

# TORTIOUS INTERFERENCE WITH GOODS: TITLE TO SUE

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## I. INTRODUCTION

The question of who has a right to claim for losses suffered as a result of wrongful interference with goods is an old and recurrent one. Where a tortfeasor commits negligence, conversion, trespass or detinue by acts of damage, destruction or removal of goods, there may be various others who suffer adverse consequences, economic or otherwise, as a result. This class of affected people may be large and their interests in the goods in question may be diverse. Interests of a legal, beneficial, proprietary and possessory kind may subsist concurrently in the same goods; and the holders of these interests may be affected in different ways by the interference with them. There may be others who lack vested interests, but have expectations of financial gain from the goods, based on contractual or other connections with them. What principles apply in determining who, from a potentially large class of plaintiffs, has a sufficient interest to claim for losses resulting from wrongful interference with the goods?

Let us imagine that a factory machine is legally owned by A, who holds it on trust for a beneficiary, B. The machine has been leased for six months to C. In the course of that six month period, A agrees to sell it to D, their contract providing that title to the machine will pass to D a month after the lease to C has ended. Before the lease expires, E negligently damages the machine, rendering it unusable. A, B, C and D each claim to have suffered loss in consequence of E's actions.

A asserts that he, as a trustee, has a legal interest in the machine and, in addition, that he has a reversionary interest in it. B, as the beneficiary of the trust, has an equitable interest in the machine. C, as a lessee, claims a possessory interest; he has lost the use of the machine. D asserts that he, under his agreement to buy the machine from A, is contractually entitled to acquire the proprietary title in the future, and that E's conduct has caused him to lose the machine and the profits he would have made from it. All allege that they have suffered economic losses as a result of E's conduct.

Potentially, the range of people who may be disadvantaged by E's actions is even larger. What of C's employees and customers, who will lose money if C cannot continue to use the machine productively? What if, for example, D had contracted to sell or lease the machine on to a person who had also contemplated deriving a profit from it? Clearly, in such cases, a line must be drawn somewhere, and not everyone who might be adversely affected by E's actions will be able to recover compensation from him. Floodgates must be considered; E's conduct, although in fact causing harm to a range of people, may not be actionable by all of them.

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The discussion in this article focuses on the torts of conversion and negligence. This is because negligence has largely subsumed trespass and, in addition, nearly every case of detinue also constitutes conversion.<sup>1</sup> It is suggested that conversion remains a tort of some significance in New Zealand despite the passage of the Personal Property Securities Act 1999. Indeed, it may be more important today than it was before, for that Act now provides for the circumstances in which owners and possessors may lose their rights in goods, and allocates those rights. The right to claim in conversion of course survives the Act, and may be a useful recourse available to an owner who loses secured goods under its provisions.<sup>2</sup> Similarly, the principles of the law of negligence are not altered by the Act.

The purpose of this article is to discuss the interests in goods that these torts currently protect, and to consider recent case law on the matter. Some conclusions, recommending a less restrictive approach than that which exists at present, will be drawn.

## II. THE NEED FOR AN INTEREST

The law has consistently required that a claimant in an action for tortious interference with goods must have an interest in the goods. The kind of interest required varies according to the tort in question, but it is clear that, without an interest of some kind, a claimant will be precluded from recovering losses resulting from interference with goods.

In the case of conversion, detinue, trespass and negligence, the protection is afforded to those with certain possessory interests in the goods. The proprietary interest of the owner of the goods is not itself protected by these torts. An owner of goods who is in possession of the goods may, of course, claim against the tortfeasor, but that is because the owner also has the requisite possessory interest. Ownership without possession or a right to it is not sufficient title for claims in any of these torts. This principle has been long established.<sup>3</sup>

A possessory title may be established by proving either *de facto* possession or the immediate right to possession.<sup>4</sup> In this context, *de facto* possession, meaning effective physical control as evidenced by some outward act, is a question of fact;<sup>5</sup> and, provided it is coupled with the manifest intention of sole and exclusive dominion over the chattel in question, always constitutes

1 For this reason, detinue has been abolished in England: see the Torts (Interference with Goods) Act 1977, s 2.

2 It was said by Fogarty J in *Cameron v Phelps* [2009] BC 347 that the PPSA did not in any way replace the common law of conversion.

3 The many authorities include *Harris v Lombard New Zealand Ltd* [1974] 2 NZLR 161; *The Hamburg Star* [1994] 1 Lloyd's Rep 399; *Transcontainer Express Ltd v Custodian Security Ltd* [1988] 1 Lloyd's Rep 128; *HSBC Rail (UK) Ltd v Network Rail Infrastructure Ltd* [2005] EWCA Civ 1437; [2006] 1 WLR 643 (CA); *Islamic Republic of Iran v Barakat Galleries Ltd* [2008] 1 All ER 1177 (CA).

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

5 *Balmoral Supermarket Ltd v Bank of New Zealand* [1974] 2 NZLR 155.

possession in law.<sup>6</sup> Such possession is not just evidence in support of ownership; rather, a possessory title is as good as ownership against all the world except for the true owner.<sup>7</sup> Whether or not there exists a right to immediate possession is a question of law; the existence of this right confers a right to sue for tortious interference with goods.<sup>8</sup> The facts constituting possession generate rights as truly as do the facts which constitute ownership, although the rights of a mere possessor are less extensive than those of an owner: “A complete title consists of: possession, the right of possession and the right of property ... and invests the owner with the three incidents of free and exclusive enjoyment, free disposition, and indeterminate duration.”<sup>9</sup>

Thus, no one but a person who has actual, *de facto* possession, or the immediate right to possession, of the goods at the time they are converted may bring an action in conversion, detinue, trespass or negligence. Because it is possession and not ownership which is protected, it is not necessary to show ownership to establish a right to sue, although of course an owner with possession has such a right. The right, however, is not a consequence of ownership, but of possession,<sup>10</sup> which is a right included in unrestricted ownership.

Thus, in the case of these torts, claimants must show that they have the relevant possessory interest on which to base a claim. Outside this class of plaintiffs, the law draws its line. This is significant in the case of claimants who may be unable to establish the necessary possessory interest, but nevertheless assert a contractual connection or some other contingent right in respect of them. Such claimants will generally be unable to recover from the wrongdoer any losses they have suffered.

There is, of course, good reason for excluding plaintiffs who can show no interest at all in goods in this context. As was stated in *Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd*<sup>11</sup> “some limit or control mechanism has to be imposed upon the liability of a wrongdoer towards those who have suffered economic damage”. Thus, it was held in that case, reaffirming the principle, that a time charterer with only a contractual interest in a vessel could not succeed in a negligence claim for damage done to it by a third party.

Many other authoritative cases confirm that a contractual right to acquire ownership of goods in the future, without more, does not confer an interest to claim for losses suffered in consequence of negligent damage to them. Typically in such cases a contract of sale of goods has been made and, while in they are still in transit to the buyer (usually at sea) the goods are damaged by a third party. The question then is whether the buyer may sue the party who damaged them. The focus of the Courts in such cases has been on the fundamental distinction between a sale and an agreement to sell. The former,

6 Pollock *An Essay on Possession in the Common Law* (Clarendon Press, Oxford, 1888) at 20.

7 *Flack v Chairperson, National Crime Authority* (1997) 150 ALR 153 and 156 (FCA).

8 The issue is discussed by Palmer in *Possessory Title* in Palmer and McKendrick (eds) *Interests in Goods* (2nd ed, LLP, 1998).

9 Blackstone: 2 Black Comm 199.

10 *Harris v Lombard NZ Ltd* [1974] 2 NZLR 161.

11 *Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd* [1986] AC 1 (PC), per Lord Fraser of Tullybelton.

of course, is a contract under which property in the goods passes to the buyer; in the latter case, the passing of property in the goods is suspended until some later time, or until some condition has been fulfilled.<sup>12</sup> The buyer under an agreement to sell has no more than a conditional or contingent interest in the goods and, until the agreement to sell ripens into a sale, he or she has no proprietary interest in the goods. The right to sue in tort may thus depend upon whether the buyer has become the owner of the goods or not. An example of this is *The Elafi*,<sup>13</sup> where property in the goods being carried had passed to the buyers while the ship was at sea, and the buyers could sue the shipowners in tort for damage which occurred at their port of destination.

Many cases concerning the right of sellers or buyers to claim in negligence have focused on this question of whether property has passed under the relevant contract of sale. In such cases, it is generally stated or implied that the relevance of determining whether property has passed to a buyer is that, if it has, a possessory right will also have been transferred.<sup>14</sup> This is not always expressly stated, however, and unqualified dicta may in consequence, if read literally, be misleading. *The Aliakmon*<sup>15</sup> contains an example of this. In that case it was held that buyers of goods which were damaged during sea transit before property in the goods had passed to them could not sue the shipowners in negligence. The buyers had agreed to buy, but had not bought, the goods at the time the damage was done, and they therefore had no property in the goods. The buyers' contractual right to acquire property in the future did not suffice to allow them to sue. Lord Brandon of Oakbrook said:<sup>16</sup>

... there is a long line of authority for a principle of law that, in order to enable a person to claim in negligence for loss caused to him by reason of loss of or damage to property, he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred, and it is not enough for him to have only had contractual rights in relation to such property which have been adversely affected by the loss of or damage to it.

*The Aliakmon* thus makes it clear that a mere contractual right to acquire an interest in goods at some future time does not confer a title to claim in negligence. However, Lord Brandon's dictum appears to go further than this; if read or quoted in isolation, it appears to state that a proprietary interest, without possession, is sufficient title to claim. This cannot be what was intended. Rather, it is suggested that, in cases concerning conditional purchasers, such as *The Aliakmon*, there is no need for the Courts to enquire into whether property has passed from seller to buyer unless the passing of

12 Sale of Goods Act 1908, s 3.

13 *Karlsbamms Oljefabriker v East Navigation Corp, The Elafi* [1982] 1 All ER 208.

14 This is evident in, as examples, *The Albazero* [1977] AC 774 and *Obestain Inc v National Mineral Development Corp, The Sanix Ace* [1987] 1 Lloyd's Rep 465.

15 *The Aliakmon* [1986] AC 785. This case is discussed in detail by SMD Todd (1986) 3 *Canta LR* 86 and by Palmer *Interests in Goods*, Palmer and McKendrick (eds) (2nd ed, LLP, London, 1998) at ch 3.

16 At 809, per Lord Brandon of Oakbrook.

property is presumed to carry with it an associated right to possession of the goods. This is a justified assumption, for possession is a right that is included in uncurtailed ownership. Hence, it is true to say both that possession is a root of title, and that possession follows title.<sup>17</sup>

Broad statements concerning ownership such as that made by Lord Brandon, need to be read with that point in mind. Although Lord Brandon appears to refer to “the legal ownership or a possessory title” as alternatives, it is unlikely that the statement can be taken literally and he cannot have meant that the buyers could have sued if they had acquired legal ownership of the goods but no right to possession of them. Otherwise, *The Aliakmon* and the line of cases concerning the passing of property in goods that were damaged in transit would have been quite misdirected and out of step with the many authorities that have consistently held that a possessory interest in goods is necessary to enable a tort action to be undertaken. Rather, the enquiry into the passing of property from sellers to buyers in those cases was necessary because the passing of a legal title would carry with it a right (unless the buyers had chosen to divest themselves of it) to possess the goods. In other words, Lord Brandon’s reference to “legal ownership of or a possessory title to the property” should be read as meaning “legal ownership (an incident of which is a right to possession) or a possessory title alone”.

If dicta such as Lord Brandon’s are read in this qualified way, no inconsistency in the cases appears. They do not contradict the established rule that a possessory title is necessary to claim in the torts relating to goods.

To avoid restrictions as to title, plaintiffs who have agreed to buy goods have attempted in a number of cases to establish that they thereby obtained an equitable interest in the goods they have contracted to buy. Such arguments have been consistently and decisively rejected by the courts,<sup>18</sup> including the House of Lords in *The Aliakmon*, where it was held that, although equitable interests could be created in goods, an agreement to purchase did not engender such an interest. The “property” in goods that passes from seller to buyer in a sale is the legal title, not an equitable interest.

Again, it may be commented that even if the Court in *The Aliakmon* had found that an equitable interest existed, this alone presumably would not in any event have enabled the buyers to sue. Just as a proprietary interest without a concurrent right of possession would not have sufficed, an equitable interest without more would have excluded the buyers. Whether this is, or should be, the law is questionable, for the recent case of *Shell UK Ltd v Total UK Ltd*<sup>19</sup> has now appeared to cast doubt on that principle. We turn now to consider that case and the issue of equitable interests in goods.

17 These concepts are discussed in detail in Pollock *Possession in the Common Law*, 1888, above, n 6.

18 The leading New Zealand case on this is *Re Goldcorp Exchange Ltd* [1994] 1 AC 74.

19 [2011] QB 86. For a note on this case, see C Hawes [2011] NZLJ 370.

### III. LEGAL AND BENEFICIAL INTERESTS

It has in the past been uncertain whether an equitable interest in goods, without more, is a sufficient interest to found a claim in tort in respect of wrongful interference with them. There has been surprisingly little authority on the point and some judicial dicta occur in contexts where it has not been necessary to address the point.

A frequently cited case is *International Factors Ltd v Rodriguez*,<sup>20</sup> which suggests that an equitable interest might itself suffice. In that case, an agreement was made that cheques handed to the defendant company by third parties would be held in trust for the plaintiffs and immediately handed to them. In breach of the agreement, the defendants paid cheques into its own bank account. It was held that the trust in favour of the plaintiffs gave them a sufficient proprietary right to sue in conversion, the authority for this being *Healey v Healey*.<sup>21</sup> It was also commented, however, that the agreement that the cheques should be delivered to the plaintiffs gave them an immediate possessory right sufficient to support a conversion action; and whether or not an enforceable trust arose when the defendant took possession of cheques, the plaintiffs had been entitled to demand that the cheques be handed to them. Thus, the plaintiffs had in any event a right to immediate possession and so sufficient title to sue. A similar point may be made about *Healey v Healey*. In that case, a husband had assigned chattels to trustees to be held for his wife under a marriage settlement, the chattels to be held free of the control of the husband. The wife was permitted to maintain an action against her husband for wrongful detention of the chattels, despite the objection of the husband that the trustees had not been joined as parties to the action. The Court held that the only title required by the wife was the right to immediate possession of the property, a right which she had under the settlement. Thus, the case is not authority for the proposition that an equitable title alone suffices for a claim in detinue. An obiter dictum of Lord Brandon of Oakbrook in *The Aliakmon*<sup>22</sup> also suggested that an action for negligence in respect of damaged goods could not be maintained by a person with no more than an equitable interest. Lord Brandon said that although a plaintiff with both a possessory and an equitable interest (such as the wife in *Healey v Healey*) could sue in negligence, the entitlement arose from the existence of the possessory right. There are dicta to the same effect in the subsequent cases of *MCC Proceeds Inc v Lehman Bros International (Europe)*,<sup>23</sup> where an equitable owner of shares sought their recovery from persons to whom the trustee had transferred them. Mummery LJ stated that a person with an equitable interest had no title to sue in conversion unless he could also show actual possession or an immediate right to it; and that the fusion of law and equity by the Supreme Court of Judicature Acts had not altered this fundamental common law rule. *Healey v Healey* and *International Factors Ltd v Rodriguez* were distinguished in the case, as the plaintiffs in both cases had, in any event, title based on their possessory interests.

20 [1979] 1 QB 351 (CA).

21 [1915] 1 KB 938.

22 *The Aliakmon* [1986] 1 AC 785, 812 (HL).

23 *MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675, 691 (CA).

However, it is clear that it was not necessary for the Court in *MCC Proceeds Inc v Lehman Bros International (Europe)* to base its decision on the plaintiff's lack of title, for the Court held that the transferees were *bona fide* purchasers for value and so obtained good title to the shares. Thus, no claim in conversion would have succeeded in any event. *International Factors Ltd v Rodriguez* and *MCC Proceeds Inc v Lehman Bros International (Europe)* were subsequently considered in *London Borough of Hounslow v Jenkins*<sup>24</sup> where the Court suggested that those cases provided authority that an equitable interest alone would not found a conversion claim. In that case, the claimant, a local authority, had mistakenly paid a cheque to the defendants, and sought to recover its value as money had and received under a mistake of fact, or alternatively, damages for conversion. The claimant contended that the defendants were trustees of the cheque. The Court did not accept this contention, because the claimant had intentionally and unconditionally drawn and transferred the cheque to the defendants. Thus, again, the claim was not one made by a person with only an equitable title to the property in question.

The status of an equitable title in relation to a negligence claim fell squarely to be considered by the Court of Appeal in *Shell UK Ltd v Total UK Ltd*. In 2005, explosions and fires occurred in the Buncefield oil storage depot in England as a result of the negligent overfilling of a fuel storage tank for which Total UK Ltd (Total) was responsible. At the time, Shell UK Ltd (Shell) stored and transported its fuel in tanks and pipelines at the facility. The legal title to the tanks and pipelines was held by two non-trading service companies and Shell, together with other companies, was a beneficiary of this trust. The tanks and pipelines were destroyed in the fires, as was fuel, owned by Shell, inside them. In consequence, Shell suffered economic losses from its consequently restricted ability to trade with its customers.

Total compensated Shell for the damage that Shell suffered to its own fuel, but denied liability in negligence for Shell's economic losses resulting from the damage to the tanks and pipelines. At trial, it was held that Shell could not recover for such loss of profits because Shell, having neither legal title nor a right to immediate possession of the tanks and pipelines, had no title on which to base its claim. The trial judge cited cases such as *The Aliakmon* and *Candlewood Navigation Corp v Mitsui OSK Lines Ltd* as authority that such an interest was needed.

The Court of Appeal in *Shell* then had to consider whether this decision was justified by the authorities cited. The Court held that it was not; rather, Shell's beneficial ownership was itself sufficient and there was no binding authority to the contrary. The court added, as a proviso to this, that a plaintiff with only a beneficial interest would nevertheless be required to join the party with the legal title to the action. This had been stated in *The Aliakmon* by Lord Brandon,<sup>25</sup> who had observed (obiter, because the plaintiff in that case was held to have no equitable interest) that, although a person with a possessory title could sue without joining the owner of goods, this was not

24 *London Borough of Hounslow v Jenkins* [2004] EWHC 315.

25 *The Aliakmon*, above n 22, at 812.

so in the case of a plaintiff who was a beneficial owner with no possessory interest. A beneficial owner was required to join the legal owner “either as a co-plaintiff if he willing or co-defendant if he is not”. This was the law for equitable owners of both land and goods.

The Court of Appeal went on to consider the nature of Shell’s interest under the arrangements made by the participants. Shell, as a beneficial owner, was not a stranger in relation to the tanks and pipelines, but had the right to make use of them. The legal owner was only a bare trustee, and Shell could be regarded as, in reality, the “owner”. Shell’s relationship to the property was closer than that of the legal owner, and went beyond a mere contractual dependence on it. Thus, it would be “legalistic” to hold that Shell had no interest to protect. Given these circumstances, Shell could not be regarded as equivalent to a purchaser of goods, and floodgates arguments were of little force.

The court held in the *Shell* case that Shell had neither actual possession of the pipelines (Shell did not control their use) nor a right to immediate possession of them (other companies used them to transfer their fuel as well). Thus, the decision in the *Shell* case is that a beneficial interest is sufficient to sue in negligence, and that it is unnecessary for a beneficiary to establish a concurrent possessory right. The court considered its decision was in accord with the broad dicta, such as that of Lord Brandon in *The Aliakmon*, which stated that a proprietary or possessory interest was needed for a negligence action; and Lord Brandon’s statement that legal ownership was sufficient did not mean that an equitable interest was not.

It is suggested that the general statements of the Court of Appeal in the *Shell* case are not in accord with the authorities as far as the need for a possessory interest is concerned. As suggested above, *The Aliakmon* cannot be considered as authority for the proposition that a proprietary interest alone suffices for a tort action in relation to interference with goods. Nor, it is suggested, does the principle that a beneficial owner may sue provided the legal owner is joined have this effect. It cannot be that, provided a legal owner and beneficial owner take their action jointly, they thereby acquire an interest that neither would have had separately. It is of course otherwise if the legal owner has the right to possession of the goods which was, in fact, the position in the *Shell* case.

The Court of Appeal in *Shell* confessed to being somewhat influenced by “the impulse to do practical justice”; and it is submitted that the Court achieved this. The result of the *Shell* case is, despite the difficulties of the reasoning in it, good policy. It is strongly arguable that a beneficial interest should be sufficient to enable a plaintiff to claim. The reasons for this are the same as those given in relation to reversionary interests, which are discussed below. In that discussion, it is proposed that, just as a legal owner who is out of possession should be able to sue directly in conversion, negligence or detinue, so should a beneficial owner; and that both these interests warrant the protection of these torts.



## IV. REVERSIONARY INTERESTS

As we have seen, the established view is that torts relating to interference with goods protect possessory interests; and a person with only a proprietary interest has, by definition, no possessory interest to entitle him or her to claim in these torts. What right may the owner assert if the goods are unlawfully interfered with by a third person while they are in the possession of a bailee? The position of owners of bailed goods is not straightforward, as a comparison of the following simple sets of hypothetical facts indicates.

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

In the second case, the owner accepts a payment of \$1 from his friend for the use of the car for the month. The supposed events just described occur the day before the month ends. Whether the car is returned or detained by the stranger, or whether it is damaged deliberately or not, the friend alone may sue the stranger in conversion, detinue, trespass or negligence. None of these actions is open to the owner.

The bailee who sues a third party for wrongful interference with the goods is entitled to recover the value of the goods or their diminution in value from the third party, regardless of whether the bailee has suffered any loss or has any liability to the bailor in respect of the damaged or lost goods. This was once a doubtful proposition, as some 19th century cases reveal. For example, in *Rooth v Wilson*,<sup>26</sup> the plaintiff, who was in possession for a night of another's horse, turned it into a field where it fell and died because of the failure of the defendant, a neighbour, to repair a fence. The plaintiff claimed the value of the horse and the defendant objected that he lacked sufficient property in it to do so. The Court allowed the plaintiff to maintain his suit, seemingly not simply because he was in possession of the horse, but because he was potentially liable to the owner of the horse for negligently turning it loose in a dangerous area. Lord Ellenborough CJ said that the plaintiff had shown a degree of negligence sufficient to render him liable to the bailor, and such liability was sufficient to allow the plaintiff to maintain the action. Bayley J was of the same view: "the plaintiff by receiving the horse becomes accountable". The other two judges simply stated that the action was a possessory one, and could be maintained.

The opinion of Lord Ellenborough was echoed in a later case by Wills J in *Claridge v South Staffordshire Tramway Co*.<sup>27</sup> In that case a horse, which had been delivered by its owner into the possession of the plaintiff auctioneer,

26 *Rooth v Wilson* (1817) 1 B & Ald 59; 106 ER 22.

27 *Claridge v South Staffordshire Tramway Co* [1892] 1 QB 422.

was injured in consequence of being frightened by the defendant's steamcar, which was being driven at an excessive speed. Here, the auctioneer was under no liability to the owner of the horse, the injury being caused solely by the defendants' negligence. It was held that the auctioneer could not claim the loss in value of the horse. Hawkins J rejected the argument that the auctioneer's possession alone sufficed for the action, saying:<sup>28</sup>

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

Wills J agreed:<sup>29</sup>

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

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

*Claridge* was overruled by the Court of Appeal in the well known case of *The Winkfield*.<sup>30</sup> In that case, mail was lost when two ships collided at sea and the Postmaster-General, who was regarded as a bailee with custody of the mail at the relevant time, sued the ship-owners in negligence. The court at first instance treated the claim as one by a bailee with no liability to his bailor, and dismissed the claim on the ground that *Claridge* was conclusive. On appeal, Collins MR stated that the authorities bearing against *Claridge* had not been fully considered by the Court in that case, and the case had been decided upon "very scanty materials".<sup>31</sup> Reviewing the history of the issue, Collins MR observed that the preponderance of authority supported the principle that possession in itself sufficed to allow a bailee to sue, and the relationship between the bailee and his or her bailor was of no relevance to the third party wrongdoer. It had been long established that a finder of

28 Ibid, 423-424.

29 Ibid, 424-425.

30 *The Winkfield* [1902] P 42.

31 Ibid, at 61.

goods, by virtue of no more than his possession of them, could maintain an action for interference with them by a third party;<sup>32</sup> and there was no reason why this should not apply equally to a bailee. This was because “the person who has possession has the property”,<sup>33</sup> and so a general bailment conferred a title sufficient to sue.<sup>34</sup>

After an elaborate review of the authorities, Collins MR stated that the root principle was clearly established:<sup>35</sup>

[A]s against a wrongdoer, possession is title. The chattel that has been converted or damaged is deemed to be the chattel of the possessor and of no other, and therefore its loss or deterioration is his loss, and to him, if he demands it, it must be recouped. His obligation to account to the bailor is really not ad rem in the discussion. It only comes in after he has carried his legal position to its logical consequence against a wrongdoer, and serves to soothe a mind disconcerted by the notion that a person who is not himself the complete owner should be entitled to receive back the full value of the chattel converted or destroyed ... As between bailor and bailee the real interests of each must be inquired into, and, as the bailee has to account for the thing bailed, so he must account for that which has become its equivalent and now represents it. What he has received above his own interest he has received to the use of his bailor. The wrongdoer, having once paid full damages to the bailee, has an answer to any action by the bailor ... The liability by the bailee to account is also well established.

Although a bailee has the requisite possessory title to sue for interference with goods, that right is exclusive to the bailee only if the bailor had no right to regain possession of the goods at the time the unlawful interference occurred. If the bailment is at will, the bailor by definition has the right to possession of the goods at any time, although actual possession is with the bailee.<sup>36</sup> In such circumstances, bailor and bailee have concurrent rights to sue a third party who wrongfully interferes with the goods, although they cannot both, of course, recover for the same loss. So in *O’Sullivan v Williams*,<sup>37</sup> the Court of Appeal held that if the bailor owner sued, the settlement of those proceedings precluded a claim by the bailee. In that case a parked car, which was in the possession of the owner’s girlfriend who had borrowed it while the owner was away, was irreparably damaged by the third party defendant’s negligence. The owner claimed from the defendant the value of the car and compensation for loss of use, and this claim was settled.

32 *Armory v Delamirie* (1722) 1 Stra 504; 93 Eng Rep 664.

33 Collins MR cited *Jeffries v Great Western Ry Co* (1856) E & B 802; 119 ER 680.

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

35 *The Winkfield*, above n 30 at 60-61. This principle was accepted as correct in *NZ Securities & Finance Ltd v Wrightcars Ltd* [1976] 1 NZLR 77, but not applied in the particular case because the bailee was a rogue who had sold to the plaintiff a vehicle which he had fraudulently obtained from the defendant; the plaintiff received good title from the rogue and leased the vehicle back to him. When the defendant wrongfully repossessed the vehicle and sold it, the plaintiff was entitled to recover in conversion only the amount outstanding under its lease, and not the market price for which the defendant had sold it. Otherwise, the plaintiff would have had to account to the rogue, which the Court considered would have been an absurd result.

36 See *The Hamburg Star* [1994] 1 Lloyd’s Rep 399.

37 *O’Sullivan v Williams* [1992] RTR 402.

Subsequently, the owner's girlfriend, the bailee, commenced proceedings against the defendant for nervous shock (she having been upset and off work for two days in consequence of having witnessed the event causing the damage) and for loss of use of the car and inconvenience. The nervous shock claim was dismissed but the loss of use was allowed. On appeal, it was held that there could be no action by the bailee for loss of use because the bailor owner had settled the matter. Citing *Nicholls v Bastard*,<sup>38</sup> Fox LJ said:<sup>39</sup>

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

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

The principle stated in *O'Sullivan v Williams* is, it is suggested, unexceptionable. As Fox LJ pointed out, any other rule would expose the defendant to several actions founded on the same cause of action by people who had limited interests in the same goods.<sup>40</sup> Whether the bailor or the bailee had the actual use of it, there could be only one loss of use claim.

Therefore, in a bailment at will, such as a simple loan, both bailor and bailee have possessory rights in the goods and concurrent rights to sue a wrongdoer, even though they cannot both undertake the same cause of action. Similarly, once the right to repossess goods arises under a contract of sale involving hire purchase<sup>41</sup> or reservation of property,<sup>42</sup> the seller is entitled to sue a third party in conversion. Apart from contracts of this kind, a bailment may be determined by operation of law, as when a hirer or carrier of goods breaches the bailment by wrongfully delivering them to a third person. In such cases, the immediate right of possession<sup>38</sup> at once reverts in the bailor owner, who may sue in conversion either the bailee or the person to whom the bailee has delivered the goods.<sup>43</sup> However, unless or until the owner has recovered the right to possession of the goods, he or she will be unable to sue the wrongdoer in conversion. Of course as soon as the owner lawfully regains actual possession of goods from a bailee, the exclusive entitlement to sue in conversion will also revert to the owner.

Although an owner excluded from possession is precluded from maintaining an action in negligence or conversion, he or she may sue for damage to the reversionary interest which he or she retains in the goods.

38 *Nicholls v Bastard* (1853) 2 CM & R 659; 150 ER 279.

39 *Ibid*, at 405.

40 *Ibid*, at 406.

41 *North Central Wagon and Finance Co Ltd v Graham* [1950] 1 All ER 580 (CA).

42 *Cameron v Phelps* [2009] BCL 347.

43 *Cooper v Willomatt* (1845) 1 CB 672; 135 ER 706, *Wyld v Pickford* (1841) 8 M & W 443; 151 ER 1113.

This has been labelled an action for “reversionary damage”.<sup>44</sup> This is because, if a wrongdoer permanently damages the reversionary interest, the common law recognises this as conferring a sufficient title to sue the wrongdoer.<sup>45</sup> A straightforward New Zealand example is *Checker Taxicab Co Ltd v Stone*.<sup>46</sup> In that case, a taxi which the driver had hired from its owner was damaged in a collision with a third party. It was held that the owner could sue the third party for the damage done to his taxi. Herdman J observed that it was clear that an action in conversion would not lie for damage to a chattel which was out on loan, but an action for permanent injury done to it while the owner’s right to possession of it was suspended could be maintained by the owner.

The distinction between a possessory and a reversionary interest is important when the recovery of damages is under consideration. We have seen that, because a bailee is regarded as having complete title vis-à-vis a stranger, the bailee may sue to recover the whole value of the goods. By contrast, the holder of only a reversionary interest may recover no more than his or her actual loss. This may cause practical difficulties, as illustrated by the recent New Zealand case of *Cameron v Phelps*.<sup>47</sup> In that case, the owner of a gold screening machine had agreed to sell it for ten ounces of gold (worth at the time about \$6,000) under a contract containing a reservation of property clause. The purchasers permitted the defendants, who were involved in a gold mining enterprise with the purchasers, to take possession of the machine, and the defendants spent considerable time and money in modifying it for use in the enterprise. The enterprise came to an end and the defendants, who had retained possession of the machine, sold it for \$30,000. The owner, who had received no payment from the purchasers, claimed in the District Court that the defendants had converted the machine, and sought damages from them. The District Court held that the plaintiff had not been entitled to possession of the machine at the time it was sold by the defendants, and so could not maintain an action in conversion. The value of the plaintiff’s reversionary interest was held to be ten ounces of gold, because this was the consideration to be provided under the agreement to sell, and so the only loss suffered by the plaintiff. On appeal, Fogarty J held that the District Court had erred in finding that the plaintiff had no possessory interest in the machine; rather, because the purchasers had defaulted in payment, the plaintiff had been entitled under the reservation of property clause to recover possession of it at the time the defendants converted the machine. The plaintiff thus had the requisite possessory interest to sue in conversion and was entitled, under the normal rule, to the market value of the goods at the date of the conversion, which was held to be \$30,000.

44 This term was used by A Tettenborn, who “christened” the cause of action in “Reversionary Damage to Chattels” [1994] CLJ 325.

45 *Transcontainer Express Ltd v Custodian Security Ltd* [1988] 1 Lloyd’s Rep 128 (CA); *HSBC Rail (UK) Ltd v Network Rail Infrastructure Ltd* [2005] EWCA Civ 1437; [2006] 1 WLR 643 (CA) and the authorities cited therein.

46 *Checker Taxicab Co Ltd v Stone* [1930] NZLR 169.

47 *Cameron v Phelps* [2009] BCL 347.

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

In England, the principles restricting actions for reversionary interests have also recently been affirmed by the Court of Appeal in *HSBC Rail (UK) Ltd v Network Rail Infrastructure Ltd*.<sup>48</sup> The plaintiff HSBC was the owner of railway carriages which it leased to the Great North Eastern Railway (GNER). GNER ran the carriages on tracks owned and operated by the defendant, Network Rail (Network). One of the rails shattered, causing a derailment. Two carriages were total losses; the damage to others was repaired. The costs involved were paid by the insurer of GNER and HSBC; the insurer paid GNER for the repair costs incurred by GNER and, at the request of GNER, paid HSBC the value of the destroyed carriages. The insurer brought subrogated proceedings in negligence in the name of HSBC against Network. Network's defence that HSBC was a reversioner and had suffered no damage to its reversionary interest was accepted by the trial judge. The Court of Appeal upheld this, holding that the real loss had been suffered by GNER, which had had possession of the carriages, but which had been indemnified by the insurer for the repair costs. HSBC, having been compensated for the two lost carriages, had suffered no damage to its reversionary interest. Generally speaking, a claimant could seek compensation for its own loss, not for loss suffered by another; and HSBC, having no more than a bare proprietary interest, had suffered no loss.

In *HSBC*, the Court of Appeal made it clear that if the conduct of Network had had the effect of depriving HSBC either temporarily or permanently of the benefit of its reversionary interest by destroying, seriously damaging or wrongfully disposing of title to the carriages to another, HSBC would have had a good cause of action. Here, such actual damage had not been shown and there was accordingly no permanent damage to the reversionary interest of HSBC. Therefore, on the facts, HSBC could not have succeeded. Longmore LJ, delivering the judgment of the Court, pointed this out:<sup>49</sup>

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

48 *HSBC Rail (UK) Ltd v Network Rail Infrastructure Ltd* [2006] 1 All ER 343.

49 *Ibid*, at 352.

Despite this dictum, the Court of Appeal affirmed the rule that an owner with no possessory right to goods has no title to sue in trespass, negligence or conversion. Citing the authorities in which the rule developed as well as academic commentators,<sup>50</sup> Longmore LJ stated the principle to be that an action for reversionary injury would lie in respect of any act which would, but for the problem of the claimant's lack of title to sue, amount to trespass, negligence or conversion if the claimant were temporarily or permanently deprived of his interest.<sup>51</sup>

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

In other words, the owner may sue *as if* he were founding an action on one of the relevant nominate torts, but may not directly base a claim on these torts. If this is correct, the owner's action is essentially derivative, or parasitic, for it depends upon establishing that some other, nominate, tort has been committed against another person, presumably the bailee.<sup>52</sup> This reasoning implies that the elements of the action for reversionary damage are the same as those of the individual torts of conversion, trespass or negligence.

The same general approach was adopted by Tettenborn,<sup>53</sup> whose article describing the difficulties inherent in this area of law was cited by the Court of Appeal in *HSBC*. Tettenborn raises for discussion the possibility that, to avoid the problems stated above, the law might simplify the matter and simply say that reversionary damage should be one tort encompassing the three nominate torts of conversion, trespass and negligence. Nevertheless, Tettenborn goes on to conclude that the "single tort" theory should be rejected because of the distinctions inherent in the torts themselves: trespass and conversion do not require fault on the part of the defendant, but negligence does; and the nominate torts, as individually defined, deal with different kinds of acts and interferences and so vary in the elements which must be proved. Therefore, Tettenborn considers that the distinctions among the torts remains "highly relevant" and that liability for damage to a reversionary interest will arise only if the defendant's act would have amounted to conversion, negligence or trespass proper.<sup>54</sup>

The view shared by Tettenborn and the Court in *HSBC* which holds that a claim for reversionary damage depends upon proving the commission of one of the underlying torts of conversion, trespass or negligence is open to

50 In reviewing the authorities, the Court referred extensively to A Tettenborn, above n 44, and to M Jones (ed) *Clerk & Lindsell on Torts* (18th ed, Sweet & Maxwell, London, 2000) at [14-143].

51 Above n 48, at 350.

52 Compare the view expressed in J Murphy *Street on Torts* (12th ed, Oxford University Press, Oxford, 2007) at 281: "Presumably, the act complained of must be wrongful in the sense that it is one which, had the claimant had possession of the chattel (or the immediate right to it), it would have grounded a suit in trespass, or conversion."

53 A Tettenborn, above n 44.

54 *Ibid*, at 331.

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

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

The earliest of these actions relating to interference with goods was trespass, which was available where the defendant had caused damage in a forcible and direct or immediate manner. Trespass therefore was of narrow scope and did not cover indirect or consequential damage. A frequently cited dictum of Fortescue J in *Reynolds v Clarke*<sup>55</sup> describes this limitation in the analogous context of trespass to the person:

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

Further, the Courts have tended to require that conduct amounting to trespass be wilful or negligent, and to exclude unwitting or accidental acts from its ambit. The history of trespass was reviewed in *National Coal Board v J E Evans & Co*,<sup>56</sup> in which the Court of Appeal considered that the authorities were clear that an act, which was neither deliberate nor negligent, could not constitute trespass. As suggested above, this judicial reluctance to find liability in the absence of fault no doubt explains the fact that there are today few significant cases involving trespass. The law of negligence has now expanded to cover much, if not all, of the same field; and trespass has accordingly declined in significance.

Conversion developed as a result of the narrowness of trespass, so as to cover claims for damage resulting from conduct which was not necessarily direct, immediate or forcible. However, as both trespass and conversion required that the plaintiff have a possessory interest in the damaged goods, dispossessed owners were excluded from both these actions.

These lacunae in the law were filled by the development of actions on the case, which enabled claims to be brought outside the rigid categories of trespass and conversion. In an action on the case, damages could be claimed for indirect or consequential damage, thus bypassing the restrictive requirements of trespass; and an owner out of possession could claim for damage to a reversionary interest, and so avoid the need for the possessory right which conversion and trespass required. Further, the action on the case

55 *Reynolds v Clarke* (1725) 1 Strange 634, 636; 93 ER 747, 748.

56 *National Coal Board v J E Evans & Co* [1951] 2 KB 861 (CA).



differed from conversion in that conversion, being a tort of strict liability, required no proof of fault. Case also differed from trespass, which was wrongful in itself because of its directness and associated use of force, and so was actionable *per se* without proof of damage. By contrast, actual damage had to be proved in an action on the case. Thus began the evolution of the modern law of negligence, of which the action on the case was the progenitor.

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

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

The good reasons which underlie the protection of possession clearly retain their cogency. However there seems no reason to hold that, merely because the bailee was given for the sake of convenience the right to sue, that the bailee's right should be exclusive. Rather, the reasons which may be used to support a bailee's title to sue apply equally to a bailor. Despite this, in rejecting the argument that bailor and bailee should equally be entitled to sue, Longmore LJ said in *HSBC*:<sup>57</sup>

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

By way of comment, it may be said that the words “as between bailee and stranger” deserve greater emphasis here. It is certainly true that a bailee is regarded as having “absolute and complete ownership” as between him and a stranger. However, it is not necessary for the law to go so far as to say that the bailee has absolute and complete ownership for any other purpose. The bailee does not in reality become the owner of the goods, but has a limited, possessory, interest in them, an interest which confers standing to sue in conversion, trespass or negligence as if the possessor had complete ownership.

57 Above n 48, at 364.

This deemed legal status does not alter the fact that the bailee does not have ownership as against the bailor, whose proprietary interest in the goods continues throughout the bailment. The bailor's interest during that time is also a limited one, being shorn of the right to possession. However, the law at present accords to the holder of only one of these limited interests the right to protect his title in an action of conversion, trespass or negligence, but denies it to the holder of the other, complementary, interest in the same goods. There seems no reason to maintain this rule which, it is suggested, continues to exist for no defensible reason.

The idea that actions for reversionary damage to goods are unnecessary is not new. More than a century ago, Salmond wrote:<sup>58</sup>

The difference between a present and a reversionary interest may be very material with reference to the measure of damages, but it is irrelevant with respect to the nature of the injury committed. If a reversionary owner can show that he has been deprived of his property by the unlawful interference of the defendant, he has a good cause of action against him, and there is no subsisting reason why we should call the wrong so suffered by him by any other name than that of conversion.

The same argument applies, it is suggested, to trespass and negligence. Salmond's view was endorsed and extended when reform of the law relating to interference with goods was considered in England in 1971. The Law Reform Committee said:<sup>59</sup>

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

The Law Reform Commission of British Columbia adopted the same stance in 1992. Advocating a single statutory tort devised to deal with wrongful interference with goods, the Commission stated:<sup>60</sup>

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

A similar approach was proposed by counsel in *HSBC*, but rejected by the Court. Longmore LJ said:<sup>61</sup>

58 Salmond "Observations on Trover and Conversion" (1905) 21 LQR 43, 53.

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

60 Report on Wrongful Interference with Goods LRC 127.

61 Above n 48 at 352.

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

A possible response to this statement is that it really begs the question, in that it denies the adequacy of the bailor's title because the common law, for reasons of convenience, has allocated a right to sue to the bailee. It is suggested that it might be more accurate to say that as between bailee and stranger, the bailee is *deemed* to have absolute and complete ownership of goods for the purposes of certain legal proceedings relating to interference with them, and the bailor for these purposes is regarded as having no interest in the goods at all. This is of course a fiction; the reality is that bailor and bailee each has a limited and different interest in the same goods. It is arguable that the law should recognise this reality and permit the bailor to sue directly in conversion, trespass or negligence. The law now overlooks the fact that the bailee was deemed to have a complete title for only a limited purpose, and fallaciously reasons that, because the bailee is deemed to have complete title vis-a-vis a stranger, the title must equally be regarded as real, total and exclusive with respect to the bailor. It is suggested that such use of the bailee's fictional title to bar the bailor from a claim against a stranger is to turn the law on its head. Indeed, it might be suggested that this fallacy is reinforced by the use of the expression "reversionary interest",<sup>62</sup> a description which is perhaps unfortunate, implying as it does that the owner's rights in bailed goods are subordinate or secondary to those of the bailee. In reality, the rights of bailor and bailee are co-existing and complementary, and subsist in the goods concurrently. Such rights are part of a bundle, not of a hierarchy, and there is no issue of priority.

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

If the law were changed as suggested above, it is not apparent that any party involved would be prejudiced. Rather, maintenance of the current position may operate to the prejudice of both bailor and bailee of goods. This

62 Tettenborn "christened" the action for the sake of brevity: above n 44.

is because the owner, as the law now stands, may recover only the loss which he has actually incurred and must prove fault on the part of the defendant. By contrast, the bailee may recover the full value of the goods in a claim in conversion, a tort involving strict liability. If the value of the goods exceeds the value of the bailee's interest in them, which will often be the case, the bailee must account to the bailor for the difference.<sup>63</sup> If standing to do so were accorded to the bailor, the bailor could equally recover the full amount in the appropriate action, and be required to account to the bailee for any damage done to the bailee's interest. Such a course (involving the "pleasing symmetry" which was rejected by the Court in *HSBC*) could benefit both bailor and bailee by avoiding duplication of actions. It would not appear to disadvantage the defendant wrongdoer in any way, for the wrongdoer would not be worse off if the plaintiff were the bailor rather than the bailee of the converted or damaged goods.

Further, as noted above, the bailor can sue in any event if the bailment is at will, and this appears to present no difficulty to the law. Both bailor and bailee have concurrent possessory interests in the goods in such a case, the former being based upon immediate entitlement to possession, the latter upon actual possession. Therefore either may claim damages from a wrongdoer for loss or destruction of the goods. The recovery of damages by one of them operates as full satisfaction as against the wrongdoer;<sup>64</sup> and the successful claimant must then account to his bailor or bailee, as the case may be, for any damage done to his or her interest in the goods.

At present, the bailee with an exclusive right to possession and so the sole right to sue ultimately retains in any event no more than the value of his own interest in the goods. The bailee is suing on the ground that the defendant has assumed dominion over the goods, not over his possessory right. Thus, the bailee may obtain from the wrongdoer the entire value of the lost or damaged goods, although he or she may retain as against the bailor only damages resulting from the wrongful interference with his possessory interest in them. The value of this will, of course, vary according to the terms of the bailment, but the value of the respective possessory interests of bailor and bailee must be assessed. If both are able to sue because the bailment is at will, no double recovery for damage to their respective possessory interests results, for the bailor's right to possession includes the right to make what use of his property he wishes, including allowing possession to the bailee.<sup>65</sup> Damage caused to a proprietary interest, regardless of whether it is recovered by bailee or bailor, is suffered only by the bailor and so will be recoverable by him either from the wrongdoer directly, or from the bailee who has recovered the entire value of the goods from the wrongdoer. Ultimately, in a bailment at will, whether bailor or bailee is the plaintiff, the entire value of the loss or damage is recoverable by either, and they have reciprocal obligations to account.

63 *Hepburn v A Tomlinson (Hauliers) Ltd* [1966] AC 451 (HL).

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

65 *Ibid*, at 406.

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

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

As has been pointed out in another context, fine distinctions do no good to the law.<sup>66</sup> It may be commented that this is particularly so if the distinctions in question serve no useful purpose but are merely historical relics. An owner's rights should not depend upon whether damage occurs the day before or the day after a fixed term bailment expires and becomes a bailment at will; or whether consideration had been provided by the bailee to the bailor in exchange for possession of the goods. These matters, although of relevance to the bailor and bailee, are of no moment to the defendant who has wrongfully interfered with the goods. Simplification of the law would obviate the necessity to establish, before allowing the owner of goods to claim in conversion, whether he or she also had an entitlement to possession of them at the relevant time.

Should this extension to proprietors encompass those with beneficial interests in goods? It is suggested that, in this context, there is no need to define ownership as excluding beneficiaries. For these purposes, a beneficial interest may be regarded as being as much a right of property as is a legal interest. In the *Shell UK Ltd* case, as discussed above, the Court of Appeal took the view that a beneficial interest was sufficient title for a claim in negligence and, as we have been discussing, negligence protects one who has a proprietary interest but no possession. The *Shell* case reveals an approach that looks to substance rather than form, and is well grounded in realism. Such a stance could equally be adopted when conversion is being considered. Indeed, the case is equally strong for both legal and beneficial interests, for no issues of floodgates arise; the relationship between co-existing legal, beneficial and possessory titles is clear and discrete, and there is no risk that there might be a potentially large class of plaintiffs.

Just as there is no logic in the principle that the law of negligence should protect only legal or possessory rights in goods and exclude beneficial interests, there is no reason to confine conversion to possessory interests. A number of different or overlapping rights (whether legal, equitable, proprietary or possessory) may concurrently subsist in goods. These rights co-exist and are not hierarchical; and they may be held in only one or in a number of hands.

66 *Lewis v Averay* [1972] 1 QB 198, 206 (CA), per Denning LJ.

The Court of Appeal in the *Shell* case has recognised that there is no obvious reason why a person in whom a beneficial interest in vested is less deserving of protection than one with, for example, a bare (perhaps transitory and non-contractual) right to possession. In similar vein, just as a beneficiary's relationship with property may be closer than is the relationship between the property and its legal owner, a possessor of property may or may not have a closer relationship with the property than its owner does. In either case, it should be the existence of the interest that founds the right to claim losses, and not the relationship of that interest with other, co-existing interests.

## V. CONCLUSION

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

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

In conclusion, let us return to the hypothetical facts concerning the factory machine posited at the outset of this article, or the loan of the car stated at the beginning of this part. We should also consider again the facts of *Cameron v Phelps* and the finely balanced position of the plaintiff owner of the gold screening machine in that case. It is accepted, and indeed would seem unarguable, that the class of potential plaintiffs must be closed in some way, and it is not unreasonable to exclude a person who lacks any interest in goods at the time they suffer damage. In the factory machine case, the prospective purchaser D and his customers come into this category. However, all the other parties involved have existing interests in the goods which, it is contended in this article, should be protected. It seems clear that the current

law is unnecessarily complex and restrictive, and requires reform. If, as is contended here, there is no practical or legal impediment to allowing a legal or beneficial owner without possession to sue in conversion or negligence, the law should permit him or her to do so. The present restrictions can be explained by an examination of their historical development, but their continued existence today cannot be justified. A more realistic, simple and direct approach can only benefit the law.