arbitrary or unconstitutional action by the servants of government and that their conduct ought to be judged by a stricter standard than those who hold less power and command less respect. In that case, the defendant province of Manitoba had unlawfully seized the plaintiff's chattels. The defendant was ordered to pay compensatory damages but, even on the application of the stricter test, the conduct in question was not such as to warrant an award of punitive damages.

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<sup>631</sup> *Sylvan Lake Golf & Tennis Club Ltd v Performance Industries Ltd* [2002] 1 SCR 678, [79] (SCC) (cited in *Klewchuk v Switzer* (2003) 19 Alta LR (4<sup>th</sup>) 15, 28 (ACA))

<sup>632</sup> *ibid* [87]

<sup>633</sup> *Royal Bank v W Got & Associates Electric Ltd* (2000) 178 DLR (4<sup>th</sup>) 385 (SCC)

<sup>634</sup> (2003) 19 Alta LR (4<sup>th</sup>) 15 (ACA)

<sup>635</sup> [2001] 10 WWR 574, 600

Thus, from the above, it may be safely said that exemplary damages in conversion cases are rare, and are justified only where the defendant's conduct may be considered as truly outrageous.

### 7.1.7 Concurrent liability in contract

Where an act of conversion amounts also to a breach of contract, the wronged party may sue in either tort or contract, or both, provided the contract in question does not limit or contradict the tort duty. The question of what damages would be available in such circumstances was discussed by the Supreme Court of Canada in *Royal Bank v W Got & Associates Electric Ltd*,<sup>636</sup> a case in which the appellant bank was found both to have breached its contract with the respondent corporation and also to have converted the corporation's assets when it invalidly appointed a receiver to deal with the corporation's property. It was held that where a claim was made for the same wrongful acts under different heads of liability, compensatory damages should generally be similar, it seeming anomalous to award a different level of damages for what was essentially the same wrong. This was, however, stated to be only the general rule, and the circumstances of the case or policy might dictate a distinction being made according to the particular form of action chosen. In the *Royal Bank* case, both the contract and the tort actions were concerned with damages for the appropriation of the respondent's goods, and no special features existed to justify displacement of the normal rule.

## 7.2 Specific restitution

It is a general rule that an action in conversion is a purely personal action and so results in an order for pecuniary damages only.<sup>637</sup> Thus, if converted goods are in the hands of the wrongdoer who refuses to return them, a Court order for the payment of damages operates effectively as a forced sale of the goods. In effect, if the plaintiff seeks the return of the goods, the defendant may choose whether to return the goods to the plaintiff or pay their value. This is so despite the fact that a finding that damages are payable arises from the established wrong of the defendant; by definition, a decision that a defendant has converted the plaintiff's goods is a judgment that the plaintiff's right to possession of the goods prevails over that of the defendant. It may be seen as somewhat surprising that,

<sup>636</sup> (2000) 178 DLR (4<sup>th</sup>) 385 (SCC)

<sup>637</sup> *General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd* [1963] 1 WLR 644



although the plaintiff's superior title is vindicated by the judgment, it does not automatically follow that the plaintiff is entitled to recovery of the goods themselves. This was the mediaeval rule in detinue cases, and remains so now; and the rule came to be applied to conversion.<sup>638</sup> Thus, a dispossessed owner of goods never had in English law an unqualified right to an order for their return; and the position has always been the same in New Zealand.<sup>639</sup>

Despite this general common law rule, there is authority that specific restitution of goods is possible where damages are not an adequate remedy. For example, Salmond J said in *Nash v Barnes*<sup>640</sup> that it could not be disputed that the court had power to give judgment for the specific restitution of chattels; and that a dispossessed owner of goods may sue in the alternative for either possession of the chattel or for damages in respect of its detention or conversion. Unlike damages, specific restitution, is not available as of right, and it will not normally be ordered where an injustice would result. So in *Nash v Barnes* itself the owner of a car which had been fraudulently sold to a buyer who had no knowledge of the fraud claimed the return of the car. The innocent buyer having spent a considerable sum of money in improving the car during the time it was in his possession, it was held that it would be unjust to order its return; the owner was entitled only to damages, being the value of the car at the time the unlawful sale took place. By contrast, in *Re Gillie*<sup>641</sup> it was held that the existence of reasonable grounds for apprehending that an award of damages would go unsatisfied and the lack of any cross-claim or set-off rendered it unjust or improper that the defendant should have the option of paying the money or keeping the goods, and an order for delivery of the goods was made.

Where the goods in question are ordinary articles of commerce with no special value or interest, the court is unlikely to order that they be delivered to the plaintiff. This is because damages in such a case constitute an adequate remedy; it is "far better to let the plaintiff fend for himself with the defendant's money" and simply purchase replacement goods.<sup>642</sup> In *Cohen v Roche*<sup>643</sup> the plaintiff had purchased from the defendant at an auction

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<sup>638</sup> The Common Law Procedure Act 1854, s 78. It was pointed out in the Ninety-fifth Report of the Law Reform Committee of South Australia to the Attorney-General *Law of Detinue, Conversion and Trespass to Goods*, 1987, p 23, that this statutory power should be distinguished from the jurisdiction of Equity to grant the return of a chattel. However, the distinction appears unimportant and the principles may be conflated: see *Nash v Barnes* [1922] NZLR 303, 309.

<sup>639</sup> See Salmond J's review of the relevant law in *Nash v Barnes* [1922] NZLR 303.

<sup>640</sup> *ibid*

<sup>641</sup> (1998) 150 ALR 110 (HC)

<sup>642</sup> *Howard E Perry & Co Ltd v British Railways Board* [1980] 2 All ER 579, 586

<sup>643</sup> [1927] 1 KB 169

a set of chairs. The defendant then refused to give possession of them to the plaintiff, who brought an action in detinue, claiming that once property in the chairs had passed to him under the contract, he had an absolute right to possession of them. McCardie J held that no such absolute right existed. Noting that the principles were the same whether the claim were brought in detinue or for specific performance of the contract,<sup>644</sup> McCardie J said that in equity where the plaintiff alleged and proved the money value of goods it was not the practice of the court to order specific delivery. There being nothing unique about the chairs in question, an order for damages was made.

No order for specific restitution of goods can be made unless the goods are sufficiently identified or identifiable. If goods have been mixed with others or for some other reason are in practice not identifiable, a proprietary remedy will not be available and an award of damages will be the only possible remedy.<sup>645</sup> Practicality is significant in this context and an order which cannot be satisfied without the continuing supervision of the court is unlikely to be made.<sup>646</sup> This accords with the view of Salmond J, who considered it “proper and right”<sup>647</sup> that a dispossessed owner should not have an unqualified right to the return of goods; he gave as one reason for this principle the avoidance of the need to solve the “numerous riddles” relating to identity and ownership of goods which had been subject to alteration or mixing by someone other than the owner. The common law thereby escapes the difficulties which arise in some other jurisdictions by awarding possession to the person who in justice is entitled to it, and awarding compensation in money to the other.<sup>648</sup>

If a defendant chooses to return goods when a claim of conversion is brought, the plaintiff is not obliged to accept their return unless the goods can be restored to him or her in the same condition in which they were converted.<sup>649</sup> Where the converted goods are restored to the plaintiff, credit must be given for their value, with the result that damages may be nominal.<sup>650</sup>

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<sup>644</sup> In New Zealand, s 53 Sale of Goods Act 1908 gives the courts a discretionary power to enforce a contract of sale specifically. This provision has been construed as giving a power which is to be exercised according to established equitable principles: *Cohen v Roche* [1927] 1 KB 169; *Behnke v Bede Shipping Co Ltd* [1927] 1 KB 649.

<sup>645</sup> *John Turner Logging Ltd v Knight & Friedlander* (1999) DCR 779; and see the general discussion by Hammond J in *Butler v Countrywide Finance Ltd* [1993] 3 NZLR 623 in the context of specific performance of sales of goods; cf *Cutler v Oceanside Developments Ltd* [2009] DCR 645.

<sup>646</sup> *Butler v Countrywide Finance Ltd* [1993] 3 NZLR 623.

<sup>647</sup> *Nash v Barnes* [1922] NZLR 303, 307

<sup>648</sup> *ibid*, 308

<sup>649</sup> *Moon v Raphael* (1835) 2 Bing NC 310, 314; 132 ER 122 at 123; and see *Kidman v Farmers Centre Pty Ltd* [1959] Qd R 8, where it was doubted whether the plaintiff was obliged to accept the return of the goods at all.

<sup>650</sup> *ibid*

In some circumstances a defendant may be entitled to insist, as a condition of returning goods to the plaintiff, upon reimbursement of reasonable expenses incurred in relation to the goods. The authorities on this question were reviewed by the Supreme Court of Queensland in *Rapid Roofing Pty Ltd v Natalise Pty Ltd*,<sup>651</sup> in its discussion of whether the defendants, who were detaining the plaintiffs' imported machinery, were entitled to withhold delivery unless and until the plaintiffs reimbursed associated port charges which the defendants had paid. The plaintiffs claimed that such a conditional offer of return was not justified, and that the defendants had therefore converted their goods. The Court held that the defendant in these circumstances had an entitlement to reimbursement, in the nature of a lien, or charge, upon their obligation to deliver the machinery to the plaintiffs. If the port charges had not been paid, the plaintiffs would have been unable to obtain possession of their machinery at all. Accordingly, the defendants' retention of the machinery was justified, and they were not liable in conversion.

Certain statutory provisions exist which allow the courts to order that goods be delivered *in specie* to a plaintiff. For example, if a contract of sale exists between the parties and the seller wrongly detains the goods, the buyer may apply for an order that the seller specifically perform the contract and deliver the goods. Again, this remedy is discretionary, and is not available as of right.<sup>652</sup> Where seized goods are in the custody of the police, the District Court may order them to be delivered to the person who appears to the Court to be entitled to them.<sup>653</sup> An example of the use of this procedure is *Siggelkow v Gibbs*<sup>654</sup> in which the contest was between an innocent buyer who had left the purchased goods in the custody of the seller and the equally innocent second buyer of the same goods. The seller having been convicted of theft by reason of having sold the first buyer's goods to the second buyer, and the goods being in the custody of the police, the police sought a ruling from the Court to determine which of the two buyers was entitled to the goods.<sup>655</sup>

The question then arises: why should the law allow a defendant who has wrongfully taken possession of goods to choose to keep and pay for them rather than returning them? Should not the plaintiff have an absolute right to their return, rather than

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<sup>651</sup>[2007] 2 Qd R 335. In particular, the Court analysed *Peruvian Guano Co v Dreyfus Brothers & Co* [1892] AC 166.

<sup>652</sup> Sale of Goods Act 1908, s 53; and see *Cohen v Roche* [1927] 1 KB 169

<sup>653</sup> Summary Proceedings Act 1957, s 199

<sup>654</sup> [1990] 3 NZLR 503

<sup>655</sup> The principles involved in the actual decision are discussed above, in ch 6.5.2.

having to accept the defendant's choice or persuade a Court that they should be returned? The rule appears to have developed from the fact that conversion is a tortious action; although it is linked with, and depends upon, the ranking of interests in goods, the action is not strictly proprietary in nature.<sup>656</sup> Thus, damages as compensation for tortious conduct result from the action, rather than an order that the goods be delivered up. It has been pointed out that this is unfair and anomalous; land and trust property are generally recoverable as of right and there seems no reason why converted goods should be treated differently. Further, to allow a wrongdoer (who may be a thief) to keep goods as against their owner who desires their return is unjust, and a form of compulsory purchase which may be regarded as a breach of the owner's human rights.<sup>657</sup>

In this context, an analogy may be drawn with the cases concerning the power of the Courts to award damages in lieu of an injunction against a wrongdoer. It may be argued that a Court which orders damages rather than an injunction when a wrong has been committed, or is continuing, is in effect "a tribunal for legalising wrongful acts".<sup>658</sup> However, it must be borne in mind that conversion is a tort which may be committed unwittingly, and with no moral fault on the part of the defendant. The matter may be complicated by the way in which the defendant has used the goods; and the nature or quality of the goods may have changed while in the defendant's possession. Clearly, the simplicity of making an order for the payment of money in some circumstances has much to recommend it.

The wishes of the plaintiff should also be considered in claims for the recovery of converted goods. If a plaintiff indicates that he or she wants, or would be satisfied with, only money, that will clearly be a sound reason for awarding damages and not a return of the goods.<sup>659</sup> It has been suggested that the reason the plaintiff originally had the goods in his possession, or the use to which he or she intended to put them before they were converted, should also be taken into account. A plaintiff who had goods for his or her own use or pleasure should, arguably, be absolutely entitled to their return; by contrast, a plaintiff trader whose converted goods were part of his or her stock in trade could perhaps

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<sup>656</sup> This is discussed by Curwen (2006) 26 LS 570.

<sup>657</sup> *ibid*

<sup>658</sup> This argument was rejected by Lindley LJ in *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, 315-6. The case is discussed in another "ancient lights" case, *Regan v Paul Properties Ltd* [2006] EWCA Civ 1391.

<sup>659</sup> This is relevant in considering whether to award damages in lieu of an injunction: *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 and *Regan v Paul Properties Ltd* [2006] EWCA Civ 1391.

expect to be satisfied with an award of damages, having been already willing to sell the goods.<sup>660</sup>

Specific restitution has been considered by various law reform bodies. In the United Kingdom, the Committee considering the matter made recommendations concerning remedies which resulted in the Torts (Interference with Goods) Act 1977 (UK). The relevant provisions state:

S 3(2) The relief is –

(a) an order for delivery of goods, and for payment of any consequential damages,  
or

(b) an order for delivery of the goods, but giving the defendant the alternative of paying damages by reference to the value of the goods, together in either alternative with payment of any consequential damages, or

(c) damages.

(3) Subject to rules of court –

(a) relief shall be given under only one of paragraphs (a), (b) and (c) of subsection (2),

(b) relief under paragraph (a) of subsection (2) is at the discretion of the court, and the claimant may choose between the others.

(4) If it is shown to the satisfaction of the court that an order under subsection (2)(a) had not been complied with, the court may –

(a) revoke the order, or the relevant part of it, and

(b) make an order for payment of damages by reference to the value of the goods.

Thus, in the United Kingdom, the rule remains that there is no absolute right to the return of goods which have been unlawfully taken, and their return is subject to the Court's discretion.<sup>661</sup> Otherwise, the option to pay damages remains with the defendant.

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<sup>660</sup> This is proposed by Curwen (2006) 26 LS 570.

<sup>661</sup> Generally, no order for delivery of goods will be made under s 3 if damages are adequate: *Blue Sky One Ltd v Blue Airways LLC* [2009] EWHC 3314 (Comm).

Detinue of course has been abolished in the United Kingdom, but the old rule allowing an effective forced sale of converted or detained goods remains in conversion cases.

Reform was considered in Ontario in 1989.<sup>662</sup> It was proposed that legislation should provide that a party might claim recovery of possession, whether or not he or she had a right of immediate possession, subject to the objection of any other person with an interest in the goods. Such a person could be joined as a party to the action and the successful party would be required to hold the goods in trust for all persons with an interest in them. The proposed legislation would provide that a successful party to an action for wrongful interference with goods should be entitled, at his or her option, to their recovery, unless the Court considered another disposition to be more appropriate, the burden of which should be on the party resisting the order. In effect, the Ontario solution was to reverse the current principle that favours the defendant's option.

In British Columbia,<sup>663</sup> in considering how proposed draft legislation should deal with specific restitution, the question was posed thus:

Should the legislation provide that preference should be given to such an order? Should it be left to the option of the plaintiff? Or the option of the defendant? All of these ideas have been considered at one time or another. The last, curiously enough, is the one adopted at common law. The draft legislation leaves the issue to the court's discretion.

In consequence, the draft legislation provides simply that, as one of a number of possible orders,<sup>664</sup> the Court may "order the return of the property". There is thus no presumption in favour of either party.

Consideration of the matter in South Australia<sup>665</sup> led to the recommendation that the Court should have the power to give judgment for the return of goods without any right in the defendant to pay their assessed value. Where an order for the return of goods was made, their value would need to be assessed only if for some reason it proved impossible to secure the return of the goods themselves.<sup>666</sup>

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<sup>662</sup> Ontario Law Reform Commission *Study Paper on Wrongful Interference with Goods* 1989.

<sup>663</sup> Law Reform Commission of British Columbia *Report on Wrongful Interference with Goods* LRC 127, 1992

<sup>664</sup> Cl 52. These are discussed further in the context of damages, ch 7.1.

<sup>665</sup> Ninety-fifth Report of the Law Reform Committee of South Australia to the Attorney-General *Law of Detinue, Conversion and Trespass to Goods*, 1987

<sup>666</sup> p 95

All of these proposals clearly indicate the need to retain judicial discretion in making orders for the return of goods, but adopt different approaches as to whether to lean towards favouring the plaintiff's right to opt for the return of the goods or their value.

As far as the possibility of reform in New Zealand is concerned, some particular factors must be borne in mind.

First, the question of whether the return of goods should be ordered is both a practical and a legal one; goods may be concealed, altered, damaged (visibly or otherwise), and may be dealt with by innocent handlers, who are unaware of the plaintiff's interest in them. The goods may have also been improved or enhanced, but not in accordance with the owner's wants or needs. In such cases, payment of damages rather than the return of the goods may well be the best solution. The retention of a judicial discretion in such circumstances as these is clearly desirable, and avoids complicated questions of assessment of value and liability for diminution of value or improvements.

Second, the Personal Property Securities Act 1999 now dictates in many cases of wrongful interference how rights to possession should be allocated. Typically, these cases include those where owners of goods have voluntarily transferred possession of goods under the various secured transactions covered by the Act. In consequence, rights to possession are perhaps more likely now to be disputed in cases where their owners never consented to the wrongdoers' possession in the first place, or secured goods are in the hands of third parties. In the former case, it may be argued that the owner's claim to a return of the goods should be a strong one; and in the latter, the Act generally gives to the owner a right to repossess the goods in any event.

Further, the erosion of the *nemo dat* principle, as described above, is such that under current law there are few cases in which a dispossessed owner who has voluntarily transferred possession will not lose his or her interest in the goods. Gratuitous loans are an exception to this, but generally speaking, the law has changed to such an extent that it may be suggested that the *nemo dat* principle should be regarded as generally abrogated, except in cases of simple taking, whether amounting to theft or otherwise.<sup>667</sup> It is suggested that, in cases where goods have been removed without the owner's consent, a change in the law to give the owner an election whether to demand the return of the goods or their value would certainly be justified.

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<sup>667</sup> This is discussed further in ch 9.

### 7.3 Recaption

Where goods have been wrongfully interfered with, or taken or withheld from the person entitled to their possession, the common law accords to that person a limited right of self-help to retake or protect the goods. Generally speaking self-help, particularly if it involves the use of force, is regarded as undesirable for the reason that it encourages breaches of the peace.<sup>668</sup> This assumes that the public peace is more deserving of protection than an individual's personal property rights,<sup>669</sup> and that the right to be protected against invasion or assault is worth as much as the right of an owner to recover his goods. As Blackstone stated, "if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give way to the weak, and every man would revert to a state of nature".<sup>670</sup> The same point was made more than two centuries later by Lord Hoffmann,<sup>671</sup> who observed that "tight control of the use of force is necessary to prevent society from sliding into anarchy, what Hobbes (*Leviathan* ch 13) called the state of nature ... [i]n principle, therefore, the state entrusts the power to use force only to the armed forces, the police and other similarly trained and disciplined law enforcement officers. Ordinary citizens who apprehend breaches of the law, whether affecting themselves, third parties or the community as a whole, are normally expected to call in the police and not to take the law into their own hands ... 'the law regards with the deepest suspicion any remedies of self-help, and permits those remedies to be resorted to only in very special circumstances.'"<sup>672</sup> These statements indicate the good reasons for the general view that resort to law is preferable to self-help.

Despite these objections, violent or forceful self-redress to recover or protect goods is excused by the law in some cases. There are obvious reasons why a person who has been wrongfully dispossessed of goods might prefer to take the law into his or her own hands rather than resort to the courts. First, it is cheaper, quicker and perhaps less troublesome than litigation. Judicial proceedings inevitably require time for preparation, and the goods may be

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<sup>668</sup> The arguments for and against the existence of a right of recaption of chattels are stated in the Eighteenth Report (Conversion and Detinue) of the English Law Reform Committee Cmnd 4774, September 1971.

<sup>669</sup> Blackstone's comment that "the public peace is a superior consideration to one man's private property" was cited by the Committee, *ibid*, p 41.

<sup>670</sup> 3 Comm 4, cited in *Anthony v Haney* 8 Bing 186, 192; 131 ER 372, 374

<sup>671</sup> *R v Jones* [2006] 2 WLR 772, 801 (HL)

<sup>672</sup> Lord Hoffmann cited this observation of Edmund Davies LJ in *Southwark LBC v Williams* [1971] Ch 734, 745.



at risk during such delay. If, for example, the goods in question are perishable or likely to be destroyed or onsold,<sup>673</sup> it is clearly advantageous to be able to retake the goods themselves as soon as possible. Even if the goods are not at risk of deterioration or destruction, the recovery of them will not necessarily be achieved by undertaking legal proceedings. The law was, historically, slow to develop remedies enabling orders for the specific return of chattels, although specific restitution was possible in equity.<sup>674</sup> Such orders today remain discretionary; they are not available as of right and are normally granted only in cases where the goods in question are rare or unusual or of particular value to the plaintiff.<sup>675</sup> In the absence of a court order for the return of the goods, the plaintiff might or might not consider damages an adequate remedy; and in any event there can be no certainty in every case that an order for damages will or can be in fact complied with. Accordingly, the simple and direct method of recourse to the goods themselves may have a lot to recommend it in the eyes of a dispossessed owner wishing to “revert to man’s primeval instinct to take the law into his own hands”.<sup>676</sup>

It has been observed that the common law is more tolerant of self-help than are Continental legal systems and that this is for good reasons; given the pressure on courts, and subject to the need to avoid a breach of the peace, “[c]ivilised self-help has the advantages of speed, efficiency, flexibility and cheapness upon which the smooth functioning of business life so much depends”.<sup>677</sup> This view is consistent with the way the common law now stands as far as the peaceful retaking of unlawfully held property is concerned.

### 7.3.1 Peaceful recaption

At common law, a person entitled to the immediate possession of a chattel may, with no need for a prior demand, retake it peaceably from a person into whose *de facto* possession it has come. There is “little doubt”<sup>678</sup> that this is correct; the principle was stated unequivocally by Blackstone<sup>679</sup> and has since been declared in many common law jurisdictions.<sup>680</sup>

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<sup>673</sup> The goods in *Blades v Higgs* (1861) 10 CBNS 713; 142 ER 634 were of this kind, being dead rabbits.

<sup>674</sup> As to specific restitution, see ch 7.2.

<sup>675</sup> *Nash v Barnes* [1922] NZLJ 303, per Salmond J

<sup>676</sup> *Branston* (1912) 28 LQR 262, 264

<sup>677</sup> *Goode* (1988) 14 Mon LR 135

<sup>678</sup> This is stated in the Law Reform Committee Report (UK) *Conversion and Detinue* (1971) Cmnd 4774 para 116.

<sup>679</sup> “This happens, when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one’s wife, child, or servant; in which case the owner of the goods, and the husband, parent or master, may lawfully claim and retake them, wherever he happens to find them; so it be not in a riotous

Because recaption may be peaceably exercised by the person entitled to immediate possession, the owner of a lost item is entitled to take it from the possession of, for example, a finder if the finder refuses to deliver it up. The finder in such a case has a possessory title acquired from the mere fact of taking possession; but, although this title gives the finder a right to retain the goods as against a stranger or subsequent wrongdoer, it is inferior to that of the owner. The finder's right must also, of course, give way to that of any other person entitled to immediate possession, such as a hirer or other bailee. For the same reason, the owner or bailee of goods which have been unlawfully taken from him or her and sold by the thief to an innocent third party may lawfully remove them from that third party.<sup>681</sup> The buyer from the thief in such a case acquires by the transaction no proprietary title to the goods, but has a possessory interest based upon no more than bare, *de facto*, possession of them. In such circumstances the owner or bailee who simply retakes the goods with no associated force or violence commits no wrong for his or her entitlement to immediate possession, deriving from ownership or bailment, prevails over the more limited interest of the buyer.

Thus, at common law the peaceable retaking itself of goods by the person entitled to immediate possession of them is uncontentious. In such a case, there is no risk of any actual breach of the peace. The matter however becomes more complex when the associated conduct of the person who retakes the goods would be, in the absence of a defence of entitlement to possession of the goods, tortious. The question in such a case is not whether the retaking of the goods is itself lawful, but whether the use of associated violence or force such as would otherwise constitute an assault or trespass is justified or excused. Does an entitlement to possession of goods render lawful the use of violence in effecting their recovery?

### 7.3.2 *Forcible recaption*

The modern common law permits in some circumstances the use of reasonable force against the person of one who wrongfully takes or withholds chattels. This was not always so; in mediaeval times, an owner or possessor who had been deprived of his or her goods was not generally permitted to retake them by force. This reflects the importance which the law

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manner, or attended with a breach of the peace ... if therefore he so contrive it as to gain possession of his property again without force or terror, the law favours and will justify his proceeding." (Blackstone, 3 Comm 4).

<sup>680</sup> See the review of the law in *Toyota Finance Australia Ltd v Dennis* (2003) 58 NSWLR 101.

<sup>681</sup> This is subject to the statutory exceptions to the principle of *nemo dat quod non habet*, which enable an innocent purchaser to obtain a good title from a thief in the circumstances provided by those exceptions.

placed in this context on possession rather than ownership; *de facto* possession of the goods was vested in the trespasser despite the wrong done in obtaining the goods, and the law protected that possession. An owner who retook his or her own goods by force thereby committed trespass and was generally not entitled to retain them.<sup>682</sup>

It is curious that the mediaeval law, which appears generally to modern eyes to have tolerated or even advocated what today would be seen as violence and barbarism, circumscribed force in this context more narrowly than does the current law.<sup>683</sup> There are two possible reasons which may be suggested for this. First, as described above, the early mediaeval view of ownership was not generally differentiated from the reality of possession. However eventually English law came to recognise the concept of title to goods as a legal abstraction which could be separated from factual or physical possession; and title to goods could pass regardless of whether delivery were effected or not.<sup>684</sup> In consequence, interests in goods could be transferred independently from any change in possession of them. This fact was beneficial to traders but could cause disadvantages as far as unauthorised dealings with goods were concerned, for possession was neither a necessary nor a sufficient condition for the existence of a right to transfer an interest in goods. A second suggested reason for the modern acceptance of force in this context perhaps results from a recognition of the long-standing reality that judicial remedies for the return of goods may be difficult to obtain or ineffective. In other words, it may be that the modern law which allows a certain amount of violence in recaption has resulted from the inadequacy of legal procedures. There are judicial dicta to this effect: for example Erle CJ, in approving a right of forcible recaption, observed that “[i]f the owner was compellable by law to seek redress by action for a violation of his right of property, the remedy would be often worse than the mischief, and the law would aggravate the injury instead of redressing it”;<sup>685</sup> and it was aptly remarked by Bankes LJ, in considering the right to retake land from a trespasser, that if self-help were not permitted, “it must follow that the law confers upon the lawless trespasser a right of occupancy the length

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<sup>682</sup> The mediaeval law is described by Branston (1912) 28 LQR 262. It seems it was otherwise if the taker was caught on fresh pursuit: *Vaspor v Edwards* (1701) 12 Mod 658. If the trespasser was caught with the goods in his possession and the owner and others made oath that the goods had been taken, the trespasser could be put to death and the goods restored to the owner: see the description of this procedure in Ames (1897) 11 Harv LR 277, 278.

<sup>683</sup> Holdsworth observed that the law in mediaeval times attempted to repress self-help and describes the procedure: *A History of English Law* ii, 101.

<sup>684</sup> *The Oxford History of English Law* p 739 describes this process.

<sup>685</sup> *Blades v Higgs* (1861) 10 CBNS 713, 721; 142 ER 634, 637

of which is determined only by the law's delay".<sup>686</sup> The same point may be made in the context of recovering chattels.<sup>687</sup>

Whatever the historical reasons might be, it is clear that, despite the mediaeval prohibition, the common law had moved by the nineteenth century to permit some force against a wrongdoer for the purpose of recaption, and the difficult questions related, and continue to relate, to the circumstances of its exercise. In particular, it is still today not clear whether the right to use force is limited to the case where the wrongdoer's adverse possession of the chattel was wrongful from its inception. Is there a right of forceful recaption if a person tortiously detaining or using the goods of another originally obtained possession of them lawfully? The starting point in English law on this question is the frequently cited case of *Blades v Higgs*,<sup>688</sup> in which the judgment of Erle CJ indicates that the answer to it may be in the affirmative.

It will be remembered that the tort of trespass requires interference of a direct or physical kind with the possession of a plaintiff and, with a few exceptions,<sup>689</sup> the plaintiff must be the possessor of the goods at the time the act complained of occurs. Accordingly, the possession of goods by a trespasser must by definition be wrongful from its inception. This is not necessarily so in the case of conversion or detinue; a person may have obtained goods lawfully, as by a bailment or a finding but subsequently commit conversion or detinue by using or detaining the goods in defiance of the plaintiff's title. In such a case, the goods may remain in the hands of the defendant, whose previously lawful possession of them is rendered tortious by his usurpation or denial of the plaintiff's title.

The decision in *Blades v Higgs* indicates that there is no difference between the case where goods are in the possession of one who has obtained them by means of a trespass and other cases of conversion or detinue where the person in adverse possession of the goods has not obtained them by a trespassory taking. In other words, adverse possession is in itself, according to *Blades v Higgs*, sufficient to justify recaption and it is not necessary to prove how the adverse possession was obtained.

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<sup>686</sup> *Hemmings v Stoke Poges Golf Club* [1920] 1 KB 720, 736-737

<sup>687</sup> Although urgent and *ex parte* proceedings to secure jeopardised goods are possible (see for example *Powell v Koene* [2003] DCR 341, in which *ex parte* temporary furniture and protection orders were obtained under the Domestic Violence Act 1995) delays of hours or days may still place goods at risk.

<sup>688</sup> (1861) 10 CBNS 713; 142 ER 634

<sup>689</sup> For example, a trustee yet to take possession may sue although the goods are in the actual possession of the beneficiary; as may an executor or administrator if the goods of the deceased are interfered with before probate or letters of administration are granted. The owner of a franchise to take wreck or treasure trove who has yet to seize the goods may maintain an action in the case of unlawful interference by another.

In *Blades v Higgs*, the plaintiff game dealer had obtained dead rabbits which had previously been poached from the Marquis of Exeter, and was about to carry them away and convert them to his own use. The defendant servants of the Marquis, having unsuccessfully requested the plaintiff not to take them away, laid hands on the plaintiff and used force to remove the rabbits from him. The plaintiff contended in the Court of Common Pleas that these acts constituted assault and battery on the part of the defendants. The defendants successfully argued that their acts were justified because the plaintiff had maintained his wrongful possession of the rabbits and force was necessary to effect their recovery. Erle CJ observed that there already existed a rule that a person entitled to possession of a chattel could use force to prevent its being unlawfully taken from his actual possession, but went on to extend the right to the case where the goods were wrongfully in the possession of a person who was not the original taker:<sup>690</sup>

If the defendants had actual possession of the chattels, and the plaintiff took them from them against their will, it is not disputed that the defendants might justify using the force sufficient to defend their right and re-take the chattels; and we think there is no substantial distinction between that case and the present; for if the defendants were the owners of the chattels, and entitled to the possession of them, and the plaintiff wrongfully detained them from them after request, the defendants in law would have the possession, and the plaintiff's wrongful detention against the request of the defendants would be the same violation of the right of property as the taking of the chattels out of the actual possession of the owner.

Therefore, the defence to the claim of assault could be made out without any necessity of showing how the plaintiff originally obtained the property of the defendant and became the holder of it.

It has been suggested that *Blades v Higgs* was a departure from previous law and was wrongly decided.<sup>691</sup> The views found in cases and texts differ as to the scope of recaption, and that divergence is reflected in the current difference between the law as it stands currently in different jurisdictions.

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<sup>690</sup> p 637

<sup>691</sup> Landon, for example, says that the reasons given in the case "seem wrong, and the decision itself is contrary to the common law as understood in the thirteenth century. One who retook his own goods by force (save, perhaps, on fresh pursuit) was a trespasser and lost the goods.": *Pollock's Law of Torts*, 1951, p 293.

In New Zealand, it has been judicially observed at least twice that although the proposition stated in *Blades v Higgs* has been criticised, it nevertheless is good law. In *De Lambert v Ongley*<sup>692</sup> the plaintiff claimed damages from the defendant for assault. The defendant had, in consequence of an erroneous belief that the plaintiff had given him a correctly drawn cheque for money owed to him, handed a receipt to the plaintiff. Upon discovering the error, the defendant sought the return of the receipt and, when the plaintiff refused to give it to him, attempted to take it from him by force. The Supreme Court held that the defendant's action in such circumstances was justified, for the plaintiff should have returned the receipt to the defendant when requested to do so. The Court considered that *Blades v Higgs* had been tacitly accepted by the House of Lords as correct,<sup>693</sup> and was supported by leading writers; accordingly, it was "definite authority" for the right of recaption in such a case.<sup>694</sup>

More recently, in *Slater v Attorney-General*<sup>695</sup> the issue arose again. A company which owned a car hired it on terms that it was entitled to repossess it immediately if it were damaged. The car was observed parked on the roadside in a damaged state with its two occupants, a sub-bailee (S) of the hirer and his friend, drunkenly asleep inside. The owner decided to terminate the agreement and sought the assistance of the police to oust the occupants and retake the car. The police used force and a burst of pepper spray to remove the occupants from the car, and then subdued and arrested them (again using force) for disorderly behaviour and breaches of the peace. S claimed damages for battery, false imprisonment and related breaches of the Bill of Rights. The trial Judge upheld the contention of the Attorney-General that the police, acting as the agents of the owner, who had terminated the hire agreement and so become entitled to immediate possession, had been justified at common law in using reasonable force to repossess the car.

On appeal, it was contended for S that the common law defence which the trial Judge had affirmed, deriving from *Blades v Higgs* and applicable in New Zealand as a result of *De Lambert v Ongley*, was too widely expressed and ought no longer to be taken as stating the law. It was undesirable that possession could be resumed by force in a case where the one who retained possession had come by the goods innocently. S argued that the principle adopted by the New South Wales Court of Appeal three years before in *Toyota Finance*

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<sup>692</sup> [1924] NZLR 430

<sup>693</sup> *Blades v Higgs* was appealed to the House of Lords on another point, and the issue of recaption was not questioned further.

<sup>694</sup> The plaintiff succeeded however on the ground that the force employed by the defendant in the case exceeded what was reasonable.

<sup>695</sup> [2006] NZAR 664

*Australia Ltd v Dennis*<sup>696</sup> (discussed below) was preferable and ought to be adopted, so that force could be used only against one who was a trespasser from the first, which was not the present case.

In his judgment, Keane J observed that the right of recaption as expressed in *Blades v Higgs* “may well deserve to be revisited in New Zealand”. At the time Sim J had adopted it in *De Lambert v Ongley*, he had recognised while doing so that even then the principle was controversial, but nevertheless it had been tacitly approved by the House of Lords. Keane J, however, commented that although *Blades v Higgs* had been adhered to since, the cases had been infrequent and were all, except for *Toyota*, “expressions of a different age”. Whether the explicit policy underpinning *Blades v Higgs* ought to enjoy currency any longer was a pertinent question. Keane J observed, citing Fleming,<sup>697</sup> that the forcible recaption was a privilege, and not a right; and the remedy for wrongs lay in the courts. Had the matter arisen in the High Court at first instance, Keane J stated, he would have applied that policy and preferred the *Toyota* principle to that of *Blades v Higgs*. However, he was hearing the matter by way of appeal and the trial Judge had not been wrong in basing his decision on *De Lambert v Ongley*. In consequence, that case would continue to state the law in New Zealand until the matter could be revisited by an appropriate court.

In Australia, by contrast, a different approach was taken, and the breadth of the principle stated in *Blades v Higgs* was recently rejected by a majority of the New South Wales Court of Appeal in *Toyota Finance Australia Ltd v Dennis*.<sup>698</sup> The facts were that the respondent lessee of a vehicle was in arrears with his payments and the appellant lessor was entitled to repossess the vehicle. The respondent resisted the appellant’s attempt to repossess and a struggle for the keys ensued, during which the appellant grabbed and pulled on the arm of the respondent’s wife. The issue for the Court was whether this act constituted an assault or was justified by the appellant’s right of recaption by force of the vehicle. By a majority (Meagher JA and Sheller JA), the Court declined to follow *Blades v Higgs*, holding that it was not based on precedent and could encourage unnecessary forcible or violent redress. The majority reviewed the law and literature in some detail and concluded that the correct rule was that an owner’s right of forcible recaption of unlawfully detained chattels from another was limited to the case where that other’s possession was wrongful from its inception. Recaption would therefore have been justified if the vehicle had been initially obtained by the

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<sup>696</sup> (2003) 58 NSWLR 101

<sup>697</sup> p 131

<sup>698</sup> (2003) 58 NSWLR 101

commission of trespass by the respondent. However, the respondent had come into possession of the vehicle with the consent of the appellant under the lease, and his initial possession was therefore not unlawful. Accordingly, the appellant was not entitled to use force to regain possession and his conduct amounted to an actionable assault.

In his strongly argued and equally detailed dissenting judgment, Handley JA observed that *Blades v Higgs* had been treated at the time it was decided as settling the question; it was based upon authority and had been accepted by leading scholars of the day. Further, *Blades v Higgs* had twice been followed by the Full Court of the Supreme Court of New South Wales in *Zimmler v Manning*<sup>699</sup> and *Abbott v NSW Monte de Piete Co.*<sup>700</sup> Handley JA also remarked that, contrary to the view taken by the English Law Reform Committee on the point, there did not exist uniformity amongst modern text writers; rather, they were “lined up on both sides of the issue”.<sup>701</sup> His conclusion was that *Blades v Higgs* had been correctly decided at the time and subsequently correctly followed, and that the Court should not resile from that view.

In Canada, *Devoe v Long*<sup>702</sup> is frequently cited as the leading case in this context. The New Brunswick Supreme Court in that case rejected the broad principle of *Blades v Higgs* in holding that force could not be used against a person unjustifiably holding the chattels of another unless that possession had originally been obtained wrongfully. In that case, a document had been handed by its owner, the defendant, to the plaintiff, who subsequently refused to return it. The owner used force to retrieve it, and the question was whether this self-help was justified in these circumstances. It was held that it was not; the Court considered that *Blades v Higgs* did not apply to the case for the plaintiff’s possession of the disputed document was not unlawful from its inception but was due to the act of the defendant himself, who had handed it to the plaintiff.

None of the persons in wrongful possession of the disputed goods in these four leading cases was a trespasser. However it is clear that *Blades v Higgs* may be distinguished from the other three cases in regard to the nature of the possession of each wrongdoer. First, in *Blades v Higgs* itself, the person from whom the rabbits were forcibly removed was not the initial trespassing poacher, but the person who had purchased the rabbits from him. His taking possession of them under a purported purchase, in defiance of the defendants’ title,

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<sup>699</sup> (1863) 2 SCR (NSW) 235

<sup>700</sup> (1904) 4 SR (NSW) 336. However, although the respective Courts in each case cited *Blades v Higgs* with approval, the issue in *Zimmler* was whether a right to enter land to retake goods depended upon the need to prove how the goods first came there; and *Abbott* concerned the effect of a licence to enter land and retake goods.

<sup>701</sup> The competing sides are described at p 104.

<sup>702</sup> [1951] 1 DLR 203



constituted conversion and was wrong from its inception. In *De Lambert v Ongley*, the disputed receipt was originally given voluntarily by the defendant to the plaintiff, who thereby came into possession of it with the defendant's consent. His possession was therefore not wrong from its inception, although it became so when he refused to return the receipt and thereby committed the torts of conversion and detinue. In *Toyota Finance*, the person unlawfully detaining the vehicle in question had obtained possession of it under a lease; thus his possession was not unlawful from the beginning, but became so when he refused to return it after a demand was made for him to do so. The facts of *Devoe v Long* are essentially the same as those of *De Lambert v Ongley* where, similarly, the disputed document was handed voluntarily by its owner to the plaintiff whose original obtaining of possession of it was therefore not unlawful.

Accordingly, the only case of the four in which the possession of the person against whom force had been used was unlawful from its inception was *Blades v Higgs* itself. The broad remarks of Erle CJ were of course made in that context, and it may be said that it was not necessary for them to go, or perhaps to be interpreted as going, further than the particular circumstances of the case. However, it will be remembered that Erle CJ held that it was unnecessary for the defendants, in establishing justification for their force, to show how the plaintiff had taken possession of the property and become the holder of it. If this broad principle is regarded as the ratio of the case, the facts of all four cases may be regarded as subsumed within it. In consequence, it may be said that the principle of *Blades v Higgs* has been rejected in Australia and in Canada, is doubtful in England, but is currently the law in New Zealand. The law in New Zealand thus appears to be that, subject to any statutory provisions (which are discussed below), a person entitled to possession of goods may retake them using reasonable force from anyone who is wrongfully holding them; and the lawfulness or otherwise of the initial obtaining of possession is irrelevant.

It may be commented that whether or not this should today be the law in New Zealand should be a matter of policy, and that it should not depend upon the correctness or otherwise of *Blades v Higgs*. Further, if it should be decided in future cases that *Blades v Higgs* should be limited in New Zealand as it has been in other jurisdictions as described above, it is arguable that the concept of "wrongfulness from inception" is not a useful test to apply in this context. This is because, it is suggested, such a principle ignores the state of mind of the wrongdoer.

The torts of trespass, conversion and detinue may all be committed unwittingly. Although they are described as intentional torts,<sup>703</sup> this means that they cannot be committed accidentally, and that the act complained of which constitutes the tort in the particular case must have been performed intentionally or deliberately. An inadvertent act in this context is not tortious. However, provided the defendant knowingly performs the act which constitutes the tort, he or she may be liable for any of these torts even though he or she honestly believes the action is justified and has no idea or knowledge of the other party's interest in the goods. Thus, the commission of these torts does not depend upon knowledge or moral fault, but upon where possessory title is allocated in the particular case and whether such title has been interfered with in a manner which the law regards as tortious.

As described above, trespass is always wrongful from its inception because it is committed by a direct and physical interference with the plaintiff's possession. However the state of mind of the trespasser is irrelevant. So, for example, he or she may take the goods dishonestly and the trespass may amount to theft; or the trespasser may mistakenly believe that the goods are his or her own and that he or she is entitled to take them. In both these cases, trespass is committed but the trespasser in the latter case is unaware of his or her lack of right to take the goods. Conversion and detinue similarly do not depend upon knowledge of the true legal position, but may be committed by a person who is acting in the belief that his or her acts are justified.<sup>704</sup> Conversion may or may not be wrongful from its inception for the original taking or using may have been unlawful from the outset or, alternatively, an original lawful possession of goods may subsequently become unlawful; but the conduct is tortious regardless of the wrongdoer's state of mind or beliefs. Similarly, although detinue requires that the detention must be consciously adverse to the other party, it may be committed either by one who mistakenly believes he or she is entitled to detain the goods, or by one who knows well that he or she has no interest in them to justify the detention.

It may be argued that, if one is considering the rightness or otherwise of permitting or excusing violence, a criterion which rests upon the state of mind of the wrongdoer might be more useful than that which requires consideration of whether the wrongdoer's possession was originally justified or not. One argument for the "unlawful from inception" requirement is that lawfulness in such cases frequently derives from the fact that the person entitled to possession of the goods in question has voluntarily given possession of them to the other, as by a loan, hiring or other bailment. When this occurs, it may be argued that the state of affairs

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<sup>703</sup> *National Coal Board v J E Evans & Co (Cardiff) Ltd* [1951] 2 KB 861, *Everitt v Martin* [1953] NZLR 298

<sup>704</sup> *Wilson v New Brighton Panelbeaters Ltd* [1989] 1 NZLR 74

has been caused by the voluntary delivery of the goods, and therefore force should not be justifiable to obtain their return.<sup>705</sup> However, this argument, it is suggested, is unsatisfactory. If the “unlawful from inception” criterion is employed, force against the respective wrongdoers in *Toyota Finance* and *De Lambert v Ongley* would not be justified but, by contrast, the recipient of the rabbits in *Blades v Higgs* could be forcibly handled. It is suggested that this result is undesirable. In the first two cases, the goods were throughout in the hands of the persons converting them, each of whom was aware of his lack of right to retain them; in the latter case, force could be exercised against the purchaser of the rabbits even if he was completely unaware of any other person’s right to the goods. Why should a bailee who is aware that he or she has no right to the goods be protected from force, while an innocent purchaser from the bailee is not?

Thus, the case for supporting a right of force in *De Lambert v Ongley*, *Devoe v Long* and *Toyota Finance* is strong, for in all of those cases the force used was against people who were aware of their lack of right to the goods. No confusion or misunderstanding existed in the minds of any of them and in each case the disputed chattel in each case had been in the hands of the one individual tortfeasor throughout. By contrast, a person in the position of the game dealer in *Blades v Higgs* should, it is suggested, be subject to force (if it is permitted at all) only if he had bought the rabbits with the knowledge that they had been poached. Such a person, having had no direct dealings with the person entitled to possession, and having acted honestly, is unaware of the previous dishonest taking or dealing with the goods; and, even when the facts are known, it may be that the law (for example, the exceptions to the *nemo dat* rules) operates to confer entitlement to possession or ownership on him or her. In other words, it is arguable that a genuine belief in the existence of an entitlement to possession should protect from the use of force a tortfeasor who is unaware that his or her possession is unlawful.

This view is to some extent supported by Branson, who considered that forcible recaption might be exercised against “all those who possess without the right of possession, and who are not custodians, provided always they be privy or consenting to the original trespass or wrong”, the circumstances being that there had been a taking of goods “without claim of title and which therefore involves a breach of the peace”.<sup>706</sup> The instances provided by Branson in which a claim of title will arise are narrow; and they exclude some persons who have taken possession of goods in the genuine belief they are entitled to do so but whose

<sup>705</sup> This point was made in *Devoe v Long*.

<sup>706</sup> Branson (1912) 28 LQR 262, 266-7, citing Maitland as authority.

conduct is unwittingly tortious, such as those who buy innocently from thieves. Such persons would, however, be protected from force under Branston's criteria for they would not be privy to the original trespass or wrong.

It is arguable that the broad concept of "colour of right" or "claim of right" may be more satisfactory here, and that there is no need to limit the category of protected people to those who assert a claim of title of the kind postulated by Branston. Provided a person is in possession of goods with the honest, albeit erroneous, belief that he or she is entitled to such possession, it is suggested that the use of force should be limited and that the disputing parties should be required to have recourse to law to settle the question of title. These concepts are discussed further below.

It was pointed out by the UK Law Reform Committee in considering the law of recaption that it is "of the essence of a good law on the subject that the existence of the circumstances which justify any particular measure of self-help should be readily ascertainable at the time".<sup>707</sup> The current law, which requires the parties to understand complex concepts of property rights, does not, it is suggested, fulfil the criterion that the existence of recaption rights should be readily ascertainable. A tortfeasor lacking such any claim of right has no ground, legally or morally, to defend his or her possession; and as such will be aware of the other party's higher legal and moral ground to justify the retaking of possession. That other party may, in exercising force, be unaware of the true state of mind of the person withholding possession and so will be taking a risk that his or her use of force is legally excusable. However, it is submitted that it is impossible to lay down a rule that a precondition for the use of force is that both parties correctly understand the facts and true legal position. This conclusion was, it seems, reached by the UK Law Committee when it considered the matter, for it decided that no hard and fast rule could be stated. In consequence, although it considered that the law should be clarified, the difficulties inherent in doing so precluded the Committee from recommending any major change in the current law.

### *7.3.3 Statutory control of recaption*

Against this unsatisfactory common law background, the Crimes Act 1961 provides:

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<sup>707</sup> Law Reform Committee, 18<sup>th</sup> Report, Cmnd 4774, 1971, 41

**Section 52 Defence of movable property against trespasser**

(1) Every one in peaceable possession of any movable thing, and every one lawfully assisting him, is justified in using reasonable force to resist the taking of the thing by any trespasser or to retake it from any trespasser, if in either case he does not strike or do bodily harm to the trespasser.

**Section 53 Defence of movable property with claim of right**

(1) Every one in peaceable possession of any movable thing under a claim of right, and every one acting under his authority, is protected from criminal responsibility for defending his possession by the use of reasonable force, even against a person entitled by law to possession, if he does not strike or do bodily harm to the other person.

**Section 54 Defence of movable property without claim of right**

(1) Every one in peaceable possession of any movable thing, but neither claiming right thereto nor acting under the authority of a person claiming right thereto, is neither justified in nor protected from criminal responsibility for defending his possession against a person entitled by law to possession.

Several points may be made about these provisions.

First, the justification provided in these sections applies in the context of both crime and tort. The word “justified” is defined as meaning not guilty of a criminal offence, and also not liable to any civil proceedings.<sup>708</sup> Section 52 will therefore provide a defence to a claim in tort in the appropriate circumstances.

Second, it is not clear to what extent these statutory provisions codify the law relating to recaption. This is because section 20 of the Crimes Act provides:

**Section 20 General rule as to justifications**

(1) All rules and principles of the common law which render any circumstances a justification or excuse for any act or omission, or a defence to any charge, shall remain in force and apply in respect of a charge of any offence, whether under this Act or under any other enactment, except so far as they are altered by or are inconsistent with this Act or any other enactment.

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<sup>708</sup> Crimes Act 1961, s 2

Section 52 is the only provision which expressly covers an act of recaption so as to provide a defence to a claim in tort. A person in peaceable possession may use reasonable force against a trespasser not only to resist the taking of the thing but also to retake it. Although the right to retake is accorded to “a person in peaceable possession”, it is clear that this cannot be read literally; the right to retake must be available to one who has lost the physical possession of the goods to the trespasser and so is no longer in *de facto* possession. The phrase “peaceable possession” is not defined in the Act. In *Singh v Police*<sup>709</sup> Williams J referred to *R v Born With A Tooth*<sup>710</sup> as providing assistance; in that case it was said that “peaceable” is not synonymous with “peaceful”, but meant a possession not seriously challenged by others.<sup>711</sup> If it were otherwise, then every property dispute could be legitimately resolved by force. This would be inconsistent with the object of the law, which was to confine the defence only to those whose possession has not been seriously questioned by somebody before the particular incident of force occurs.

It is clear that the protection afforded by the section applies only in the case where the goods are being removed, or have been removed, by a trespasser. The word “trespasser” is not defined in the Act. Assuming that it has the meaning used in the tortious sense, recaption will provide a justification for the use of force only against one who has performed an act of direct and physical interference against the person in peaceable possession. As described above, the original obtaining of goods by an act of trespass is necessarily always unlawful. It would seem however that acts of conversion or detinue, unless they include trespass, would not be covered by s 52, even if such acts were unlawful from their inception. Accordingly, the section would not encompass recaption from, for example, a purchaser from a thief, even though the purported purchase constituted an act of conversion and so was tortious at its inception.

Indeed, s 52 would not allow recaption in the circumstances of any of the four cases of *Blades v Higgs*, *De Lambert v Ongley*, *Devoe v Long* or *Toyota*. In none of those cases was the person refusing to return the goods a trespasser, for each of them had come into possession of the goods without any act of direct interference with the possession of the person entitled to them. Nor would *Slater v A-G* come within the wording of the section.

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<sup>709</sup> [2003] NZAR 596

<sup>710</sup> (1992) 76 CCC (3d) 169, 177

<sup>711</sup> This was also accepted in the criminal context in *R v Haddon* CA 311/05, 9 May 2006: “[I]t is apparent that it is sufficient for an accused to have actual control of the property and peaceable possession is a possession hitherto not seriously challenged by others”.

Sections 53 and 54 involve the concept of “claim of right” which means, in this context, a claim to, or belief in, entitlement which is honestly or genuinely held, even if there exists no foundation for it or the belief is unreasonable.<sup>712</sup> Under s 53, those in peaceable possession of movable things may use reasonable force (but not strike or do bodily harm) to defend their possession if that possession is under a claim of right.<sup>713</sup> The protection afforded here, however, is against criminal liability only, so the user of force in such circumstances does not have a statutory defence against a tort action. By contrast, one who is in peaceable possession of a thing but without a claim of right has no protection against either criminal or tortious liability in defending his or her possession against another who is legally entitled to it.

In relation to protection from liability in tort then, the combined effect of ss 52-54 is, in summary, that a person whose right to possession of a thing has not previously been seriously challenged may use reasonable force (but not strike or do bodily harm) against a trespasser to defend or retake the possession. Outside these circumstances, one who is in peaceable possession of property and uses force to defend it against the person who is legally entitled to it has no defence to a tort action under these provisions, even though he or she may assert a claim of right.

Clearly, the principle emerging from these sections does not cover the whole range of possible circumstances which may arise in recaption cases. In particular, s 52 covers only one circumstance in which possession is wrongful from its inception, namely, the act of a trespasser. The section does not expressly cover other “unlawful from inception” cases and so would not justify, for example, an owner’s forceful retaking of goods from one who had knowingly received them from a thief. There was no mention of these Crimes Act provisions in *De Lambert v Ongley*; and in *Singh*, Williams J appears to have assumed that the common law of recaption remained in force and had not been displaced by the Crimes Act provisions. It therefore seems that the Crimes Act defences do not, and cannot, constitute a code in

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<sup>712</sup> See *Singh v Police* [2003] NZAR 596 for a review of the history of the term “claim of right”.

<sup>713</sup> In *Ruwhiu v Police* [2009] BCL 169, Priestley J said that the defence under s 53(1) to a criminal charge was available “when a person uses reasonable force (short of striking or inflicting bodily harm) to defend one’s possession of movable property. Such a defence might well occur in what I have called a possessory tussle, where assaults are inflicted in the context of a struggle over one’s property or trying immediately to reclaim property which is taken from one” (para 44). The defence was not available in the particular case, because the defendant had been attempting to retrieve his property which had been out of his possession for some time.

regard to civil proceedings;<sup>714</sup> and nor have they altered the common law or are so inconsistent with it as to have displaced it as provided in s 20.

#### 7.3.4 Degree of force

In three States of Australia, legislation permits recaption of chattels by “such force to overcome resistance as is necessary to obtain possession, provided it is not likely to cause death or grievous bodily harm”.<sup>715</sup> In the *Toyota Finance* case, Handley JA commented, obiter and without further discussion, that these provisions codified the common law, and that in this context the common law and Australian statute law were broadly the same.

In New Zealand, the permitted level of force is generally described as being “reasonable”. This was said to be so in both *De Lambert v Ongley* and in *Slater v A-G*; and s 52 of the Crimes Act also speaks of the use of “reasonable” force against a trespasser. It has been suggested that “reasonable” in this context means “necessary”; Branson, for example, observes that “the amount of force which one is justified in using is a matter of dispute, but now it would seem that whatever force is necessary is also justified.”<sup>716</sup> Clearly, this statement cannot stand without qualification, for both statute and the common law place limits on the amount of force which is justified for recaption. In New Zealand, it has been suggested that “reasonable” and “necessary” mean essentially the same thing, and that the degree of force allowed must be assessed on a standard of objective reasonableness.<sup>717</sup> The tests for such limits have been stated in variable language and in different contexts, and tend to be influenced from the circumstances of each case. It has also been judicially observed that, whatever force may be reasonably or necessary, the defence of one’s property is not broader than the defence of one’s person.<sup>718</sup>

In questioning generally any right for one to retake his own goods by force, Landon observes that, whatever the circumstances in which such retaking may be permitted, “at all events, maiming<sup>719</sup> or wounding is not justified for this cause”.<sup>720</sup> In *De Lambert v Ongley*

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<sup>714</sup> In the context of criminal proceedings, Priestley J stated in *Ruwhiu v New Zealand Police* [2009] BCL 169 that s 20 left little scope for common law defences to operate as a supplement or gloss to a specific statutory defence, and that the statutory words of s 53(1) set out the ambit of the defence.

<sup>715</sup> See the Criminal Codes of Queensland, Tasmania and Western Australia, ss 75, 43 and 253 respectively.

<sup>716</sup> Branson (1912) LQR 262, 269, and see the cases listed in fnn 2 and 3

<sup>717</sup> See *R v Haddon*, citing *R v Frew* [1993] 2 NZLR 731.

<sup>718</sup> *R v Haddon*, citing *R v Scopelliti* (1981) 34 OR (2d) 524; 63 CCC (2d) 481

<sup>719</sup> In New Zealand, it has been held that maiming involves the cutting or removing of part of a person’s body: *R v Rapana* (1988) 3 CRNZ 256.

<sup>720</sup> *Pollock’s Law of Torts*, London, 1951



the defendant struck the plaintiff a blow and knelt on him when he was on the floor. Sim J said that the defendant had used “much more force and violence than was necessary to obtain possession of the receipt”<sup>721</sup> and that, although some force could lawfully have been used in the circumstances of the case for the recaption, that which was in fact used was excessive. Sim J also remarked that the rules in this context were the same as those applicable to the ejection of a trespasser on land and that “beating, wounding and knocking the party down”<sup>722</sup> would not be justified. In *Slater v A-G*, the use of pepper spray by the police to assist the owner of a car recover it at the termination of the hiring was held to be unreasonable; and this was so whether the police were acting as the agent’s owner or in the execution of their duty as police officers.

The “reasonable force” to achieve the specified object which is permitted by s 52 of the Crimes Act is circumscribed by the requirement that there must be no “strike” or “bodily harm” done. In *Hastings v Police*<sup>723</sup> the issue was whether a push or shove to the complainant’s chest was a “strike”, which is not defined in the Act. Priestley J observed that it was not easy to provide a definition; and that some meaning must be given to the legislative prohibition against striking, such a meaning being nonetheless one which preserved a realistic and reasonable range of bodily contact which was clearly envisaged by the expression “reasonable force”. The Oxford English Dictionary definition of “to strike” was essentially “to deal a blow, to hit”; and these definitions provided some assistance. Priestley J held that “striking” differed from actions involving pushing, holding, or physically obstructing a person, although it would be possible for a push or a shove to reach such a level of force that it might constitute a “strike”. Similarly, in *Galvin v Police*<sup>724</sup> Bisson J considered that a push to the chest with an open hand with reasonable force would not normally be regarded as a “strike”. In *Galvin*, Bisson J also considered the term “bodily harm”, which is not defined in the Crimes Act. Bisson J observed that “to injure” was defined in the Act as “to cause actual bodily harm”; “bodily harm” should therefore be read as contrasting with “grievous bodily harm”, with the result that an injury to a trespasser under s 52 could be nothing more than some slight hurt or discomfort. In *DPP v Smith*<sup>725</sup> it was held that the cutting of another’s hair without consent constituted actual bodily harm; it was not necessary that there be any bruising or bleeding, or any cutting or breaking of the victim’s skin. Priestley J in *Ruwhiu v*

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<sup>721</sup> p 432

<sup>722</sup> *ibid*

<sup>723</sup> [2001] BCL 778

<sup>724</sup> HC, Rotorua, M44/85, Bisson J, 22 April 1986

<sup>725</sup> [2006] 1 WLR 1571

*New Zealand Police*<sup>726</sup> doubted, without deciding the point, whether the statutory defence would be removed merely because of the infliction of a minor bruise.

These cases make it clear that the kind of physical harm or contact permitted by s 52 must be very minor or trivial. Further, a person may be “injured” without proof of physical injury if a hysterical or nervous condition results from the physical assault.<sup>727</sup> Psychological effects which are merely trivial or transitory do not come into this category;<sup>728</sup> and nor do other emotional responses such as fear or distress, which do not amount to mental injury.<sup>729</sup>

#### 7.4.5 Reform

The common law governing the circumstances in which a person may use force against another for the recaption of chattels is unclear. Statutory intervention may be desirable but, as the UK Law Reform Committee pointed out, it is an area which may touch the ordinary person’s view of his or her fundamental rights and so the laying down of rigid rules presents difficulties.<sup>730</sup>

It is suggested that if reform were contemplated, and a blanket rule applied, an approach could be adopted which allows forcible recaption only where no claim of right is asserted by the person wrongfully in possession of chattels. Such a person, being aware of his or her lack of entitlement, is in no state of confusion or misunderstanding about his or her interest in the disputed goods and has no justification to defend his or her unlawful possession. This approach, which takes into account the state of mind of the parties, would do away with the need to classify the action of a wrongdoer as trespass, conversion or detinue; and would not require consideration of the “wrongfulness from inception” argument. A person who defended his or her wrongful possession, knowing it to be so, would in such circumstances be thereby committing an assault. In cases where a person in possession of goods, correctly or otherwise, asserts a claim of right, it is suggested that recourse to the law is the desirable way for the disputing parties to settle the matter.

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<sup>726</sup> [2009] BCL 169

<sup>727</sup> *R v Miller* [1954] 2 QB 282, 292

<sup>728</sup> *R v McArthur* [1975] 1 NZLR 486

<sup>729</sup> *R v Chan-Fook* [1994] 1 WLR 689. See, further, Simester and Brookbanks, *Principles of Criminal Law*, 1998.

<sup>730</sup> Eighteenth Report, (Conversion and Detinue) Cmnd 4774, p 41

## Chapter 8 Defences

In certain circumstances, an act which would constitute an unlawful interference with goods may be excused or justified by the defendant. The most important of these defences are discussed below. In addition to these categories, there are of course numerous statutory provisions which permit or justify the interference with the goods of another. For example, goods may be seized pursuant to a search warrant or a distress warrant or some other court order; or pursuant to statutory powers given to customs officers or other taxation officials. In such cases, provided the powers in question are exercised according to law, no tort will be committed.<sup>731</sup>

Powers which enable a person to deprive another of his or her goods are strictly confined and the authority must be unequivocal. It was said in *Grubmayr v Bloxham*<sup>732</sup> that any authorised interference with another's goods must be the minimum necessary to achieve the particular objective, particularly if the goods in question are the source of the owner's livelihood. In that case, a local authority had seized and held the goods of the plaintiff unlicensed street trader pursuant to by-laws which were made for the purpose of "defining, licensing and regulating the conduct of itinerant traders". The Council was permitted by the by-laws to remove any material which contravened any by-law and recover from the person in breach any expenses incurred in connection with the removal. It was held that the Council was entitled to remove the plaintiff's goods but was not entitled to detain them, the reason being that detention of the goods was not within the purpose of licensing or regulating itinerant traders. Nor could detention until payment of expenses be described as recovery of expenses incurred in connection with removal; such recovery would have to be effected by civil action.

The Council argued in *Grubmayr v Bloxham* that there existed a rule that a local authority was exempted from liability where it exercised its functions in good faith, even if the by-law under which it acted was later found to be invalid.<sup>733</sup> The Court held, however,

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<sup>731</sup> See, for example, the Summary Proceedings Act 1957, s 199 (police entitled to detain goods seized pursuant to warrant issued under the Act); Proceeds of Crime Act 1991 (certain powers of police to deal with property designated as "tainted" under the Act); Customs and Excise Act 1996, s 166 (seizure and detention by customs officers of documents and goods). A new Search and Surveillance Bill was introduced on 2 July 2009 which will, if passed, effect comprehensive reform of the law of search and surveillance powers.

<sup>732</sup> [2004] NZAR 577, 583, per Harrison J

<sup>733</sup> The authority cited for this was *Dunlop Joinery & Furniture Ltd v Invercargill City Council* (1984) 4 NZAR 251.

that this proposition, if correct, was confined to instances where no specific tort had been committed. The Council had converted the plaintiff's goods and, conversion being a tort of strict liability, it could not be protected by saying it did so in good faith.

### 8.1 Defence of person or property

Where property is in real or imminent danger, and any reasonable person would consider it necessary in the circumstances, the goods of another may be interfered with to preserve the threatened property. So in *Cresswell v Sirl*<sup>734</sup> the defendant shot and killed the plaintiff's dog which was attacking sheep. The plaintiff sued the defendant for trespass to the dog. The Court of Appeal stated the test to be applied was that if a reasonable person would have considered that there was no alternative to shooting the dog if the sheep were to be preserved the defendant should not be guilty of trespass.<sup>735</sup>

This test was also applied in *Hamps v Darby*,<sup>736</sup> in which the Court of Appeal emphasised that the burden of proof was on the defendant in such cases to establish the justification for what would otherwise be an unlawful act. The issue in the case was whether the defendant farmer was entitled to shoot the plaintiff's racing pigeons which had settled on the defendant's crop of peas and damaged it. The defendant did not fire any warning shots before he fired at the birds, several of which he killed or wounded. It was held that the defendant had not discharged the onus laid on him by the test in *Cresswell v Sirl* of showing that he reasonably thought there was no other practicable means of getting rid of the birds and the plaintiff was entitled to damages for the trespass to his birds. It was not necessary to establish whether a warning shot would in fact have successfully driven off the birds, however; rather, the absence of such a shot was relevant to the question of whether the defendant could discharge the burden of showing either that there was no practicable means of protecting his property other than by shooting to kill, or that the defendant reasonably thought there was no other such practicable means.

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<sup>734</sup> [1948] 1 KB 241 (CA). This case is cited by the House of Lords in *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25, in its consideration of self-defence as a defence to tortious claims of assault and battery.

<sup>735</sup> The justification for seizing or destroying dogs attacking persons, stock, poultry, domestic animals or protected wildlife is now provided in s 57 Dog Control Act 1996. Presumably the common law principles continue to apply to the protection of property of the kind not expressly included in the Act. In the UK, s 5(2) Criminal Damage Act 1971 provides a lawful excuse to a person who damages or destroys the property of another if the person acts to protect his or her property, believing the property to be in immediate need of protection and the means used is reasonable in all the circumstances.

<sup>736</sup> [1948] 2 KB 311 (CA)

The concept that destruction or interference with another's property is necessary and justified in some circumstances recognises that the defendant in such cases is generally faced with a choice between two evils and reasonably chooses to prevent the greater evil. The issue is discussed generally in *Dehn v Attorney-General*,<sup>737</sup> a case concerning trespass to land and police powers, in which Tipping J cited as examples the pulling down of a house on fire to prevent the spread of the fire to other property, or throwing goods overboard to lighten a boat in a storm. In effect a choice is made by the defendant, who must consider whether the threatened harm is equal to, or greater than, the harm he or she intends to inflict.<sup>738</sup> Tipping J further stated that the safety of human lives was on "a different scale of values" from the safety of property and the necessity for saving life was always a proper ground for inflicting damage upon the property of another.<sup>739</sup> This broad and seemingly humane principle may, however, not go so far as to justify interference with the autonomy and personal responsibility of others. In *Scott v CAL No 14 Pty Ltd (No 2)*,<sup>740</sup> it was said that a publican would not be justified in withholding the key of a motorcycle which had previously been handed to him by a customer who subsequently became intoxicated, in order to prevent the customer from driving it. The customer insisted that the key be returned to him and was then killed whilst driving the motorcycle. The case was argued in negligence, and the High Court of Australia held that no duty of care was owed to the customer in the circumstances. The Court considered that to find such a duty would interfere with customer autonomy, and would also conflict with other legal rules. The Court observed that the bailment of the key was gratuitous and at will, and the publican had no right to withhold it from the customer, who was entitled to demand immediate possession of it. It may be commented that one may agree with the Court's view that a publican owes no duty to prevent a drunk customer from driving, but disagree with the view expressed about withholding the key. The key had been given to the publican for the express purpose of protecting the customer from himself, with the intention that he should be prevented from driving should he become intoxicated. Accepting that the publican owed no duty of care to the customer or any obligation to withhold the key, it does not follow that the publican should have had no defence to a claim in conversion or detinue if he had refused to return the key. Had the publican withheld it, he would have been valuing life over property; and would also have been obeying an instruction given when the customer was sober, in recognition of his own likely inability to abstain from driving if he

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<sup>737</sup> [1988] 2 NZLR 564, 577

<sup>738</sup> *ibid*, p 578

<sup>739</sup> *ibid*

<sup>740</sup> [2009] HCA 47

became intoxicated. It is suggested that the lack of obligation on a publican, or anyone else, to protect an intoxicated person in such circumstances should not preclude the availability of a defence against a claim of wrongfully withholding property.

In *R v Hutchinson*<sup>741</sup> the Court of Appeal considered the possible applicability in criminal proceedings of s 48 Crimes Act 1961 to the destruction of property. That section provides that a person is justified in using, in self-defence or the defence of another, such force as, in the circumstances as he or she believes them to be, it is reasonable to use. In this context, “justified” means not only not guilty of an offence, but also not liable to any civil proceeding;<sup>742</sup> in consequence, the provision may be of relevance in the present context. In *R v Hutchinson*, the appellant had broken into a shed owned by the Department of Conservation and destroyed a stored quantity of pesticide which the Department had intended to drop by air the following day. The appellant wished to defend the resulting charges of burglary and wilful destruction or damage on the ground that his actions had been necessary to defend humans and animals from the harmful effects of the pesticide. The Court of Appeal held that it was inapt to speak of breaking and entering and destroying property as “force” within s 48, and rejected the possibility in the circumstances of any defence based on self-defence or defence of another. The court was speaking, however, in the context of possible defences to criminal charges, and it is therefore doubtful to what extent the case would be generally applicable in civil proceedings concerning destroyed or damaged goods.

## 8.2 Jus tertii

It will be remembered that an action in conversion, trespass or detinue may be undertaken by a plaintiff on the basis of a merely possessory interest in goods and it is not necessary that the plaintiff be the owner. The interest of the person in possession of goods is one which prevails over that of a stranger with the result that, as we have seen, even a finder may acquire an interest sufficient to be protected against anyone but the true owner of the goods. It follows from this that it is no defence to an action for wrongful interference with goods that the true title to the goods is in some third person; in other words, it is not open to a defendant to plead the *jus tertii*, or right of a third person, as an answer to a claim brought by the person entitled

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<sup>741</sup> [2004] NZAR 303

<sup>742</sup> Crimes Act 1961, s 2

to possession of the goods.<sup>743</sup> The fact that some third party has a right superior to that of the plaintiff is generally not the concern of the defendant in cases where the plaintiff is asserting a right to retain possession as against the defendant.<sup>744</sup> An example of the application of this rule is *Wilson v Lombank Ltd.*<sup>745</sup> The plaintiff, having bought in good faith a car from a seller who had had no title to it, took it to a garage for repairs. After completing the repairs, the garage staff left the car on its forecourt for collection by the plaintiff. The defendants took the car away, believing that it belonged to them. Upon discovering the car was not theirs, the defendants then delivered it to the true owner. The plaintiff claimed damages for trespass to the car, and succeeded on the ground that the defendant had wrongfully infringed the plaintiff's possession. The fact that the true owner had a right superior to that of the plaintiff could not, as between plaintiff and defendant, alter the plaintiff's right to compensation for this infringement. Similarly, in *Knight and McLennan v National Mortgage and Agency Co*<sup>746</sup> the appellants who had bought cocksfoot seed from a Road Board claimed against the respondents who, while trespassing, enabled their sheep to damage the seed. The respondents wished to dispute the validity of the sale of the seed from the Road Board to the appellants. It was held that it was not open to the respondents to challenge the title of the appellants or the validity of the sale of the seed to them; as against a wrongdoer, possession is title and converted or damaged goods are deemed to be the goods of the possessor and no other.

Even in cases where goods have been stolen, the defendant may not be able to raise *jus tertii* as defence. In *Bliss v Attorney-General*<sup>747</sup> the plaintiff, after being acquitted of stealing kauri fitches, claimed against the police in negligence and under s 21 of the New Zealand Bill of Rights Act 1990 that the fitches had been wrongfully taken from him and negligently stored by the police pending his trial. In the civil claim, William Young J was of the view that at least some of the fitches had been stolen by the plaintiff. Noting that there was little authority on the point, he said that whether the *jus tertii* rule would be available to a defendant in such circumstances might depend on the exact circumstances and, in particular, whether "it would be an affront to the public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his

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<sup>743</sup> This principle is also applicable in claims in both negligence and under s 21 of the New Zealand Bill of Rights Act 1990: see *Bliss v A-G* [2009] NZAR 672.

<sup>744</sup> *Berg v Anglo Pacific International (1988) Ltd* (1988) 1 PRNZ 713, 716 (CA)

<sup>745</sup> [1963] 1 WLR 1294

<sup>746</sup> [1920] NZLR 748

<sup>747</sup> [2009] NZAR 672

illegally conduct or to encourage others in similar acts".<sup>748</sup> William Young J held that a defence of *jus tertii* was not available to the police in the case. Three reasons were given: the police had chosen to return the fitches to the plaintiff; regardless of who owned them, the police had a duty to look after them; and the true owner had made no claim to ownership of the fitches. William Young J considered that the claim under s 21 of the New Zealand Bill of Rights Act 1990 was analogous to a claim in trespass, and the *jus tertii* rule applied to it, just as it did in negligence. Accordingly, the rule is of wide scope and extends, at least in some cases, to shield those who have obtained goods dishonestly.

There are some exceptions to the rule. For example, in cases where the plaintiff was in actual possession, the *jus tertii* may be pleaded when the defendant has acted with the authority of the true owner either in defending the action or in committing the act complained of.<sup>749</sup> This exception arises simply from the application of agency principles, which treat the acts of an authorised agent as being the acts of his or her principal. A further exception arises in the case of bailed goods. Generally a bailee is not permitted to deny the title of the bailor in an action brought by the bailor; however, a bailee may set up a superior right as against his or her bailor if the bailee is defending the action with the authority of the true owner or where the bailee has, upon demand being made, surrendered the goods to the true owner.

It will be apparent that the rule that the *jus tertii* is not available as a defence may sometimes be harsh in its effect. For example, because it is no defence that the defendant may have already delivered the goods or paid damages in respect of the wrongful act to some prior claimant, the defendant may be exposed to double liability. If this occurs and the defendant is required to pay damages a second time in respect of the same act of wrongful interference, he or she is not entitled to be reimbursed by the first claimant.<sup>750</sup>

The *jus tertii* rule has been criticised on the ground that it is unjust and absurd to refuse to listen to a defendant's proof that the plaintiff has no entitlement to goods the value of which he or she is claiming from the defendant.<sup>751</sup> For this reason the law governing the matter has been reformed in England and the defence of *jus tertii* in all actions for wrongful

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<sup>748</sup> William Young J cited Kerr LJ in *Euro-Diam Ltd v Bathurst* [1988] 2 All ER 23, 28-29 (CA) for this proposition.

<sup>749</sup> It was suggested (obiter, the point not being argued) in *Cuff v Broadlands Finance Ltd* [1987] 2 NZLR 343, 346 (CA) that if property were the subject of co-ownership, the authority of only one of the co-owners would not suffice for this purpose.

<sup>750</sup> *Marriot v Hampton* (1797) 7 TR 269; 101 Eng Rep 969

<sup>751</sup> For an outline and analysis of the law of *jus tertii* see the Eighteenth Report (Conversion and Detinue) of the Law Reform Committee Cmnd 4774, September 1971 paras 51-78). The place of *jus tertii* in the law is debated by Atiyah and Jolly (1955) 18 MLR 97, 371, 595. Rogers in *Winfield and Jolowicz on Tort*, 17<sup>th</sup> edn, observes that there are arguments either way and that the common law position is a compromise: p 764.



interference with goods is now permitted.<sup>752</sup> The plaintiff in such cases may be required to give particulars of his title or to identify any person who has or claims any interest in the goods; and the defendant may apply for directions as to whether any person should be joined with a view to establishing whether he or she has a better right than the plaintiff or has a claim which could result in double liability on the part of the defendant.<sup>753</sup>

No such practical reform has taken place in New Zealand.<sup>754</sup> It is suggested that, for the good reasons which have been frequently stated, there is no reason to retain the rule.

### 8.3 Contributory negligence

It has been said that contributory negligence was not a defence at common law to a claim in conversion. This was stated by the English Law Reform Committee,<sup>755</sup> and has been assumed or expressly stated in a number of cases.<sup>756</sup> Whether this was in fact an established common law rule, or whether there was simply no clear authority allowing contributory negligence as a defence in a conversion case, is not clear; certainly judicial doubts have been expressed on the point.<sup>757</sup>

Today, the Contributory Negligence Act 1947 governs the position, although the common law may still be of relevance to its interpretation. The Act allows damages to be reduced where a person suffers damage or loss as the result partly of his own fault and partly of the fault of another.<sup>758</sup> “Fault” means “negligence, breach of statutory duty, or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence”. How far this definition can encompass conversion, an intentional tort of strict liability, is open to question.

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<sup>752</sup> The abolition of the rule has also been recommended by various law reform bodies in other jurisdictions, including South Australia (Ninety-fifth Report of the Law Reform Committee of South Australia to Attorney-General, *Law of Detinue, Conversion, and Trespass to Goods*, 1989); Ontario (Ontario Law Reform Commission *Study Paper on Wrongful Interference with Goods*, 1989) and British Columbia (Law Reform Commission of British Columbia *Report on Wrongful Interference with Goods*, LRC 127, 1992).

<sup>753</sup> Torts (Interference with Goods) Act 1977, ss 7, 8

<sup>754</sup> See the remarks as to this by Young J in *Bliss v A-G* [2009] NZAR 672.

<sup>755</sup> Para 79, citing *Bank of Ireland v Evans' Trustees* (1855) 5 HLC 388; 10 E R 950, a trespass action against a bank which paid on a forged cheque.

<sup>756</sup> It was stated categorically in *Wilton v Commonwealth Trading Bank* [1973] 2 NSWLR 644, 667 in a detailed review of the authorities by Samuels J, that contributory negligence was not at common law a defence to conversion.

<sup>757</sup> See the discussion in *Dairy Containers Ltd v NZI Bank Ltd* [1995] 2 NZLR 30, 110 per Thomas J.

<sup>758</sup> S 3(1)

The issue was raised in *Helson v McKenzies Ltd*<sup>759</sup> shortly after the Act was passed. In that case, the plaintiff inadvertently left a handbag containing a large sum of money on the counter of the defendant's shop. Another shopper saw the bag and handed it to a shop assistant. Subsequently, the defendant gave the bag to a person who claimed to be the owner of it, who took it away and was not seen again. The Supreme Court found the defendant not liable in conversion, but remarked, obiter, that the plaintiff had been negligent in walking about a busy shopping street, in and out of shops, with a view to making a purchase, while carrying a large sum of cash in her bag and so risking the loss of it.<sup>760</sup> The plaintiff's appeal was successful, insofar as the Court of Appeal held that the defendant's act in handing the bag to a stranger was conversion. The Court of Appeal was divided on the question of whether contributory negligence was available as a defence. The majority<sup>761</sup> said it was very doubtful whether walking about carrying cash while shopping was "*per se* negligence", but the plaintiff's act in leaving her bag on the shop counter was "beyond all question a careless act". This carelessness contributed to her loss to a greater extent than did the defendant's conversion. Her damages were, accordingly, reduced by three quarters of the sum lost. The majority considered that the Contributory Negligence Act should apply, and that the concept of "fault" should not be read so as to exclude conversion. To come within the Act, it was not necessary to show that the plaintiff had breached any duty owed; it was sufficient if her conduct amounted to a lack of reasonable care for the safety of her property.<sup>762</sup> She was to some extent the author of her own misfortune, and her carelessness had started the train of events. Her act of leaving the handbag on the counter and the defendant's act of wrongdoing were linked, and the plaintiff's carelessness was partly causative of the defendant's act of conversion.

By contrast, in his dissent, Finlay J said that although the term "contributory negligence" in the definition of "fault" was not confined to negligence actions, it should apply to those actions to which it was possible to raise a defence of contributory negligence before the Act was passed. Conversion was not in this category.

After *Helson v McKenzies Ltd*, at least two New Zealand authorities allowed contributory negligence in conversion actions. In *Australian Guarantee Corp (NZ) Ltd v*

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<sup>759</sup> [1950] NZLR 878 (SC & CA)

<sup>760</sup> *ibid*, p 894

<sup>761</sup> Northcroft and Gresson JJ

<sup>762</sup> This was the view stated in *Davies v Swan Motor Co (Swansea) Ltd* [1949] 1 All ER 620 with reference to the Law Reform (Contributory Negligence) Act 1954 (Eng), which is in the same terms.

*National Bank of New Zealand Ltd*,<sup>763</sup> an action against a bank for conversion of a cheque, McGechan J allowed a defence of contributory negligence. However, McGechan J observed that he was bound by the decision in *Helson v McKenzies* but that, if the matter had been open to him, some “interesting questions” would have been raised. These included an examination of the Australian approach, and the English statutory bar on contributory negligence in conversion actions. Further, he considered that *Helson v McKenzies Ltd* could, if read strictly, be confined to “situations where the plaintiff’s negligence was the originating and “causal or operative” “first step” in the loss; virtually an initiating and a ‘but for’ situation”.<sup>764</sup> Clearly, McGechan J had reservations about *Helson v McKenzies*, but observed that if the matter were to be reconsidered, it was a matter for the Court of Appeal or the legislature. Subsequently, Thomas J in *Dairy Containers Ltd v NZI Bank Ltd*<sup>765</sup> took a broad view of the Contributory Negligence Act in relation to a conversion action against a bank. Thomas J considered that the Act applied to all torts, and that a broad, purposeful and policy-based approach should be adopted. Otherwise, the owner of a cheque would have no incentive to take proper care of it. There was no reason, he considered, to confine the operation of the Act to cases in which contributory negligence would have been available at common law, but in any event it had not been shown that the common law barred such a defence in conversion cases. The fact that no authority on the point had been found did not mean that such a prohibition existed. Further, to confine the defence to accord with prior common law would freeze the law which would, if the Act had not been passed, have evolved anyway to allow contributory negligence to be raised in conversion actions.

It is perhaps significant that both these cases were concerned with actions against banks for conversion of cheques. Section 5 of the Cheques Act 1960 provides protection for banks which act in good faith and without negligence. Thus, negligence is inevitably in issue in this context. As McGechan J pointed out in the *Australian Guarantee Corp* case, when contributory negligence was declared by statute in England to be unavailable in conversion actions (as described below), an exception to this was created in cases under the equivalent of s 5 of the Cheques Act.<sup>766</sup> Section 5 is not concerned with the strict liability tort of conversion.

The robust view of Thomas J does not appear to have been adopted in any subsequent New Zealand cases. Rather, subsequent authority tends the other way. In *Rowe v Turner*

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<sup>763</sup> HC, Wellington, CP 18/88, McGechan J, 4 July 1988

<sup>764</sup> p 14

<sup>765</sup> [1995] 2 NZLR 30

<sup>766</sup> Banking Act 1979, s 47

*Hopkins & Partners*,<sup>767</sup> Prichard J said, in the context of a negligence action, that the word “fault” in s 3(1) of the Contributory Negligence Act 1947 was used in two senses. In the first, it referred to the defendant’s conduct, which had to be such as to found a cause of action in tort; and the second sense referred to the conduct of the plaintiff. This related to conduct which would, prior to the Act, have given rise to a defence of contributory negligence and which would, under the Act, lead not to a complete defence but to a reduction in damages. Put simply, the plaintiff’s cause of action must be in tort, and contributory negligence must have been available to the defendant at common law.

The Contributory Negligence Act 1947 was modelled on the Law Reform (Contributory Negligence) Act 1945 (UK), and the definition of “fault” is the same in both Acts. Despite this, there is little English authority of assistance regarding its application to conversion actions because the Torts (Interference with Goods) Act 1977 (UK) subsequently barred contributory negligence as a defence to conversion or intentional trespass to goods.<sup>768</sup> Before this occurred, the only case in which the English Act was considered in the context of conversion appears to be *Lumsden & Co v London Trustee Savings Bank*.<sup>769</sup> In that case, the majority view of *Helson v McKenzies Ltd* was supported, and a bank which was liable for converting a cheque was held entitled to plead that the owner had been negligent in drawing it. The case was not closely reasoned, but Donaldson J appears to have accepted either that the common law position regarding conversion was unclear, or that the drawer of a cheque owed a duty of care towards a collecting banker under normal negligence principles. After 1977, such English authority as there is on contributory negligence inevitably relates to torts other than conversion or trespass. Most significant among these is *Standard Chartered Bank v Pakistan National Shipping Corp*,<sup>770</sup> where the House of Lords considered the purpose of the legislation, and held that it could not apply to an action in deceit. The House of Lords held that the definition of “fault” meant that a defendant’s conduct must amount to “negligence, breach of statutory duty or other act or omission” such as to found liability in tort; and that the plaintiff’s conduct must have been such as would have permitted at common law a defence of contributory negligence. As contributory negligence had never

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<sup>767</sup> [1980] 2 NZLR 550 (HC), affd [1982] 1 NZLR 178 (CA)

<sup>768</sup> s 11

<sup>769</sup> [1971] 1 Lloyd’s Rep 114. Section 4(1) of the Cheques Act 1957 (UK) was in the same form as s 5 of the Cheques Act 1960. Thus, like *Australian Guarantee Corp* and *Dairy Containers*, the case inevitably involved negligence.

<sup>770</sup> [2003] 1 AC (HL). The Supreme Court in *Amaltal Corp Ltd v Maruha Corp* [2007] 3 NZLR 192 cited this case as authority for the principle that a fraudulent person could not raise a defence that the victim should have been more careful, but did not discuss the approach to be adopted in interpreting the legislation.

been a defence to deceit or any other intentional tort at common law, it could not be raised in the case. The House of Lords considered that the purpose of the legislation was to relieve plaintiffs whose actions would have failed completely at common law because of the inability of the common law to apportion fault. This approach is similar to that expressed in *Rowe v Turner Hopkins & Partners* as well as the dissenting view of Finlay J in *Helson v McKenzies Ltd*.

In New South Wales, the place of contributory negligence in relation to conversion arose in *Wilton v Commonwealth Trading Bank*.<sup>771</sup> In a closely researched and detailed judgment, Samuels J declined to follow *Lumsden* or *Helson v McKenzies*, saying that he found the latter case unpersuasive. He held that contributory negligence had not been available as a defence at common law in New South Wales and so was not available under the Law Reform (Miscellaneous Provisions) Act 1965, an Act which was in the same terms as the English and New Zealand legislation relating to contributory negligence.

The Supreme Court of Canada considered the point in *Boma Manufacturing Ltd v Canadian Imperial Bank of Commerce*,<sup>772</sup> another case concerning conversion of cheques. The majority observed that the situation as to contributory negligence was unknown in Canada, and that most provinces had contributory negligence legislation similar to that of England and Australia. It was held, with little analysis, that as a matter of principle contributory negligence would not be available in the context of a strict liability tort and any change were to be introduced, it should be left to Parliament.

If the construction of the legislation is as proposed in *Rowe v Turner Hopkins & Partners* and *Standard Chartered Bank*, the purpose of it is to permit a reduction in damages in cases where contributory negligence would previously have been a complete defence. This was also the opinion of the New Zealand Law Commission, when it reviewed the subject of apportionment of civil liability.<sup>773</sup> Assuming this is correct, the only question is whether conversion would have been available as a defence at common law. The answer to this appears to be that it was not. The reason for this is not only the lack of authority permitting it, but the nature of conversion itself. Fault is irrelevant where the plaintiff's title has been interfered with, and the law does not require owners to take precautions to safeguard their goods, or to act defensively on the basis that other people are potential tortfeasors. Unless conduct amounts to a representation sufficient to found an estoppel against an owner, the fact

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<sup>771</sup> [1973] 2 NSWLR 644

<sup>772</sup> [1996] 3 SCR 727

<sup>773</sup> Preliminary Paper No 19, *Apportionment of Civil Liability*, 1992, para 52

that an owner could have acted more carefully is not, and should not be, a defence. As the English Law Reform Committee point out,<sup>774</sup> if such a defence were to be admitted, “much judicial time would be occupied, to little advantage, in considering what particular precautions are required from householders against burglars, or from an ordinary citizen against pickpockets, or from a store proprietor against shoplifters”. It is suggested that this view must be right; the plaintiff’s loss is caused by the burglar, the pickpocket or the shoplifter in these examples, not from his or her own failure to predict or forestall their wrongdoing.<sup>775</sup>

Although New Zealand has no counterpart to the Torts (Interference with Goods) Act 1977 which was passed in England, the fact that both the English Law Reform Committee and Parliament favoured the barring of any possibility of contributory negligence arising in conversion cases supports this view.

In New Zealand, the Law Commission has considered that the Contributory Negligence Act 1947 is too narrow, and that contributory negligence should be broadened.<sup>776</sup> However, the Commission did not particularly consider conversion, although it considered that the position of intentional and strict liability torts was uncertain. The Commission put forward draft legislation, one purpose of which was stated to be “to revise and extend the rights of wrongdoers to have their liability to pay damages reduced because the wronged person has failed to act with due regard for that person’s own interest”.<sup>777</sup> The Court is required to ascertain the loss suffered by the wronged person, and ascertain the proportion of the loss attributable to the failure of the wronged person to act with due regard to that person’s own interest.<sup>778</sup>

It is suggested that this provision, if enacted, would cover conversion, and would be interpreted to do so. However, it is arguable that the very breadth of it, and its discretionary nature, would themselves create problems in conversion actions. It would not remove the issues which relate to title, which are frequently the real basis of claims in conversion.

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<sup>774</sup> Eighteenth Report *Conversion and Detinue* Cmnd 4774, 1971, para 81

<sup>775</sup> The carelessness of the plaintiff who lost her handbag in *Helson v McKenzies Ltd* is of the kind stated in *Farquharson Bros v King & Co* [1902] AC 325, 336 as conduct which would not suffice for estoppel, the examples being leaving a watch or ring on a seat in the park on a café table. This is discussed in ch 6.12, in relation to title.

<sup>776</sup> Preliminary Paper No 19 *Apportionment of Civil Liability*, 1992, para 52; Report 47 *Apportionment of Civil Liability*, 1998

<sup>777</sup> Draft Civil Liability and Contribution Act, cl 2(b)

<sup>778</sup> *Ibid*, cl 11(3)(a)(i),(ii)

Because conversion has property interests at its heart, it is suggested that a better path to reform would be by way of modification of the *nemo dat* rule. This would allow an owner's causation of loss to be recognised by way of a clear and simple rule relating to allocation of title, and avoid the injustice which frequently results when an owner is able to recover goods, or damages for their conversion, as against an innocent third party. This is a more certain and practical way of dealing with the problem than the use of apportionment, and would result in less complexity.

#### 8.4 Goods unlawfully on land

If a landowner or occupier finds the goods of another unlawfully on the land and doing damage, the landowner is entitled to seize the goods and withhold them from the owner until such time as the owner has paid compensation for the damage that has been done. This right, known as distress damage feasant, developed in medieval times principally as a remedy for those whose land was damaged by straying livestock. It has since been extended over centuries to include other diverse goods, inanimate as well as animate.<sup>779</sup> Today the rights of landowners and the owners of straying stock are dealt with by the Impounding Act 1955.<sup>780</sup> Apart from this the courts are now left to deal with the problem of how far this ancient right should be applicable to modern circumstances of the kind which are very different from those which existed at the time the right was originally developed. In particular, most recent cases on the subject have arisen in the context of disputes relating to unauthorised car parking.

The remedy being one of self-help and involving the right to seize and detain the goods of another, the courts have generally tended to confine rather than expand its scope, and the right must be exercised within defined limits. For example, the presence of the distrained goods on the distrainer's land must be unlawful. So in *Tillett v Ward*<sup>781</sup> the defendant's ox entered the plaintiff's open shop while it was being driven through a country town. It was held that the entry of the animal on to the plaintiff's land involved no liability on the part of the defendant, the plaintiff's shop being open. In such

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<sup>779</sup> In *Arthur v Anker* [1996] 2 WLR 602, 608 (CA) Sir Thomas Bingham MR in an outline of the history of distress damage feasant cites as examples of such goods fishing equipment, grain and straw and a railway locomotive. Injuries caused by straying animals to other animals is included: *Boden v Roscoe* [1894] 1 QB 609. In England, distress damage feasant no longer applies to animals, which are now covered by the Animals Act 1971.

<sup>780</sup> See para 9.4.02(1)(a)

<sup>781</sup> (1882) 10 QBD 17

circumstances no right to distrain will arise. A further limitation on the right to distrain is that the goods must be still on the land when they are seized, and the landowner has no right to pursue the goods and seize them once they are no longer on the land in question. In *Clement v Milner*,<sup>782</sup> for example, it was held that distress damage feasant did not justify the seizure of a cow which had been damaging turnips where the seizure occurred after the cow was no longer on the land.

Because of the risk that a confrontation between the landowner and the owner of the goods may lead to a breach of the peace, the remedy is not available if the owner of the goods is present at the time the landowner seeks to seize the goods. So in *Jamieson's Tow & Salvage Ltd v Murray*<sup>783</sup> the unauthorised parking motorist was present when the car was towed away as a result of the landowner's instruction to a tow firm to remove the car. The car was damaged during this process and the motorist sued the tow firm in trespass and conversion. It was held that the remedy of distress damage feasant was not available to the tow firm because of the presence of the motorist at the time the car was towed away. In consequence the tow firm was liable to compensate the motorist for the damage done to his car and both general and exemplary damages were awarded. The case was followed in *Police v Krupinski*<sup>784</sup> in which it was held that landowners had no right to distrain the defendant's car by wheel clamping it because the owner was present during the distraint. The court recognised that wheel clamping differed from towing away because in wheel clamping cases it was almost inevitable that, the car being immobilised, the clumper and the clamped would at some point confront each other, and in consequence wheel clamping would lose any practical utility as the presence of the owner would render it unlawful. However, it was considered that the potential for breaches of the peace in such cases was too great to ignore.<sup>785</sup>

A further limitation on the availability of distress damage feasant is the requirement that the landowner who distrains must have suffered some actual damage caused by the distrained goods. It seems that a simple trespass, being no more than the unlawful presence of the goods on the land, may not be sufficient. This is consistent with the reason for the existence of the remedy in the first place, which was to enable the landowner to retain the goods as security for payment of compensation due for any

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<sup>782</sup> *Clement v Milner* (1880) 3 Esp 95

<sup>783</sup> [1984] 2 NZLR 144

<sup>784</sup> [1994] DCR 12

<sup>785</sup> The significance of the prominent signs warning of clamping was not argued in the case.



damage done. This was the approach taken in *Forhan & Read Estates Ltd v Hallett*,<sup>786</sup> where it was held that parking on another's land, with no blocking of ingress or egress or deprivation of parking fees or physical damage, did not justify distress damage feasant and the occupier of the land was liable in damages for impounding the car. This decision was cited as a correct statement of the law in subsequent Canadian cases.<sup>787</sup> By contrast, it has been held in New Zealand that actual damage may be constituted by no more than the cost of removing the goods from the land and that no further damage need be shown. This was the view of Quilliam J in *Jamieson's Tow & Salvage Ltd v Murray*<sup>788</sup> in which it was held that the cost of removing an illegally parked vehicle was recoverable as actual damage. However, this approach was not endorsed in the later case of *Arthur v Anker*,<sup>789</sup> which concerned the legality of wheel clamping. The plaintiff motorist in that case had parked on private land on which were prominent signs warning of the possibility of wheel clamping and the charging of a release fee. The defendant, under the landowner's authority, clamped the plaintiff's car. The plaintiff claimed, amongst other causes of action, that the defendant had unlawfully interfered with the car, and the defendant, in his defence and counterclaim claimed that distress damage feasant was available, and also that the plaintiff should be taken to have known of and consented to the risk of being clamped. The defendant succeeded in his argument as to consent, it being held that the plaintiff knew of the risk of being clamped and accepted it, with the result that the clamping was not tortious. However, the argument as to distress damage feasant failed. In his leading judgment, Sir Thomas Bingham MR agreed that actual damage, as opposed to a mere unlawful presence, was a requirement for distress damage feasant; however, he had difficulty in accepting the view propounded in the *Jamieson* case that the cost of towing away, without more, could amount to actual damage justifying distress.<sup>790</sup> He further stated that, in the case of wheel clamping, the distress compounded rather than removed the trespass to the land; the clamping ensured that the car would continue to cause the very damage, namely unlawful occupation of a parking space, that the

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<sup>786</sup> 19 DLR (2d) 756

<sup>787</sup> *R v Howson* 55 DLR (2d) 582, *Controlled Parking Systems Ltd v Sedgewick* [1980] 4 WWR 425

<sup>788</sup> [1984] 2 NZLR 144, 148-149

<sup>789</sup> [1996] 2 WLR 602 (CA), noted by Scragg [1997] NZLJ 23. In *Stear v Scott* [1992] RTR 226, a case about wheel clamping, it was suggested, obiter, that there was some authority that distress damage feasant might be justified if a chattel were no more than an encumbrance or obstruction on the land of another; however, it was not necessary for the court to consider the point, it being held that, regardless of whether a landowner was entitled to clamp a vehicle or not, the vehicle owner, as a trespasser, was not entitled to break the clamp and retake the vehicle. See further, as to recaption of chattels, ch 7.3.

<sup>790</sup> *ibid*, p 610.

defendant complained of. It would be anomalous then that such a self-help remedy would amount in effect to “a self-inflicted wound”.

In the modern cases on distress damage feasant such as those described here there are dicta which indicate clearly that the courts are likely to restrict rather than extend the right of distress damage feasant. For instance in *Arthur v Anker*,<sup>791</sup> Sir Thomas Bingham MR said that he did not “feel constrained to undertake heroic surgery to seek to apply this medieval remedy to twentieth century facts” and Quilliam J expressed a similar reluctance in the *Jamieson* case to extend the remedy any further than necessary.<sup>792</sup> In Scotland, the High Court of Justiciary in *Carmichael v Black*<sup>793</sup> went so far as to hold that the clamping of a vehicle in a private car park constituted theft, despite the presence of a prominent warning sign. The act of depriving the motorist of the use of his car against his will could, it was held, accurately be described as stealing something from him.<sup>794</sup> Lord Hope observed that he had “every sympathy”<sup>795</sup> with landowners who found it intolerable that others should park without permission on their land, but that clamping as a means to deter that activity was not legitimate.

In the absence of a right to distress damage feasant, it is not clear how far the use of warning signs or notices on land may be effective to legitimise towing, clamping or otherwise detaining vehicles which are merely on the land and not doing damage. Generally speaking, even if a vehicle is trespassing, the clamping or towing of it is itself unlawful unless the vehicle owner can be taken in the circumstances to have accepted the risk of it. The matter was considered from the contractual point of view in *Controlled Parking Systems Ltd v Sedgewick*.<sup>796</sup> In that case, a sign in a parking lot directed patrons to buy a ticket from a meter and stated that cars without a ticket would be towed away and would be released upon payment of a fee. The plaintiff parked his car without buying a ticket; it was towed away and he had to pay for its release. He successfully claimed the return of the payment. It was held that the plaintiff, not having accepted the offer to buy a ticket, had no contract with the defendant operator of the parking lot and had not accepted the terms of the notice. Accordingly, the defendant had no right to tow the vehicle

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<sup>791</sup> [1996] 2 WLR 602, 608 (CA); and see *Stear v Scott* [1992] RTR 226, 232

<sup>792</sup> [1984] 2 NZLR 144, 149

<sup>793</sup> 1992 SLT 897.

<sup>794</sup> An intention to deprive the owner permanently of his or her property was not an ingredient of theft under Scots law.

<sup>795</sup> p 900

<sup>796</sup> 1980] 4 WWR 425.

elsewhere and demand a fee for its release. In *Tag N Tow v Parker*<sup>797</sup> the existence of a notice warning of towing was held to be no more than a warning of the risk of being towed, but did not mean that the car owner had accepted the risk so as to be contractually bound. Rather, the actions of the tow truck operator was against the wishes of the car owner.

Several other cases, by contrast, have adopted the view that a person who parks unlawfully in the presence of a warning sign must be taken to have assented to the terms of the sign and voluntarily accepted the risk.<sup>798</sup> This broad principle has perhaps been qualified by the additional requirement, stated by the Court of Appeal in *Vine v Waltham Forest London Borough Council*,<sup>799</sup> that in some circumstances the motorist must have actually read the notice to be taken to have assented to its contents. In that case, a sign warning of clamping was conspicuously placed but the motorist, who was feeling ill at the time she parked, did not read it. It was held that she could not be regarded as having consented to terms which she had not in fact read; and Waller LJ observed that the onus on a person seeking to clamp in reliance on a notice was high.<sup>800</sup> Despite the actual decision in the case, it was stated as a general principle that, absent unusual circumstances, if a driver saw a notice and appreciated that it concerned the basis upon which he might enter another's land, but did not read the notice and thus did not understand its precise terms, he would not be able to say that he had not consented to, and willingly assumed, the risk of being clamped.<sup>801</sup>

By way of comment, it is tentatively suggested that this general statement in *Vine* may well represent the general rule to which the Courts are tending. There appears to be no judicial preference to adopt the reasoning of *Controlled Parking Systems Ltd v Sedgewick* or *Tag N Tow v Parker*; and there is no reason why a contractual relationship need be established between parties to found consent to what would otherwise be tortious conduct. If the contents of clear notices are not deemed to be brought home to those who enter without authority on others' land, there appears to be no reasonable way in which occupiers of land may control its use.

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<sup>797</sup> (1996) 190 AR 230.

<sup>798</sup> As examples, *Lloyd v DPP* [1992] 1 All ER 982, *Police v Krupinski* [1994] DCR 12, *Arthur v Anker* [1996] 2 WLR 602 (CA)

<sup>799</sup> [2000] 1 WLR 2383 (CA)

<sup>800</sup> *ibid*, p 2394

<sup>801</sup> *ibid*, p 2393

Where self-help is justified on the part of an occupier of land to end a continuing trespass or nuisance upon it, the occupier is not entitled to appropriate the offending goods for himself or herself, or destroy them. If consent to the immobilisation or removal of the goods is established, the consent extends to their detention pending payment. The goods must be released once their owner has indicated willingness to pay; and an unreasonable or exorbitant charge may not be demanded for their release.<sup>802</sup> Despite these general principles, there is authority that where the cost of preserving or removing a chattel materially exceeds its value, destruction of it may be justified. For example, the owner of land upon which a worthless trailer was stored was entitled to have it hauled away for scrap, its owner having failed to comply with a reasonable notice to remove it;<sup>803</sup> and a landowner may burn piles of rotted timber or dilapidated farm buildings if their owner does not remove them within a reasonable time.<sup>804</sup> The occupier of land who destroys the goods in such a case bears the burden of establishing the requisite cost-benefit analysis.<sup>805</sup>

The difficulties of dealing with the competing claims of the respective owners of land and of goods placed without authority on their land do not appear to have abated and, at least with respect to the parking of motor vehicles, seem unlikely to do so. Exactly what kind of conduct might in general be legitimate to deter unauthorised parkers, or to immobilise or remove their vehicles, cannot be stated with absolute certainty, particularly as the facts vary from case to case. The limited regulation of “vehicle recovery services” which exists is not directed to these questions.<sup>806</sup>

It is suggested that the common law right of distress damage feasant should have no place today. The reality is that vehicles do not generally damage land; their presence may be an impediment, or prevent others from using the land, but actual damage or destruction to property does not result. Generally, the cost to the landowner is no more than the removal or immobilising of the vehicle, and the cost recoverable should be limited to this.

It is recommended that the right to tow or clamp should be founded only on one of two possible bases. First, the presence of clear signage may give rise to a presumption of consent by the vehicle owner that the vehicle, if placed on the land, might be clamped or

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<sup>802</sup> *Arthur v Anker* [1996] 2 WLR 602, 608 (CA)

<sup>803</sup> *Visscher v Triple Broker Holdings Ltd* 40 CCLT (3d) 451, *Sinclair v Small* 2007 Carswell Ont 3555

<sup>804</sup> *Stewart v Gustafson* (1991) 171 Sask R 27, 31

<sup>805</sup> *ibid*

<sup>806</sup> Section 10 of the Land Transport Rule 81001 2007 (Operator Licensing) sets out certain requirements relating to the licensing and conduct of drivers of vehicle recovery service vehicles, but does not prescribe the circumstances in which towing or clamping may be lawfully authorised.

removed. Second, and preferable, would be the enactment of legislation which states this, and which provides for release fees which are no more than the actual and reasonable costs of removal. In the absence of clear rules, the issue will doubtless continue to give rise to disputes between motorists and landowners.<sup>807</sup>

## 8.5 Distress and replevin

An ancient common law right, known as distress, once permitted a landlord to seize goods belonging to a tenant for the purpose of securing the payment of money due under the lease. The person whose goods had been wrongfully distrained or taken could seek their return under the process known as replevin, which enabled the goods to be recovered until the entitlement to them was determined by the Court.<sup>808</sup> The exercise of these processes came to be regulated in New Zealand by the Distress and Replevin Act 1908, which implied the power to distrain in all leases except those relating to dwelling houses. That Act has now been repealed. Under s 265(a) of the Property Law Act 2007, the right to distrain for rent or other amounts payable under a lease or for a rentcharge is abolished, and a provision in a lease purporting to confer a right to levy distress for payments due under a lease is now of no effect.<sup>809</sup> Despite this, if the process of levying of distress had been lawfully commenced but was uncompleted before 1 January 2008, it may be completed as if the abolition had not occurred.<sup>810</sup>

The abolition of the right to distrain for rent does not affect the enforcement of judgment debts, nor prevent the creation by the lessee of an encumbrance over goods to secure any payment due under the lease.<sup>811</sup>

## 8.6 Abandonment

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<sup>807</sup> The applicability of distress damage feasant in wheel clamping cases is discussed by Sparkes (1986) 50 Conveyancer and Property Lawyer 107; and Hawes (2001) 9 Tort L Rev 208.

<sup>808</sup> Replevin was considered in *Mennie v Blake* (1856) 6 El & Bl 842, 850; 119 ER 1078, 1080, where it was observed that “... as a general rule it is just that a party in the peaceable possession of land or goods should remain undisturbed .. until the right be determined and the possession shown to be unlawful. But where, either by distress or merely by a strong hand, the peaceable possession has been disturbed, an exception case arises; and it may be just that, even before any determination of the right, the law should interpose to replace the parties in the condition in which they were before the act done, security being taken that the right shall be tried, and the goods be forthcoming to abide the decision”.

<sup>809</sup> Property Law Act 2007, s 265(b)

<sup>810</sup> Property Law Act 2007, s 368

<sup>811</sup> Property Law Act 2007, s 265(c)

Because conversion protects possessory rights, it is a good defence to a claim in conversion that the plaintiff has abandoned the goods and so no longer has any interest in them to assert. The elements of abandonment were described in *Wicks Estate v Harnett*,<sup>812</sup> which concerned a dispute between the estate of a well known cartoonist who had, during his lifetime, placed a large number of original drawings and cartoons in bags and boxes for storage, and the defendant, whose brother had purchased a house from the son of the cartoonist. The defendant discovered some bags of the cartoonist's drawings in the garage and, assuming they had been left as garbage, sold some of them. The cartoonist's estate successfully claimed in conversion. It was held that, to constitute abandonment, it had to be shown that "a giving up, a total desertion, and absolute relinquishment"<sup>813</sup> of the cartoons by the cartoonist's estate had occurred and an intention, express or implied, to abandon was a constituent of this. The facts in the case did not support such a finding; there was nothing to indicate that the cartoons had been given up, and a demand for their return had been made by the estate shortly after it was known that the material was in the possession of the defendant.

It was stated in *Wicks Estate v Harnett* that abandonment could also occur when, after a casual and unintentional loss, any further purpose to seek and reclaim the lost property was given up. Again, an express or implied intention to do this was a necessary element. Failure to look for property that had been unintentionally lost could, depending on the particular facts, be a factor contributing to the inference of an intention to abandon.

The plaintiff must establish ownership of the goods but, once that is shown, the onus of proving that the plaintiff has abandoned the goods rests on the defendant.<sup>814</sup>

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<sup>812</sup> 48 CCLT (3d) 155

<sup>813</sup> *ibid*, p 161

<sup>814</sup> *ibid*, p 162

## Chapter 9 Conclusions

In the previous chapters, an attempt was made to outline the current law in New Zealand concerning unlawful interference with goods, and to identify and discuss some of the inherent difficulties in it. In this chapter, the areas which appear to require reform in New Zealand will be summarised, and particular reforms proposed.

The first thing which strikes one who investigates the law of unlawful interference with goods is that the language and principles associated with the individual torts are literally mediaeval in their nature. They developed hundreds of years ago, and have altered little over the intervening centuries. There may be good reasons for this; doubtless the concerns of owners of goods which are taken or damaged do not change according to whether the goods are cattle or cars, and in either case a wronged owner wants his goods back, or compensation for them. The requirements of plaintiffs are therefore easy to state. However it is the attempt to provide solutions which has led to the current complex web which is the law in this area. It has not proved easy to provide fair remedies in cases where there may be different interests existing in the same goods, particularly as the rigidity of the old forms of action has continued to exercise a fettering influence. Probably, it is in the nature of things that the chattel torts should present difficulties. Movable property may pass from hand to hand under any number of different transactions and arrangements, honest and otherwise. Perhaps it is simply impossible to devise legal rules which do justice in all situations.

The same difficulties and historical anomalies which are apparent in New Zealand have also been observed in other jurisdictions, and various approaches to reform have been proposed or undertaken. Some of these will be summarised briefly before the New Zealand position is discussed.

### 9.1 Reform in other common law jurisdictions

#### 9.1.1 *England*

England appears to be the only common law jurisdiction in which a report produced by a law reform body has led to legislation relating to interference with goods.<sup>815</sup> The Law Reform Committee sought to simplify the law by recommending the creation of a single tort called

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<sup>815</sup> The Torts (Interference with Goods) Act 1977 followed the 18<sup>th</sup> Report *Conversion and Detinue* Cmd 4774, 1971.

“wrongful interference”, the subject matter of which would be the same as that of conversion, detinue and trespass. It recommended that detinue itself should be abolished, and the one remaining instance of it which did not at the time constitute conversion should be deemed to do so. The Committee did not recommend a codification of the whole law of interference with chattels, but proposed that any legislation should retain the existing incidents of conversion. The distinctions amongst the remedies available for conversion, detinue and trespass should be rationalised, and the Courts should have a discretion whether to allow the specific return of goods.

In accordance with the Committee’s recommendations, the Torts (Interference with Goods) Act 1977 reformed the law by abolishing detinue, and creating an action for wrongful interference with goods. Wrongful interference is defined to mean conversion, trespass and negligence or any other tort so far as it damages goods or an interest in goods.<sup>816</sup> Thus, the legislation does not create a single tort, and the changes to the law relating to the nature of the individual torts have in consequence been minor. The principal effect of the Act is that a regime of procedure and remedies has been created for the common treatment of the torts which come within the rubric of unlawful interference.

Thus, the common law relating to conversion, detinue and trespass as it was before the passage of the Act is of relevance to New Zealand, as is the post-Act law, *mutatis mutandis*, relating to the torts which constitute unlawful interference. England has not, however, enacted a statute equivalent to the Personal Property Securities Act 1999, a statute which has in New Zealand reduced the need to a considerable extent to have recourse to the common law relating to chattel torts.

### 9.1.2 Australia

Despite the production of a lengthy report published in 1987 by the Law Reform Committee of South Australia,<sup>817</sup> no legislation has been enacted in Australia relating to wrongful interference with goods.

The South Australian Committee observed that commentators had differed in their responses to the failure of the legislators in England to adopt the recommendations of the Law Reform Committee regarding the introduction of a single tort. Some writers considered that the English Committee’s proposals could not in any event have produced a satisfactory

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<sup>816</sup> s 1

<sup>817</sup> Ninety-fifth Report of the Law Reform Committee of South Australia to the Attorney-General *Law of Detinue, Conversion, and Trespass to Goods*, 1987



result because a single statutory tort would have conflated proceedings for the invasion of rights and unintentional negligent acts. Therefore, legislation as recommended by the Committee would have failed to recognise the important distinction between a claim for a right and an action for a wrong.<sup>818</sup> Other commentators considered that the English Committee had not gone far enough, and that it should have advocated the replacement of the common law by an entirely new and self-contained code which would define the characteristics and incidents of a new and all-encompassing statutory tort.<sup>819</sup> The South Australian Committee noted that the English Act had been criticised on a number of grounds, and no consensus of opinion existed as to what approach should have been taken.

The South Australian Committee agreed that the historical development of the chattel torts had led to overlap and confusion, but considered that they had largely been successful in protecting and compensating proprietary interests in goods. What was required was the eradication of unnecessary duplication and historical anomalies. There should be either a complete and comprehensive creation of a truly new tort, or the existing nominate torts should be retained, although subject to some rationalisation. The Committee considered that the English Act was an unfortunate compromise between the two; it amalgamated the pre-existing torts into an ostensibly cumulative tort, but did not eradicate the undesirable elements of each of the old forms. The South Australian recommendation was, therefore, that the existing torts, including detinue, should be retained and rationalised.

The chattel torts currently continue to be dealt with in Australia under common law principles. Australia does not yet have a single statutory regime covering personal property securities, although the introduction of one is imminent.<sup>820</sup>

### 9.1.3 *Canada*

In both Ontario<sup>821</sup> and British Columbia,<sup>822</sup> reports were published some years ago which advocated reform of the law of wrongful interference with goods. Both reports appended draft legislation.

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<sup>818</sup> The opinion of Samuel 31 ICLQ 357 to this effect was cited as an example by the South Australian Committee.

<sup>819</sup> Bentley (1972) 35 MLR 171 was cited for this view.

<sup>820</sup> The Personal Property Securities Bill 2008 (Cth) is currently before Parliament. The new legislation will provide a unified national regime which will replace the more than 40 registers which currently operate throughout Australia.

<sup>821</sup> Ontario Law Reform Commission *Study Paper on Wrongful Interference with Goods*, 1989

<sup>822</sup> Law Reform Commission of British Columbia *Report on Wrongful Interference with Goods*, LRC 127, 1992

In the Ontario report, it was pointed out that the existing law of wrongful interference was complex, deficient and in need of legislative reform, although not of a radical kind. The Commission recommended the creation of a statutory tort called “wrongful interference with goods” which would retain the existing actions. The traditional common law remedies would remain, and proposed new remedies would also be available. The Commission proposed that the new tort should be less directed towards strict liability than were the torts which it encompassed. The recovery of goods should be more generally available and statutory provision should be made for the recaption of goods.

The British Columbian report also recommended a “legislative push” to the law of wrongful interference with goods, which remained “as if frozen in amber, a monument to the past”.<sup>823</sup> The report noted that both the English and the Ontario proposals for reform essentially built on, or retained, the existing law, and that neither had contemplated the complete replacement of the law with a statutory tort. This was perhaps because both the Committees of both England and Ontario appeared to believe that a statutory tort must require the difficult technical exercise of comprehensive codification. Neither body seemed to have considered the case in favour of a completely new statutory tort which did not codify the existing law, but was altogether a new start. The British Columbian Commission considered that it made more sense to start afresh, particularly as the whole of the law owed less to rational development than to historical accident. The proposed legislation drafted by the Commission was based on four general principles:<sup>824</sup>

- (a) Remedies should be made available through a single cause of action;
- (b) The action should be available to anyone with an interest in the property;
- (c) Damage awards should compensate for a claimant’s actual loss; and
- (d) The courts should be able to select from a full range of remedies.

The Commission drafted its proposed legislation to state two central duties. First, the draft states a prohibition that a person, with respect to property owned by another, must not interfere with, or harm, directly or indirectly the property or the owner’s interest in the property without lawful justification; and, second, that a person receiving property owned by another must return it on the request of an owner entitled to possession of it.<sup>825</sup> Breach of these duties would give rise to one or more of the range of remedies stated in the draft. These would include declarations as to entitlement to property, as well as orders for damages for

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<sup>823</sup> *ibid.*, p 28

<sup>824</sup> *ibid.*, p 31

<sup>825</sup> cl 51

reasonably foreseeable loss resulting from the breach of duty, loss of profits, the return of property, the sale of property, compensation for improvements or expenses. Aggravated, exemplary or punitive damages would also be included. The Commission recommended that the new legislation should be expressed not to affect the law of negligence.

Although only one of these reports has led to the enactment of legislation, the reports are themselves of interest in the New Zealand context. They all recognise that the common law relating to wrongful interference with goods is complex and intricate, and that reform is desirable. It is equally of interest that the reports are far from uniform in their recommended reforms, a fact which indicates that the current problems of the law are easier to state than to solve.

#### 9.1.4 *The United States*

In the United States, interference with goods continues to be dealt with by the common law. Secured transactions are covered by art 9 of the Uniform Commercial Code (the predecessor of the equivalent Canadian legislation). The position is therefore similar to that of Canada and New Zealand as far as the enactment of legislation is concerned.

## **9.2 Proposed reform in New Zealand**

The current law can of course be understood only against its historical background, and that background must be taken into account if reform is to be undertaken. It is suggested that simplification of the law as it now stands is desirable, and some features which are now recognised as existing only for historical reasons should be discarded. Two very significant and influential legal events have opened this door, the first relating to title to goods, and the second to physical damage or destruction of them.

The first is the passage of the Personal Property Securities Act 1999 in New Zealand, which has to a considerable extent solved the previously perennial problem of how to deal with unauthorised dealings in goods by non-owners. As discussed above, the PPSA does not change the substance of the law of conversion, trespass or detinue. The significance of the Act in this context is that it determines, in the many kinds of transaction which it covers, how title is allocated by prioritising different interests in goods. Because the Act ranks these competing interests, and provides remedies in accordance with the scheme of the Act, there is simply less scope or need for the general law relating to unlawful interference with goods to operate. This is of course the purpose of the Act. For example, s 87(1) provides that the rights of a debtor in collateral may be transferred despite a prohibition on transfer in the security

agreement, although such a transfer does not prejudice the rights of the secured party under the agreement or otherwise. This includes the right to treat a prohibited transfer as an act of default, which justifies the secured party in regaining possession of the goods under the Act.<sup>826</sup> Because the security interest continues in the collateral,<sup>827</sup> the secured party may demand the return of the goods from the transferee and sell them, distributing the proceeds in accordance with the provisions of the Act.<sup>828</sup> A transferee who refuses to surrender to the secured party's demand for possession of the goods, or who has disposed of the goods and cannot return them, may be liable in conversion or detinue,<sup>829</sup> but there is little reason for a security holder to pursue such actions when the PPSA already spells out his or her right to recover the goods. Thus, at least some of the many cases of conversion and detinue which were previously dealt with by the Courts under other legal rules, such as those involving goods on hire purchase or lease being wrongfully sold by their bailees, today fall within the regime of the PPSA. Further, as we have seen, the erosion of the other statutory rules relating to title to goods by the PPSA has been extensive.

The second significant development is the recent growth of the law of negligence, a tort which has demonstrated an ability to expand inexorably. As discussed above,<sup>830</sup> the law of negligence now predominates when liability for physical damage or destruction of goods is in issue, and this is so whether goods are the subject of bailment or not. The Courts have tended to require that fault be established for liability in trespass; if it were otherwise, it would follow that liability for every motor vehicle collision or other act causing damage to another's goods would be strict. In consequence, lawyers have all but forgotten trespass for careless acts, which are today largely dealt with by negligence actions.

It is against this background that the following reforms are proposed. As we have seen, conversion and detinue are torts which are available to those alleging that their possessory interests in goods have been infringed; and trespass requires interference of a direct physical kind. Although the torts may overlap, conversion and detinue are different in their nature from trespass, for conversion and detinue are concerned about protecting existing vested rights rather than the physical state or condition of the goods. These two essential and differing functions of the torts must be borne in mind when reform is considered.

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<sup>826</sup> s 87(2)

<sup>827</sup> s 45(1)

<sup>828</sup> s 109(1)

<sup>829</sup> *United States v Tugwell* 779 F 2d 5 (1985)

<sup>830</sup> ch 2.3

### 9.2.1 *The protection of interests: conversion and detinue*

#### (i) Abolition of detinue

Conversion is concerned with the usurpation of an existing right, not damage caused as a result of a wrong. In consequence, conversion is a strict liability tort of wide scope. This is a desirable feature of conversion. If it were necessary to prove fault or bad faith in every circumstance involving interference with possession, including when intermediate handlers were involved, the tort would be considerably weakened; indeed, its very purpose would be defeated. The burden on a plaintiff in such cases would be very heavy and, in practice, dishonesty would be encouraged or rewarded.<sup>831</sup> Thus, proof that the plaintiff's possessory rights have been infringed by the defendant's deliberate conduct should justify a remedy. This principle does not appear to have been seriously questioned in any common law jurisdiction, and, despite the criticisms and concerns about the complexity of the chattel torts, the central place of conversion has always been recognised and affirmed. Nor has it been seriously suggested that its fundamental nature of conversion is undesirable or should be altered. Rather, the problems of differentiating among the torts and their overlapping features and individual complexities, resulting from haphazard historical development, have tended to be the primary focus of law reformers.

Thus, the essential nature of conversion has evolved for good reason; a dispossessed owner should be entitled to assert "those are my goods", and the law should accord its assistance in the claim.

As described above, there have been suggestions that the existing chattel torts should be subsumed into a single tort of unlawful interference with goods. As stated by the Law Reform Commission of British Columbia, there are two possible ways doing this: either to collect the existing torts under one rubric whilst leaving their essential natures intact, or to create a genuinely new single tort which does not attempt to codify the existing law. The former method is in essence that adopted in England, and the latter is adopted in the British Columbian proposals. Clearly, both of these approaches have advantages and disadvantages. A process which does not abolish or recast the existing torts may be criticised for not going far enough; while a completely fresh start may ultimately result in legal confusion of the very kind which the reform was intended to cure.

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<sup>831</sup> This point is made by the English Law Reform Committee in its report, pp 6-7.

The British Columbian draft legislation is short, concise, and has an attractive simplicity of drafting. However it is likely, indeed inevitable, that interpretation of it would prove difficult without recourse to the common law which it was intended to replace, precisely because it is elliptical in expression. The Commission itself of course acknowledges this in its advocacy of a new start “where legislation restates the general principles to be applied, even if the new legislation fails to address every conceivable issue on which some sort of legal solution has been arrived at in the past eight hundred or so years”.<sup>832</sup> Thus, it may be that the draft legislation does not really solve the difficulties for, as we have seen, general principles are easier to state than to apply in practice to particular cases. The result of such legislation may well do no more than replace disputes about the scope of the common law with problems of statutory interpretation. It is in the details of delineation, differentiation and application, not the broad principles, that the difficulties have arisen with the chattel torts.

It is therefore suggested that the creation of a new statutory tort is neither necessary nor desirable. Rather, the tort of conversion should be retained as the tort which protects property interests in goods. Further, it should be the only tort with this function, and detinue should be abolished.

This is not merely a question of nomenclature. It is preferable to retain an existing tort, the elements of which have been the subject of a large body of judicial consideration, than to create a newly named and independent tort which will doubtless eventually be subject to the same process. Such labels as “unlawful interference” or “wrongful interference” are, by themselves, unclear and, unless they are further defined, they are unhelpful. Attempts at further definition would ultimately be difficult, if not impossible, without reference to the previous common law which has addressed so many of the relevant issues. Further, such expressions as “unlawful interference” or “wrongful interference” do not make clear the distinction between interference by usurpation of interests in goods, and interference which results in damage to the physical condition of the goods. This is a fundamental distinction which is well understood as inherent in the word “conversion”, and which ought to be retained. Conversion is essential in this context, both as an irreplaceable term of art and as a cause of action.

By contrast, detinue should be abolished because it is simply unnecessary. As discussed above, all cases in which goods are unjustifiably detained in defiance of the person

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<sup>832</sup> p 30

entitled to them constitute conversion. The commonly cited single exception to this is the case of the bailee of goods who has in breach of his or her duty allowed goods to be lost or destroyed. Assuming that this is in fact the only exception, it is suggested that this circumstance can be adequately dealt with by the law of negligence as it applies to bailments. It is not necessary to enact, as was done in England,<sup>833</sup> that such a circumstance is deemed to be conversion. Indeed, in the recent case of *Yearworth v North Bristol NHS Trust*,<sup>834</sup> in which a bailee carelessly destroyed goods in breach of its duty, neither counsel nor the Court of Appeal appeared to consider the possibility that a conversion action could be undertaken. Rather, the legislation was, it seemed, simply overlooked, and the case was dealt with as one of negligence and bailment. The principles of these are, it is suggested, adequate and apt for cases involving breaches of duty by bailees.

If detinue were abolished, the wrongful detention of goods would be seen, rightly, as but one instance of conversion, with no particular or discrete legal rules to differentiate it from other conversion cases. The removal of a tort which has been all but overlapped by another would certainly reduce unnecessary confusion and duplication in the law.

The abolition of detinue would entail some consequential amendments to the law of conversion, particularly in the area of remedies. These are described below. These matters should not present any difficulties, particularly as the distinctions between remedies for detinue and for conversion may, at least in recent times, have been honoured as much in the breach as in the observance.

## (ii) Reform of conversion

If conversion is to be retained as the sole tort for protecting interests in goods, the parameters of the tort require definition for the sake of certainty and clarity, and the historical anomalies and restrictions identified above must be addressed. To those ends, the following reforms are suggested.

### (a) *The property*

We have seen that the traditional view is that conversion applies only to physical, tangible, personal property. This may be in part due to the historical fact that the concept of property, during the time the tort of conversion was developing, was more confined than it is today. The growth in mass communications and technology and the associated lucrative rights

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<sup>833</sup> Torts (Interference with Goods) Act 1977, s 2(2)

<sup>834</sup> [2009] EWCA Civ 37, discussed above in ch 2

attached to intellectual property of many kinds are very recent phenomena which were simply not in contemplation when the law of conversion emerged. Although conversion proved sufficiently flexible to cover such rights as represented by cheques, insurance policies and guarantees, an unlawful dealing with the relevant physical documents still had to be shown. Arguably, these cases are not in any event really conversions of intangible rights or choses in action, but of the documents embodying them. Some dealing with the physical document is required, and damages are assessed by reference to the loss incurred as a consequence.

It is suggested that it is right that conversion should be confined to tangible property.<sup>835</sup> Conversion is not a suitable cause of action for intangible property rights, which are better dealt with by other, more focussed, causes of action, difficult those these may be to formulate. Conversion of a book is not the same thing as an improper dealing with its content,<sup>836</sup> and purely intangible property rights, such as licences, domain names and trade secrets, which may not be represented by any physical tokens at all, require rights and remedies which are specifically tailored for their protection. The intellectual property interests involved in producing such items as books, films and domain names transcend, and are independent of, the interests in resulting physical items.<sup>837</sup> Conversion is simply too blunt an instrument to apply to rights which may transcend any connection with tangible goods at all.

Further, conversion is a tort of strict liability, in which the defendant's knowledge of the existence of the plaintiff's rights in the goods is largely irrelevant. By contrast, the knowledge of the defendant is relevant in relation to remedies for infringement of some intellectual property rights. Damages for infringement of copyright, for example, are not available if the defendant was unaware of the existence of the copyright.<sup>838</sup> For the same reason, the use of conversion in contractual rights cases would interfere with other,

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<sup>835</sup> The English Law Committee in its report recommended that choses in action, including copyright, patents and contractual rights, good will, trade secrets, know-how and other intellectual property should be excluded from reforming legislation. Although the 1977 Act defines goods simply as "all chattels personal other than things in action and money", the minority in *OGB Ltd v Allan* [2008] 1 AC 1 (HL) considered that this did not prevent the common law from developing so as to include choses in action.

<sup>836</sup> The unsuitability of "conversion damages" for copyright infringements which previously existed in the Copyright Act 1962 became apparent in practice in the Courts, and resulted in their omission in the replacement Copyright Act 1994. It appears impossible to apply in a fair way the rules relating to damages in conversion to copyright infringements without statutory modification of them: see the views of the Australian Copyright law Review Committee *Report on Conversion Damages*, Canberra, 1990.

<sup>837</sup> *Viacom Global (Netherlands) BV v Secene One Entertainment Ltd (In Receivership)* [2009] NZCA 437

<sup>838</sup> Copyright Act 1994, s 121. S 97(1) of the Copyright, Designs and Patents Act 1988 (UK) makes the same provision. As the primary remedy for conversion is damages, conversion is effectively ruled out by s 121 in any event.



established, economic torts, which have their own elements and which are not decided on the basis of strict liability.<sup>839</sup>

The challenge for the law in protecting hitherto unimagined kinds of intangible property rights is considerable. However, the very complexity of the area means that the law must create, or develop, causes of action and remedies which are well suited to it. Conversion has its own realm, and it is not sufficiently flexible or malleable to be applied to intangible property.

By contrast, it is suggested that, despite the historical view, conversion is an appropriate action today for the human body, as well as its parts and products. The law already recognises that property interests may arise in cases where bodies or their parts have become objectified by the application of skill, labour, or the process of time. In cases where the right to deal with the body of a deceased person is disputed, the law should be clarified by according to administrators and executors a right, and not merely an obligation, to possess the body for the purposes of burial.

The human body is of course tangible, and the objections to allowing property interests in it are based on concerns of morality or policy. The general denial of interests in the body or its parts evolved at a time when a dead body or a body part or product could be of no practical use or value to anyone else, although high emotions might be involved. Today the position is different, and technology affords great benefits by way of transplants, grafts, reproductive assistance, and other such procedures. Simple realism suggests that useful body parts and products should be the subject of property interests and that such interests, once in existence, might compete, or require protection, allocation or ranking. Legislation providing for such cases could co-exist with prohibitions, such as exist now, on trafficking or improperly dealing in such items.

(b) *The plaintiff's interest*

It is suggested that anyone with a possessory or proprietary interest in goods should be able to sue for conversion of them. The exclusion of reversionary interests from conversion is unjustifiable, for the reasons given above.<sup>840</sup> If bailed goods are converted, both or either of the owner and the bailee should be able to sue for the whole value of the loss or damage to the goods, and account to the other for the proportion of the damages which represent that other's loss. Consequential losses relating to the circumstances of an owner or bailee, such as

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<sup>839</sup> See the decisions relating to economic torts in *OBG Ltd v Allan* [2008] 1 AC 1 (HL).

<sup>840</sup> Reversionary interests are discussed in ch 5.2.

loss of profits, would of course require proof from the party alleging that loss. Similarly, one co-owner should be able, as now, to sue for the whole loss or damage to goods.

Other interests cause their own difficulties. Equitable interests, if unaccompanied by any possessory right, are not at present protected by actions in conversion.<sup>841</sup> The law reform bodies described above each considered whether this principle should be altered, and came to different conclusions. The English Committee recommended that the law should not be changed to allow a person with no more than an equitable interest to sue.<sup>842</sup> The British Columbian Commission considered that there was no point in distinguishing among different kinds of interests; it recommended that its proposed new statutory tort should be open to anyone with any interest at all in the goods, including an equitable interest, and that the nature of the interest would determine the remedy.<sup>843</sup> The South Australian Committee did not recommend that equitable interests should give a right to sue in conversion.

It is suggested that the existing rule is the correct and logical one, and that an equitable interest in goods should not suffice for a conversion action. The equitable rules relating to the disposition of trust property to *bona fide* recipients are discrete, and would clash with the principles of conversion if they were to co-exist. The rights of a beneficiary against a trustee who disposes of trust property are well established, and the limits on rights to recover such property from third parties are consistent with longstanding equitable principles. It is in the nature of trust property that the legal and beneficial interests are separated, and the equitable rules relating to improper dealing are grounded on this. Nothing would be gained except confusion if these principles were disturbed. Hobhouse LJ explained the difficulties of combining a strict legal remedy with an equitable right:<sup>844</sup>

In the context of the law of conversion, the failure to make the distinction produces anomalies and absurdities ... How can a sale of a legal title by a person entitled to sell it to another who thereby acquires a good legal title be tortious? The way in which equity works is to say that the purchaser takes subject to the same equities as the vendor unless the purchaser can show that he was a bona fide purchaser for value without notice of those equities; if he cannot he is open to the same equitable remedies as was the vendor. The common law acts in a different way, as can be illustrated by the rule that a person paying damages in conversion thereby acquires the

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<sup>841</sup> *MCC Proceeds Inc v Lehman Bros International (Europe)* [1988] 4 All ER 675 (CA)

<sup>842</sup> para 128(5)

<sup>843</sup> p 31

<sup>844</sup> *MCC Proceeds Inc v Lehman Bros International (Europe)* [1988] 4 All ER 675, 701 (CA)

title of the plaintiff. If the plaintiff's title is complete in law and equity, how is this principle to operate?

If the case is one in which the trustee has not disposed of the goods, but they have been converted by a third party, the fact that they are trust property would appear to be of little relevance. The trustee, or whoever is entitled to possession, whether beneficiary or not, may bring a claim under the normal conversion principles. It is the possessory right, not the legal or equitable interest, which is the basis of the right to sue.

Other interests, of a future or contingent kind, are perhaps less easily dealt with. The traditional view, that such interests are excluded, was restated in *Leigh & Silavan Ltd v Aliakmon Shipping Co Ltd*,<sup>845</sup> where it was held that a person who had agreed to buy goods, but had not acquired either ownership or a right to possess them, could not sue in negligence when the goods were damaged by their carriers. No duty was owed to the plaintiff, who had no interest in the goods. This view is consistent with the approach which has been consistently taken that, in agreements for sale, no legal or equitable title passes to the buyer. The agreement becomes a sale, by definition, when title passes to the buyer but, until then, the buyer has no property right in the goods themselves. The same approach was adopted in *Re Goldcorp Exchange Ltd*.<sup>846</sup>

The English Law Reform Committee recommended that “not only actual possession (or a right to immediate possession) at the material time, but any other interest in a chattel, whether present or future, possessory or proprietary (but not being an equitable interest) should constitute sufficient title to sue”.<sup>847</sup> If one accepts this, the requirement nevertheless remains that a plaintiff must have an interest to protect. In cases where a person has no legal, equitable or possessory interest in goods, it is not clear exactly what the nature of that interest may be. It is suggested that *The Aliakmon* and *Re Goldcorp Exchange Ltd* are correct statements of principle, recognising the reluctance of the law to contemplate or create interests in goods which transcend the existing rules relating to transfers of goods. To find otherwise would negate the clear and logical principles codified in the Sale of Goods Act 1908 concerning the rights of parties under agreements to sell and sales.<sup>848</sup> Risk generally

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<sup>845</sup> [1986] AC 785 (HL). This case is considered above in ch 5.1.

<sup>846</sup> [1994] 2 All ER 806 (PC)

<sup>847</sup> para 128(5)

<sup>848</sup> The passing of property is covered under Sale of Goods Act 1908, ss 18-20. The basis of these rules is well described in *Karlshamns Oljefabriker v East Navigation Corp, The Elafi* [1982] 1 All ER 208.

goes with property in goods;<sup>849</sup> and the rights between the parties when goods perish are also provided for under the Act.<sup>850</sup> A disappointed buyer, or other person who expects to obtain an interest in goods, will generally have contractual remedies available. Conversion as a tort of strict liability is justified only if there are vested interests in the goods themselves to protect.

Reversionary interests are in a different category. This is an existing interest and, for the reasons set out above, the holder of such an interest should be able to sue in conversion. In all cases where ownership and possession are separated, each party has only a limited interest in the goods; and it makes no sense to prevent an owner from claiming against a third party in conversion merely because his or her right to recover possession of the goods from the bailee is not immediate. Any person with a limited interest in the goods, whether bailor, bailee, or co-owner, should be able to sue a third party for the whole value of the goods and, if successful, account to the other interest holder for the value of his or her loss.

(c) *The allocation of title*

Many cases of conversion and detinue involve, in reality, disputes about property interests and their rankings, and the outcome of the claim in tort follows inevitably once the relative interests of the parties in the goods have been determined. It follows that, if there were more certainty and less complexity in matters of title, many cases would not require determination, for the prior question would have been answered upon which the entitlement to a remedy depends.

The law would be simplified if the *nemo dat* rule in its present form were to be altered. There are two reasons for this. First, although it is called a “rule”, and is regarded as the *prima facie* position as far as title is concerned, the reality is that it has now been eroded to such an extent that it occupies a very small patch of ground in the field of the law relating to title. The rule has so many exceptions that it can no longer be considered as a fundamental statement of principle. The second reason is that the current law is very complex. It might of course be said that inherently difficult law should not be altered simply on the ground of its complexity. This is no doubt generally correct, but the response in this case must be that the complexity is unnecessary, and serves no useful purpose.

The current law may also be criticised on the ground that it yields unjust results in some cases. As we have seen, conversion and detinue actions frequently pose the question of which of two innocent parties should suffer loss caused by a blameworthy third party. In

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<sup>849</sup> *ibid*, s 22

<sup>850</sup> *ibid*, ss 8,9

these situations, it is strongly arguable that the person who first voluntarily delivered his or her goods to the wrongdoer should bear the resulting loss. Currently, the innocent recipient of goods from the wrongdoer can succeed only if a statutory exception to the *nemo dat* rule is shown. Although the range of these exceptions is wide, the law is not always clear as to what conduct on the part of the original owner of the goods justifies his or her loss of title: for example, the parameters of the mercantile agent exception are somewhat imprecise, and the estoppel exception is even more so. The exceptions to the rule are bewildering and poorly understood, and the problem is compounded by the exceptions to the exceptions created by the Personal Property Securities Act.

The current policy of the law reveals a realistic trend towards requiring owners of property to protect their own interests when they deliver their goods to others. This is in reality the whole basis of the Personal Property Securities Act, which is a rational piece of legislation, designed to deal clearly and decisively with the problems associated with security interests in goods. The policy choice was to place the burden on the holder of the security interest to protect his or her interest, and the Act provides the means for this to be done. It would be consistent with this general approach if the law were to give priority to the innocent recipient of goods in a case where possession of the goods had been voluntarily transferred by their owner to another. In such a case, the owner is the person who, in effect, elects to put the goods in the hands of another, thereby risking their possible transfer elsewhere. This point is argued more fully above.

It is suggested therefore that the general rule should be that a disposition for value of goods to an innocent person by one who has possession of them with the consent of their owner should be effective to vest title in that innocent person. The consequence of such a change in policy would be to provide clarity in the law, and reduce the number of innocent persons who might potentially be liable in conversion. Such a change in the law would not require owners to safeguard their own goods or protect them from thieves, for the change would extend only to owners who voluntarily delivered possession of goods to others.

#### (d) Remedies

One consequence of the abolition of detinue would be that the only cause of action available for the unjustified refusal to return goods would be conversion. As we have seen, an order for specific restitution is a discretionary one, and generally the remedy for conversion is damages. The law in this regard is certainly in need of reform.

It is suggested that the common law rule which gives the defendant the option of whether to return the plaintiff's goods, or to keep and pay for them, is both absurd and unjust. There may be good reasons in particular cases why goods should not be returned; they may have been damaged, or for some reason a return *in specie* might be impossible or impractical. However, the option should be with the plaintiff, not the defendant.<sup>851</sup> Where a plaintiff is, or chooses to be, compensated for the full value of the goods, title to the goods would then vest in the defendant.<sup>852</sup> If an order for delivery of the goods is made, any consequential losses should also be recoverable. This would allow for any alteration in the value of the goods during the period of unjustified detention by the defendant, or any other resulting proven losses.<sup>853</sup>

Although the assessment of damages in conversion cases is not always easy, it is unlikely that any legislation reform could encompass all cases or deal with all the difficulties which might arise. Goods may alter in value over time; their value might be improved or diminished by the defendant; the plaintiff may have lost opportunities, profits, or simply the pleasure of possession of his or her own goods. Generally, the principle can be only that the plaintiff should be able to recover his or her reasonably foreseeable and foreseen proven actual losses, bearing in mind that the defendant is not allowed to gamble with the goods at the possible expense of the plaintiff. Allowance may be made for the improvement of goods, a factor which might be influential where a plaintiff is electing whether or not to claim the return of the goods or their value.

#### (e) *Defences*

##### (i) *Jus tertii*

There is no justification for the retention of the *jus tertii* principle. A defendant in a conversion claim should be able to show that some other person has a better right to goods than the plaintiff has. The current rule has no sensible basis, and reform of the kind which has taken place in England should be undertaken.

##### (ii) *Contributory negligence*

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<sup>851</sup> The English Act allows for an order for the delivery of the goods as one possible form of relief, as is the giving of the option to return and pay to the defendant: s 3. There is thus no presumption in favour of the plaintiff.

<sup>852</sup> This is provided in the English Act: s 5.

<sup>853</sup> This was also recommended by the English Law Reform Committee: para 9.

For the reasons set out above, it should be made clear that contributory negligence is not a defence to a conversion claim. Although this appears to be the common law position in any event, any legislation dealing with contributory negligence in general, or conversion in particular, should spell this out.

(iii) *Distress damage feasant*

The origin of the process of *distress damage feasant* was to give landowners security for damage caused by the intrusion of animals or objects onto their land. The modern cases appear to be exclusively concerned with the wheel clamping or towing of motor vehicles. This is a matter which generally involves relatively small expense and inconvenience, but nevertheless causes considerable strong feeling and conflict. It is suggested that legislation should be enacted to provide for the circumstances in which clamping or towing are permitted. Clearly, a landowner should be able to prevent the depositing of vehicles on his or her land, and have some means to enforce that right. It is suggested that clamping or towing should be lawful where clear signage warns of the possibility, and that sums for the release of vehicles should be no more than reasonably covers the cost involved.

9.2.2 *Protection of physical state of goods: trespass and negligence*

There are good arguments for the abolition of the tort of trespass. As described above, it seems that the only acts of trespass which today cannot with certainty also be categorised as either conversion or negligence are deliberate acts of damage which do not have the effect of interfering with the plaintiff's possessory title.<sup>854</sup>

It is strongly arguable that the intentional damaging of another's goods could be in any event classified as conversion. A decision to damage or alter the physical condition of goods may be one which only a person entitled to do so may make; and an unentitled person may be seen as assuming dominion over the goods by an act of wilful damage of them. However, the law has avoided this somewhat strained conclusion, and has regarded wilful acts of damage as not being tantamount to interference with possession. Conduct which is trespass but not conversion is thus defined as that which directly interferes with the physical state of the goods, but falls short of an interference with possession or usurpation of the possessory interest in them. Assuming this is the correct position, it would be preferable to

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<sup>854</sup> This is discussed above in ch 2.2.1.

bring cases of wilful damage into the broad category of negligence, where they would in any event fit more comfortably and logically than they would in conversion.

There seems no good reason why the law of negligence should not encompass deliberate acts. If, for example, one driver deliberately damaged another's vehicle by deliberately driving into it, it would surely be no defence to say that the act was done intentionally and not inadvertently. The elements of negligence would be established in such a case: the wrongdoer owed a duty of care to other road users; he breached that duty by driving into the vehicle of another; and caused the resulting damage. The additional, irrelevant, fact that the wrongdoer had performed his act intentionally should not alter this. In the same way, a defendant's hope or expectation that no damage will result (decreasing, not increasing, the moral blameworthiness) is not of significance in a negligence action if the elements of the tort are made out. Fault is not determined by an examination of the defendant's state of mind when goods are negligently damaged.

Given that the law has moved towards requiring fault in trespass cases, it is not surprising that there is little scope for trespass, and there are few modern cases of it. The modern growth of negligence implies that the law accepts that not all conduct which results in harm should be actionable. The members of crowded, active, mobile societies must accept a certain amount of interference with their goods; there are inevitable accidents and unpredictable events which, in the absence of fault, must be tolerated in the normal conduct of affairs. There is no reason to impose liability without fault in such cases. It is proposed, therefore, that conduct which results in physical damage to goods should be covered by negligence, and that trespass is unnecessary. The tort of trespass should be abolished, and acts which previously came within its compass should be dealt with by the law of negligence.

As we have seen, a defining feature of trespass is that it involves an interference with actual possession and so is open only to a limited range of plaintiffs. A person with only a right to possession, albeit an immediate right, therefore cannot sue in trespass, and the same applies to one with only a reversionary interest. The holders of these interests are of course likely to own the goods and so, in reality, suffer the loss resulting from the damage. If trespass were abolished, there would be no need to limit the right to sue to the person whose actual possession had been infringed. A person with a reversionary or other interest in the goods could sue, as could any person suffering foreseeable loss within the normal parameters of a negligence action.



The abolition of trespass would mean that conduct causing physical damage which involves neither usurpation of title nor negligence would be no tort at all. This does not seem an unreasonable or unjust state of affairs.



### Summary of suggested reforms

The law relating to unlawful interference with goods requires reform in a number of aspects, the reasons for which have been described in this work. Legislation would of course be required to effect significant reform.

The principal suggestions are summarised as follows:

- 1 The tort of detinue should be abolished (ch 9.2.1(i)).
- 2 Conversion should be the sole tort for the protection of interests in goods (ch 9.2.1(ii)).
- 3 Conversion should protect only tangible personal property (ch 9.2.1(ii)(a)).
- 4 A conversion action should be available to any person with a proprietary or possessory interests in goods, including a reversionary interest (ch 9.2.1(ii)(b)).
- 5 A plaintiff in a conversion action should be able to claim the return of the goods and any consequential losses, or damages, flexibly assessed to cover actual losses and allow for improvements in appropriate cases (ch 9.2.1(ii)(d)).
- 6 The current rule that gives a defendant in a conversion action the election of returning the goods or paying their value should be abolished(ch 9.2.1(ii)(d)).
- 7 The *jus tertii* principle should be abolished (ch 9.2.1(ii)(e)(i)).
- 8 Contributory negligence should not be available as a defence in a conversion action (ch 9.2.1(ii)(e)(ii)).
- 9 The common law right of *distress damage feasant* should be abolished, and legislation should cover the clamping and towing of vehicles (ch9.2.1(ii)(e)(iii)).

10 The extent to which the self-help remedy of forcible recaption is available should be clarified (ch 7.3.5).

11 The *nemo dat* rule should be further limited so as to exclude owners who voluntarily place their goods in the hands of others (ch 6.12; 9.2.1(c)).

12 The tort of trespass to goods should be abolished (ch 2.2.1, ch 9.2.2).

13 Negligence should be proved where physical damage, not amounting to conversion, is involved (ch 9.2.2).

14 A negligence action should be available to any person with a proprietary or possessory interests in goods, including a reversionary interest (ch 9.2.2).

15 Whether or not a defendant acted intentionally in damaging goods should be irrelevant in a negligence action (ch 9.2.2).

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Distress and Replevin Act 1908 (repealed)

Dog Control Act 1996

Human Assisted Reproductive Technology Act 2004

Human Tissue Act 2008

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Limitation Act 1950

Limitation Bill 2009

Limitation Defences Bill 2009

Mercantile Law Act 1908

Mercantile Law Act 1908

Personal Property Securities Act 1999

Proceeds of Crime Act 1991

Property Law Act 1952 (repealed)

Property Law Act 2007

Sale of Goods Act 1908

Search and Surveillance Bill

Summary Proceedings Act 1957

Unsolicited Goods and Services Act 1975

Wages Protection and Contractors' Liens Act Repeal Act 1987

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Personal Property Securities Bill 2008 (Cth)

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