



DK Srivastava and AD Tennekone

# The Law of Tort in Hong Kong

Fourth Edition

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Student

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Third, the Chapter examines what interferences are direct. Fourth, the Chapter explains the meaning of possession. Fifth, the Chapter examines the meaning of what is an intentional conduct. Finally, it sets out what damages can be awarded to a successful plaintiff suing in the tort of trespass to chattels.

## 2. GOODS AND OTHER ITEMS OF VALUE<sup>6</sup>

[9-3] The Sale of Goods Ordinance (Cap 26) defines goods, *inter alia*, as including all chattels personal.<sup>7</sup> To determine whether an item is a chattel or a fixture, the court may examine the objective intention of the party who places the item on the land at the time of installation; and the degree of annexation. The objective intention of the person is assumed to be more important than the degree of annexation.<sup>8</sup> Some authorities also pay some regard to the 'affixer's' actual intention. These two matters are applied with the presumption that an item fixed to the land is a fixture, whereas an item resting on the land is a chattel. Though no single factor is determinative, when considering whether an item is a fixture or a chattel, items that are intended to improve the value of the land, and in this way form part of the land, will ordinarily be deemed fixtures. Thus, the question sometimes asked is: has the item been installed for the benefit of the house or for its use and enjoyment alone? Simple examples of such chattels are cars, bicycles, animals, clothes, items of jewellery and so forth. Judicial

<sup>6</sup> See *Thompson v National Australia Bank Ltd; Thompson v Geminder Holdings Pty Ltd* [2016] VSC 495 where the plaintiff sold a house with the Bank as mortgagee. Four other defendants were sued by the plaintiff, *inter alia*, for claims in trespass, conversion and detinue, delivery up of the chattels and/or damages in respect of chandeliers, carpets, carpet squares, curtains amongst other claims. The court held that the eight chandeliers were chattels, however, the other items, being the curtains and carpets, were fixtures and thus were owned by the NAB once it became mortgagee in possession and by the defendants after their purchase of the property in November 2013. The claim of trespass to goods was not successful as Mrs Thompson leased the property to Mr Geminder (one of the five defendants), who was entitled to use the items under the lease. The NAB's notice of redirection of rent involved an adoption of the lease, although the NAB had not formally consented to it. Once the NAB had repossessed the property by serving the notice of redirection of rent, the Geminders paid rent to the NAB and were in possession of any chattels holding them as bailee in possession for the true owner or owners or otherwise for Mrs Thompson who had an immediate right to possession of them. See also para 472.

<sup>7</sup> Section 2 of the Sale of Goods Ordinance (Cap 26). It also includes leasehold interests in chattels real as well as any tangible goods, except for freehold land.

<sup>8</sup> See *Thompson v National Australia Bank Ltd; Thompson v Geminder Holdings Pty Ltd* [2016] VSC 495, para 463, 464s.

decisions in the United States have extended the traditional boundaries of trespass to chattels, to include websites which are treated as sharing the characteristics of property. It is argued that a website is a product of one's labour and a person has a proprietary right in his labour and that the theories of property that underlie the law of trespass would justify extending the doctrine of trespass to include unauthorised access to a website.<sup>9</sup> Furthermore one can surmise why courts insist that the plaintiff should be able to prove actual damages for a claim under this tort as with the increasing use of internet and social networking sites, there is a potential that claimants may use it to quash fair competition and subsequently dissuade free speech, cause harm to the business reputation or mental distress.

## 3. ACTS CONSTITUTING TRESPASS TO CHATTELS

[9-4] Trespass to chattels may take various forms. It is trespass to a chattel to dispossess the plaintiff of his chattel or damage it. Unauthorised use or handling may also amount to trespass.<sup>10</sup> Acts such as riding another person's horse, driving another person's car or scratching a panel of a car<sup>11</sup> are all equally trespasses.<sup>12</sup> In the case of animals, beating, wounding, killing or infecting them with diseases are also trespasses.

[9-5] Trespass to chattels was originally called trespass *de bonis asportatis*, a form of action for recovery of damages resulting from the defendant taking the chattel or personal property away from the possession of the plaintiff. This tort, however, is no longer confined to this situation and the defendant can be liable even though his act may not have involved an actual carrying away of a chattel. The movement of a person's belongings without permission can give rise to a trespass to goods. However, in circumstances where the items have been moved in the interests of safety or in an attempt to protect the plaintiff's belongings from degradation over time and by weather and where the plaintiff has left items on the property

<sup>9</sup> Srivastava, D.K., *Trespass to Chattels: On the Internet?* *Hong Kong Lawyer*, November 2002, p 63 at 66. See also *eBay Inc v Bidders edge Inc* No C-99-21200 RMW; *Thrifty-Tel Inc v Bezenek* 46 Cal. App. 4th 1559 and *Intel v Hamidi* 30 Cal. 4th 1342.

<sup>10</sup> Trespass to goods is constituted by an unlawful disturbance of the possession of goods by seizure, removal or by direct act causing damage; see *Ogbonna v Newmont Mining Corporation* [2017] WADC 154, para 43.

<sup>11</sup> *Everitt v Martin* [1953] NZLR 298.

<sup>12</sup> There may be conversion as well.

for several years while no longer residing there, the action of an involuntary bailee may not amount to an actionable tort. Furthermore

it cannot be the case that the mere persistence in a claim can indefinitely prevent the bailee, in circumstances... from rid[ding] itself of the responsibility and risks associated with retaining possession, involuntarily, of the goods in question.<sup>13</sup>

[9-6] Given that the primary purpose of this tort, like other torts of trespass, was to prevent violence or confrontation leading to breaches of the peace, trivial interferences with the chattel, even mere asportation of the chattel or carrying away of the chattel, also amount to trespass.<sup>15</sup> Such a principle is necessary to meet special situations such as where the defendant touches wet paint on waxworks or museum exhibits.

[9-7] In *Kirk v Gregory*,<sup>16</sup> the plaintiff's testator died. The defendant, who was the testator's sister-in-law, removed some rings and jewellery from the room where the testator lay dead, to another room from where it was stolen. It was held that the defendant was liable in trespass, for there clearly was an asportation.

[9-8] In *Fouldes v Willoughby*,<sup>17</sup> although the court found that the taking of the plaintiff's horses by the defendant on board a ferry boat and turning them out would not be conversion, yet it held that the plaintiff might have maintained an action in trespass. Judicial opinion, however, is divided on whether the plaintiff can sue when there has been no asportation of a chattel and no dispossession.

[9-9] In the New Zealand case of *Everitt v Martin*,<sup>18</sup> Adams J said that 'for the mere touching of another's goods without damage or asportation, there could be no action for trespass to chattels'. The prevailing view, however, is that trespass to chattels is actionable *per se*, without proof of any damage.<sup>19</sup> However, a mere casual or accidental unintentional contact with a chattel without causing any damage would not amount to trespass. In the context of the

Internet, an action of trespass to chattels would lie, for example, where an unauthorised use is made of the plaintiff's website or online devices. American law recognises that trespass may be committed by means of electronic interference.<sup>20</sup>

#### 4. INTERFERENCE MUST BE DIRECT

[9-10] As in the case of other forms of trespass, no action can succeed unless the act is direct. It is no trespass to lock a room in which the plaintiff has stored his goods. Street states that 'although he who mixes a drug with the feed of a racehorse commits a trespass to the feed, he does not commit a trespass to the racehorse when it is later given the feed'.<sup>21</sup> It will be a direct interference to beat or shoot the plaintiff's animals including dogs,<sup>22</sup> birds<sup>23</sup> or fish. Modern cases meticulously apply the test of directness, for example, where the plaintiff's animal dies or becomes ill as a result of eating the defendant's contaminated food, the latter's liability would depend on whether the animal's death or illness was caused by a direct act on his part or where a direct act of securing a gate upon lawful entry for inspection by police officers but tying it with a tie in a manner where the claimant believes that he would be unable to leave the property without obtaining a special tool to cut the tie. In *Young v Sprague* a case from New South Wales,<sup>24</sup> Australia, the appellant sued two police officers and two officers of RSPCA who had entered the property where he was in-charge for damages in trespass to land and trespass to chattels. The appellant had occupied a horse breeding property located at Gundary near Goulburn (Property). The Property was owned by Lugen Pty Ltd (Lugen), a company of which the appellant was a director. Lugen used the Property in order to breed horses and the appellant was in charge of activities on the Property. The police and other RSPCA officers had entered onto the property in order to investigate claims that a horse had been neglected. The trial judge held that the entry by the four officers onto the Property was lawful, even though they had to exercise force by

<sup>13</sup> *Tait v Village Community Cooperative Ltd* [2017] SASC 109, para 90.

<sup>14</sup> *Ibid*, para 109.

<sup>15</sup> See *Leith & Co Ltd v Leydon* [1931] AC 90.

<sup>16</sup> *Kirk v Gregory* (1876) 1 Ex D 55.

<sup>17</sup> *Fouldes v Willoughby* (1841) 8 M & W 540.

<sup>18</sup> *Everitt v Martin* [1953] NZLR 298.

<sup>19</sup> Barker, K., Caine, P., Lunney, M. and Trindade, F. A., *The Law of Torts in Australia* (5th edn, 2012) p 104.

<sup>20</sup> See eg *Ticketmaster Corp v Tickets.com Inc* US Dist CD Ca (27 March 2000); *Thrifty-Tel Inc v Bezenek* 54 Cal Rptr 2d 468 (Cal Ct App 1996); *Register.com Inc v Verio Inc* Supp 2d 238 (SDNY, 12 December 2000).

<sup>21</sup> Murphy, J., and Harry Street, *Street on Torts* (13th edn, OUP, 2012) p 303.

<sup>22</sup> *Wright v Ramscot* (1665) 2 KB 311.

<sup>23</sup> *Hamps v Darby* [1948] 1 Wms Saund 183.

<sup>24</sup> *Young v Sprague* [2014] NSWCA 456 on appeal from *Young v Sprague* (District Court (NSW), Norton SC DCJ, 10 March 2014 (unreported)).

breaking a lock to gain entry in the first place. Accordingly, the appellant's claim, insofar as it was based on trespass to land and by the cutting of locks to gain entry, was dismissed. However, the plaintiff was awarded damages to the tune of \$7000 for trespass to chattels including \$5,000 for aggravated damages for the pain and distress he had experienced. The trial judge accepted that the actions of the first respondent in securing the entrance to the property after the inspection constituted trespass to chattels. It was found that the appellant had requested the inspector to secure the gate, but that the method she used to secure it was inconsistent with the appellant's rights. The first respondent's actions meant that the appellant believed that he was unable to leave the property without obtaining a special tool to cut the tie.<sup>25</sup>

- [9-11] In *Hutchins v Maughan*,<sup>26</sup> the defendant had laid poisoned baits on his land. The plaintiff's dogs picked up some baits, ate them and died. Herring CJ said:

Trespass does not lie in respect of the defendant's act in laying the baits. Had the baits been thrown by the defendant to the complainant's dogs, then no doubt the injury could properly have been regarded as directly occasioned by the act of the defendant so that trespass would lie. His position is like that of a man who goes along the road upon which a log has been thrown, receives an injury by falling over it. In such a case the man who threw the log upon the road has, of course, caused the mischief, but trespass does not lie, as the injury is consequential upon his act and not immediately or directly occasioned thereby. Had the man who fell over the log not passed that way, he would have suffered no injury from the others act.

- [9-12] This decision, however, should not be taken literally to mean that a direct physical contact is always essential to constitute trespass. Directness here means that an act of the defendant had set in motion an unbroken series of consequences, the last of which caused contact with the plaintiff's chattel or goods.<sup>27</sup> Thus, it would be trespass to wilfully frighten a horse so that it runs away or to drive cattle out of a field.<sup>28</sup>

<sup>25</sup> Ibid paras 5, 6, 10.

<sup>26</sup> *Hutchins v Maughan* [1947] VLR 131.

<sup>27</sup> Barker, K., Caine, P., Lunney, M. and Trindade, F. A., *The Law of Torts in Australia* (5th edn, 2012) pp 101-102.

<sup>28</sup> Heuston, R.F.V., *Salmond and Heuston on The Law of Torts* (21st edn, Sweet and Maxwell, 1996), p 94.

## 5. PLAINTIFF MUST HAVE POSSESSION OF THE CHATTEL

- [9-13] Trespass to goods is essentially an invasion of the plaintiff's possession. In a narrow sense, a person possesses what the person has in physical control, for example, the clothes that he is wearing. However, the word 'possession' has not been used in such a limited sense. In *Tallott v City of Stirling*,<sup>29</sup> a decision from the Supreme Court of Western Australia, the claimant brought several causes of action inter alia, trespass to goods, conversion, and 'combination', which was a reference to the tort of conspiracy to har against the police officers and City of Stirling, Western Australia. The stated case facts are that since at least January 2011, Mr Tallott wanted the freedom to stay and sleep in the general area of Scarborough and Trigg beaches. Those areas were within Stirling City. The City, through its officers, tried to prevent Mr Tallott from doing so on several occasions, on the basis that Mr Tallott was breaching various local laws. The City eventually involved the police, who issued Mr Tallott with move on notices. Mr Tallott, however, breached those notices, and was subsequently arrested and imprisoned.<sup>30</sup> The relationship between the City and Mr Tallott continued to deteriorate. This ultimately led Mr Tallott to institute the above proceedings against the City and its officers. On appeal, the Supreme Court dealt with over nine main grounds hearing two appeals and a notice of contention- all actions where grounds overlapped, involving seven incidents where the plaintiff and claimant were involved. At trial the Judge dismissed the plaintiff's case and in relation to the claim for trespass to goods, the judge found that, while Mr Tallott may have had a right to possession, at the time when the goods were removed they were apparently abandoned on land over which the City exercised control, and it was therefore effectively in possession of the goods. It did not interfere with Mr Tallott's right to possession of the goods as owner, which he subsequently exercised by recovering the goods from the police station.<sup>31</sup> The Supreme Court did not find any error of law or fact in the judge's reasoning on trespass to chattels arising out of ground two of the notice of contention and ground 9, when he held that the action for trespass to goods was not

<sup>29</sup> *Tallott v City of Stirling* [2017] WASCA 126, per Buss P, Murphy and Mitchell JJA, Court of Appeal and *Tallott v City of Stirling (No 2)* [2015] WASC 483.

<sup>30</sup> Ibid paras 6, 7, 8.

<sup>31</sup> Ibid, para 95.

*Ltd*,<sup>45</sup> the plaintiff had bought a car from a person who had no title to sell it. As the car needed repairs, the plaintiff entrusted it to a garage. The defendant believing, though wrongly, that the car was his, removed it from the garage. On these facts, the plaintiff succeeded in an action for trespass to goods against the defendant. Equally, the defendant will be liable for trespass to chattels where he takes away the plaintiff's book believing it was his.

## 7. JUS TERTII AND TRESPASS TO CHATTELS

[9-21] A person whose actual or constructive possession is violated can sue in trespass to chattels, whether or not he was the true owner of the chattel. The defendant cannot plead *jus tertii*, that is, that another person has better title to it. In such cases, there are, however, two defences. First, where the defendant defends the action on behalf of the true owner, who in law is entitled to the possession of the chattel. Second, where the defendant committed the trespass on behalf of the person who was entitled to the possession.

## 8. MEASURE OF DAMAGES

[9-22] Since trespass to chattels is actionable per se, that is, without the need to show proof of any actual damage, it is not essential for the plaintiff to prove the nature or the extent of the damage caused. The plaintiff will be at least entitled to nominal damages. However it is important to reiterate that where a plaintiff brings an exaggerated and inflated claim which is unsupported by evidence and without following proper court procedure, seeking special damages in a claim for trespass to goods,<sup>46</sup> the court will rightfully not believe the plaintiff and refuse to allow any damages. Furthermore in such kind of cases where the plaintiff represents himself and is unaware of court procedure, without a focus on the pleaded issues, nor his trial bundle agreed to with the defendant, valuable court time gets lost in sorting relevant information from irrelevant one, prolonged duration of trial and higher costs, not to mention the presiding judge's discontent or 'weary resignation in the judgment'.<sup>47</sup> An interesting recent English decision provides a direction for potential plaintiffs

<sup>45</sup> *Wilson v Lombank Ltd* [1963] 1 All ER 740, [1963] 1 WLR 1294.

<sup>46</sup> See *Diaz v Karim* [2017] All ER 595 (CA), per HHJ Parkes.

<sup>47</sup> See Peaker, G., 'One Million Pounds', [2017] *Nearly legal: Housing Law News and Comment*, available at <https://nearlylegal.co.uk/2017/05/one-million-pounds/> and *Assured ShortHold Tenancy Housing Law* accessed 2/06/2019.

in Hong Kong suing for special damages in trespass to goods. In *Diaz v Karim*<sup>48</sup> the plaintiff had been the tenant of a flat in London, rented out by the defendant landlord. The plaintiff claimed that, on 3 September 2015, the defendant had unlawfully entered the claimant's room and removed his possessions from the same, much of the possessions being left outside of the property. The plaintiff commenced proceedings against the defendant, seeking damages for trespass to goods and land. In the claim form, the claimant valued his claim between £900,000 and £1m. This included an exaggerated and inflated claims for, inter alia, £450,000 for '12 CDs of invaluable academic and political research data/information', 'a 1487 first edition of the *Malleus Maleficarum*' (one of only four extant copies), bought for 10,000 euros and valued at 'between \$25,000 and \$110,000, depending on its condition', or an original 1383 Wycliffe English Bible, bought for between 12-15,000 euros and valued at \$1.65 million without any evidence or supporting titles to such 'valuable' goods taken away, destroyed or disposed off by the defendant. Having sorted through the relevant evidence the court allowed a claim in trespass awarding £5000<sup>49</sup> as damages to the plaintiff based on the principle, that the measure of damage ought to be the market value of the goods at the date of conversion or trespass.<sup>50</sup>

[9-23] However, where the defendant has destroyed or disposed of the plaintiff's goods, the plaintiff will be entitled to recover the full value of the goods.<sup>51</sup> 'Value' here means the market price or the cost of replacement<sup>52</sup> or the highest possible value if there is any doubt about the value of the chattel.<sup>53</sup> Where the chattel is only damaged, the damages must be the cost of repair to put the chattel back into its former position. The plaintiff will also be entitled to any consequential loss which is not too remote, such as loss of profits of a profit-earning chattel<sup>54</sup> or loss of use.<sup>55</sup> Where a carpenter's tools are damaged, destroyed or taken away, the carpenter may be awarded loss of earnings caused by the defendant's interference with the tools.<sup>56</sup>

<sup>48</sup> *Diaz v Karim* [2017] All ER 595 (CA).

<sup>49</sup> *Ibid*.

<sup>50</sup> *Ibid*, paras [41], [43]-[48] of the judgment.

<sup>51</sup> *Wilson v Lombank* [1963] 1 All ER 740, [1963] 1 WLR 1294.

<sup>52</sup> *Hall v Barclay* [1937] 3 All ER 620.

<sup>53</sup> See *Armory v Delamirie* (1721) 1 Stra 505.

<sup>54</sup> See *Liesbosch Dredger v The Edison* [1933] AC 44, (HL).

<sup>55</sup> *The Mediana* [1900] AC 113 (HL).

<sup>56</sup> See *Bodley v Reynolds* (1846) 8 QB 779; cf *Chubb Cash Ltd v John Crilley & Son* [1983] 2 All ER 294, [1983] 1 WLR 599 (CA, Eng).

[10-2] Conversion embraces such a varied range of acts that it defies any precise definition. It may be stated, that conversion, in general, means any intentional act of dominion in relation to a chattel (herein property other than land) which is inconsistent with the plaintiff's possession or his right to immediate possession. The act being so extensive an encroachment on the rights of the owner as to exclude the owner from use and possession of the goods. Every person through whose hands the plaintiff's goods pass in a series of conversions is himself guilty of conversion and is liable where the plaintiff suffers loss as a result of misappropriation of such goods.<sup>4</sup>

[10-3] Conversion had its genesis in the old common law action of trover.<sup>5</sup> It emerged after the mid-fifteenth century as a species of the action on the case to provide the plaintiff with a remedy where his chattels had been wrongfully disposed of by the defendant.<sup>6</sup>

[10-4] The word 'conversion' has been derived from a French word for finding. Originally, the plaintiff in his action alleged that 'he was possessed of certain goods, that he casually lost them, that the defendant found them, and that the defendant converted them to his own use'.<sup>7</sup> The existing writs of trespass and detinue did not provide for that situation, as the action of trespass lay for the wrongful taking of a chattel and detinue for a wrongful detention.<sup>8</sup>

[10-5] Eventually, the allegations of losing and finding became a fiction and the only question to be decided was whether the defendant by his act, denied the plaintiff his right to possession. The

<sup>3</sup> The House of Lords has defined conversion in the case of *Kuwait Airways v Iraqi Airways (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883, [2002] 3 All ER 209 (HL). See also Dugdale A, J.F., Clerk, & W.H.B. Lindsell, *Clerk & Lindsell on Torts* (20th ed) Ch 17, para 07 at p 1115; *Tsun Fat Finance Co Ltd v Commissioner of Police* [2002] 3 HKC 232 (CA), at para 50 per Deputy Judge Fung.

<sup>4</sup> See *Kuwait Airways v Iraqi Airways (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883, [2002] 3 All ER 209 (HL).

<sup>5</sup> Trover is a common law action to recover the value of goods wrongfully converted by another person for his own use. It came from the French word 'to find'.

<sup>6</sup> See Pollock and Maitland, *History of English Law* (2nd edn, 1905), 108, 166, 525, 526, 572; *Holdsworth History of English Law* (3rd edn, 1923), 284 as cited in Wodhams G 'Origins of The Action in Trespass', 33 YALE.LJ (1924) 799, available at: <http://digitalcommons.law.yale.edu/ylj/vol33/iss8/1> at 809. See also Abraham, K, *The Form and Functions of Tort Law*, (5th edn, Foundation Press (USA), 2017), p 41.

<sup>7</sup> By 1554, these allegations had become standardised.

<sup>8</sup> Fleming, J.G., *The Law of Torts* (10th edn, The Law Book Company Ltd., 2003) pp 66-68.

procedural simplification resulted in conversion encroaching on the province of detinue and trespass. There was, however, a basic difference between conversion and detinue. Detinue has been held to be a continuation of the tort of conversion in the persistent withholding of goods and a refusal to re-deliver them.<sup>9</sup> Detinue was simply then detention of a chattel while conversion means its use by the defendant for his own purposes, but it was soon recognised that refusal to surrender after demand was conversion because such conduct was clearly inconsistent with the plaintiff's right to possession.

[10-6] Conversion in its next stage of development became the most sought after remedy for any act of interference with chattels, whether by taking, detention or disposal.

[10-7] Despite the expansion of the tort of conversion, detinue and trespass have not become completely redundant. Detinue still is the most appropriate remedy where the plaintiff wants a return of his chattel. Trivial interferences may ground a remedy in trespass but they would not entitle the plaintiff to sue in conversion, for the defendant's act does not justify a compulsory sale of the chattel to him. A successful plaintiff in an action in conversion is not required to take the chattel back but is entitled to ask for its full value instead. On the other hand, in trespass, the plaintiff remains the owner of the chattel and cannot ordinarily ask for its value.<sup>10</sup> A plaintiff who sues in conversion needs to show that the (a) the plaintiff has a superior possessory right; that there is (b) a deprivation of the plaintiff's full benefit of that right; and (c) that there is an assumption by the defendant of that right.<sup>11</sup> The tort of conversion thus exists to protect proprietary or possessory rights in property; it is committed by an act inconsistent with those rights and it is a tort of strict liability.<sup>12</sup>

<sup>9</sup> See *Chun Sang Plastics Co Ltd v Commissioner of Police* [2018] HKCU 100 (unreported, DCCC 583/2017, 28 December 2017) (DC).

<sup>10</sup> Where goods have been damaged by the defendant, the plaintiff instead of repairing the goods, can sell them and claim the difference between the value of the chattels and the price at which he sold them.

<sup>11</sup> *Messrs Bruno Arboit and Ian Robinson, the Joint and Several Liquidators of Chung Ying Renminbi Exchange Ltd (in compulsory liquidation) v Hu Yan & Another* [2017] 5 HKLRD 768, [2017] HKCU 2720 (CFI), para 21.

<sup>12</sup> See *Chun Sang Plastics Co Ltd v Commissioner of Police* [2018] HKCU 1003.

## 2. ACTS CONSTITUTING CONVERSION

[10-8] No act or conduct can under any or all circumstances amount to conversion, although receiving the plaintiff's chattel, removing it, withholding it, damaging it, altering it or using it can constitute conversion if and when such acts amount to a serious interference with the plaintiff's possession or his right to immediate possession. Whether the interference is serious enough to constitute conversion would depend on a number of factors such as the extent and duration of the interference, the defendant's intent to assert a right of dominion over the chattel, the harm done to the chattel and expense and inconvenience caused to the plaintiff.<sup>13</sup>

### 2.1 Receiving chattels

[10-9] Receiving chattels belonging to the plaintiff may or may not constitute conversion depending on whether the act of receiving denies or disputes the plaintiff's title to the chattel. Accordingly, mere receipt of chattels by a pledgee<sup>14</sup> or a warehouseman<sup>15</sup> for safe keeping or storage does not constitute conversion because in each of such cases, the defendant's act cannot be considered to be inconsistent with the plaintiff's possessory title. On the other hand, a purchaser who voluntarily, albeit innocently, receives goods from a person who has no right to sell them<sup>16</sup> or a banker who collects a cheque for his customer who has no title to it commits conversion<sup>17</sup> because, in either case, the purchaser or banker's act is a denial of the true owner's title.

[10-10] There are, however, exceptions to the rule that a voluntary recipient of chattels commits conversion by purchasing or receiving the plaintiff's chattels from another person who has

<sup>13</sup> W Prosser, *The Nature of Conversion* (1955) 42 *Corn LQ* 168.

<sup>14</sup> Section 11(2) of the Torts (Interference with Goods) Act 1977 (UK) states that 'receipt of goods by way of pledge is conversion if the delivery of the goods is converted'.

<sup>15</sup> See *Hollins v Fowler* (1875) LR 7 HL 757.

<sup>16</sup> *Hilbery v Hattan* (1864) 2 H & C 822.

<sup>17</sup> *Fine Art Society v Union Bank of London* (1886) 17 QBD 705; *Gordon v London City Midland Bank* [1902] 1 KB 242; *Morison v London County and Westminster Bank* [1914] 3 KB 356; *Lloyds Bank v Chartered Bank of India, Australia and China* [1929] 1 KB 40; *Orbit Mining and Trading Co Ltd v Westminster Bank Ltd* [1963] 1 QB 794, [1962] 3 All ER 565 (CA, Eng). Under s 80 of the Bills of Exchange Ordinance (Cap 19), a banker has a good defence if he has acted in good faith and without negligence.

no legal right to sell, for example, where chattels are purchased in a shop or in a market,<sup>18</sup> or from a mercantile agent having authority in the ordinary course of business to dispose of such chattels,<sup>19</sup> or from a seller, who having sold a chattel, continues in possession of the chattel,<sup>20</sup> or where a person (holder in due course) in good faith acquires negotiable instruments which is not overdue, such as cheques or bills of exchange,<sup>21</sup> for value or where a purchaser in good faith and without knowledge of any defect in the title receives a chattel from the seller or pledgor under a voidable title.<sup>22</sup>

#### 2.1.1 Involuntary bailee

[10-11] The recipient of unsolicited chattels<sup>23</sup> such as books, magazines, fountain pens, and even a parcel of fish which are left at his home or when another's wallet is thrust into his pocket by a thief, is an involuntary bailee. Mere involuntary reception of any chattel is not conversion.<sup>24</sup> However, there is some authority for the view that an involuntary bailee must not wilfully damage or destroy the chattel.<sup>25</sup> Paton, however, doubts the existence of such a liability.<sup>26</sup>

<sup>18</sup> Markets overt are shops or markets where goods are openly sold in the ordinary course of business of such shops or markets, eg supermarkets, open markets such as Stanley and Hong Kong Markets: see s 24 of the Sale of Goods Ordinance (Cap 26); *Bishopgate Motor Finance Corp Ltd v Transport Brakes Ltd* [1949] 1 KB 322, [1949] 1 All ER 37.

<sup>19</sup> Section 9 of the Factors Ordinance (Cap 48); *Pearson v Rose and Young Ltd* [1951] 1 KB 275, [1950] 2 All ER 1027.

<sup>20</sup> Sections 9 and 10 of the Factors Ordinance (Cap 48); s 27 of the Sale of Goods Ordinance (Cap 26); *Worcester Works Finance Ltd v Cooden Engineering Co Ltd* [1972] 1 QB 210.

<sup>21</sup> Bills of Exchange Ordinance (Cap 19) s 29.

<sup>22</sup> Sale of Goods Ordinance (Cap 26) s 25; *Kings Norton Metal Co Ltd v Edridge, Merrett & Co* (1897) 14 TLR 98; *Phillips v Brooks* [1919] 2 KB 243; *Lewis v Averay* [1972] 1 QB 198, [1971] 3 All ER 907, [1971] 3 WLR 603; Cf *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 AC 919, [2004] 1 All ER 215 (HL).

<sup>23</sup> See generally, Srivastava, D.K., 'Every Mans Castle or Every Traders Dumping Ground' (1976) 2 *Mon LR* 195, p 203.

<sup>24</sup> An involuntary bailee, in general, is liable where he by an unauthorised and negligent act deprives the owner of his chattel but he will not be liable for mere negligence. See Rogers, W.V.H. *Winfield & Jolowicz on Tort* (18th edn, Sweet and Maxwell Ltd, 2010) p 473; Heuston, R.F.V., *Salmond and Heuston on The Law of Torts* (19th edn, Sweet and Maxwell, 1996) p 103-104. see also Burnett, 'Conversion by an Involuntary Bailee' (1960) 76 *LQR* 364 at 368-369.

<sup>25</sup> For example, *Hiort v Bott* (1874) LR 9 Ex 86.

<sup>26</sup> Paton, *Bailment in the Common Law* (1952) p 115.

[10-12] The case law on tortious liability of an involuntary bailee is quite unhelpful. In *Elvin and Powell Ltd v Plummer*,<sup>27</sup> when the defendant had made a mistaken but bona fide delivery to a fraudulent third party, it was held that the defendant was liable neither in conversion nor in negligence.<sup>28</sup> On the other hand, in *Hiort v Bott*,<sup>29</sup> the defendant was held liable in similar circumstances. In this case, the plaintiffs sent to the defendant an invoice for barley, which stated that the barley was bought by the defendant from the plaintiffs through G as broker, and also a delivery order, which made the barley deliverable to the order of the consignor or consignee. The defendant had not in fact ordered any barley of the plaintiffs. G called on the defendant, showed him the documents, and told him it was a mistake. G asked the defendant to indorse the order to him. The defendant indorsed the order in G's name. G disposed of the barley and then absconded. Bramwell J said that 'by an unauthorized act on the part of the defendant, the plaintiffs have lost their barley without any remedy except against G, and that is worthless. It seems to me therefore, that this was assuming a control over the disposition of these goods, and causing them to be delivered to a person who, deprived the plaintiffs of them. The conversion is therefore made out'. Bramwell J's decision turned on the fact that the defendant by indorsing the order in G's name had gone much further than necessary to secure the return of the barley to the plaintiffs.<sup>30</sup>

[10-13] Cases have arisen where an involuntary recipient has misused the chattels sent to him. In *Howard v Harris*,<sup>31</sup> it was held that the involuntary recipient of the manuscript of a play was not liable as 'no duty of any kind or sort was cast upon the defendant with regard to what was so sent'. On the other hand, in *Summer v Challenor*,<sup>32</sup> the defendant, who also had received the manuscript of a play, was held liable on the ground that he owed a duty in those circumstances to take care of the manuscript. These cases are hard to reconcile. It is difficult to find a justification for imposing liability on an involuntary recipient for loss or damage to chattels he never solicited. He should have no duty of any

27 *Elvin and Powell Ltd v Plummer* (1933) 50 TLR 158.

28 See also *James v Oxley* (1939) 61 CLR 433 at 447; *Heugh v L & NW Rly* (1870) LR 1 Ex 51.

29 *Hiort v Bott* (1874) LR 9 Ex 86.

30 See also *Winfield & Jolowicz on Tort* (15th edn, 1998) p 592.

31 *Howard v Harris* (1884) 1 Cab & El 253.

32 *Summer v Challenor* (1926) 70 Sol Jo 760.

kind but, on the contrary, should be entitled to consign them to his rubbish bin, throw them into the gutter or put them on the mantle-piece.<sup>33</sup> If the recipient gets perishable chattels, he will be justified in destroying them in order to avoid a nuisance.<sup>34</sup>

## 2.2 Dispossession<sup>35</sup>

[10-14] Disposing the plaintiff of his chattel is conversion. Taking a chattel out of the possession of another person is conversion if the intention is to exercise dominion over it. Thus, theft, robbery or seizure,<sup>36</sup> without lawful justification<sup>37</sup> are all acts amounting to conversion. In *Chun Sang Plastics Co Ltd v Commissioner of Police*<sup>38</sup> the plaintiff sued the Commissioner of Police for conversion. The plaintiffs were bona fide purchasers and traders of plastic containers. The police unlawfully seized significant amount of their plastic containers (17 in all) and withheld them from the plaintiffs thus inhibiting their normal course of trading. That action on the part of the police was unjustified, in ignorance of the law, and borne out of incompetence and thorough misjudgment. The police did not seek any warrant. The seizure and detention was illegal and 'that illegality tainted police action and that of the Department of Justice thereafter.' The court held that the defendants committed the torts of conversion and detainee. Similarly in *Maruken Kougyou Co Ltd v Hsin Chong Construction Co Ltd and Another*, the defendant was held liable for conversion and detainee, wherein the 1st defendant retained

33 *Srivastava, D.K.*, 'Every Mans Castle or Every Traders Dumping Ground' (1976) 2 Mon LR 195 p 213.

34 However, where the defendant has assumed some duty of care by his own conduct, he may be liable for any loss or damage occasioned through his negligence. In *Newman v Bourne* (1915) 31 TLR 209, a customer had accidentally left a diamond brooch in the defendant's shop. The defendant's servant had picked it up and left it in a desk from where it disappeared. The defendant was held liable for the loss of the brooch on the ground of his servant's negligence.

35 *Chun Sang Plastics Co Ltd v Commr of Police* [2018] HKCFI 661, [2018] HKCU 1003 (CFI).

36 Police are entitled to seize, as potential evidence, documents or goods where an offence has been or suspected to have been committed. Documents or goods can also be seized under the order of a magistrate or under legislative provisions empowering the police to do so: see *Chan Hoi (No 2) v The Commissioner of Police The Attorney General* [1968] HKLR 126, [1968] HKCU 11 (FC).

37 *Chan Hoi (No 2) v The Commissioner of Police The Attorney General* [1968] HKLR 126, [1968] HKCU 11 (FC).

38 *Chun Sang Plastics Co Ltd v Commissioner of Police* [2018] HKCFI 661, [2018] HKCU 1003 (CFI).