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THE NATURE OF CONVERSION

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CHIEF Justice Best once declared: "I am no great friend of the action of [conversion], nor to any other action which keeps parties so much in the dark …"[1] Although speaking almost two centuries ago his comments ring true today. Conversion remains misunderstood and ignored in many quarters. The tort rarely appears on an undergraduate syllabus, despite theft and knowing receipt, the criminal and equitable equivalents, being well known to students. Some torts textbooks do not even mention it.[2] More worrying is the position of litigants. It remains an almost impossible task for a lawyer to advise a client on the merits of a possible claim when the facts fall outside one of a few well established categories of conversion. One senior judge has recently said that a definition of the tort is "well nigh impossible"[3] and it is hardly surprising that the House of Lords has now revisited conversion twice within the space of five years;[4] the Court of Appeal on many more occasions.[5]

With the modern dominance of fault based liability, conversion has never looked so obscure. Practitioners and courts are clearly uncomfortable with the strict liability of the action and the applicability of the doctrine of causation. Until we understand the nature and scope of liability in conversion we cannot answer these concerns or offer clearer guidance to litigants. The aim of this article is to provide a stable and comprehensive definition of the action. Part I will track the historical origin and development of conversion. Salmond, writing about the tort at the start of the 20th century, said that it was "… still darkened by the mists of legal formalism … "[6] Although there has been limited statutory reforms since then, conversion remains for the most part a product of its complex historical development and we cannot make sense of its most important features without considering its history. Part II will attempt to provide a fully workable definition of the tort. It will first consider the basis of liability, or the "gist" of

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[1] *Mallalieu* v. *Laugher* (1828) 3 Car & P 551, 553; 172 E.R. 542, 543. His actual words were the "action of *trover*", the old word for conversion.

[2] *e.g.* M. Jones, *Textbook on Torts* 8th ed. (Oxford 2002).

[3] *Kuwait Airways Corpn* v. *Iraqi Airways Co (Nos 4 & 5)* [2002] A.C. 883 (HL) 1084. (Lord Nicholls).

[4] *Kuwait Airways* (last note) and *OBG* v. *Allan* [2008] 1 A.C. 1 (HL).

[5] *e.g. Marcq* v. *Christie Mason* [2004] Q.B. 286 (CA), *BMW Financial Services* v. *Bhagwanani* [2007] EWCA Civ 1230 (CA) and *Iran* v. *Barakat Galleries* [2007] EWCA Civ 1374 (CA).

[6] J. Salmond, "Observations on Trover and Conversion" (1905) 21 L.Q.R. 43.

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conversion. It will then introduce a new definition for the tort: an "intentional exercise of exclusive control" over another's chattel. The three elements of this definition: "control", "exclusive" and "intentional", will be dealt with in turn. The two most controversial features of the tort, namely its strict liability and its application of the doctrine of causation, require separate treatment and will be considered in Part III.

Part I: History

The circumstances surrounding the emergence of conversion at the end of the 15th century and its subsequent expansion into the fields of other forms of action still affects the shape and content of the modern tort. It was the history of conversion that Salmond chose as his guide through the "dark mists" of legal formalism and it is here too that this analysis will begin. We will first consider the origin of the action and then its subsequent expansion.

1. Origin of conversion

Most legal historians agree that the tort of conversion grew out of detinue, the old action that protected an owner's rights in his chattels. Liability in detinue was based on a detention of goods and proved by a defendant's refusal to return the goods upon demand.[7] By way of a remedy a defendant found liable in detinue would be forced to return the chattel or its value in lieu.[8] Detinue was the early common law's primary action for the protection of a claimant's interests in his chattels but it suffered from a "dismal catalogue of defects".[9] One major problem was that liability would be discharged if the defendant returned the chattel in a damaged state.[10] This most likely led to the introduction of an action on the case (or simply "case")[11] which allowed a remedy where a wrong was committed that was not actionable under the older actions. A good illustration of this new action on the case is

[7] The "demand and refusal" hardened into a strict requirement in detinue's later history. This meant that even a defendant who, by his conduct, had made it clear that he intended to keep the claimant's chattel, could not be sued in detinue until a demand and refusal had been made: *Clayton* v. *Le Roy* [1911] 2 K.B. 1031 (CA). See generally S. Douglas, "The Abolition of Detinue" [2008] Conv. 30.

[8] A passage from Blackstone (3 Comm. 152) mentions these two features: "If I lend a man a horse and he afterwards refuses to restore it, this injury consists in the detaining and not in the original taking, and the regular method for me to recover possession, is by the action of detinue."

[9] C.H.S. Fifoot, *History and Sources of the Common Law: Tort and Contract* (London 1949), 102.

[10] J.H. Baker, *The Reports of Sir John Spelman* (94 Selden Society), 248; A.W.B. Simpson, "The Introduction of the Action on the Case for Conversion" (1959) 75 L.Q.R. 364, 366.

[11] So called as it was once thought that the jurisdiction of the central courts was expanded by a 13th century statute that allowed the courts to hear complaints that were "in like cases" (*in consimili casu*): J.H. Baker, *An Introduction to English Legal History*, 4th ed. (London 2002), 62.

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an anonymous case from 1510 where Sergeant More is reported as saying:

> If I bail goods to a man to keep safely, and he undertakes to do so (with or without reward), and through his fault the goods perish, I shall have an action on my case in this case. For if I were to bring an action of detinue – as I could, if I wished – I would recover the thing as it is; and it would be foolish of me to bring such an action where I could have a better.[12]

This action on the case, which existed since at least 1472[13], is not yet the tort of conversion, but a generic action that allowed the claimant a remedy where detinue did not provide one.

This new action had filled some gaps left by detinue but there was still pressure to bring case in simple detention cases where the claimant could sue in detinue. The main reason for this was the ability of a defendant to wage his law in detinue. This was an arcane form of proof that allowed a defendant to escape liability if he could produce compurgators who would vouch his innocence. Unsurprisingly claimants preferred to sue in case where trial was by jury. This was problematic, however, as it would duplicate actions. An action on the case was only permitted if the claimant's complaint was not covered by an existing action; and a detention, being so covered by detinue, could not form the basis of an action on the case.[14] In the 1555 case of *Lord Mounteagle* v. *Countess of Worcester* the reporter Dyer says:

> Also, the action on the case will not lie, since it appears that the plaintiff could well maintain an action of detinue; and where a man has an ordinary writ ready framed in the register for his case he shall not pursue some other novel form of writ.[15]

To avoid the problem of duplication in cases where a defendant was detaining a chattel, claimants suing in case had to ensure that their complaint was, or at least seemed to be, of something other than a simple detention. It was here that the term "conversion" became so important.

The origin of the legal usage of the term "conversion" is unclear. Simpson has argued that it derives from a case, which he calls *The Case of the Golden Cloth*, discussed in the 1479 case of *Calwodelegh* v. *John*[16], where a defendant made the claimant's gold cloth into a piece of clothing.[17] Because this (known to Roman lawyers as *specificatio*)

[12] *Anon* (1510) Keil 160, in Baker and Milsom, *Sources of English Legal History: Private Law to 1750* (London 1986) (hereafter B & M), 528.
[13] Fifoot, *History and Sources*, 102.
[14] Simpson, "The Introduction of the Action on the Case for Conversion" (1959) 75 L.Q.R. 364, 370.
[15] *Lord Mounteagle* v. *Countess of Worcester* (1555), 532.
[16] Y.B. 18 Edw. IV, f.23, pl. 5 (1479); B & M 526.
[17] Simpson, "The Introduction of the Action on the Case for Conversion" (1959) 75 L.Q.R. 364.

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would have destroyed the claimant's original title it may have been difficult to frame a claim in detinue[18], thus permitting an action on the case for the actual "conversion" of the goods to be introduced. Simpson argued that shortly after this case pleaders started to use the word "conversion" in a slightly different sense. Instead of arguing that the goods themselves had been converted from one thing to another, they argued that the defendant had converted the goods "to his own use". In other words it is not the chattel itself that is changed, but the person using it. Although there is not enough evidence at the moment to either confirm or deny Simpson's argument, if correct it would explain why we use a word as odd as "conversion" in the modern tort. Whatever the origin of the term we know that pleaders in the late 15th and early 16th centuries recognised its utility (in its modified sense) in their attempts to avoid the duplication problem in cases where a defendant merely detained the goods.

As an action on the case could not be brought for a simple detention of goods, pleaders started to argue that the gist of the action was the defendant's conversion of the goods to his own use. An early example of this new form of pleading is the 1524 case of *Warton* v. *Ashpole* where the claimant had bailed his horse to the defendant who had "… used the horse and converted it to his own use."[19] In other cases, instead of saying that the defendant had used the chattel, pleaders would count that the defendant had benefited or profited from it. In the *Lord Mounteagle* case, discussed above, the claimant pleaded that the defendant had converted his gold chain by selling it "… to persons unknown to the plaintiff, for various sums of money, and received the money for the same and converted it to her own use."[20] Although it was the proceeds of the sale of the chattel, rather than the chattel itself that was converted, the sentiment is the same: the claimant was stressing that the defendant had done more than simply detain the chattel, but was now diverting its benefit to herself and, therefore, using it as if it were her own.[21] A more modern term that captures this allegation is "misappropriation". Pleaders stressed the "conversion" in order to differentiate the claim from detinue sufficiently. Whereas a claimant brought detinue with the purpose of obtaining the return of his chattel, when a chattel was "converted" *i.e.* misappropriated, the defendant had taken it for himself thus completely depriving the claimant. As one judge in *Gumbleton* v. *Grafton* said, "… the conversion takes the property in the pieces of cloth away from the plaintiff."[22] As conversion

[18] As the defendant would no longer be detaining the claimant's goods.
[19] *Warton* v. *Ashpole* (1524) B & M 529.
[20] *Lord Mounteagle* v. *Countess of Worcester* (1555) Dyer 121; B & M 531.
[21] The claim eventually failed as the defendant argued that she was still in possession and that detinue was the appropriate action.
[22] *Gumbleton* v. *Grafton* (1600) B & M 530.

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emerged in the early 16th century it generally referred to a 'misappropriation' of a chattel; by using the chattel the defendant had taken it for himself and deprived the owner.

2. Expansion

The new action on the case for conversion proved extremely popular because it did not allow a defendant to wage his law. The type of case that most naturally lent itself to this new form of pleading was where a defendant had disposed of the claimant's goods by, for example, selling, consuming or destroying them. It had always been problematic to bring detinue in disposal cases as the claimant could not truthfully count that the defendant detained the goods.[23] Such facts, however, fitted neatly within the conversion allegation which focused on the deprivation of the property rights.[24] Bringing an action for conversion in cases where a defendant was still in possession of the claimant's chattel was more problematic. Although pleaders were in the habit of stressing the conversion of the chattel to distinguish the action from detinue, some courts in the 16th century remained unconvinced and continued to insist that detinue be brought when a defendant was still in possession. We have already seen this in the 1555 case of *Lord Mounteagle*. Although the claimant alleged that the defendant sold the gold chain and converted the proceeds to her use, the defendant denied this and argued that she was still in possession. The claim for conversion failed, Dyer reporting that "… case will not lie, since it appears that the plaintiff could well maintain an action of detinue …"[25] An anonymous case of 1579 is more explicit: "If I bail to you a horse for one day, and you keep it for two days, or convert it to your own use, no action on the case [lies] for this conversion. For an action of detinue lies …"[26] However, constant pressure from litigants to bring conversion to prevent defendants from waging their law led some courts to accept that a detention, in itself, could constitute a conversion of goods. The most well known example of this is the 1596 case of *Easom* v. *Newman*. A jury had found that the defendant had come into possession of the claimant's goods and had "utterly refused to deliver them and still withholds the same goods and chattels". The question was whether this

[23] The modern position is that detinue was not available in cases of a disposal: *Alicia Hosiery* v. *Brown Shipley* [1970] 1 Q.B. 195. The earlier position is less clear. See the two anonymous cases reproduced by Baker & Milsom: *Anon* (1535) B & M 272 and *Anon* (1572) B & M 273.

[24] Salmond would later write that a "disposal" was the original form of conversion. See Salmond "Observations on Trover and Conversion" (1905) 21 L.Q.R. 43, 44. Although not strictly correct, a disposal was the type of act that fitted most naturally within the "conversion" allegation.

[25] *Lord Mounteagle* v. *Countess of Worcester* (1555) Dyer 121; B & M 531.

[26] *Anon* (1579) B & M 529.

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could, without anything more, constitute a conversion. The court held that it did and Gawdy J. is reported as saying:

> [A]lthough the plaintiff could have an action of detinue for the goods, whereby he could recover the things themselves, nevertheless the withholding and refusing to deliver them is another wrong, properly to be punished by this action. And so it seemed to him that this refusal was a conversion.[27]

If followed this would eliminate any distinction between detinue and conversion and allow claimants to choose freely between the actions. Gawdy J.'s judgment effectively reduced the allegation of conversion to a fiction; although claimants would continue to allege a conversion as a matter of form, there would be no need to stress the defendant's misappropriation of their chattel, the simple detention being sufficient.

Not everyone was ready to accept that the allegation of conversion had become a fiction. Popham C.J. notably disagreed with the majority in *Easom* v. *Newman* and when the issue was revisited twenty years later in *Isaack* v. *Clark*[28] the court came to a different conclusion. All of the judges stressed that there was a difference between detinue and conversion, Croke J. saying, "A bare denial shall not make a conversion …", and Houghton J., "… shall this denier here be a conversion? It shall not, but of necessity there ought to be some user of it to make a conversion."[29] The compromise reached was that a detention was said to be evidence of a conversion, not conclusive proof of it[30] and, they reasoned, just because a defendant was detaining a chattel did not mean that he was treating it as his own. By maintaining that a simple detention could not, in itself, constitute a conversion, the court kept alive the idea that conversion meant a misappropriation of goods. Although the decision apparently overruled *Easom* v. *Newman*, it would be wrong to ascribe too much significance to *Isaack* v. *Clark*. The facts were that the claimant had delivered a purse of money to the defendant as a pledge against a debt owed by a third party which had not, by the time of the trial, been paid off. Although the judges appear to be answering the question whether facts that are actionable in detinue could also constitute a conversion, it is clear, given that the debt had not been discharged, that the defendant would not even have been liable in detinue as his detention was entirely justified. Any attempts to distinguish detinue and conversion, therefore, were strictly obiter. Although there is at least one case shortly after *Isaack* v. *Clark* that held that a detention did not constitute a conversion,[31] it is difficult to

[27] *Easom* v. *Newman* (1596) B & M 537, 538. See also *Anon* (1579) B & M 533.
[28] *Isaack* v. *Clark* (1615) 3 Buls 306; B & M 541.
[29] *Ibid.*, 542.
[30] *Ibid.*, 545 (Coke C.J.).
[31] *Robinson* v. *Walter* (1616) 3 Buls 269, 81 E.R. 227.

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find any such cases by the eighteenth century. In *Baldwin* v. *Cole*,[32] for example, Holt C.J. said, "The very denial of the goods to him that has a right to demand them is an actual conversion."[33] Similarly, in *Alexander* v. *Southey* in the nineteenth century, Best J. said, "An unqualified refusal is almost always conclusive evidence of a conversion."[34] Judges would continue to repeat that a detention was only evidence of a conversion, but in truth this was a fiction. The position was essentially that stated in *Easom* v. *Newman* in that a detention, in itself, came to be thought of as a form of conversion. This removed any need for claimants to stress the defendant's misappropriation of their chattel.

Any lingering doubts were finally settled when detinue was abolished by s. 2(1) of the Torts (Interference with Goods) Act 1977. The Law Reform Committee had recommended its abolition because, as they stated, "… the present position appears to be that conversion will lie in every case in which detinue would lie …"[35] In *Howard E. Perry* v. *British Railways Board*,[36] which was decided shortly after the Act, the defendants had been transporting the claimant's steel when a steel strike broke out and refused to deliver it or allow the claimants to collect it for fear of aggravating the striking unions. Had *Isaack* v. *Clark* represented the law then the claimants would have been without a cause of action. The defendants had fully recognised the claimants as owners, promising to deliver the steel once the strike was over, and therefore were detaining the goods without treating them as though they were their own. Megarry V.C., however, in finding that it was a conversion, said: "A denial of possession to the plaintiffs does not cease to be a denial by being accompanied by a statement that the plaintiffs are entitled to the possession that is being denied to them."[37] A detention, unaccompanied by any evidence that a defendant is using the chattel as his own, constitutes a conversion.

The other area of expansion of conversion was into the sphere of trespass. Trespass, another old action, protected a claimant against any direct interference with his possession of his goods. Expansion into the sphere of this tort came much later because of the technical barriers that arose from the way conversion was pleaded in court.[38] Pleaders in conversion had adopted many of the old counts, or formal allegations, used in detinue. One such count that was always repeated was that the defendant had come into possession the chattel by finding it (hence

[32] (1705) 6 Mod 212, 90 E.R. 1290.
[33] *Ibid.*, 212; 1290.
[34] (1821) 5 B & A 247, 106 E.R. 1183.
[35] Law Reform Committee, "Conversion and Detinue" (Law Reform Com No 18 Cm 4774, 1971) 4. The only exception was where a bailee had negligently lost the claimant's chattel.
[36] [1980] 1 W.L.R. 1375 (Ch).
[37] *Ibid.*, 1380.
[38] Baker, *Introduction to English Legal History*, 86.

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"trover", the old Law-French word for finding). This count was from an early stage non-traversable which meant that the defendant could not formally deny it.[39] As the courts would always assume that the defendant had found the chattel, this prevented claimants from arguing that the defendant's "taking" of it from his possession constituted a conversion. This did not mean that conversion could not be brought against a defendant who had taken the chattel from the claimant's possession, just that the court would "waive the trespass" and ask whether the subsequent detention or disposal constituted a conversion.[40] It is not entirely clear when this position changed, but at some point in the early part of the nineteenth century a "taking" of a chattel came to be thought of as a conversion. The 1838 case of *Grainger* v. *Hill*[41] is an early example. The defendant had seized the claimant's boat register, and Tindal C.J. said, "If the taking of the register was wrongful, that taking was of itself a conversion."[42]

The expansion into the sphere of taking goods, like the expansion into the sphere of detinue, created new problems. The courts had always stressed that a conversion would only exist when the defendant had completely excluded the claimant from his chattel. The two typical types of conversion, a disposal or a detention of a chattel, are only a disposal or detention *if* they result in the owner being excluded from his goods. A taking does not necessarily have the same result. A defendant may take goods permanently, or he may take fleeting or temporary possession. An office worker who picks up his colleagues pen to inspect it takes the pen, just as a thief who steals a Holbein from the National Gallery takes the painting. The courts had to articulate that it was only a taking which resulted in the claimant's exclusion from his goods that would constitute a conversion. The leading case is *Fouldes* v. *Willoughby*,[43] where the manager of a ferry took the claimant's horses onshore to entice the misbehaving claimant to leave the ferry. Although the defendant did literally take the horses, in that he took hold of their harness and led them onshore, it was clear that this could not constitute a conversion. As Lord Abinger C.B. pointed out, the claimant was free to go onshore and collect his horses and it was his own fault that he did not. The defendant's taking had to have the effect of excluding the claimant if it was to amount to a conversion. Lord Abinger gave the following example: "… suppose, in the present case, the defendant had

[39] A likely early example of this is *Lord Mounteagle* v. *Countess of Worcester* (1555) Dyer 121; B & M 531. See Baker, *Introduction to English Legal History*, 398.
[40] *e.g. Chitty* v. *Cooper* (1756) 1 Burr 20, 31; 97 E.R. 166, 172. For an early example, see *Bishop* v. *Viscountess Montague* (1600) B & M 531.
[41] (1838) 4 Bing NC 212, 132 E.R. 769.
[42] *Ibid.*, 221; 773.
[43] (1841) 8 M & W 540, 151 E.R. 1153.

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thrown the horses into the water, whereby they were drowned, that would have amounted to an actual conversion."[44]

Conversion's relationship with trespass, unlike its relationship with detinue, has not been the subject of any statutory reform. The Law Reform Committee had recommended the abolition of trespass and the further expansion of conversion.[45] This would have turned conversion into a simple tort of interference, with no requirement of showing that that the interference excluded the claimant from possession. Cases such as *Fouldes* v. *Willoughby* would consequently become actionable in conversion. However, the suggestion was not acted upon in the Torts (Interference with Goods) Act 1977, which kept trespass as a separate tort[46], and we still maintain the distinction espoused in *Fouldes* between interferences which exclude the claimant, and interferences which do not.

Part II: Defining Conversion

Conversion, as we have seen, owes much to fifteenth and sixteenth century pleaders who employed various tactics to avoid the effects of a rigid pleading system. Because the action evolved to deal with the problems of the older writs it is difficult to discern within conversion any clear policy towards the question of how property rights in chattels should be protected. It is mainly for this reason why it has proved so hard to conceptualise the modern action. Our starting point in this section, therefore, must be an attempt to identify the basis of liability in conversion or, to use the older language, the gist of the action. If this can be done then it may be possible to fashion a fully workable definition.

1. The basis of liability in conversion

A conversion, as we have said, initially meant a misappropriation of a chattel. To misappropriate something reveals two facts: first, it means that the owner has been excluded from his goods; second, it means that the defendant is using the goods as his own. An action which has the purpose of protecting property rights can be based on either of these facts.[47] To exclude an owner from his goods is to infringe his property rights, namely his right to possess or use his goods, and any legal system may introduce a wrong or tort which responds to such an infringement. Alternatively an action may be based on the defendant's use of the goods. Because the ability to use a chattel is a benefit in itself,

[44] *Ibid.*, 547; 1156.
[45] Law Reform Committee, "Conversion and Detinue" (Law Reform Com No 18 Cm 4774, 1971) 8.
[46] Sec. 1.
[47] P.B.H. Birks, "Personal Property: Proprietary Rights and Remedies" (2000) 11 K.C.L.J. 1, 3.

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and one that the owner usually has to pay for by purchasing the chattel in the first place, a defendant's unauthorised use of the chattel means that he obtains a benefit which should, in law, belong to the owner. In other words, when a defendant uses the claimant's chattel without authorisation he derives a benefit at the claimant's expense and this is an unjust enrichment which can generate a right to restitution.[48] A misappropriation, therefore, reveals facts that can form the basis of either a tort or unjust enrichment claim. Of course, a legal system may adopt one or both of these forms of protection, but it cannot combine them in a single action. The ambiguity at the heart of the modern tort of conversion, it is suggested, is caused by the failure to distinguish between these two different types of claim.

There are a number of instances in the development of conversion which are suggestive of an unjust enrichment type claim. Early pleaders, attempting to distinguish conversion from detinue, focused on the very fact that the defendant had used the chattel, adopting "conversion to his own use" as their standard allegation. Reading these words now it is easy to see the implication: the defendant was not merely the passive detainer of the goods, but was actually using them for his own benefit. Some pleaders made this more explicit by alleging that the defendant had obtained an incontrovertible benefit from the chattel by selling it and "converting the proceeds to his own use".[49] In the 18th and 19th centuries the courts started to express this through slightly more abstract language, defining conversion as the assertion of ownership or dominion over the claimant's chattel. For example, in *Heald* v. *Carey*[50] Maule J. said that conversion "only lies where some dominion is asserted by the defendant over the chattel which is the subject of the action".[51] Similarly, in *Hollins* v. *Fowler* Brett J. said that a defendant only converts a chattel if he used the goods "with an intent to exercise an act of ownership on his own behalf …"[52], adding that "possession or detention which is a mere custody or asporation made without reference to the question of property in chattels is not a conversion".[53] Of course, a defendant cannot turn himself into the owner of the chattel or alter the claimant's ownership. The real question posed by these definitions is whether the defendant has treated the chattel *as though* it were his own. The strongest evidence of this will always be that he has obtained a benefit from it, usually by using it or selling it.

[48] P.B.H. Birks, *Unjust Enrichment* (Oxford 2003), 69.
[49] e.g. *Lord Mounteagle* v. *Countess of Worcester* (1555) Dyer 121; B & M 531, and *Anon* (1579) B & M 533.
[50] (1852) 11 CB 977, 138 E.R. 762.
[51] *Ibid.*, 993; 769.
[52] (1874–1875) L.R. 7 H.L. 757, 784.
[53] *Ibid.*, 785. See also *Simmonds* v. *Lillystone* (1853) 8 Exch 432, 437; 155 E.R. 1417, 420 (Parke B.).

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On the other hand there is also a large amount of evidence that suggests that the action is entirely unconcerned with any benefit a defendant has derived from the chattel. The tort may have initially focused on the defendant's use but as it expanded into the sphere of detinue it lost this characteristic. The reason, as was illustrated in cases like *Easom* v. *Newman* and *Isaack* v. *Clark*, is that there are numerous instances where a defendant detains a chattel but does not use it, benefit from it or treat it as though it were his own in any way. Take, for instance, *Pillot* v. *Wilkinson*[54] where a warehouse owner had been told by the sheriff not to dispose of any goods so that he could satisfy debts owed to a third party. When the claimant demanded his goods that were stored at the warehouse the defendant, who was unsure if he was allowed to release the goods, asked for time to consult his attorney. A claim in conversion succeeded even though the purpose of the defendant's detention, in asking for time to consult his attorney, had been to determine who was entitled to possess and use the goods, contradicting any suggestion that he treated the goods as though they were his own.[55] A similar pattern can be seen in other areas of the tort. Take, for example, a disposal of goods. A disposal will often benefit a defendant, such as where he sells a chattel and keeps the proceeds, but this is not always the case. Often a disposal will benefit a third party, not the defendant. In *Syeds* v. *Hay*[56] a ship's captain transporting the claimant's goods was asked by the claimant to deliver the goods directly to him and not to land them on the wharf. The captain delivered them to the wharfinger and the claimant had to pay for their release. This was held to be a conversion even though the defendant derived no benefit from his disposal of the goods, Buller J. saying, "… if one man, who is entrusted with the goods of another, put them into the hands of a third person contrary to orders, it is a conversion".[57] It is now well established that a disposal of goods for the benefit of a third party can constitute a conversion.[58] Similarly, a defendant may take goods without deriving any benefit from them. In *Chitty* v. *Cooper*[59] the defendant, a sheriff, had seized a debtor's goods but, owing to the debtor's bankruptcy, title to the goods had vested in the claimant, the assignee in bankruptcy. This was a conversion even though the defendant was clearly not claiming to be the owner of the goods but merely acting under his perceived duties as sheriff. The common feature of these cases

[54] (1863) 2 H & C 72, 159 E.R. 31.
[55] See also *Burroughs* v. *Bayne* (1860) 5 H & N 296, 157 E.R. 1196 and *Vaughan* v. *Watt* (1840) 6 M & W 492, 151 E.R. 506.
[56] (1791) 4 TR 260, 100 E.R. 1008.
[57] *Ibid.*, 264, 1009.
[58] e.g. *Parker* v. *Godin* (1795) 2 Stra 813, 93 E.R. 866, *Stephens* v. *Elwall* (1815) 4 M & S 259, 105 E.R. 830.
[59] *Chitty* v. *Cooper* (1756) 1 Burr 20, 31; 97 E.R. 166, 172.

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is not that the defendant has used the goods as his own or obtained a benefit from them, but that he has excluded the owner from the use or possession of his goods.

The early action of conversion may have focused on the defendant's use of the chattel but, as it expanded into the sphere of detinue, conversion's sole focus became the exclusion of the owner from the use or possession of his goods. However, the tort never abandoned the older language of conversion to his own use, or the more modern equivalents of assertion of dominium. The result is that we have a tort which in substance is based on an exclusion, but is defined in terms that suggest the focus is on the defendant's use of and benefit from the chattel. It is for this reason that it has proved so difficult to conceptualise the tort. Previous attempts have tried to take into account both of these perceived features.[60] In the Common Law Procedure Act of 1852, for example, the form of the claim in conversion is stated as, "That the defendant converted to his own use, *or wrongfully deprived the plaintiff* of the use and possession of the plaintiff's goods".[61] Whilst repeating the old language of "converted to his own use", the authors of the Act were also stressing that the tort could be committed by just excluding or depriving the owner of possession or use. We have now seen that it is the exclusion that is the sole focus of the tort and our modern definition must be built around this requirement.

2. A new definition

"Exclusion of the owner from the use or possession of his goods" is not yet a definition of conversion. A fully workable definition must explain what degree of interference with a chattel is required to constitute an exclusion and also take into account the requisite mental state of the defendant. Drawing on the historical materials it will be suggested that a conversion exists whenever a defendant intentionally exercises exclusive control over the claimant's chattel without his consent. The three elements of this definition, "control", "exclusive" and "intentional" will be explored in this section.

(a) Control

Whilst an exclusion of the claimant from the use or possession of his goods is the gist of conversion, the exclusion *must* result from the defendant's interference with the chattel itself. For example, if A kidnaps B and imprisons him at A's house, he necessarily excludes B from his home and his goods within. A is no doubt liable for false imprisonment,

[60] Compare, for example, the judgments of Martin B. and Bramwell B. in *Burroughs* v. *Bayne* (1860) 5 H & N 296, 157 E.R. 1196. Bramwell B. also dissented in *Pillot* v. *Wilkinson* on similar grounds.
[61] Common Law Procedure Act 1852, Sch. B, no. 28.

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but it would be odd if he had converted all of B's goods. There is an exclusion but it does not result from an interference with the goods themselves. A less extreme example would be where a petrol company increases prices so much that I am effectively prevented or excluded from using my car. Our environment constantly affects how we use our goods, but not all such cases attract tortious liability. An interference with an owner's use of his goods is only actionable in tort law when it is the result of a defendant interfering with the chattel itself. This is clearly illustrated in the historical development of conversion. The classic examples of the tort, such as a taking, detaining and disposing of a chattel, all involve an interference with chattel itself which have the end result of preventing the claimant from using them. What we need, therefore, is a word which captures this requirement of interference with the chattel, but is neutral to the question of whether or not the defendant has used or benefited from the goods. "Control" is such a word.

Control is defined as "the power of directing, command".[62] We may add other words to this list: rule, manage, master, dominate etc. To control a chattel simply means to make a decision as to how it is directed. Simple decisions such as where the chattel is kept, for how long, to what use it is put, if it is to be destroyed etc, if taken by the defendant indicate that he is controlling it. A defendant who detains a chattel to clarify his rights over it, or who disposes of goods for the benefit of a third party, exercises control over the chattel even though he does not obtain a benefit. Of course a defendant may benefit, such as when he sells a chattel and keeps the proceeds, but the benefit is purely incidental. Control is exercised in such a case not because the defendant has obtained a benefit, but because in selling the chattel he has made a decision as to how it should be directed.

Possession is undoubtedly a form of control over a chattel, but it should not be equated with control. In *Lewis Trust* v. *Bambers Stores*[63] Master Dyson said:

> [I]n my judgment it is irrelevant, in considering the acts capable of constituting the conversion, whether those acts are carried out by the defendants themselves, their employees, their subsidiaries, or by wholly independent contractors.[64]

A king controls his kingdom even though he does not have possession of his subjects or personally collect taxes. He makes decisions about the welfare of his subjects and directs that taxes be collected. In the same way, the question of control of a chattel is simply whether someone is

[62] *Oxford English Dictionary*, *sub. verb*.
[63] [1983] F.S.R. 453.
[64] *Ibid.*,

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making decisions on how the chattel is being directed. His physical possession is not required.

(b) Exclusive

As we have said, the exclusion of the owner is the gist of conversion. Early pleaders stressed the permanent exclusion of the claimant from his property as a way of distinguishing conversion from detinue. As Ibbetson has said, "Plaintiffs in detinue affirmed their property rights; plaintiffs in conversion claimed that they had been deprived of them".[65] When the other features of conversion, namely the allegation that the defendant had used the chattel for his own benefit, became fictional, conversion became a tort that was based solely on the exclusion of the owner from the use or possession of his goods. The exclusion requirement is expressed in this definition by the requirement that the defendant exercise exclusive control over the chattel. We will first look at the meaning of "exclusive control" and then look at the problem of temporary or fleeting exclusions.

(i) Meaning of "exclusive control"

"Exclusive control" means that the defendant must take the chattel completely outside the owner's sphere of control. From the defendant's perspective this means that it is he, and he only, who is making *all* of the decisions as to how the chattel is controlled. From an outsider's perspective, exclusive control means that everyone else is excluded from making these decisions. If this is not the case then we can only say that the defendant is exercising partial control. Take the case of *Fouldes* v. *Willoughby* discussed above. It will be recalled that the defendant took the claimant's horses on shore to entice their owner to leave the ferry. Although the defendant had exercised some control over the horses, he had not made *all* of the decisions as to how they were to be directed. He did not decide how long the horses would remain on shore, where they would be taken next, whether they should be sold, what use they would be put to etc. As a result the claimant was free to collect his horses at any point. As Lord Abinger C.B. said, "If the plaintiff had immediately gone on shore and taken possession of [the horses] there could be no conversion".[66] The claimant's use of his horses was interfered with, but not completely. The claim in conversion accordingly failed. In *England* v. *Cowley* the defendant, with no proximity to the claimant's goods, warned the claimant not to move them. The claim failed. Not only did the defendant not have control of the goods himself, but he seemed physically unable to prevent the claimant from

[65] D.J. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford 1999), 108.
[66] (1841) 8 M & W 540, 546; 151 E.R. 1153, 1155.

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using his chattels. Bramwell B. stressed the need for the control to be exclusive:

> The truth is that, in order to maintain trover, a plaintiff who is left in possession of the goods must prove that his dominion over his property has been interfered with, not in some particular way, but altogether; that he has been entirely deprived of the use of it.[67]

A similar case is *Penfolds Wines* v. *Elliot*[68] where the claimants sold wine but retained title to the bottles it was sold in. One of their customers took an empty bottle to the defendant who he asked to fill it with wine. The majority of the Australian High Court held that this was not a conversion, Dixon J. saying that he could not impute an "intention of depriving the appellants"[69] of the bottle. Because the defendant had not made all of the decisions concerning the bottle, but had only agreed to fill it with wine, it could not be said that through his control he had excluded the claimant from the bottle. The person who was controlling the chattel to the exclusion of the owner was the customer who had brought it to him to be filled. It was the customer, not the defendant, who had been deciding what to do with the bottle.

In many cases the claimant is excluded because the defendant has actually taken the chattel from him, for example, a thief who steals a watch from the claimant's possession. However, this need not be the case. Often the defendant will not be aware of the claimant's existence until a later date, the innocent purchaser of stolen goods being the classic example.[70] The relevant enquiry is whether or not the defendant has, at some point, been the only person controlling the chattel. It is for this reason that we ask whether the defendant has exercised exclusive control, not whether he has taken the chattel *from* the claimant. The reason why someone can convert a chattel after its initial taking from the owner's possession is that the owner will still have the right to the use and possession of his chattel no matter how many hands it passes through. Anyone who exercises exclusive control over the chattel, whether he is the first person to do so or the tenth, still excludes the owner from what is rightfully his.[71] This issue is at the heart of *Kuwait Airways Corpn* v. *Iraqi Airways Co (Nos 4 & 5)*.[72] During the first gulf war the Iraqi Airforce had taken possession of a number of the claimant's aircraft and flown them back to Iraq. The defendants then incorporated the aircraft into their fleet, registering them and changing

[67] (1873) LR 8 Ex 126, 130 (Exch).
[68] [1946] C.L.R. 204.
[69] *Ibid.*, 230.
[70] P. Cane, "Causing Conversion" (2002) 118 L.Q.R. 544, 545.
[71] The point being made here is that a subsequent converter infringes the claimant's rights in the same way as the first converter. Whether he causes loss in the same way is discussed below.
[72] [2002] 2 A.C. 883 (HL).

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their colours. It was a clear example of an exercise of exclusive control as no other party was making decisions concerning the aircraft. However, the defendants argued, it had been the Airforce, a branch of the military, who had deprived the claimants, not the defendants, a civil body, who had simply absorbed the aircraft into their fleet once they had been flown to Iraq. The argument was rejected in the House of Lords. Because the claimants continued to be entitled to the use of their planes after they came into the defendant's possession, the defendants were, in Lord Hoffmann's words, under a "continuing strict duty to restore the chattel to its owner".[73] Because an owner's property right will survive most unauthorised transactions, it is possible for multiple parties to infringe the same right.

(ii) Temporary exclusions

There will always be borderline cases when it comes to the exclusion issue. Most problematic is when the defendant exercises control for a temporary period. I may pick up someone's expensive electrical gadget to inspect it before putting it back down; even though for a short moment I am controlling the gadget and not its owner, no one would consider this a conversion. However, this does not mean that a defendant must intend to permanently deprive the owner of his chattel. The New Zealand case of *Aiken Agencies* v. *Richardson*,[74] where the defendant took the claimant's van joy riding before abandoning it, is a good example. The defendant unsuccessfully argued that because he did not intend to keep the van permanently he could not be liable in conversion. Although the interference was for a short period, the defendant had, for that period, made all of the decisions as to how the van should be directed, including for how long his control lasted. The difficulty for the courts is to distinguish between cases where a defendant exercises control over a chattel for a temporary period out of deference to its owner's rights, and cases, such as *Aiken*, where the decision is not made out of deference to the owner's rights. In the above example I put the electric gadget back down because I knew that it belonged to someone else and, therefore, I still recognised another's right to control the chattel. As a result my control could not be called exclusive. In *Aiken*, however, the defendant's decision to abandon the car was not taken out of deference to the owner's rights but because he got bored of driving.

If there is no requirement for a permanent deprivation then a defendant who exercises control over a chattel for a day, or even a minute, can in theory be liable in conversion. However, this will not usually

[73] *Ibid.*, 1106.
[74] [1967] N.Z.L.R. 65.

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work harshly against a defendant because if he returns the chattel to the claimant he will be liable for consequential losses only.[75] If the defendant in *Aiken* had been caught as he pulled out of the claimant's garage he would still have been liable in conversion, even though his control would have lasted for no more than a minute, but this would not mean that he would have to pay the full value of the van as it would be returned to its owner. Further, if there is a rule to the effect that control for a temporary period cannot constitute a conversion then this exposes the owner of a chattel to considerable risk. If a defendant allows a claimant's chattel to be lost or stolen, this does not, in itself, constitute a conversion; the reason, as we see below, is that this is an unintentional exclusion. It follows that if a defendant is not liable in conversion because his interference was for a short period, then, if he allows the chattel to be lost or stolen during that period, the claimant will be deprived of both his chattel and a remedy unless he can recover in the tort of negligence. We can see this in the old American case of *Johnson* v. *Weedman*.[76] Knowing that the claimant would be away for a few days, the defendant rode his horse without his permission. Counsel for the defendant[77] successfully argued that period of control was not sufficient for liability in conversion. Normally this outcome would not prove too problematic as the as the horse would be returned to the claimant. However, in this case the horse died immediately following the defendant's ride. Because the loss of the horse did not constitute a conversion in itself, and, as the court had held that the short period of control of the horse was not a conversion in the first place, the claimant was left without a horse or a remedy. It is surely wrong to say that the risk of the death of the horse remains with the owner even though it is under the defendant's exclusive control, albeit for a short period. It is suggested that that *Aiken* represents a far better approach; if the defendant exercises exclusive control, even for a short period, he is liable in conversion and, therefore, bears the risk of the loss or theft of the chattel during the period of his control.

(c) Intentional

A defendant must intentionally exercise exclusive control over the claimant's chattel if he is to be liable in conversion. As with the "exclusive"' requirement, the "intentional" requirement results from the early conceptualisation of conversion. Early pleaders would stress that a defendant had used the claimant's chattel as though it were his own and, generally speaking, it is impossible to use a chattel in such a way

[75] *e.g. Hillesden Securities Ltd* v. *Ryjack Ltd* [1983] 1 W.L.R. 959 (QB).
[76] (1843) 5 Ill 495.
[77] A young Abraham Lincoln.

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unintentionally. I cannot, for example, unintentionally drive a car or wear clothes. To use a chattel usually requires a conscious effort. This has been long established in conversion. In the 1590 case of *Walgrave* v. *Ogden*, for example, Walmsley J. said:

> If a man finds my garments and suffereth them to be eaten with moths by the negligent keeping of them, no action lieth: but if he weareth my garments it is otherwise, for the wearing is a conversion.[78]

Carelessly allowing moths to eat a garment is not an intentional interference. Although the old definition of conversion which focused on the defendant's use of the chattel is now redundant, it still had the effect of shaping the tort into one that could only be committed intentionally. This is evident from the types of acts that typically constitute a conversion in the modern tort. For example, it is difficult to envisage a case where a defendant unintentionally takes a chattel from the claimant's possession. More telling is the case of a detention. A defendant only detains a chattel if he refuses to hand it over; the fact that a defendant has made a refusal means that he must be intentionally withholding the chattel. Yet the description of conversion as an intentional tort may seem at odds with the fact that it is also a strict liability tort in that fault, or lack of, plays no part in questions of liability. However, what we mean by intention in conversion is an intention to interfere with the chattel itself, not an intention to harm its owner. For example, if an innocent defendant purchases a stolen car in good faith, although he has not intentionally harmed its true owner (he does not even know of his existence) he has still intentionally interfered with the car itself by driving it everyday. The intention is to the interference with the chattel, not the harm suffered by its owner.

In the context of conversion a defendant must not only intend to interfere with the chattel, he must also intend to exclude all others from it. This is apparent from a number of cases unsuccessfully litigated in conversion where the defendant has, through his conduct, unintentionally caused others to be excluded from the chattel. In *BMW Financial Services* v. *Bhagwanani*[79] the defendant had borrowed the claimant's car, with the claimant's consent,[80] but crashed it whilst driving in Romania. This effectively excluded the claimants from their car as it languished in a Romanian garage in need of $20,000 worth of repairs. Although excluded from their car, this was not an intended consequence of the defendant's conduct. The exclusion had, after all,

[78] *Walgrave* v. *Ogden* (1590) 1 Leon 224, 74 E.R. 205.
[79] [2007] EWCA Civ 1230 (CA).
[80] The car actually belonged to a third party who had possession under a hire purchase agreement with the claimants. When he defaulted on the agreement the claimants became entitled to possession.

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resulted from an accident. The resulting exclusion was an unintended consequence and the defendant was accordingly found not liable in conversion. Similarly, in *Rushworth* v. *Taylor*[81] the defendant fired the claimant's gun which caused it to jam and become useless. Although the defendant intended to exercise some control over the chattel, it could not be said that he intended to exercise that control to the exclusion of others, even though that was the result of his conduct. The claim in conversion failed.[82] In *Heald* v. *Carey*[83] a customs officer, contrary to normal practice, stored the claimant's goods in a warehouse. The warehouse burnt down, destroying the goods. The defendant's unauthorised conduct was a contributory factor to the claimant's ultimate exclusion from his goods. However this was never an intended consequence of the defendant's conduct and the claim therefore failed. It is only when the defendant intends to exercise control to the complete exclusion of others that he will be liable in conversion.

However, there is one case that suggests something less is required. In *Moorgate Mercantile* v. *Finch*[84] the defendant borrowed the claimant's car, with the claimant's consent, but used it to smuggle watches into England. He was caught at the border and the car confiscated by Customs and Excise. The defendant was found liable in conversion. This is problematic because he had not intended to exclude the claimant. On the contrary, he had intended to return the car. The exclusion was an unintended consequence. The case suggests that as long as the defendant has intended to exercise some (or partial) control over the defendant's chattel, then he will be liable in conversion if he loses the goods. We may attempt to justify this approach by saying that if a defendant has decided to exercise partial control over the car, he should become responsible for any loss or theft of it, even though an unintended consequence. However, this approach was specifically rejected in *BMW Finance*. Further, *Moorgate* only supports this approach on its facts. The judicial reasoning expressly rejects it. It does so by presuming that the defendant *did* intend to lose the car. Dankwerts L.J. said:

> What the second defendant did in fact was to take the car and use it in a way which necessarily resulted, or might, at any rate, in all probability, result in the owners being deprived of the car for ever … It seems to me that whether the second defendant intended that consequence to follow or not – presumably he did not intend it, but hoped he would not be found out – nonetheless, he must be

[81] (1842) 3 Q.B. 699 (QB).
[82] *Towne* v. *Lewis* (1849) 7 CB 608, 137 E.R. 241 and *Barnard* v. *How* (1824) 1 C & P 366, 171 E.R. 1233 also support this line of authority.
[83] (1852) 11 CB 977, 138 E.R. 762.
[84] [1962] 1 Q.B. 701 (CA). See also *Forsdick* v. *Collins* (1816) 1 Stark 173, 171 E.R. 437.

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> taken to intend the consequences which were likely to happen from the conduct of which he was guilty, and which did in fact result in the loss of the car to the plaintiffs.[85]

After expressly stating that the defendant did not "intend to lose the car" and exclude the claimant, Dankwerts L.J. goes on to find that he did "intend [this] consequence" and it is on this basis that the defendant was held liable. This is of course a fiction, but it proves that the court was aware that it is only when a defendant has intended to exclude others that he can be liable in conversion. Of course the defendant in the case should have been liable, but only in the tort of negligence. His exclusion of the claimant was unintended and therefore should not have been actionable in conversion. These three elements of control, exclusion and intention having been proved, we will now consider the strict liability of the tort and its approach to loss.

Part III: Strict Liability and Causation of Loss

The two most controversial features of conversion, its strict liability and its apparent indifference to causation, require separate treatment.

1. Strict liability

In *Marfani & Co Ltd* v. *Midland Bank Ltd*[86] Lord Diplock said of conversion:

> The tort at common law is one of strict liability in which the moral concept of fault in the sense of either knowledge by the doer of an act that it is likely to cause injury, loss or damage to another, or lack of reasonable care to avoid causing injury, loss or damage to another, plays no part.[87]

The classic illustration of the strictness of the tort, and the type of case that attracts the most criticism, is the innocent purchaser of stolen goods. In *Hollins* v. *Fowler*[88], for example, the defendants were held liable in conversion for buying and selling cotton that, unbeknown to them, had been stolen from the claimants. The rule undoubtedly works harshly against such defendants, but it cannot be rejected for this sole reason. No matter how innocent the defendants were in *Hollins*, they were no more innocent than the claimants whose goods had been stolen. If the defendant's innocence means that he should not have to bear the loss then, equally, the claimant's innocence means that he should

[85] *Ibid.*, 706.
[86] [1968] 1 W.L.R. 956 (CA).
[87] *Ibid.*, 970–1.
[88] (1874–5) L.R. 7 H.L. 757 (HL).

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not have to. Innocence both demands and rejects the defendant's liability.

Strict liability in conversion is most likely the result of its early interaction with detinue. Detinue, as we have said, was an action based upon the detention of the claimant's chattel and was often regarded as a proprietary action. It attracts this label through its similarity to the Roman *vindicatio* which allowed the owner of a chattel to directly assert his property rights against anyone in possession. Having this proprietary characteristic it is easy to see why fault would play no part in detinue: as Tettenborn rightly points out, a defendant in possession of a claimant's chattel cannot, no matter how innocent, retain possession against the owner.[89] As conversion expanded into the field of detinue, to save claimants from the possibility of a defendant waging his law, it is not surprising that it inherited this proprietary characteristic and continued to ensure that even innocent defendants in possession could not withhold possession from the rightful owner of the chattel. The problem, of course, is that conversion was much wider than detinue. It could also be brought against defendants who were no longer in possession because they had disposed of the chattel. It is quite possible that the strictness of the action, initially introduced to fulfil its proprietary function, came to be applied against defendants no longer in possession. There may be some historical evidence for this "mixed purposes" explanation, as Tettenborn calls it, if we consider two cases at the end of the 16th century which came to differing conclusions concerning strict liability. In the 1589 case of *Gallyard* v. *Archer* conversion was brought for 50 yards of tuffed taffeta which, the defendant pleaded, he had bought and sold without any knowledge that it belonged to the claimant. Three of the judges said that the absence of fault defeated the claim, Anderson C.J. saying, "because this action supposes a fraudulent conversion, and here he justifies by a lawful conversion".[90] A year later in *Vandrink* v. *Archer*[91] a similar claim for the conversion of cloth was brought and again the defendant pleaded his innocence, but this time his argument was rejected. We may speculate that a possible reason for the different outcomes is that the defendant in *Vandrink*, unlike the defendant in *Gallyard*, was still in possession of the goods at the time of the trial. It may well be that the courts at this point only saw strict liability as being appropriate when conversion was actually doing the work of detinue. However, by the 17th century any suggestion that fault had a role in the tort is gone.

[89] A. Tettenborn, "Conversion, Tort and Restitution", in N. Palmer and E. McKendrick (eds), *Interests in Goods*, 2nd ed. (London 1998).
[90] B & M 536. There is no recorded verdict however. For commentary on the pleading in the case see Ibbetson, *Historical Introduction to the Law of Obligations*, 112.
[91] (1687) 1 Leo 221, 74 E.R. 203.

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The mixed purposes of conversion may explain why it initially imposed strict liability. However, when we consider developments, particularly in the nineteenth century, it does not explain why strict liability survived into modern times. The leading nineteenth century case to confirm the strictness of the tort is *Hollins* v. *Fowler*, where the innocent cotton broker was found liable. Despite the long standing rule of strict liability, the House of Lords agreed to revisit the issue. The importance of their judgment is that proof by wager of law had been abolished in 1833,[92] over forty years before the court handed down their decision. This had removed the only deterrent to a claimant suing in detinue. As Baker said, the statute "had the effect of reviving detinue as a viable remedy".[93] In other words, by the time the House of Lords fully considered strict liability in conversion in the 19th century, there was no need for conversion to do the work of detinue. Strict liability could easily have been limited to defendants in possession of the claimant's chattel through the action of detinue, whilst conversion could have imposed fault based liability on defendants no longer in possession. After a lengthy review of the law all five Law Lords rejected calls to introduce fault into conversion, re-affirming the strict liability rule. The reason they did this is that they saw strict liability not as an accidental feature, filling a gap left by detinue, but as serving the important function of protecting a claimant's rights in his chattel. Cleasby B., for example, said that strict liability is the "salutary rule for the protection of property".[94] A similar view was adopted nearly a century later when the Law Reform Committee published their 18th report. Again they considered introducing fault based liability in conversion and limiting strict liability to claims against a defendant in possession. Rejecting such a suggestion, they said of conversion, "it is and always has been primarily an action for the protection of ownership and it is because of this that questions as to fault of the defendant are irrelevant".[95]

It is perfectly legitimate to stress the importance of the claimant's property rights in our attempt to justify strict liability. Epstein notably argued that the focus of the common law should be the claimant's liberty to be free from any interference with such rights.[96] There are, however, significant problems if a legal system takes the importance attached to a claimant's property rights as its sole organising principle. It would, for one, demand a system of general strict liability as only this would reflect absolute protection for the claimant's rights. It is clear that such a system could not work as it would prove too restrictive of

[92] 3 & 4 William IV, c 42, s 13.
[93] Baker, *Introduction to English Legal History*, 399.
[94] *Hollins* v. *Fowler* (1872) L.R. 7 Q.B. 616 (Ex) 639.
[95] Law Reform Committee, "Conversion and Detinue" (Law Reform Com No 18 Cm 4774, 1971) 6.
[96] Epstein, "A Theory of Strict Liability" (1973) 2 J. Legal Studies 151.

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the defendant's liberty to act: if a claimant's property rights are sacrosanct, meaning that it is impermissible for any one to create a risk of harm to them, then we effectively deny the defendant's freedom of action because *all* action creates risk.[97] The importance attached to the claimant's property rights cannot, in itself, justify strict liability. Any system of liability must balance this against the defendant's liberty to act.

This does not mean, however, that there is no room at all for a strict liability tort like conversion. The objection has always been to a *general* system of strict liability as it is only such a system which reflects extreme solicitude for a victim's rights, thus denying the defendant's *general* liberty to act. What does seem permissible, however, is to have small pockets of strict liability, which do not deny a defendant's general freedom to act. Perry, one of Epstein's critics, said:

> It should be emphasised that the conclusion applies only to a *general* standard of strict liability. The coherence of what might be called localized standards in which liability can only be said to be strict relative to certain specified precondition having been met, for example the defendant's having manufactured a defective product, is not called into question.[98]

There may, therefore, still be room for strict liability in conversion. The importance of a claimant's property rights may still justify the imposition of strict liability in the tort but only if this does not represent too great a restriction on the defendant's freedom of action. It is suggested that it does not. It does not because it is only when a defendant *intentionally* interferes with a chattel that he can be liable in conversion. Unintended interferences must be litigated in negligence where fault must be proved. As a result a defendant's general freedom to act is still recognised *except* when chooses to consciously interfere with a chattel. Because this is a well defined and limited form of activity, his freedom is restricted in a comparatively minor way. The outcome is that a balance is struck between the importance attached to the claimant's property rights on the one hand, and the defendant's liberty to act on the other. Strict liability, therefore, can be justified.

2. Causation of Loss

Conversion, like most torts, will only compensate a claimant for a loss that has actually been suffered. A well known illustration is *Chinery* v. *Viall*[99] where the claimant had bought sheep from the defendant and,

[97] E. Weinrib, *The Idea of Private Law* (Cambridge Mass. 1995), 152.
[98] Perry, "The Impossibility of General Strict Liability" (1988) 1 Can. J.L. Juris. 147, 158.
[99] (1860) 5 H & N 288, 157 E.R. 1192. See also *Butler* v. *Egg and Egg Pulp Marketing Board* [1966] 114 C.L.R. 185 (High Ct of Australia).

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before they had been delivered, the defendant resold them. Because the claimant had bought the sheep on credit from the defendant the conversion had not actually caused him to suffer any loss. Bramwell B. said that his damages "ought to be no more than were really sustained by the plaintiff, that is, the value of the sheep, minus the price he would have had to pay for them".[100] Similarly, if a defendant has only a limited interest in a converted chattel then he can only be compensated for the loss of this interest. In *Wickham Holdings* v. *Brooke House Motors*[101] the defendants had converted a car that the claimants, a finance company, had let on a hire purchase to a third party. The claimants could only recover about a third of the value of the car because the third party, before the conversion, had paid substantial amounts to the claimants under the agreement. Lord Denning M.R. said, "The finance company is only entitled to what it has lost by the wrongful act of the defendants".[102] In the more recent case of *Borders (UK)* v. *Commission of Police of the Metropolis*,[103] when calculating damages for the conversion of a large number of books stolen from the claimants, the court took into account the fact that not all of the books would have been sold. The claimants were not entitled to be compensated for every book converted as this would not accurately reflect their financial losses.[104]

Although conversion only allows a claimant to recover for financial losses actually suffered, the problem has always been the tort's apparent indifference to the question of who actually causes those losses. For example, if my watch is stolen by a thief who then sells it to an innocent purchaser who converts it, although most would agree that it was the thief who caused the loss, I am still entitled to recover the value of the watch from the innocent purchaser. The most recent case to confirm this is *Kuwait Airways* where it will be recalled that the House of Lords held the defendants liable for the value of the claimant's aircraft even though it had been the military, a separate body, which had initially taken them. Since the claimants remained the owners of the aircraft when they fell into the defendants' hands, there was nothing wrong with the finding that the defendants could convert the aircraft. The difficulty is with the finding that the defendants' conversion had the same financial impact on the claimants as the initial taking of the aircraft had. One possible answer to this problem is that although the defendants had not initially taken the aircraft they had, through their

[100] *Ibid.*, 294; 1195.
[101] [1967] 1 W.L.R. 295 (CA).
[102] *Ibid.*, 299.
[103] [2005] EWCA Civ 197 (CA).
[104] A similar approach is taken towards consequential loss. It is only consequential losses that a claimant can prove that he has actually suffered that are recoverable: *B*randeis Goldschmidt *Ltd* v *Western Transport Ltd* [1981] Q.B. 864 and *Williams v Peel River Land & Mineral Co* (1886) 55 L.T. 689.

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conversion, still excluded the claimants from their goods thus causing a new and separate loss.[105] This approach, however, would be highly fictional. Although it is true that when multiple parties convert a chattel each and every party excludes the owner from the use of his goods, it does not follow that each exclusion has the same financial impact on the owner. Returning to the stolen watch example above, although the innocent purchaser continues to exclude me from possession of my watch, because I had already lost it, it is difficult to say that this exclusion has made me any worse off financially.[106] Further, if we say that in cases of serial conversions that each and every time the owner is excluded from his chattel he suffers a new and separate loss, then he should be able to recover these losses from each and every converter. This is not the law. If a claimant recovers against one converter then this extinguishes his claims against any other party who may have converted his chattel.[107]

The most likely explanation for conversion's indifference to the requirement of causation is that it is a rule based on policy. The only party who would be liable for the claimant's loss if the "but for" test was applied in conversion would be the first converter. Because the first converter is often a thief, conversion would in practice, if not in theory, start to resemble the tort of negligence as only blameworthy parties would usually be sued. In short, if the courts did not allow a claimant to recover the full amount of his loss against a subsequent converter of his goods then the strict liability of the tort would be essentially redundant. In the previous section it was explained that the importance of a claimant's property rights, when balanced against the defendant's liberty, justify the imposition of strict liability in cases of intentional interferences. However, if this value judgment is to have any real teeth then it must be backed up with remedies that work in favour of the claimant. In Lord Nicholls' judgment in *Kuwait Airways* it is this policy based justification that is adopted:

> The court may treat wrongful conduct as having sufficient causal connection with the loss for the purpose of attracting responsibility even though the simple "but for" test is not satisfied. In so deciding the court is primarily making a value judgment on responsibility. In making this judgment the court will have regard to the purpose sought to be achieved by the relevant tort, as applied to the particular circumstances.[108]

[105] It is possible to read Lord Hoffmann's judgment as suggesting this justification: [2002] 2 A.C. 883 1106 (HL).
[106] See A. Tettenborn, "Damages in Conversion: Exception or Anomaly?" [2003] C.L.J. 128, 134–5.
[107] Torts (Interference with Goods) Act 1977, s. 5, largely reaffirming the position at common law: *Brinsmead* v. *Harrison* (1871) L.R. 6 C. & P. 584.
[108] [2002] 2 A.C. 883 1092 (HL).

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Conversion's indifference to causation undoubtedly works harshly against innocent defendants. However, as the claimant's ability to recover in full against parties who did not necessarily cause the loss is an essential concomitant of the strict liability of the tort, any criticism should be aimed at conversion's strict liability, not its skewed application of causation. Unless the courts are willing to reconsider the strictness of the tort, it seems as though the best way to mitigate the harshness of the rule for innocent converters is to allow them to seek contribution against the initial converter.[109]

Conclusion

It is hardly surprising that conversion is a tort that many choose to ignore. It is not just the strict liability of the action or its slightly odd approach to causation that some find troubling, but even the most basic features of the tort are ambiguous. Conversion was presented here as an action that could only be understood in the context of its historical development. It was only through this approach that we could see that the basis of liability in conversion is the exclusion of the owner from his goods. Distracting references to a defendant's use of the chattel or his assertion of dominium over it all too often obscure this fact. It is hoped that a new definition which abandons such terms and focuses solely on a defendant's intentional exercise of exclusive control will make the tort more approachable.

[109] It has been suggested in *Middle Temple* v. *Lloyds Bank plc* [1999] All E.R. Comm 193 and *Linklaters* v. *HSBC Bank plc* [2003] EWHC 1113 (Comm), [2003] 2 Lloyd's Rep. 505 that a defendant may be able to seek contribution from other converters under s.1 of the Civil Liability (Contribution) Act 1978.

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