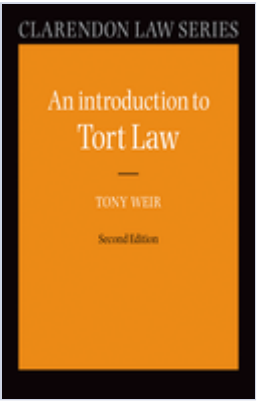

An Introduction to Tort Law (2nd edn)
Tony Weir

11. Conversion

Tony Weir, Fellow of Trinity College, Cambridge

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Abstract

Celebrated for their conceptual clarity, titles in the Clarendon Law Series offer concise, accessible overviews of major fields of law and legal thought. This chapter deals with the tort of conversion. Conversion is best regarded as the tort which protects the owner of goods not against their being damaged (negligence covers that) but against their being dealt with or detained against his will. It is concerned with loss of goods rather than damage to them. The chapter discusses what goods can be converted; what entitlements the claimant in conversion must show; liability in conversion; remedies, such as the return of the goods or damages or both; and length of protection provided to the legal owner of goods.

Keywords: tort law, tort of conversion, rights, loss of goods, protection

Property is either tangible or intangible, fixed or moveable, depending on the answer to the lawyer's almost childlike questions (1) can you touch it? (2) can you move it? Tort, as one would expect, is mainly concerned with the physical, the tangible, that is, land and goods, not debts and shares. Trespass and negligence protect both land and goods, nuisance only the former, and the tort of conversion only the latter. Trespass and conversion are alike in that both are in the business of protecting rights, with the result that neither requires the defendant to have acted unreasonably, but the rights they protect differ: to put it bluntly—the qualifications come shortly—trespass protects possession and conversion protects ownership. It is true that trespass to goods, conversion, and negligence have all been grouped together in a statute as 'wrongful interference with goods',[1] but this is for purely procedural purposes: in substance they are quite distinct torts

with different requirements and effects, and 'wrongful interference with goods' is just a name and not a tort at all. Conversion is certainly a tort in England (though not in Scotland) and, subject to the important qualifications which follow, is best regarded as the tort which protects the owner of goods not against their being damaged (negligence covers that) but against their being dealt with or detained against his will. It is concerned with loss of goods rather than damage to them.

Every legal system which recognises ownership (as even the communist systems did) must provide a remedy whereby the owner can sue the person who has his property and has no right to keep it. This remedy the Romans called the *vindicatio* since it vindicates the right of ownership, and it is a vital feature in all modern civilian systems. But ownership is not a central concept in the English law relating to moveables and our law has no *vindicatio,* though which of these facts is the cause of the other may be a question. At any rate we have no property remedy whereby the owner of a chattel can sue the possessor simply by claiming 'That's my thing you've got!'. Instead we use the tort remedy of conversion to perform the property function of the *vindicatio*. This makes conversion sit rather uneasily in the tort books, since property is concerned with what people have and tort with what people do. What the defendant in a typical conversion case has done is to sell or buy a thing belonging to the claimant. These are the commonest and most characteristic examples of 'denying the plaintiff's title', as it is unhelpfully called.

People who sell goods normally own them—indeed they warrant that they have a right to sell them—so it follows that all those who sell goods are acting as if they owned them, or at least had the owner's authority to sell them, as auctioneers do. If the owner has not authorised the sale, the seller is said to have 'converted' the goods by disposing of them: by implicitly asserting his own title the seller is 'denying the title' of the true owner, as we shall call him for the moment. What of the person who buys such goods? He, too, is implicitly asserting that he (now) owns them, so he too can be taken to be denying the true owner's title, unless, exceptionally, the true owner's title has been lost by the sale, purchase and delivery. In many systems the buyer who bona fide believed the seller to be authorised to sell does acquire title and the true owner thereupon loses his, but this is not the position of the common law: in our law, subject to several statutory exceptions, the buyer is in no better position than the seller himself, and is therefore is liable in conversion if, whatever he may have thought, the sale was in fact unauthorised.

Now it may seem unfair to make the buyer liable when he was in perfect good faith and did nothing more unreasonable than answer an advert in *Exchange and Mart,* but consider the situation as one of property law: if you have my thing and no right to hold on to it, it is hardly an answer to my claim for you to say 'It's not my fault I've got it.' This strict liability, which is really inevitable in property law, is carried over into our tort remedy of conversion. This is odd but not entirely irrational. After all, if you sell my goods, however innocently, you surely owe me the price you got for them; and if you bought my goods and still have them, you must hand them over. The oddity is that in conversion the seller is liable even if he no longer has the price, and the buyer is liable though he no longer has the goods. That is, however, the consequence of using a tort remedy to perform a property function, of looking to what people have done rather than what they still have. It is small comfort for the buyer that he can always sue his seller for failing to make him owner, for the original unauthorised seller, con-man or thief, is probably in Pentonville picking oakum.

In one case, however, it seems peculiarly unfair to make the bona fide purchaser liable to the claimant, and that is where it is due to the claimant's own negligence that the goods got into circulation and the defendant was enabled to buy them. To enable a careless claimant to obtain full damages from a careful defendant flies in the face of proper tort thinking. But of course conversion is not a tort quite like others, and if, as we have seen, it is no answer for the defendant to say 'It's not my fault I've got your thing', Parliament has laid down that it is not an answer either to say 'And, what's more, it's *your* fault that I've got it'.[2] If you leave your keys in the car, you may not be able to claim on your insurance policy but the law allows you to claim from the bona fide purchaser to whom the entirely predictable thief sells it. Odd? Acceptable?

Although selling and buying are unquestionably the paradigm instances of conversion, there is room outside these instances for the application of the untransparent notion which the common lawyers elicited from them, namely 'denying the plaintiff's title'; it certainly applies where the possessor unwarrantably refuses to hand over the goods when proper demand is made on him by the person currently entitled to have them—the very situation where the *vindicatio* is most at home. Suppose you park your car in my yard and I lock the gate. This is wrongful if I make a charge for release,[3] but I have not at common law converted your car, since I make no claim to it. It is, however, likely that I shall have to let you have it back one way or another, though which way is not so clear since the legislator decided to abolish the tort of detinue.[4]

What Can Be Converted?

We have said that conversion applies only to goods, that is, tangible moveables. Does this need to be qualified? Certainly the law regards cheques, share certificates and other such documents as subject to the tort of conversion[5] but they do have physical form although their significance is purely financial. A licence to use goods may also be worth a lot and liability in conversion was once imposed on a person who, having bought lorries from a hire-purchaser without taking possession of them, was able to deprive the finance company of the valuable licence attaching (in a non-physical sense) to the vehicles; the defendant in that case was in bad faith, however, and could have been held liable on another basis.[6] The question came up in much clearer form in 2005 though on very unusual facts. Administrative receivers took over the business of the apparently insolvent claimant company, whose assets included land, goods and contracts. The appointment of the receivers was invalid: they had no right to do what they did. As to the land they were liable in trespass, as to the goods in conversion. But what of the contracts which they terminated or settled at an undervalue? The Court of Appeal divided on the question whether the tort of interference with contractual relations, which requires intentional wrongdoing, was made out, but all agreed that 'there can be no conversion of a chose in action'.[7]

Title to Sue

What entitlement must the claimant in conversion show? In contrast with the *vindicatio* it is neither necessary nor sufficient for the claimant to be owner. This may seem surprising, since the owner is the person with the ultimate economic interest in the property—the person who can turn it into money by selling it—but the

common law has always been more interested in the physical than the economic relationship between person and thing, and instead of asking who is eventually to have the benefit of the thing, it asks who is currently entitled to get his hands on it. Accordingly, in order to claim in conversion you must show that at the time of the alleged conversion you were entitled to the possession of the thing, on simple demand, if necessary.

Not all such entitlements qualify. First, it must be an entitlement recognised at common law rather than in equity. The reason for this is that an equitable title yields to a bona fide purchaser, whereas a common law right does not, and since the bona fide purchaser is liable in conversion it would be contradictory to allow the merely beneficial owner to use the tort. This was made quite clear in 1998.[8] Secondly, not all common law entitlements qualify. The same case seems to suggest that a *contractual* right to obtain possession is sufficient, but this is surely wrong, for an analogous reason: interference with a merely contractual right is actionable in tort only if the defendant was aware of the contract, and since there is certainly no such requirement in the tort of conversion, it would stultify the proper rule to allow a person with a merely contractual right to possession to bring a claim in conversion. Furthermore, since equitable entitlements commonly arise from contractual rights of particular strength, it would be eccentric to welcome the contractual claimant and dismiss the equitable one.

In this light we may consider a case to be found in the contract books.[9] The plaintiff had been negotiating with his nephew for the purchase of a horse and wrote to him offering a compromise price and saying that if he heard nothing further he would consider the horse his. He heard nothing further although the nephew appears to have been willing to sell it to him, for the nephew told the defendant auctioneer who was to sell the rest of his stock that this particular horse was not to be sold. The defendant by mistake did sell the horse, and the uncle sued him. The uncle's claim was dismissed, on the ground that since he had received no acceptance of his offer to buy the horse he had not actually bought it, and had therefore not become its owner. Some commentators think the decision wrong. But consider. If the uncle's claim had been allowed, he would be receiving the value of a horse for which he had not paid and could not be made to pay, and the auctioneer would be paying him the value of the horse or whatever he received from the buyer, although he had already handed the proceeds over to the nephew and could not claim it back. Hardly a fair result? Yet it would be even worse when one considers the position of the person who bought the horse at the auction. If the horse still belonged to the nephew, the buyer at auction would become owner despite the nephew's having told the auctioneer not to sell it, because the auctioneer would be a mercantile agent in possession with the consent of the owner.[10] But that would not be true if the horse was already owned by the uncle, for he had not consented to the auctioneer's possession of the horse and the buyer too would be liable to him in conversion. It would seem clear, then, that one should not allow a person with a merely contractual claim to sue in conversion, for although the buyer of specific goods in a deliverable state is said to become owner, in reality he obtains, until delivery, nothing more than a personal right to obtain possession. In fact, however, even if he becomes owner, the buyer who has not paid for the goods has no right to sue in conversion, for if the seller has a lien on the goods till payment, as is often the case, the buyer has no *immediate* right, but only a conditional right to possession.[11] If A, the buyer of specific goods, has paid B for them, and B resells and delivers them to C, who does not know of the prior sale, B is of course liable to A in conversion, but C is not: that is because C, unlike most bona fide purchasers, is given special statutory protection[12]—or, to put it another way, obtains a good title though his seller was no longer owner.

A commoner case where the owner has no title to sue in conversion is where he has bailed the chattel to another and is prevented by contract or estoppel from demanding it back for the time being. This is the case where the owner lets the thing on hire for a period not yet elapsed at the time of the alleged conversion. In such a case it is the person in justified possession, the bailee, who can sue in conversion and not the owner. When a finance company lets a thing on hire-purchase it becomes the equivalent, as regards chattels, of the absentee landlord, who not only cannot sue a third party in trespass but can actually be sued in trespass by the tenant. But not all those who have granted possession to another are deprived of a claim: the bailor may sue if the bailment is gratuitous or if the terms of the bailment, though for a period not yet expired, have been seriously flouted by the bailee.

Bailment is one of the situations where different parties may have concurrent interests in the property and have claims against the same person in negligence or conversion. In the 1977 Act Parliament sought to allay this 'double liability' by requiring the claimant to identify anyone else with an interest in the property and entitling the defendant to require them to be brought into the lawsuit or abide by its consequences.[13]

Persons Not Liable

The strictness of liability in conversion makes life difficult for those who handle large numbers of things belonging to others. Consider bankers, for instance. We have seen (p. 167) that the law regards cheques, share certificates, and other documents representing intangible property as capable of being converted.[14] In the normal case where a cheque in favour of A is drawn by B on his bank X, it is presented by A to A's bank Y, and the Y bank then tenders it to bank X for payment. Bank X then, pursuant to B's instructions (the cheque says 'Pay....'), pays bank Y which credits A's account. On analysis one will see that bank X has effectively sold the cheque to bank Y which has bought it. Now if for some reason A is not entitled to the cheque, both banks would, in principle, be liable to B or the 'true owner', but given the literally millions of cheques handled by banks every day it would be intolerable if they were held strictly liable, so they have statutory protection, provided they act with proper care.[15] Carriers also handle goods belonging to many others (consider the Post Office, which admittedly has a statutory immunity),[16] but they are not treated as converters at all if they simply obey the instructions of the consignor, even if he is not the owner or authorised to deal with the goods, for in carrying the goods as instructed the carrier is not 'acting like an owner' or denying anyone's title. Auctioneers, who also handle lots of goods, do not seem to 'act like an owner' either, since they do not suggest that the goods put up for sale are their own. Nevertheless the law is that if an auctioneer delivers the goods to the successful bidder he is liable in conversion to the true owner, though not if the goods remain unsold and he redelivers them to the person from whom he received them.[17] Somewhat similarly, the carrier who delivers the goods contrary to instructions or without the authorisation of the person entitled to their possession will be liable in conversion, as where he delivers to an insolvent buyer despite a proper instruction from the seller not to do so, or where the carrier by sea delivers the cargo to a person not possessed of the requisite document, such as the bill of lading.

Remedies

The 1977 Act provides that the court may order the return of the goods or damages or both. As regards return of the thing, there is no real difficulty, but the mismatch between the function and the form of a conversion claim gives rise to serious problems as to the measure of damages. In tort the measure of recovery is usually the claimant's loss, to the extent that it is not too remote, whereas in a *vindicatio* the recovery would be of the thing itself or its value. The tendency therefore was for the measure of recovery in conversion to be the value of the thing itself rather than the loss suffered by the claimant. Since value is objective (what would other people pay for it?) and loss personal, the claimant's loss may be greater or less than the value of the thing. If greater, he will not be fully compensated by the award of the value; if less, he gets a windfall. The former case arises where the thing was being put to unusually profitable use, perhaps in conjunction with other property. The latter often arises in hire-purchase transactions where the defendant has bought a thing from a hire-purchaser who had no right to sell it. The finance house which owns the thing is now, by reason of the hire-purchaser's repudiation, entitled to possession and so to claim in conversion, but since it has already been paid part, perhaps much, of the sum due to it under its contract with the hire-purchaser, its loss is only the outstanding amount.[18]

Difficulties as regards causation are caused by the fact that conversion is primarily about vindicating the claimant's right to have the thing rather than damages for actual loss. Consider the Contribution Act 1978. It provides a remedy between those 'liable in respect of the same damage'. Are subsequent converters of a chattel 'liable for the same damage'? Are they liable for *damage* at all? But even supposing that the claimant's damage consists of not having the thing, how can it be said that it would not have arisen 'but for' the second or subsequent conversion when it has already arisen as a result of the first? In a case arising out of the Iraqi snaffling of planes belonging to Kuwait, there was a discussion regarding the requisite link between the conversion and 'consequential loss', that is, 'loss beyond that represented by the value of the goods'. Lord Nicholls was of the opinion that if the defendant was in good faith, the loss had to be merely foreseeable, a test which he described as 'more restrictive', whereas the bad faith converter had to pay for all loss 'directly and naturally' resulting, as in the tort of deceit. Lord Hoffmann, in apparent agreement, would apply 'conventional principles', helpfully stated to be 'the rules which lay down the causal requirements for that form of liability.'[19]

Where the converted goods are not returned, a question arises as to the time at which they should be valued—the time of the conversion (tort) or the time of trial *(vindicatio)*? The question is important, since the passage of time may cause chattels to depreciate physically or appreciate financially, but a single answer is not required for all cases, and the courts feel free to choose the time which gives the fairest result.[20]

Length of Protection

The concern of the common law of England to protect the legal owner of goods is shown by the fact that he can sue even the good faith purchaser. But for how long is he protected? His rights may be cut off in two ways. First, if he sues for conversion and the judgment in his favour is paid, his ownership vests in the defendant or anyone who bought it from him. Secondly, he may lose his ownership by lapse of time: once six years have

elapsed after the first conversion in respect of which suit could have been brought, no suit may be brought in respect of any subsequent conversion and the owner's title is extinguished, subject to this, that the six years do not start to run against the victim of theft until the moment when the goods are first purchased in good faith.[21]

Notes

1 Torts (Interference with Goods) Act 1977, s 1.

2 Torts (Interference with Goods) Act 1977, s 2(1).

3 Private Security Industry Act 2001, Sch 2, para 3.

4 Torts (Interference with Goods Act) 1977, s 2(1).

5 *Marfani & Co v Midland Bank* [1968] 2 All ER 573.

6 *Douglas Valley Finance Co. v Hughes* 1969] 1 QB 738.

7 *OBG Ltd v Allan* [2005] EWCA Civ 106.

8 *MCC Proceeds v Lehman Bros* [1998] 4 All ER 675.

9 *Felthouse v Bindley* (1862) 142 ER 1037.

10 Factors Act 1889, s 2(1).

11 *Lord v Price* (1873) LR 9 Exch 54.

12 Sale of Goods Act 1979, s 24.

13 Torts (Interference with Goods) Act 1977, s 8.

14 *Marfani & Co v Midland Bank* [1968] 2 All ER 573.

15 Bills of Exchange Act 1882, ss 60, 80.

16 Postal Services Act 2000, s 90.

17 *Marcq v Christie Manson & Woods* [2003] EWCA Civ 73L

18 *Wickham Holdings v Brooke House Motors* [1967] 1 All ER 117.

19 *Kuwait Airways v Iraqi Airways* [2002] UKHL 19.

20 *IBL Ltd v Coussens* [1991] 2 All ER 133.

21 Limitation Act 1980, s 3.

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