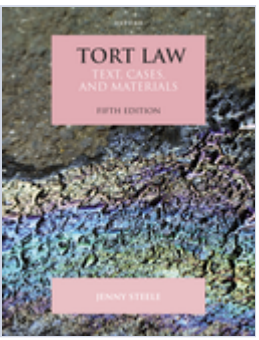

Tort Law: Text, Cases, and Materials (5th edn)
Jenny Steele

p. 940

18. Trespass to Land and Goods, and Conversion

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Abstract

All books in this flagship series contain carefully selected substantial extracts from key cases, legislation, and academic debate, providing able students with a stand-alone resource. This chapter considers a range of proprietary torts which protect against trespass to land and goods, as well as conversion which protects against interferences with goods (but not land). It considers the overlap in functions between conversion and property law, particularly in the available remedies such as recovery of the chattel and damages based both on value of the goods (if not recovered) and on consequential loss. The chapter first looks at non-deliberate trespass to land and the remedies available to the claimant. This is followed by a discussion on wrongful interference with goods. The chapter then presents a general definition of conversion and its distinctive features, and what interest in the chattels the claimant must have. Finally, it outlines a number of remedies available to the claimant in the case of conversion. Relevant court cases are cited where appropriate.

Keywords: torts, trespass, land, goods, conversion, property law, remedies, damages, wrongful interference, chattels

Central Issues

i) The torts in this chapter all protect proprietary rights, but they do so in different ways. The trespass torts protect against direct interferences with land and goods possessed by the claimant. Conversion on the other hand protects against interferences with goods (but not land) which are actually inconsistent with the claimant's right of possession. In effect, a conversion amounts to a denial of the claimant's right.

ii) Conversion occupies a unique place in English law. It is a tort, but its functions overlap strongly with property law. This unique position is reflected in all aspects of the tort but most particularly in the available remedies. These remedies include recovery of the chattel in some cases (though not as of right), and damages based both on value of the goods (if not recovered), and on consequential loss. Though sidelined in the majority of tort courses, conversion is a hard-working tort of broad commercial significance.

1 Trespass to Land

Trespass to land is constituted by a direct and unjustifiable interference with the possession of land.

The specific interest protected by trespass to land will be more clearly grasped if we compare it with the action in private nuisance (Chapter 11). **Private nuisance** protects against unlawful interference with the **use and enjoyment of land**. It is actionable only by a person with title to the land, in the form of a *right to exclusive possession*. This may be the freeholder, or the leaseholder, or someone who holds a right to exclusive possession through statute. Although injunction is usually the preferred remedy in a case of continuing nuisance, where damages are assessed they are assessed by reference to diminution in the amenity value of
p. 941 the land.[1] Interference must be shown to be 'unreasonable', and this may involve a balancing ↵ exercise taking into account the interests of the claimant and the activity of the defendant. Some interferences are not actionable, on the basis of a principle of 'live and let live'.

Trespass to land on the other hand protects against interference with the possession of land itself. It is actionable by anyone with the right to possession, even if this falls short of a right to *exclusive* possession. It is actionable, for example, by a mere licensee, who would not be able to bring an action in private nuisance. Invasions are actionable without reference to 'reasonableness', and there is no question of permitting minor invasions on a principle of 'live and let live'. This would be incompatible with the rights to possession which are protected by the tort. Although *reasonableness* is no defence, a defendant may escape liability by showing **justification**. As with the other trespass torts examined in Chapter 2, justification may be established in the form of emergency or self-defence, for example.

1.1 Non-Deliberate trespass to Land

In Chapter 2, we explained that the torts which together constitute trespass to the person are now regarded as 'intentional', even though the form of intention required is not closely related to culpability. It is the *direct physical contact with the person of the claimant* that must be intended, and not any wrongfulness or harm. Equally, in the case of trespass to land, no wrongfulness nor actual harm need be intended. Trespass liability is 'strict'. But does the incursion on to the claimant's land need to be intentional?

League Against Cruel Sports v Scott [1986] QB 240

The claimants owned various parcels of unfenced moorland, over which they did not allow hunting. After several incursions on to their land by the hunt, including incursion by hounds, the claimants brought an action in trespass against the defendants, who were joint masters of the hunt. They claimed not only damages but also a declaration of unlawfulness and an injunction to prevent future trespasses.

The claim was successful. Damages were awarded, together with an injunction.

Park J, *League Against Cruel Sports v Scott*
[1986] 1 QB 240

> Mr Blom-Cooper submits that intention, wilfulness, and indeed any concept of fault liability do not constitute an element in the tort of trespass to land. When hounds enter or cross forbidden land the only question is whether such intrusion is voluntary or involuntary. The only defences recognised by law to an action for trespass are inevitable accident and necessity.
>
> ...
>
> ... I am, however, unable to spell out from the authorities cited by Mr Blom-Cooper the proposition that he has advanced. I have, therefore, come to the conclusion that, before a master of hounds may be held liable for trespass on land by hounds, it has to be shown that he either intended that the hounds should enter the land, or by negligence he failed to prevent them from doing so.
>
> In my judgment the law as I take it to be may be stated thus: where a master of staghounds takes out
> p. 942 a pack of hounds and deliberately sets them in pursuit of a stag or hind, knowing ↵ that there is a real risk that in the pursuit hounds may enter or cross prohibited land, the master will be liable for trespass if he intended to cause hounds to enter such land, or if by his failure to exercise proper control over them he caused them to enter such land.
>
> ...
>
> Further, if it is virtually impossible, whatever precautions are taken, to prevent hounds from entering league land, such as Pitleigh, for example, yet the master knowing that to be the case, nevertheless persists in hunting in its vicinity, with the result that hounds frequently trespass on the land, then the inference might well be drawn that his indifference to the risk of trespass amounted to an intention that hounds should trespass on the land.
>
> The master's negligence, or the negligence of those servants or agents or followers of the hunt for whose conduct he is responsible, has also to be judged in the light of all the circumstances in which the trespass in question occurred.

Trespass to land requires the defendant to enter the land either intentionally or through *carelessness*. Here, the idea of 'involuntary' (as opposed to merely mistaken) entry is quite plausible: the land was unfenced, and some of the incursions were by hounds rather than people.

We discovered in Chapter 2 that since *Letang v Cooper* [1965] 1 QB 232, trespass to the person has been confined to *intentional* acts. For example, in the tort of battery, only if physical contact is intended is there an action in trespass to the person. Cases of *careless* contact are to be governed only by the principles of the tort of negligence. This reasoning has not been replicated in respect of trespass to land.

Remedies

As with trespass to the person, the claimant may seek an injunction to prevent continuing or future interference; compensatory damages in respect of past interference and any consequential damage caused; and a declaration that the trespass is unlawful.

In *Anchor Brewhouse Developments Ltd v Berkley House Ltd* (1987) 38 BLR 87, Scott J granted an injunction where the jib of a crane on the defendant's land trespassed over the property of the plaintiffs. Scott J recognized that the grant of an injunction here would allow the plaintiff to seek extortionate payments for the right to 'use' their space to complete construction works, but considered himself bound to award the injunction. More recent cases have not taken such an uncompromising view about appropriate remedies.

In *Jaggard v Sawyer* [1995] 1 WLR 269, the Court of Appeal pointed out that the injunctive remedy is an *equitable* remedy which is always within the discretion of the court. Although damages in lieu of an injunction may only be awarded where relevant criteria are fulfilled, there is always an option for the court to award no remedy at all. The injunction is not available 'as of right'.

We extracted *Jaggard v Sawyer* in Chapter 11, where we also discussed the '*Shelfer* criteria' for award of damages in lieu of an injunction, and their revised role since *Coventry v Lawrence* [2014] UKSC 13. Here, it is worth noting Millett LJ's comments on the approach in *Anchor Brewhouse*:

p. 943 **Millett LJ, *Jaggard v Sawyer* [1995] 1 WLR 285**

> In *Anchor Brewhouse Developments Ltd v. Berkley House (Docklands Developments) Ltd* ... Scott J. granted an injunction to restrain a continuing trespass. In the course of his judgment, however, he cast doubt on the power of the court to award damages for future trespasses by means of what he described as a 'once and for all payment.' This was because, as he put it, the court could not by an award of damages put the defendant in the position of a person entitled to an easement; whether or not an injunction were granted, the defendant's conduct would still constitute a trespass; and a succession of further actions for damages could accordingly still be brought. This reasoning strikes at the very heart of the statutory jurisdiction; it is in marked contrast to the attitude of the many judges who from the very first have recognised that, while the Act[2] does not enable the court to license future wrongs, this may be the practical result of withholding injunctive relief. ... It is in my view fallacious because it is not the award of damages which has the practical effect of licensing the defendant to commit the wrong, but the refusal of injunctive relief. Thereafter the defendant may have no right to act in the manner complained of, but he cannot be prevented from doing so. The court can in my judgment properly award damages 'once and for all' in respect of future wrongs because it awards them in substitution for an injunction and to compensate for those future wrongs which an injunction would have prevented. ...

The choice is not only between injunction and damages; if damages are not appropriate, there is still a choice between injunction, and nothing. As we saw in Chapter 9, when assessing damages in lieu of an injunction, the court will ask what reasonable parties would have bargained for. This is clearly illustrated by the decision of the Supreme Court in *Star Energy UK Onshore Ltd v Bocardo* [2010] UKSC 35. Here there was a trespass, which the judge found did not disturb the claimant's use and enjoyment of land 'one iota'. Rights to search for and get oil from a natural underground reservoir had been granted to the defendants pursuant to statute; but they committed a trespass to the extent that they did not obtain access rights for their pipelines beneath the claimants' land. The claimants had 'title' to the substrata. The wells extended from about 800 feet to 2,800 feet below the surface, and therefore were 'far from being so deep as to reach the point of absurdity' ([27]). Were they, however, 'in possession' of the substrata so that they could claim in trespass?

Lord Hope of Craighead, *Bocardo v Star Energy*
[2010] UKSC 35

> 31 As Aikens LJ said in the Court of Appeal [2010] Ch 100, para 66, it is difficult to say that Bocardo has actual possession of the strata below the Oxted Estate as it has done nothing to reduce those strata into its actual possession. But he held that Bocardo, as the paper title owner to the strata and all within it (other than any gold, silver, saltpetre, coal and petroleum which belong to the Crown at common law or by statute), has the prima facie right to possession of those strata so as to be deemed to be in factual possession of them. I think that
> p. 944 he was right to conclude that this was the effect of Slade J's dictum. As the paper title carries with it title to the strata below the surface, Bocardo must be deemed to be in possession of the subsurface strata too. There is no one else who is claiming to be in possession of those strata through Bocardo as the paper owner.

There was, therefore, a trespass; but how should damages be calculated? The statutory scheme set out a power of compulsory acquisition; and the correct approach was to apply general principles of compulsory acquisition law to the assessment of damages. Any value to the claimant's rights which was attributable to the scheme itself (the extraction of oil) had to be discounted. The relevant licence fee that would have been payable under the statutory scheme was assessed at £82.50. However, the Court of Appeal had concluded that if negotiating a licence, the parties would have been aware that lawyers are expensive and the defendants would have been generous to the claimants, settling for a fee of £1,000. This is very considerably lower than 9 per cent of the value of oil extracted which had been awarded by the first instance judge (£621,180, plus interest). The Supreme Court preferred the approach of the Court of Appeal, Lord Brown describing the £1,000 award as 'positively generous' ([92]). The statutory framework plainly had a decisive influence over the remedy awarded. The case nevertheless underlines that a trespass may be committed where there is no disturbance to the claimant's use and enjoyment of the land; and that a trespass which does not cause any loss may be thought to require damages on the basis of a reasonable user fee.

The right to bring an action in trespass in relation to drilling below property has been significantly adjusted by statute, in order to facilitate 'fracking'.[3] The rights created (and taken away) are very broadly defined:

Infrastructure Act 2015

> #### 43 Petroleum and geothermal energy: right to use deep-level land
>
> (1) A person has the right to use deep-level land in any way for the purposes of exploiting petroleum or deep geothermal energy.
>
> (2) Land is subject to the right of use (whether for the purposes of exploiting petroleum or deep geothermal energy) only if it is—
>
> (a) deep-level land, and
>
> (b) within a landward area.
>
> ...
>
> (4) Deep-level land is any land at a depth of at least 300 metres below surface level.

The general issue of 'negotiating damages' is considered in Chapter 9.

p. 945

2 Wrongful Interference with Goods: The Types and the Legislation

2.1 Key Legislation

Torts (Interference with Goods) Act 1977

> #### 1 Definition of 'wrongful interference with goods'
>
> In this Act 'wrongful interference', or 'wrongful interference with goods', means—
>
> (a) conversion of goods (also called trover),
>
> (b) trespass to goods,
>
> (c) negligence so far as it results in damage to goods or to an interest in goods,
>
> (d) subject to section 2, any other tort so far as it results in damage to goods or to an interest in goods
>
> [and references in this Act (however worded) to proceedings for wrongful interference or to a claim or right to claim for wrongful interference shall include references to proceedings by virtue of Part I of the Consumer Protection Act 1987 [or Part II of the Consumer Protection (Northern Ireland) Order 1987] (product liability) in respect of any damage to goods or to an interest in goods or, as the case may be, to a claim or right to claim by virtue of that Part in respect of any such damage].

The Torts (Interference with Goods) Act 1977 made a number of changes to the common law, as well as codifying the law in some respects. Although it abolished the action in detinue,[4] it did not create any new actions nor did it greatly simplify the law.

As can be seen from section 1 of the Act, a range of distinct actions at common law continues to protect interests in goods, and these actions are referred to as instances of 'wrongful interference with goods'. This includes negligence in relation to goods. For recent analysis of the whole field, contending that the area has come to be divided into intentional interferences in which liability is strict (trespass and conversion); and non-deliberate interferences in which liability is fault-based (negligence); see Simon Douglas, *Liability for Wrongful Interferences with Chattels* (Hart Publishing, 2011). The account in this chapter offers a more traditional picture, in which the law has not evolved to such a coherent position, particularly where trespass and conversion are concerned.

The traditional view is that **trespass to goods** involves direct and unjustified interference with goods, which are in the possession of the claimant. Examples include poisoning or beating animals, or scratching the paintwork of a vehicle. It is accepted that the criterion of 'directness' arose out of historical contingency, rather than logic or principle.

A. Hudson, 'Trespass to Goods', in N. E. Palmer and E. McKendrick (eds), *Interests in Goods* (2nd edn, London: Lloyds of London Press, 1998)

> Trespass [to goods] bears the marks of its early origins. It is constituted by a direct, immediate and unjustified interference with the possession of the chattels of another.

p. 946 ↵ **Conversion** by contrast involves actions which are inconsistent with the claimant's title to the goods. We define conversion more fully in the Section 3.

Trespass to goods is like all forms of trespass in its limitation to *direct* interferences[5] (though it has been suggested that the tort has more recently evolved to replace the 'directness' criterion with a requirement of 'intention' (Douglas, 105–11)). Since many (though not all) cases of trespass to goods involve damage, negligence frequently presents an alternative action, which is not confined to direct interference nor, of course, to intentional interferences. Therefore, the practical importance of trespass to goods is quite restricted, even though it may cover a wider range of interferences than conversion.

3 Conversion

3.1 General Definition and Distinctive Features

A 'conversion' is a deliberate dealing with a chattel in a manner that is seriously inconsistent with the claimant's title.

Distinctive Features

1. Although the defendant's dealing with the chattel must be deliberate, the interference with the claimant's title need not be. Liability is strict, and may catch even an entirely honest defendant (see further Section 3.2).[6]
2. As with any tort, the nature of the protected interest should be reflected in the remedies available. In an appropriate case, a court may in its discretion order the return of a converted chattel to the claimant. But this remedy is not available *as of right* even where the defendant retains possession of the goods. In this and certain other ways, conversion suffers from inconsistency. It is accused of performing too many roles, none of them wholly satisfactorily. In particular, it has been argued that the process of returning goods to those who have the appropriate interest in them ought to be achieved through the law of property, *not* through the law of obligations.[7]

Andrew Tettenborn, 'Conversion, Tort and Restitution', in N. Palmer and E. McKendrick, *Interests in Goods*, at 825

> p. 947 ... the nub of the problem is that no-one has ever sat down seriously to consider what conversion is *for*. True, it is classified as a tort: but that is only for historical reasons and for lack of anywhere else to file it. In fact it is trying to do not one, but three very different jobs at the same time; it is (1) standing in as a kind of surrogate *vindication*, allowing owners to get ↵ back their property or its value from a wrongful possessor (call this the 'recovery function'); (2) acting to compensate owners for losses caused by past misdealings with their property (tort proper); and (3) on occasion reversing unjust enrichment arising from the property or its proceeds which have got into the wrong hands (restitution).

Tettenborn suggests that the three functions of conversion need to be kept distinct, in order to avoid falling into error, and indeed to avoid hardship to 'innocent' converters caught by the strictness of its liability.

The third function specified by Tettenborn in this extract is restitution. It is in the nature of conversion that the defendant often has an opportunity to *use* the chattel in a productive way,[8] and in this sense may be 'unjustly enriched'. The relationship between conversion, and 'unjust enrichment', is awkward, because conversion (like all torts) is a 'wrong', while 'unjust enrichment' need not involve a wrong at all, but seeks to correct transfers which should not have occurred. This issue arises particularly in respect of available 'remedies' (later in this chapter).[9]

3.2 Standard of Liability

Liability in conversion is strict, in that there need not be any knowledge of inconsistency with the claimant's rights. In fact, there need not be any knowledge of the claimant's rights at all, and conversion may be committed through entirely faultless conduct. Nevertheless, intention *to assert dominion over the goods* is required.

To explain this further, we need to explore the role of 'deliberate dealing', which formed a part of our general definition in Section 3.1.

Lord Nicholls' Analysis of 'Deliberate Dealing' in *Kuwait Airways*

In the next extract, Lord Nicholls identifies three elements in the general definition of a 'conversion'.

Lord Nicholls, *Kuwait Airways v Iraqi Airways Co (Nos 4 and 5)*
[2002] 2 AC 883

> 39 … Conversion of goods can occur in so many different circumstances that framing a precise definition of universal application is well nigh impossible. In general, the basic features of the tort are threefold. First, the defendant's conduct was inconsistent with the rights of the owner (or other person entitled to possession). Second, the conduct was deliberate, not accidental. Third, the conduct was so extensive an encroachment on the rights of the owner as to exclude him from use and possession of the goods. The contrast is with lesser acts of interference. If these cause damage they may give rise to claims for trespass or in negligence, but they do not constitute conversion.

p. 948 ↵ Peter Cane has suggested that some trouble is potentially caused by the way that Lord Nicholls expressed the second general feature of conversion: the dealing with the goods must be 'deliberate, not accidental'.

Lord Nicholls' requirement for deliberate dealing refers to the *quality of the dealing with the defendant's goods*. It is this, not anything else, which must be deliberate rather than accidental. Thus, the taking of someone else's goods by mistake (or 'accidentally'), *may* amount to a conversion. For example, if I take your goods believing them to be mine, I have done so 'by accident'; yet at the same time I 'deliberately' act so as to assert dominion over the goods. This means essentially that I treat them as my own. In such a case, I am particularly likely to treat them as my own, because I think that they *are* my own. This example shows that dealing may be both deliberate and accidental, in different senses.

Therefore, Lord Nicholls did create scope for confusion when he used the word 'accidental' in contrast to 'deliberate'. An accidental taking of the claimant's chattel may still be a conversion, provided I intend to exercise dominion over it.

The opposite sort of case may also exist. This is where the *taking or possession* of the chattel is deliberate, but the defendant does *not* intend to exercise dominion over it. This is not a conversion, though it may well be a trespass. Lord Nicholls also emphasized this point in the *Kuwait Airways* case. He described the lack of intent as relevant to the question whether the owner is excluded from possession at all.

Lord Nicholls, *Kuwait Airways v Iraqi Airways Co (Nos 4 and 5)*
[2002] UKHL 19; [2002] 2 AC 883

> 14 Whether the owner is excluded from possession may sometimes depend upon whether the wrongdoer exercised dominion over the goods. Then the intention with which acts were done may be material. The ferryman who turned the plaintiff's horses off the Birkenhead to Liverpool ferry was guilty of conversion if he intended to exercise dominion over them, but not otherwise: see *Fouldes v Willoughby*. ...

In *Fouldes v Willoughby* (1841) 8 M & W 540, referred to by Lord Nicholls, the plaintiff had paid for his two horses to be transported across the River Mersey on the Birkenhead ferry. The defendant ferryman refused to transport them. He removed them from the ferry and turned them loose. This was not a conversion:

Lord Abinger, *Fouldes v Willoughby*

> It is a proposition familiar to all lawyers, that a simple asportation of a chattel, without any intention of making any further use of it, although it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion. I had thought that the matter had been fully discussed, and this distinction established, by the numerous cases which have occurred on this subject. ... I think that the learned judge was wrong, in telling the jury that the simple fact of putting these horses on the shore by the defendant, amounted to a conversion of them to his own use. In my opinion, he should have added to his direction, that it was for them to consider what was the intention of the defendant in so doing. If the object, and whether rightly or wrongly entertained is immaterial, simply
> p. 949 was to adduce the plaintiff ↵ to go on shore himself, and the defendant, in furtherance of that object, did the act in question, it was not exercising over the goods any right inconsistent with, or adverse to, the rights which the plaintiff had in them. ...
>
> In order to constitute a conversion, it is necessary either that the party taking the goods should intend some use to be made of them, by himself or by those for whom he acts, or that, owing to his act, the goods are destroyed or consumed, to the prejudice of the lawful owner. As an instance of the latter branch of this definition, suppose, in the present case, the defendant had thrown the horses into the water, whereby they were drowned, that would have amounted to an actual conversion; or as in the case cited in the course of argument, of a person throwing a piece of paper into the water for, in these cases, the chattel is changed in quality, or destroyed altogether. But it has never yet been held that the single act of removal of a chattel independently of any claim over it, either in favour of the party himself or anyone else, amounts to a conversion of the chattel. In the present case, therefore, the simple removal of the horses by the defendant for a purpose wholly unconnected with any least denial of the right of the plaintiff to the possession and enjoyment of them, is no conversion. ...

This is an example where there is no conversion because the defendant does not mean by his actions to assert ownership or a right to possession over the horses. This case illustrates the importance of intention to the tort of conversion.[10]

But does this mean, as Lord Nicholls proposes, that the intention of the defendant is relevant to the question of *whether the claimant was deprived of his or her right to possession at all*? Peter Cane has argued that Lord Nicholls was *not* correct in this respect.

Peter Cane, 'Causing Conversion' (2002) 118 LQR 544, at 546

> An obvious problem with this definition[11] is that it turns independent elements of the Clerk and Lindsell definition into interdependent elements. Under the definition, 'inconsistent dealing' (exercising dominion) is one element of conversion, and depriving the owner of possession is another. The concept of possession relates to a physical state of affairs, and the defendant's state of mind is irrelevant to whether the defendant's conduct has deprived the owner of, or excluded the owner from, possession.

The Clerk and Lindsell definition referred to by both Lord Nicholls and Peter Cane was as follows:

***Clerk and Lindsell on Torts* (17th edn, London: Sweet & Maxwell, 1995), 636, para13–12**[12]

> … conversion is an act of deliberate dealing with a chattel in a manner inconsistent with another's right whereby that other is deprived of the use and possession of it.

p. 950 ↵ What conversion protects is the **right to possession** and not simple physical possession, as Cane implies. Otherwise, the action of the ferryman in *Fouldes v Willoughby*—which deprived the claimant of physical possession—would have been a conversion. Dealing is *only* inconsistent with rights to possession if the dealing 'means' that the defendant has dominion over the goods. The 'defendant's state of mind' may be irrelevant, as Cane says, to whether the owner is excluded from *physical* possession. But it is *not* irrelevant to the prior requirement, that the manner of dealing should be (in the words of the Clerk and Lindsell definition) 'inconsistent with another's right'.[13]

This point about intention and the definition of conversion was important to the decision in *Kuwait Airways* itself. The facts of the case also demonstrate that intention can often be construed from actions. For example, someone who repaints a chattel in their own colours, or improves it in some way, is almost certainly asserting 'dominion' over it.

Kuwait Airways Corporation v Iraqi Airways Corporation (Nos 4 and 5) [2002] UKHL 19; [2002] 2 AC 883

In August 1990, Iraq invaded Kuwait, and passed resolutions proclaiming the integration of Kuwait into Iraq. The defendant was ordered by the Iraqi government to fly ten of the claimant's passenger aircraft to Iraq. These were incorporated into the defendant's fleet and used for its own flights. On 11 January 1991, the claimant issued a writ claiming the delivery up of its aircraft with consequential damages for the defendant's unlawful interference with them, alternatively consequential damages in the amount of the value of the aircraft, relying on section 3 of the Torts (Interference with Goods) Act 1977, and common law.

No state recognized the sovereignty of Iraq over the territory of Kuwait. Military action was commenced against Iraq. In the conflict, the subsequent fortunes of the aircraft themselves were mixed. Four of the ten were destroyed by bombing. These planes, stationed at Mosul, are referred to as 'the Mosul four'. The remaining six planes were evacuated to Iran between 15 January and 4 February 1991 (shortly after the writ was issued). These are 'the Iran six'. They were returned by Iran to the claimant in 1992, on payment to Iran of US$20 million.

Not surprisingly, the applicable law for this case was a real issue. The writ was issued before the enactment of the Private International Law (Miscellaneous Provisions) Act 1995. That Act would require that the law of the jurisdiction in which the tort was committed would be applied. Therefore, this case would now be approached entirely as a matter of Iraqi law. But before that, common law required that a 'double actionability rule' should be applied. This required that the acts must be tortious according to the law of *both* Iraq *and* England. The House of Lords disregarded the 'repugnant' Iraqi Resolution 369 which purported to extinguish Kuwait as an independent state. Disregarding this Resolution, the acts would amount to 'usurpation' (the relevant wrong under Iraqi law). The remaining questions (in which we are interested here) are whether the acts were *also* tortious under English law (this section); and what damages could be claimed (Section 3.5).

In this case, restoration of the aircraft was not in issue. The Mosul four could not be restored because they had been destroyed. The Iran six had already been reclaimed, but the claimant had paid $20 million to a third party in order to retrieve them.[14]

p. 951 ↵ The main judgment in the case was delivered by Lord Nicholls. Lord Scott dissented in part. The other Lords agreed with Lord Nicholls, though with some additional comments.

We have already extracted some of the crucial elements of Lord Nicholls' judgment so far as they relate to the general requirements of the tort of conversion. In due course (when we consider remedies) we will extract some important comments relating to causation and damages. These were the most difficult issues in the case. The conclusion that the acts of the defendant did in fact amount to a conversion was relatively brief:

Lord Nicholls, *Kuwait Airways v Iraqi Airways (Nos 4 and 5)*

> 43 Here, on and after 17 September 1990 IAC was in possession and control of the ten aircraft. This possession was adverse to KAC. IAC believed the aircraft were now its property, just as much as the other aircraft in its fleet, and it acted accordingly. It intended to keep the goods as its own. It treated them as its own. It made such use of them as it could in the prevailing circumstances, although this was very limited because of the hostilities. In so conducting itself IAC was asserting rights inconsistent with KAC's rights as owner. This assertion was evidenced in several ways. In particular, in September 1990 the board of IAC passed a resolution to the effect that all aircraft belonging to the (dissolved) KAC should be registered in the name of IAC and that a number of ancillary steps should be taken in relation to the aircraft. In respect of nine aircraft IAC then applied to the Iraqi Directorate of Air Safety for certificates of airworthiness and reregistration in IAC's name. IAC effected insurance cover in respect of five aircraft, and a further four after the issue of the writ. Six of the aircraft were overpainted in IAC's livery. IAC used one aircraft on internal commercial flights between Baghdad and Basra and for training flights. The two Boeing 767s were flown from Basra to Mosul in mid-November 1990.
>
> 44 Mance J concluded that in these circumstances IAC had wrongfully interfered with all ten aircraft. In the Court of Appeal Brooke LJ said, at pp 915C–D, para 74:
>
> 'The board resolution makes it completely clear that as soon as RCC Resolution 369 came into effect IAC resolved to treat these ten aircraft as their own and to exercise dominion over them in denial of KAC's rights, and this continuing usurpation and conversion of KAC's aircraft subsisted right up to the issue of the writ in this action by which KAC demanded the return of all these aircraft.'
>
> I agree. IAC's acts would have been tortious if done in this country.

The crucial thing is that IAC was (as Lord Nicholls put it) 'asserting rights inconsistent with KAC's rights as owner', and this was evidenced in various ways. In this case, which did not involve actual taking by the defendant, the *meaning* of the defendant's possession of the aircraft was particularly significant. It was irrelevant that IAC believed itself to *be* the lawful owner of the aircraft, under Iraqi law.

In *Kuwait Airways*, the defendant was liable because it 'manifested' an 'assertion of rights or dominion over the goods'.

3.3 Which Goods Can Be 'Converted'?

Only chattels (not land) may be 'converted'. Furthermore, only 'tangible' property (things with physical form
p. 952 that may be 'touched') can be converted. Although the latter distinction ↵ has been criticized as outdated and arbitrary,[15] it was confirmed by the House of Lords in *OBG v Allan* [2007] UKHL 21; [2008] 1 AC 1. Here, invalidly appointed receivers of a company were not liable in conversion for interfering with the contractual interests of the company (by bringing those contracts to an end and seeking settlements against contracting

parties). On the other hand, a *share certificate*, for example, *is* tangible property, as also is a cheque, so that these chattels may be converted. Bearing in mind that consequential losses are recoverable (and potentially disgorgement damages and restitution too), the commercial significance of the tort of conversion is considerable, even despite the decision not to extend it to 'intangibles'.[16]

OBG v Allan
[2007] UKHL 21

Lord Hoffmann

99 By contrast with the approving attitude of Cleasby B [in *Fowler v Hollins* (1872) LR 7 QB 616] to the protection of rights of property in chattels, it is a commonplace that the law has always been very wary of imposing any kind of liability for purely economic loss. The economic torts which I have discussed at length are highly restricted in their application by the requirement of an intention to procure a breach of contract or to cause loss by unlawful means. Even liability for causing economic loss by negligence is very limited. Against this background, I suggest to your Lordships that it would be an extraordinary step suddenly to extend the old tort of conversion to impose strict liability for pure economic loss on receivers who were appointed and acted in good faith. Furthermore, the effects of such a change in the law would of course not stop there. *Hunter v Canary Wharf Ltd* [1997] AC 655, 694 contains a warning from Lord Goff of Chieveley (and other of their Lordships) against making fundamental changes to the law of tort in order to provide remedies which, if they are to exist at all, are properly the function of other parts of the law.

100 As to authority for such a change, it hardly needs to be said that in English law there is none. I need go no further than Halsbury's Laws of England, 4th ed reissue vol 45(2) (1999), para 547, which says 'The subject matter of conversion or trover must be specific personal property, whether goods or chattels.' The Law Revision Committee was invited, in 1967, to consider whether any changes are desirable in the law relating to conversion and detinue. In its 18th Report (Conversion and Detinue) in 1971 (Cmnd 4774) the committee treated them both as confined to wrongful interference with chattels. They made various recommendations for changes in the law but none for the extension of conversion to intangible choses in action. On the contrary, the Torts (Interference with Goods) Act 1977, which was passed as a result of their recommendations, defined wrongful interference with goods to include conversion of goods (section 1) and defined goods in section 14(1) to include 'all chattels personal other than things in action and money'.

...

p. 953

Lord Brown

321 In common with Lord Hoffmann and Lord Walker I too would regard the expansion of the tort of conversion to cover the appropriation of things in action, as proposed by Lord Nicholls, to involve too radical and fundamental a change in the hitherto accepted nature of this tort (see particularly the Torts (Interference with Goods) Act 1977) to be properly capable of achievement under the guise of a development of the common law. Lord Nicholls suggests that this would represent merely 'a modest but principled extension of the scope of the tort'. I see it rather differently, as no less than the proposed severance of any link

> whatever between the tort of conversion and the wrongful taking of physical possession of property (whether a chattel or document) having a real and ascertainable value. Indeed, I respectfully question whether such a proposed development in the law ought in any event to be welcomed. I recognise, of course, that the tort has long since been extended to encompass a variety of documents, not merely documents of title and negotiable instruments but also any business document which in fact evidences some debt or obligation. But to my mind there remains a logical distinction between the wrongful taking of a document of this character and the wrongful assertion of a right to a chose in action which properly belongs to someone else. One (the document) has a determinable value as at the date of its seizure. The other, as so clearly demonstrated by this very case (OBG), does not. It is one thing for the law to impose strict liability for the wrongful taking of a valuable document; quite a different thing now to create strict liability for, as here, wrongly (though not knowingly so) assuming the right to advance someone else's claim.

Similar issues were more recently considered by the Court of Appeal in *Your Response Ltd v Datateam Media Ltd* [2014] EWCA Civ 281. The claim was for sums due under a contract for management of an electronic database, in which the data manager argued that it held rights (in the form of a lien) over the database pending payment of its fees, so that it was entitled to withhold data until payment. The key issue of law was whether it is possible to exercise a lien over intangible property. The judge held that such a lien is possible, based upon the analogy between electronic data, and traditional book-keeping. But as the Court of Appeal pointed out, he was not asked to consider the case of *OBG v Allan*.

In the Court of Appeal, the claim was dismissed. A common law lien permitted a bailee in possession of goods to refuse to redeliver them to the bailor until paid (*Tappenden v Artus* [1964] 2 QB 185). This, however, required 'actual possession of goods'. For this reason, the court considered whether it is possible to have 'actual possession of' an intangible. Following *OBG v Allan*, the starting point was that 'the essence of conversion is a wrongful interference with the possession of tangible property'; and that common law draws a sharp distinction between tangible and intangible property. Four arguments were made against this conclusion (set out at [18]), but all were rejected. For our purposes the most significant was the second:

Moore-Bick LJ, *Your Response v Datateam Business Media Ltd*

> 18. Mr Cogley put forward four separate arguments in opposition to that analysis. The first was that the database in the present case should be regarded as a physical object, because it exists in a physical form on the data manager's servers. The second was that the essence of possession is physical control coupled with an intention to exclude others and that a person can properly be said to possess something if he is able to exercise complete control over access to it. An example might be the possession of goods in a warehouse to which there is only one key. The third was that a database can be regarded as a document and can be treated as if it were one for all purposes. The fourth was that there is a distinction to be drawn between choses in action, properly so called, and other kinds of intangible property, such as an electronic database, to which the principles enunciated on *OBG v Allan* do not apply.

p. 954

The second argument identified by Moore-Bick LJ suggests that 'possession' should be approached in terms of 'practical control', so as to include intangibles. This was, however, rejected.

> 23. Although an analogy can be drawn between control of a database and possession of a chattel, I am unable to accept Mr Cogley's argument. It is true that practical control goes hand in hand with possession, but in my view the two are not the same. Possession is concerned with the physical control of tangible objects; practical control is a broader concept, capable of extending to intangible assets and to things which the law would not regard as property at all. The case of goods stored in a warehouse, the only key to which is held by the bailee, does not in my view undermine that distinction, because the holder of the key has physical control over physical objects. In the present case the data manager was entitled, subject to the terms of the contract, to exercise practical control over the information constituting the database, but it could not exercise physical control over that information, which was intangible in nature. For the same reason the withholding of the database by the data manager could not, even if wrongful, constitute the tort of conversion.

As to the fourth argument, the Court of Appeal reiterated the traditional common law position that there is no 'tertium quid' or third kind of property, distinct from chattels on the one hand, and 'choses in action' on the other. Moore-Bick LJ, for his part, thought the case for changing this position and recognizing 'a third category of intangible property', to be 'powerful', referring to the arguments of Green and Randall. But he also considered that it would be inconsistent with the decision in *OBG v Allan* to develop the law in this way ([27]). The other two judges agreed that this step could not be taken by the Court of Appeal; but also doubted that it should be taken.

3.4 What Interest in the Chattels Must the Claimant Have?

Sarah Worthington, *Personal Property Law: Text and Materials* (Oxford: Hart Publishing, 2000), 574

> … a claimant wishing to sue in conversion must have the right to possession at the time the conversion takes place. If the claimant cannot show this, then the action will fail. However, the claimant does not have to show that he has the ultimate or the best right to possession; all he has to show is that he has a better right than the defendant. It follows that bailees and 'finders' may be able to sue in conversion if the bailed or found property is taken from them by someone with no better right to it than they have.

p. 955

What is a 'Right to Possession'?

The legal concept of 'possession' is not the same as the lay meaning of 'possession'. Rights to possess a chattel may vary depending on the purpose of possession, and may be relative to the rights of others. (See also Green and Randall, Chapter 4.)

F. H. Lawson and B. Rudden, *The Law of Property* (3rd edn, Oxford: Clarendon Press, 2002), 64–5

> Where chattels are concerned, the law's approach reduces costs in the resolution of disputes by protecting possession without requiring the person so protected to prove ownership. It is up to the defendant to justify the taking or detention of the thing. The presumption also imposes a respect for possession, however it was obtained. If someone finds a ring, or a thief steals a bicycle, each is protected against anyone who takes it without consent—except, of course, the person who had prior possession and who lost the ring or had the bicycle stolen and so on.
>
> In more technical language, we may say that there are rights to possess and rights which flow from having acquired possession. For the first phrase English (and American) law tends to use the word 'title': your title to some asset indicates your right to possess it. It is possible for there to be two or more titles to a thing, one being stronger than another. If you make a ring from your own hair, there is no doubt whatever that it is yours and that you have a better right to it than anyone else. If you lose it, you can claim it from the finder. But in the absence of any claim by you, the finder is treated as having a title good against everyone. You have a better right to possess the thing than does the finder, but the finder has a better right to possess it than does anyone else.

The Relative Nature of Possessory Rights

Lawson and Rudden make clear that a finder—or even a thief—may acquire rights to possess a chattel, good against everyone except the person who lost the goods.

Parker v British Airways Board [1982] QB 1004

A passenger found a gold bracelet in an executive lounge occupied by the defendant. He handed it to an employee of the defendant and requested that it should be returned to him, if the owner could not be found. It was not claimed, and the defendant sold it for £850.

The passenger successfully sued the defendant in conversion, and recovered £850 as damages.

Donaldson LJ, *Parker v British Airways Board*
[1982] QB 1004

> ...
>
> **Rights and obligations of the finder**
>
> 1 The finder of a chattel acquires no rights over it unless (a) it has been abandoned or lost and (b) he takes it into his care and control.
>
> p. 956 2 The 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.
>
> 3 Subject to the foregoing and to point 4 below, a finder of a chattel, whilst not acquiring any absolute property or ownership in the chattel, acquires a right to keep it against all but the true owner or those in a position to claim through the true owner or one who can assert a prior right to keep the chattel which was subsisting at the time when the finder took the chattel into his care and control.
>
> 4 Unless otherwise agreed, any servant or agent who finds a chattel in the course of his employment or agency and not wholly incidentally or collaterally thereto and who takes it into his care and control does so on behalf of his employer or principal who acquires a finder's rights to the exclusion of those of the actual finder.
>
> 5 A person having a finder's rights has an obligation to take such measures as in all the circumstances are reasonable to acquaint the true owner of the finding and present whereabouts of the chattel and to care for it meanwhile.

Theft

Despite the proviso expressed by Donaldson LJ in the extract above, that a finder who acts with dishonest intent will acquire only very limited rights over a chattel, claimants who have (on the balance of probabilities) acquired title through *theft* have nevertheless been successful in actions to recover stolen property from the police (provided the police have no statutory powers to retain them): *Costello v Chief Constable of Derbyshire Constabulary* [2001] 1 WLR 1437; *Gough v Chief Constable of West Midlands Police* [2004] EWCA Civ 206. The claimants in these cases would not of course be able to retain the goods if the lawful owner of the goods could be found.

3.5 What Amounts to a Conversion?

Andrew Tettenborn, 'Damages in Conversion—The Exception or The Anomaly?' (1993) 52 CLJ, at 129–30

> Put shortly D commits conversion against P where, without legal justification, he does any of (i) to (vii) below in relation to a thing belonging to P:
>
> (i) Being in possession of the thing, he fails on demand to return it to P.
>
> (ii) He takes it, whether from P or from a third party.
>
> (iii) He receives it from a third-party T who has no title to it.
>
> (iv) He physically transfers it to T, eg by sale or gift, or otherwise acts so as to destroy P's title to it.
>
> (v) He destroys it.
>
> (vi) Being a bailee, he wrongfully loses it or allows it to be destroyed.
>
> (vii) Having obtained it lawfully, he wrongfully keeps or uses it.
>
> p. 957 ↵ There are two further important points on liability in conversion generally. First, it must be borne in mind that liability is prima facie strict, so that in any of the above situations D is liable in damages whether or not he knew the goods he was dealing with were P's or that he was otherwise infringing P's rights. Secondly, it should be remembered that dealings with another's goods may involve D in two or more acts of conversion. In any such case, P can (subject to the law of limitation of actions) rely on any individual conversion that he may choose.

3.6 What Are the Remedies?

Return of Goods

One would have thought, since conversion protects rights of possession, that the return of goods would, where this is possible, be available as of right. But this is not the case.

Where the defendant is still in possession of the 'converted' goods, the claimant may seek their return. But the limited scope for recovery as a remedy shows that conversion, being merely a tort, provides only a clumsy and limited mechanism for enforcing (or vindicating) proprietary rights.[17]

Historical Origins

At common law, recovery of goods *could* sometimes be achieved through the action in detinue. But even detinue carried an alternative in the form of damages. Recovery of goods could not be achieved through the action on the case which began as 'trover', and became conversion.

Nick Curwen, 'The Remedy in Conversion: Confusing Property and Obligation' (2006) 26 LS 570, at 571–2

> The failure of the common law to develop an effective action for the recovery of goods has both stunted the growth of a distinct law of property in relation to goods and distorted the principles of the law of tort. The problem goes back to the earliest days of the common law. Detinue was an ancient action brought for the recovery of goods. The remedy was an order that the defendant must return the goods or pay their full value to the claimant. The claim was proprietary in nature, a demand for recovery, but the remedy was personal rather than real because the defendant had the option of paying damages in lieu of restitution.
>
> ... Trover was an action in trespass on the case for the conversion of goods ... Brian Simpson[18] ... relates that in the sixteenth century it was not possible for two types of action to exist on the same set of facts so pleaders had to frame their action so as to avoid any suggestion that detinue was the appropriate action. If detinue lay, that prevented an action in conversion. In the early cases, going back to the late fifteenth century, it was held that if the defendant changed the nature of the goods
> p. 958 then that changed the property in them. This ↵ development enabled the new action to replace completely detinue but at the expense of perpetrating an obvious fiction.
>
> Eventually the rule against overlapping actions disappeared and it was accepted that the claimant did not lose property in the goods until the defendant had satisfied the court order by paying the full value of them to the claimant. But the fiction had done its work and the action remained in essence a tort remediable at common law by compensation. In effect, the claimant was forced to waive their proprietary claim and sue for damages. There was no scope, as in detinue, for ordering restitution in specie or, in the alternative, paying damages.

The extract above explains how the modern tort of conversion emerged. Further confusion was introduced by abolishing detinue, and shifting some of its (already compromised) functions to the tort of conversion. This was achieved by the Torts (Interference With Goods) Act 1977.

Torts (Interference With Goods) Act 1977

> **2 Abolition of detinue**
>
> (1) Detinue is abolished.
>
> (2) 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).
>
> **3 Form of judgment where goods are detained**
>
> (1) In proceedings for wrongful interference against a person who is in possession or in control of the goods relief may be given in accordance with this section, so far as appropriate.
>
> (2) The relief is—
>
> (a) an order for delivery of the 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.
>
> ...

By section 3(1), the court *may* order delivery up (section 3(1)(a)). If the court does not order delivery up, the claimant may choose between the other remedies; but if (b) is selected, the *defendant* may elect whether to return the goods, or pay their value.

Damages

Damages are available both:

1. where the defendant retains the chattel, but an order for recovery is not made; and
2. where the defendant no longer retains the chattel.

p. 959 ↵ In either case, the basic measure has generally been accepted to be *the value of the goods at the date of conversion*; damages in respect of consequential loss will also be available where appropriate. However, the judgment in *Kuwait Airways* may signal a change to come.

In either case, title to the goods is extinguished when the award of damages is satisfied (or payment made in satisfaction of a final settlement): section 5 of the Torts (Interference with Goods) Act 1977.

In a case where the defendant refuses to return the goods, then the value of the goods may be an appropriate measure. But it has been argued that a measure of damages that reflects the *value of the goods* rather than the loss caused to the claimant—particularly given that consequential losses are recoverable in any event—is unfair to 'honest converters' who do not retain the goods. It has been argued that beyond the action against converters who *retain* the chattel (Section 3), damages assessed by reference to the value of the goods cannot generally be justified. As with other torts, compensatory damages should be assessed by reference to *what the claimant has lost*. On the other hand, the full measure of damages related to the value of the goods might be justified in particular circumstances, for example, if the converter is dishonest.[19]

The general measure of damages, and the case for treating dishonest converters differently, were discussed in the case of *Kuwait Airways*. We now turn to the important issues in that case surrounding damages.

Kuwait Airways: Damages Issues

We set out the facts of *Kuwait Airways* earlier (see Section 3.2). As we saw, there was no possibility of recovering the aircraft themselves in that case. Some had been destroyed, others had been recovered by the claimant from a third party (Iran) for a large payment.

The Basic Measure of Damages in Conversion

As we said earlier, the basic measure of damages in conversion is usually based on the value of the converted goods at the date of conversion. After a wide review of the authorities, Lord Nicholls decided that the 'value measure' is intended to reflect the claimant's loss. This is controversial in itself. He then went on to say that, sometimes, the claimant's loss is not properly reflected in the value measure; and that when this is the case, the court should assess damages according to *the loss suffered*.

Lord Nicholls, *Kuwait Airways v Iraqi Airways (Nos 4 and 5)*
[2002] 2 AC 883

> 67 … The fundamental object of an award of damages in respect of this tort, as with all wrongs, is to award just compensation for loss suffered. Normally ('prima facie') the measure of damages is the market value of the goods at the time the defendant expropriated them. This is the general rule, because generally this measure represents the amount of the basic loss suffered by the plaintiff owner. He has been dispossessed of his goods by the defendant. Depending on the circumstances some other measure, yielding a higher or lower amount, may be appropriate. The plaintiff may have suffered additional damage consequential on the loss of his goods. Or the goods may have been returned.
>
> p. 960 68 This approach accords with the conclusion of the Law Reform Committee in its 18th report (Conversion and Detinue) (1971) (Cmnd 4774) that the general rule as respects the measure of damages for wrongful interference should be that the plaintiff is entitled to recover the loss he has suffered. The committee considered this conclusion was 'right in principle', and added, in paragraph 91:
>
> 'In many cases the value of the chattel itself will either represent this loss or form an important element in its calculation; but consideration of the value of the chattel should not be allowed to obscure the principle that what the plaintiff is entitled to recover is his true loss.'

Causation

Where the 'Iran six' were concerned, significant questions arose surrounding the operation of causal tests. The defendants had used the planes and treated them as their own. However, even if the defendants had not put the aircraft to use (or transported them to Iran for safe keeping), the claimants would still not have had possession of the planes. The initial taker was the state of Iraq. Could it then be said that the defendant had not 'caused' the loss of the planes? Lord Nicholls rejected this argument.

80 The existing principle of strict liability as described above is deeply ingrained in the common law. It has survived at least since the days of Lord Mansfield in *Cooper v Chitty* (1756) 1 Burr 20. The hardship it may cause to those who deal innocently with a person in possession of goods has long been recognised. Blackburn J noted this in the leading case of *Fowler v Hollins* (1875) LR 7 HL 757, 764. The hardship arises especially for innocent persons who no longer have the goods. There has been some statutory amelioration of the principle, in the Factors Acts and elsewhere, but in general the principle endures.

81 Consistently with this principle, every person through whose hands goods pass in a series of conversions is himself guilty of conversion and liable to the owner for the loss caused by his misappropriation of the owner's goods. His liability is not diminished by reason, for instance, of his having acquired the goods from a thief as distinct from the owner himself. In such a case, it may be said, looking at the successive conversions overall, the owner is no worse off as a result of the acts of the person who acquired the goods from the thief. Such a person has not 'caused' the owner any additional loss.

82 In one sense this is undoubtedly correct. The owner had already lost his goods. But that is really nothing to the point for the purposes of assessing damages for conversion. By definition, each person in a series of conversions wrongfully excludes the owner from possession of his goods. This is the basis on which each is liable to the owner. That is the nature of the tort of conversion. The wrongful acts of a previous possessor do not therefore diminish the plaintiff's claim in respect of the wrongful acts of a later possessor. Nor, for a different reason, is it anything to the point that, absent the defendant's conversion, someone else would wrongfully have converted the goods. The likelihood that, had the defendant not wronged the plaintiff, somebody would have done so is no reason for diminishing the defendant's liability and responsibility for the loss he brought upon the plaintiff.

83 Where, then, does this leave the simple 'but for' test in cases of successive conversion? I
p. 961 suggest that, if the test is to be applied at all, the answer lies in keeping in mind, as I have said, that each person in a series of conversions wrongfully excludes the owner from possession of his goods. The exclusionary threshold test is to be applied on this footing. Thus the test calls for consideration of whether the plaintiff would have suffered the loss in question had he retained his goods and not been unlawfully deprived of them by the defendant. The test calls for a comparison between the owner's position had he retained his goods and his position having been deprived of his goods by the defendant. Loss which the owner would have suffered even if he had retained the goods is not loss 'caused' by the conversion. The defendant is not liable for such loss.

...

85 For these reasons I consider KAC's claims in respect of the Iran Six do not fail at the threshold stage. Had KAC not been unlawfully deprived of its goods by IAC KAC would not have suffered any of the heads of loss it is now claiming. Had KAC retained possession of the Iran Six, the aircraft would not have been evacuated to Iran.

As we can see from the last sentence of this extract (and also from para [83]), the question is not, 'would the claimant have been deprived of possession "but for" the acts of the defendant?'; it is rather, 'would the claimant have suffered any of these heads of loss, had the claimant retained possession?' The 'but for' test does not apply in the same way in conversion as it does in any other tort. But to apply it in the usual manner would be inconsistent with the logic of the tort.

Remoteness of Damage

A significant issue arose concerning the extent of damages for which the defendants would be liable in respect of the conversion of the Iran six, since the claimants used the temporary unavailability of this part of its fleet (which had not been destroyed) as the occasion for substantial restructuring with new aircraft. As we learned in Chapter 4, rules of 'remoteness of damage' ask which losses are fairly attributable to the tort of the defendant.

> 103 I have already mentioned that, as the law now stands, the tort of conversion may cause hardship for innocent persons. This suggests that foreseeability, as the more restrictive test, is appropriate for those who act in good faith. Liability remains strict, but liability for consequential loss is confined to types of damage which can be expected to arise from the wrongful conduct. You deal with goods at the risk of discovering later that, unbeknown to you, you have not acquired a good title. That is the strict common law principle. The risk is that, should you not have acquired title, you will be liable to the owner for the losses he can expect to have suffered as a result of your misappropriation of his goods. That seems the preferable approach, in the case of a person who can prove he acted in the genuine belief the goods were his. A person in possession of goods knows where and how he acquired them. It is up to him to establish he was innocent of any knowing wrongdoing. This is the approach Parliament has taken in section 4 of the Limitation Act 1980.
>
> 104 Persons who knowingly convert another's goods stand differently. Such persons are acting dishonestly. I can see no good reason why the remoteness test of 'directly and naturally' applied in cases of deceit should not apply in cases of conversion where the defendant acted dishonestly.

p. 962 ↵ Lord Nicholls here introduces a division in the remoteness test applying to consequential losses in conversion. The 'negligence' measure (foreseeability) applies to innocent conversion. The 'intentional' measure (directness) applies to dishonest conversion. The same principles ought, if correct, to apply in other torts (such as battery, considered in Chapter 2) which may be committed either culpably (with intent as to the wrongful element), or not.

Gain-based Awards

The claimants in this case had not argued for a gain-based award. But Lord Nicholls gave a clear signal that he might have made such an award, if pleaded. There were two different elements to his discussion of a gain-based award. The first relates to restitution for unjust enrichment; the second to 'user damages' for the tort.

Unjust Enrichment

> 79 … Vindication of a plaintiff's proprietary interests requires that, in general, all those who convert his goods should be accountable for *benefits* they receive. They must make restitution to the extent they are unjustly enriched. The goods are his, and he is entitled to reclaim them and any benefits others have derived from them. Liability in this regard should be strict subject to defences available to restitutionary claims such as change of position: see *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548. Additionally, those who act dishonestly should be liable to make good any *losses* caused by their wrongful conduct. Whether those who act innocently should also be liable to make good the plaintiff's losses is a different matter. A radical reappraisal of the tort of conversion along these lines was not pursued on these appeals. So I shall say nothing more about it.

As Lord Nicholls says, this suggestion is 'radical'. It is more far-reaching than an adjustment to the measure of damages. It treats the *basis* of the claim in conversion as being unjust enrichment, requiring restitution; with an additional liability (for losses caused) which could potentially be applied to dishonest converters only. This hints at a radical reappraisal of the action in conversion. Loss-based damages would be *additional* to restitution; and they may be available only in cases of dishonest conversion.

'User Damages'

Here, Lord Nicholls said that he might have made an award of damages based on the benefit derived by the defendants from 'use' of the aircraft.

The Iran Six: 'user damages'

87 I have noted that the fundamental object of an award of damages for conversion is to award just compensation for loss suffered. Sometimes, when the goods or their equivalent are returned, the owner suffers no financial loss. But the wrongdoer may well have benefited from his temporary use of the owner's goods. It would not be right that he should be able to keep this benefit. The court may order him to pay damages assessed by reference to the value of the benefit he derived from his wrong-doing. I considered this principle in *Attorney General v Blake* [2001] 1 AC 268, 278–280. In an appropriate case the court may award damages on this 'user principle' in addition to compensation for loss suffered. For instance, if the goods are returned damaged, the court may award damages assessed by reference to the benefit obtained by the wrongdoer as well as the cost of repair.

p. 963

88 Recognition that damages may be awarded on this principle may assist in making some awards of damages in conversion cases more coherent. For example, I respectfully think this is the preferable basis for the award of damages in *Solloway v McLaughlin* [1938] AC 247 in respect of Solloway's misappropriation of the 14,000 shares deposited with him by McLaughlin. McLaughlin suffered no financial loss from the misappropriation, because equivalent shares were returned to McLaughlin when he closed his account. But Solloway profited by the fall in the value of the shares by selling them when they were deposited with him and repurchasing them at the lower market price obtaining when McLaughlin closed his account.

...

The damages discussed in this passage might, if they had been awarded, have been described in different ways. It is clear that they are *damages*, since Lord Nicholls uses that term. They are distinct from the award of 'restitution for unjust enrichment' described above. Equally, it is clear that they are a response to the defendant's tort. They are damages for a wrong (a tort), calculated on the basis of benefits to the defendant, not on the basis of financial loss suffered by the claimant (see para [87]: 'the owner suffers no financial loss. But the wrongdoer may well have benefited ...').

Beyond this, it is rather hard to categorize what is meant by 'user damages'. Perhaps Lord Nicholls is referring to the same sort of 'restitutionary damages' available in the trespass case of *MOD v Ashman*, which quantify the value of having use of the property. If that is the case, the reference to *A-G v Blake* in the extract above is not helpful. In that case, Lord Nicholls deliberately avoided describing the award as 'restitutionary'. An award based on 'benefits' in the form of 'profits' as in *Blake* (if that is what Lord Nicholls had in mind) might be described as *disgorgement damages*, rather than 'user damages'.

'Disgorgement' is generally thought to be available only in cases of *dishonest* wrongdoing. Was this a case of dishonest conversion, or not? IAC well knew the history of ownership of the aircraft, and it knew that the aircraft had been seized through an act of war. This was certainly not a case of 'accidental' conversion. But when discussing the applicable Iraqi law of usurpation, Lord Nicholls made clear that he did *not* think this was a case of 'bad faith', which was relevant to Iraqi law.

Lord Nicholls, *Kuwait Airways*

> 48 … IAC acted in the belief that RCC Resolution 369 gave it a good title. This also was common ground. (In this regard, and to this extent, the existence of this decree will be recognised by an English court. This is not giving effect to Resolution 369. This is doing no more than accept the existence of this decree as the explanation for IAC's state of mind.)

If the test for 'good faith' in usurpation (in Iraqi law) is similar to the idea of 'honesty' which might be applied in the tort of conversion, then there would be no dishonesty on the part of the defendants in this case. IAC
p. 964 honestly believed they had a good claim in law to the ↵ aircraft. But if *that* is the case, the 'user damages' discussed by Lord Nicholls should have been *restitutionary* damages, not disgorgement damages. And in that case, the references to *A-G v Blake* are not helpful.

4 Conclusions

i. The actions reviewed in this chapter are relatively little studied by undergraduate law students, but retain their significance in practice. Their applicable principles are very different from negligence; but in the retention of strict liability, trespass to land and goods appear to have diverged also from their close relatives, the torts collected in Chapter 2 as aspects of trespass to the person. Comparing them will show how important it is to ask *what* must be intended and, indeed, what *aspect* of liability is strict, when comparing one form of liability with another. Even where, as here, liability attaches to *faultless* action, there may still be an element of intention—such as the 'deliberate dealing' with goods in conversion.

Further Reading

Curwen, N., The Remedy in Conversion—Confusing Property and Obligation' (2006) 26 LS 570.

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Edelman, J., 'Gain-Based Damages and Compensation', in A. Burrows and Lord Rodger (eds), *Mapping the Law* (Oxford: Oxford University Press, 2006) 141.

Green, S., 'To Have and To Hold? Conversion and Intangible Property' (2008) 71 MLR 114–31.

Green, S., 'Conversion and Theft—Tangibly Different?' (2012) 128 LQR 564.

Green, S., and Randall, J., *The Tort of Conversion* (Oxford: Hart Publishing, 2009).

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Samuel, G., 'Wrongful Interference with Goods' (1982) 31 ICLQ 357.

Simpson, A. W. B., 'The Introduction of the Action on the Case for Conversion' (1959) 75 LQR 364.

Skene, L., ‘Property Interests in Human Bodily Material’ (2012) 20 Med L Rev 227.

Tettenborn, A., ‘Damages in Conversion—The Exception or the Anomaly?’ (1993) 52 CLJ 128–47.

Tettenborn, A., ‘Conversion, Tort and Restitution’, in N. Palmer and E. McKendrick (eds), *Interests in Goods* (2nd edn, London: Lloyds of London Press, 1998).

Wall, J., ‘The Legal Status of Body Parts: A Framework’ (2011) 31 OJLS 783.

Notes

[1] *Hunter v Canary Wharf* [1997] AC 655.

[2] Chancery Amendment Act 1858, or ‘Lord Cairns’s Act’, which permitted courts of Chancery to award damages. The Common Law Procedure Act 1854 permitted courts of common law to award injunctions.

[3] For critical discussion of the steps taken to ease the way to ‘fracking’ generally, see E. Stokes, ‘Regulatory Domain and Regulatory Dexterity: Critiquing the UK Governance of “Fracking”’ (2016) 79 MLR 961.

[4] By s 2(1), extracted below.

[5] For example, Hudson (earlier) explains that putting poison in an animal’s mouth may be trespass to the animal, but putting poison in its *feed* is only trespass to the feed.

[6] See also the exploration by Douglas: conversion is *both* strict, *and* dependent on intention.

[7] Tony Weir, *Casebook on Tort* (9th edn, Sweet & Maxwell, 2000); Nick Curwen, ‘The Remedy in Conversion: Confusing Property and Obligation’ (later in this chapter); A. Tettenborn, ‘Damages in Conversion’ (later in this chapter).

[8] Though not, of course, in the case of a conversion by destroying or losing the chattel: see Section 3.4 for an outline of relevant behaviour towards a chattel that may amount to conversion.

[9] Not everyone agrees there can be ‘remedies’ for unjust enrichment. Peter Birks argued that correction of an unjust transfer should not be described as a remedy, but as the vindication of a right.

[10] It also illustrates the distinction between conversion, and trespass to goods. If trespass to goods had been pleaded, there would have been a good chance of success. There was a direct and probably unjustified interference with the goods; but no intention on the part of the defendant to treat the goods as his own.

[11] Peter Cane is referring here to the threefold general definition of conversion offered by Lord Nicholls, and extracted above.

[12] See now the 23rd, 2020, **16-07**, where the extracted wording is retained.

[13] See also Section 3.3 of this chapter on the nature of ‘possession’ at law.

[14] Neither Iran nor Iraq could be sued in tort, because of the doctrine of state immunity.

[15] Green and Randall, *The Tort of Conversion* (2009), Chapter 5.

[16] An example of a case of conversion of a cheque is *International Factors Ltd v Rodriguez* [1979] QB 351.

[17] On the other hand, the claimant is freed from the need to *prove ownership*. As Tettenborn points out, the compromise action in conversion may actually work better in some respects than the pure property action that exists in most civilian legal systems: 'Conversion, Tort and Restitution', Section 3.1 in this chapter, at 826.

[18] A. W. B. Simpson, 'The Introduction of the Action on the Case for Conversion' (1959) 75 LQR 364.

[19] A. Tettenborn, 'Damages in Conversion—The Exception or the Anomaly?' (1993) 52 CLJ 128–47.