CONVERSION OF INTANGIBLE PROPERTY: A MODEST, BUT PRINCIPLED EXTENSION? A HISTORICAL PERSPECTIVE

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This article examines whether an expansion to the tort of conversion to cover intangible property is warranted. In the 2007 case of OBG Ltd v Allan (OBG)*, the majority of the House of Lords held in favour of retaining the rule that only tangible property may be subject to an action in conversion, while the minority argued that expansion of the tort is necessary based on principle, the history of conversion and developments in other jurisdictions. The* OBG *decision is set in its historical context through an analysis of the origins and extensive history of the tort of conversion. The article concludes there is nothing in the history of the tort that stands in the way of expansion to cover cases of interference with intangible interests, and argues that such an extension would be a welcome development in the New Zealand context.*

I INTRODUCTION

> Forms of actions are dead, but their ghosts still haunt the precincts of the law ... [i]n particular the law of trover and conversion is a region still darkened with the mists of legal formalism, through which no man will find his way by the light of nature or with any other guide save the old learning of writs and forms of action and the mysteries of pleading.[1]

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1 JW Salmond "Observations on Trover and Conversion" (1905) 21 LQR 43, 43. It appears to be customary to note that trover or conversion is a "forgotten tort", and that it has been seriously neglected by legal historians. In recent years there has been little written on these forms; for this reason it has been necessary to place reliance on older sources in this paper. In some law schools conversion is no longer taught, despite it still being consistently brought by plaintiffs in the courts. It has been suggested that this is a result of tort lecturers expecting property courses to include conversion, while property lecturers expect tort to cover it, with the result being that students are taught it in neither. This lack of attention to the tort leaves much room

Although Sir John Salmond issued these famous words in 1905, little has changed more than a century later. In 2007 the House of Lords was faced with a question of expansion to the tort of conversion to cover intangible property in *OBG Ltd v Allan (OBG)*, and the proper boundaries of the tort were considered.[2] The claimants brought proceedings alleging that the receivers converted their entire assets. The defendants admitted liability for the conversion of the claimants' tangible property; the issue in contention was whether there could be conversion of the claimants' intangible assets, specifically their debts and contractual rights. This question divided their Lordships, with the majority favouring retention of the rule that the tort of conversion is limited to chattels, the minority arguing that expansion to the tort was warranted.

This article will set the *OBG* decision in its historical context by analysing the origins and extensive history of the tort of conversion. It will be argued that the importance of history in understanding the tort should not be understated, as "[t]he hand of history lies heavy in the tort of conversion."[3] Conversion has proven to be an ever-evolving tort stemming from ancient roots; roots which have had a lasting effect on the nature of the tort today.

The ostensible justifications of the majority in the decision will then be critiqued through a discussion of the major developments in the tort of conversion. This discussion will address the creation of the document fiction by the courts to cope with the conversion of choses in action, the relationship between possession and property rights within the tort of conversion, the true connection between legal possession and tangibility, and the proper role for Parliament and the courts.

A brief discussion of the development of the tort in the United Kingdom compared to the United States and Canada will follow. The aim of this discussion is to shed light on the best way forward in the New Zealand context. This article will argue that there is nothing in the history of the tort which stands in the way of expansion, and that an extension allowing actions in conversion in cases of interference with intangible interests is to be welcomed.

II OVERVIEW OF CORE ELEMENTS OF THE TORT OF CONVERSION

In an earlier decision of the House of Lords, three essential features of the modern tort were set out.[4] First, the defendant's conduct must be inconsistent with the rights of the owner or other person entitled to possession.[5] Second, the conduct must be deliberate.[6] Third, the conduct must be so

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for confusion and misunderstanding. See William L Prosser "The Nature of Conversion" (1957) 42 Cornell LQ 168.

2 *OBG Ltd v Allan* [2007] UKHL 21 (HL).

3 Prosser, above n 1, 169.

4 *Kuwait Airways Corporation v Iraqi Airways Co (No 3)* [2002] UKHL 19 (HL).

5 Ibid, para 39 Lord Nicholls.

extensive an encroachment on the rights of the owner or other person as to exclude him or her from use and possession of the goods.[7] Title to the property passes to the defendant when there is a conversion, and the defendant is therefore required to pay for the full value of the chattel. This amounts to a compulsory sale of goods. A conversion may be committed in a wide range of ways, so wide in fact, that the tort almost escapes clear definition. Broadly speaking, there may be conversion "by taking possession of goods, by detaining them, by destroying or misusing them, by disposing of them to another, by dealing with them as owner, and by receiving them."[8]

III HISTORICAL ROOTS OF TROVER OR CONVERSION

To understand trover or conversion,[9] one must first have a proper understanding of its origins and historical development. By the fifteenth century there were three core remedies available to the plaintiff for protection of chattels in English law. These remedies were detinue, trespass to goods and trover. There is considerable overlap between the three actions, and in order to appreciate the true nature of trover, the similarities and differences must be examined. It should be noted that an underlying assumption which runs through trover's long history is that the subject-matter of the tort must be tangible property.

A Detinue:[10] an Action of "Great Antiquity"[11] Distinguished from Trover

Detinue is the oldest of the three actions, emerging from an action in debt in the earlier part of the twelfth century.[12] The essence of the tort is an unlawful detention of chattels against the person entitled to have possession.[13] In its initial form it was brought by plaintiffs seeking to recover

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6 Ibid.

7 Ibid.

8 *The Laws of New Zealand* (Butterworths, Wellington, 2008) Conversion and Detinue para 16(228) (last updated June 2008) www.butterworthsonline.com.

9 It should be noted that the development of the tort of trover is inextricably linked with conversion such that conversion is the modern name given to what was formerly known as an action in trover.

10 Detinue is abolished in the United Kingdom by the Torts (Interference with Goods) Act 1977 (UK), s 2(1), see also s 2(2), discussed at Part IV E A Job for Parliament or the Common Law?

11 NE Palmer *Bailment* (2 ed, Sweet & Maxwell Ltd, London, 1991) 241.

12 CHS Fifoot *History and Sources of the Common Law: Tort and Contract* (Stevens & Sons Ltd, London, 1949) 25-27; Phillip S James and DJL Brown *General Principles of the Law of Torts* (4 ed, Butterworths, London, 1978) 144; AKR Kiralfy *Potter's Outlines of English Legal History* (5 ed, Sweet & Maxwell Ltd, London, 1958) 165 [*Potter's Outlines of English Legal History*]; Frederick Pollock *The Law of Torts* (13 ed, Stevens & Sons Ltd, London, 1929) 366.

13 George W Paton *Bailment in the Common Law* (Stevens & Sons Ltd, London, 1952) 379; ELG Tyler and NE Palmer *Crossley Vaines' Personal Property* (5 ed, Butterworths, London, 1973) 21.

specific chattels owed by the defendant, just as debt was an action to recover a specific sum of money.[14]

The tort developed into two sub-actions: detinue sur bailment and detinue sur trover. Detinue sur bailment was based on agreement between the parties, while the latter was based on tortious wrong.[15] It has been suggested that detinue sur trover would have halted the need for the development of trover, if it had not carried a number of procedural defects. The most significant defect was the ability of the defendant to rely on a defence of wager of law.[16] Wager of law was the process by which the defendant could swear an oath denying the plaintiff's claim. This oath was usually supported by calling on eleven or twelve witnesses to testify to their belief in the truth of the defendant's oath.[17] A dishonest defendant could abuse this process bringing about a harsh result for the plaintiff wrongfully deprived of his or her goods.[18] Plaintiffs began looking for ways to avoid this procedural hurdle, resulting in the rise in prominence of actions on the case.[19]

Detinue also had substantive disadvantages. The tort recognised the act of the return of the goods in itself and did not provide a remedy where the chattel was returned in a damaged condition.[20] Difficulties arose where there was partial damage to the chattel because of the principle that there could not be alternative remedies arising out of the same cause of action.[21] The argument in the courts which enabled the expansion of the ambit of the action on the case largely revolved around questions about the duplicity of remedies, rather than the wrongfulness of the defendant's

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14 AM Wilshere *Principles of the Common Law* (4 ed, Sweet & Maxwell Ltd, London, 1937) 348; JW Salmond *Salmond and Heuston on the Law of Torts* (19 ed, Sweet & Maxwell Ltd, London, 1987) 108; Melville M Bigelow *Leading Cases of the Law of Torts* (Little Brown & Co, Boston, 1875) 421.

15 Wilshere, above n 14, 348.

16 Bigelow, above n 14, 422.

17 *Potter's Outlines of English Legal History*, above n 12, 120.

18 Defendants have been said to have widely abused their right to wager of law. Indeed, Prosser has called the procedure "a form of licensed perjury." See Lawrence H Hill "'A New Found Haliday': The Conversion of Intangible Property – Re-Examination of the Action of Trover and Tort of Conversion" (1972) Utah L Rev 511, 517; Prosser, above n 1, 169.

19 Fifoot, above n 12, 103; Wilshere, above n 14, 348; Salmond, above n 1, 45; JH Baker *An Introduction to English Legal History* (4 ed, Butterworths, London, 2002) 398; SFC Milsom *Historical Foundations of the Common Law* (2 ed, Butterworths, London, 1981) 368.

20 *Potter's Outlines of English Legal History*, above n 12, 166; AKR Kiralfy *Potter's Historical Introduction to English Law* (4 ed, Sweet & Maxwell Ltd, London, 1962) 408 [*Potter's Historical Introduction to English Law*].

21 AWB Simpson "The Introduction of the Action on the Case for Conversion" (1959) 75 LQR 364, 365; *Potter's Historical Introduction to English Law*, above n 20, 411.

conduct.[22] It was also questionable whether a plaintiff could rely on detinue to recover against a third party, for example a sub-bailee who had destroyed the chattel.[23]

When some of the strict procedural requirements were abolished in a series of nineteenth century reforms, there was a revival of actions in detinue.[24] A period ensued where, on wrongful detention of goods, plaintiffs could elect to bring proceedings in detinue or in trover. In practical terms, this choice was important because detinue lay to recover the goods or their value judged at the date of the judgment, while in trover the remedy was based on the value of the goods at the time of the conversion.[25] "The plaintiff therefore chose between the actions according to whether the goods had appreciated or depreciated since the date of conversion."[26]

1 Extension of trover to cover detinue

Trover is a wider remedy than detinue because it encompasses many situations, only one of which is the wrongful detention of goods.[27] In the *Sykes v Walls* decision of 1675, the Court allowed a claim in trover for wrongful detention of goods on the ground that a refusal to deliver the goods was evidence of trover.[28] This illustrated that the wrong which constitutes an action in detinue had been virtually subsumed by trover.[29]

B Trespass to Goods Distinguished from Trover

Trespass to goods involves wrongful taking of, or any direct and immediate injury to, goods in the possession of the plaintiff.[30] The origins of the tort can be traced to its introduction during the

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22 *Potter's Historical Introduction to English Law*, above n 20, 411; Simpson, above n 21, 365.

23 *Potter's Outlines of English Legal History*, above n 12, 166; *Potter's Historical Introduction to English Law*, above n 20, 408.

24 Baker, above n 19, 399; *Potter's Outlines of English Legal History*, above n 12, 167; Conversion and Detinue: Report of the Law Reform Committee (1971) Cmnd 4774, 4.

25 Hugh Fraser *A Compendium of the Law of Torts* (7 ed, Sweet & Maxwell Ltd, London, 1908) 93.

26 Baker, above n 19, 400.

27 Palmer, above n 11, 241.

28 *Sykes v Walls* (1675) 3 Keb 282. See Potter's Historical Introduction to English Law, above n 20, 412-413; Potter's Outlines of English Legal History, above n 12, 167.

29 *Potter's Historical Introduction to English Law*, above n 20, 413; Salmond, above n 1, 48.

30 JL Clerk and WHB Lindsell *Clerk and Lindsell on Torts* (18 ed, Sweet & Maxwell, London, 2000) 726, para 14-03; Palmer, above n 11, 200-202; Pollock, above n 12, 363-364.

latter half of the twelfth century.[31] In its early stages, the most common form was an action in trespass *de bonis asportatis*[32] which pleaded an actual removal of goods by the defendant.[33]

Trespass is a wrong against the actual possessor, whereas trover can be maintained by someone with an immediate right to possession.[34] Trespass cannot therefore be committed by the person in possession of the goods. "The actual possessor is frequently, but not always, the person entitled to immediate possession, so that conversion may, but does not necessarily, include trespass."[35]

Since trespass is a wrong against actual possessory rights, it could not lie against the grantee of a trespasser. The wrong only lay against the original trespasser, as they alone could be said to have wrongfully taken the goods out of the possession of the plaintiff.[36] This rule prevented suit against all third parties and was especially hard on bailors who had delivered possession to a bailee for a specific purpose, but could not maintain an action against a third party who subsequently took possession from the bailee.[37] The law was eventually developed through "pure judicial legislation"[38] to grant bailors the right to bring trespass in some circumstances. For example, the *Bedingfield v Onslow* case of 1685 settled the rule that, where the bailment was for a fixed term, the bailor could bring trespass against a third party but only outside of the term of the bailment.[39] This sits uncomfortably with the rule that trespass only lies at the suit of the person in actual possession, but was a desirable step toward granting justice for the honest bailor.

The remedy for trespass to goods was compensation in damages to the extent of the interference with possession.[40] As a tort which was actionable per se, the slightest injury or interference was sufficient. If the chattel was returned, this could be taken into account when assessing the amount of damages to be awarded.[41]

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31 *Potter's Historical Introduction to English Law*, above n 20, 376; *Potter's Outlines of English Legal History*, above n 12, 164; JB Ames "The History of Trover" (1897) 11 Harv L Rev 277, 282.

32 Trespass *de bonis asportatis* – the Latin name for the wrong meaning the carrying off of chattels. See Richard A Epstein *Cases and Materials on Torts* (6 ed, Little, Brown & Company, Boston, 1995) 650.

33 *Potter's Outlines of English Legal History*, above n 12, 165; John R Faust JR "Distinction between Conversion and Trespass to Chattel" (1958) 37 Ore L Rev 256, 260.

34 Fraser, above n 25, 85.

35 Ibid.

36 Ames, above n 31, 286.

37 *Potter's Historical Introduction to English Law*, above n 20, 402.

38 Ibid.

39 *Bedingfield v Onslow* (1685) 3 Lev 209.

40 Ames, above n 31, 285.

41 Ibid.

1 Extension of trover to cover trespass to goods

Trover came to be preferred not only to detinue, but also to trespass. The reason for this preference is not as obvious as it is for detinue, since trespass was not subject to the most significant procedural disadvantage of detinue, which was wager of law. It has been suggested that "litigants may merely have been in pursuit of a fashionable remedy."[42] However, it seems more likely that other procedural shortcomings were the real reason that made litigants turn from trespass to trover.[43]

For a period, the actions were alternative remedies for the situation where there was a wrongful taking and subsequent disposal of goods.[44] There were dicta in the law reports that "whenever trespass for taking goods will lie, that is where they are taken wrongfully, trover will also lie."[45] However, this is an inaccurately wide statement of the law. The case of *Bushell v Miller* conveniently illustrates this.[46] In that case, the defendant, a porter, shifted a parcel about a yard from the place where it lay to suit his own convenience. He forgot to put the parcel back and it was lost. He was found liable for trespass but not for trover. There was no intention to convert the goods to the defendant's own use here; the rule was laid down in that case that not every wrongful interference with a chattel will constitute trover.

In the leading case of *Fouldes v Willoughby* the distinction between trespass and trover was clarified.[47] The defendant refused to carry the plaintiff's horses on his ferry-boat, and put them off his boat onto the landing. The act of removing the horses was a mere trespass, but could not constitute trover. One of the presiding judges, Baron Alderson, stated that trover requires "an act inconsistent with the general right of dominion which the owner of the chattel has in it."[48] There was a subsequent revival of the action for trespass to goods.[49] However, it has been suggested that, although trespass to goods survived "as a possible remedy for interferences of a petty and minor

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42 Fifoot, above n 12, 110.

43 For example, as noted above, the plaintiff generally had no action against the grantee of the trespasser. See also VD Ricks "The Conversion of Intangible Property: Bursting the Ancient Trover Bottle with New Wine" (1991) BYU L Rev 1681, 1710.

44 *Bishop v Viscountess Montague* (1601) Cro Eliz 824. See Faust, above n 33, 260; Fifoot, above n 12, 110; Salmond, above n 1, 47.

45 Salmond, above n 1, 51; Note to Sergeant Williams on the case of *Wilbraham v Snow* (1670) 2 Saunders 47.

46 *Bushell v Miller* (1731) 1 Str 128.

47 *Fouldes v Willoughby* (1841) 8 M & W 540; 151 ER 1153.

48 Ibid 543; 1156.

49 Prosser, above n 1, 173.

character",[50] it had been largely superseded by the tort of trover. Trover provided a convenient substitute which rendered trespass to goods "more or less obsolete."[51]

C The Origin and Early History of Trover

As already discussed above, it appears trover emerged to supplement the gaps left by the action of detinue.[52] Some commentators firmly state that trover arose directly from *detinue sur trover*,[53] while others declare trover originated from the action of trespass on the case.[54]

The first reported case where it was held that the defendant converted the goods to his own use was in 1479.[55] Trover emerged as a "distinct species of case"[56] in the second half of the sixteenth century. The process by which it emerged can be drawn from the pleadings. The key elements of a claim in trover in the original pleadings consisted of: an allegation that the plaintiff was possessed of a chattel and lost it; that the chattel then came into the possession of the defendant by finding; that the defendant refused to deliver the chattel to the plaintiff on request and that the defendant converted the chattel to his or her own use to the plaintiff's damage.[57] However, the substance of the tort lay in the last element, the act of conversion. The counts of losing and finding are a notorious fiction, and were acknowledged as such rather early.[58] On the allegation of finding, the court in *Ratcliff v Davies* in 1611 held that "a trover or conversion well lies, although [the defendant] came to [the goods] by a lawful delivery, and not by trover."[59] This was followed by the *Kinaston v Moore* decision in 1627, where the allegation of losing was said to be "but a surmise and not material, for the defendant may take it in the presence of the plaintiff."[60] The fiction of losing and

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50 William L Prosser and Young Berryman Smith *Cases and Materials on Torts* (3 ed, The Foundation Press Inc, Brooklyn, 1962) 90.

51 Ibid.

52 *Potter's Historical Introduction to English Law*, above n 20, 409.

53 JB Ames *Lectures on Legal History* (Harvard University Press, Cambridge, 1913) 83; Salmond, above n 1, 46; Milsom, above n 19, 273, 366.

54 *Potter's Outlines of English Legal History*, above n 12, 151.

55 Simpson, above n 21, 364; Prosser, above n 1, 169; Ricks, above n 43, 1683.

56 Fifoot, above n 12, 103.

57 Edward Warren "Qualifying as Plaintiff in an Action for a Conversion" (1936) 49 Harv L Rev 1084, 1085; Ames, above n 31, 277; Prosser, above n 1, 169.

58 Bigelow, above n 14, 424; Salmond, above n 1, 46; Ames, above n 31, 277.

59 *Ratcliff v Davies* (1611) 79 ER 210.

60 *Kinaston v Moore* (1627) Cro Car 89.

finding was statutorily abolished by the Common Law Procedure Act 1852 (UK), with the substance of the action remaining the conversion of the goods.[61]

To bring an action in trover, the plaintiff needed to have possession or an immediate right to possession.[62] Trover is therefore widely accepted as a wrong against possessory rights. As a reflection of the importance of the protection of possession, trover is a tort of strict liability. This was laid down after much debate in *Hollins v Fowler* in 1875 where Justice Blackburn advising the House of Lords,[63] stated that "if there has been what amounts in law to a conversion of the plaintiffs' goods, by anyone, however innocent, that person must pay the value of the goods to the plaintiffs."[64] The rule therefore stands that persons deal with property in goods at their own peril.[65]

The key distinction between trover, and both detinue and trespass to goods, lies in the remedy at the suit of the plaintiff.[66] It appears that it was the measure of damages in trover, the full value of the property, which led many plaintiffs to seek to maintain actions in the tort. "In trespass and in actions on the case other than trover, the successful plaintiff sometimes recovered the full value, but frequently recovered much less than the full value."[67] In *Isaack v Clark* it was set out that a judgment in trover "changed the property" from the plaintiff to the defendant.[68] This meant the defendant was required to pay the full value of the chattel to the plaintiff. This stands in contrast to detinue, where logically the remedy lies in return, as the tort is brought out of desire for one's own goods. In trover there is a transfer which the defendant must pay for in a compulsory sale. In practice therefore, trover often provided the best possible remedy for plaintiffs. The powerful remedial nature of the tort is one of the core strengths of an action in trover.

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61 Salmond, above n 1, 43.

62 Pollock, above n 12, 371; Warren, above n 57, 1100-1101.

63 In view of the difficulty of the case, on appeal to the House of Lords, their Lordships summoned the Common Law Judges to give their opinions. Of the six judges who attended, four advised that the appeal should be dismissed, while two advised that it should be allowed. Their Lordships unanimously dismissed the appeal, and the defendant was thus held liable for conversion. Blackburn J was one of the four judges who advised the House that the appeal should be dismissed. Although his Honour's judgment is not part of the decision of the House, its "value and persuasive force, both in the case and thereafter, [has] been clearly recognised." Percy Henry Winfield *Cases on the Law of Torts* (4 ed, Sweet & Maxwell Ltd, London, 1948) 158.

64 See *Hollins & Others v Fowler & Others* (1875) 44 LJQB 169; LR 7 HL 757.

65 Palmer, above n 11, 213.

66 *Second Restatement of the Law: Torts* 2d Volume 1: 1-280 (American Law Institute Publishers, Washington, 1965) 242, 433.

67 Warren, above n 57, 1086.

68 *Isaack v Clark* (1614) 2 Bulstrode 306 (KB) Coke CJ.

In summary, a historical view of the tort reveals its flexible, remedial nature. This was seen in the emergence of the tort to provide relief for the procedural and substantive disadvantages faced by plaintiffs in the actions of detinue and trespass to goods.[69] This is perhaps best illustrated in the utility of the remedy for conversion, that is, the measure of damages in a claim for trover allowing the recovery of the full value of the property converted. The flexible, remedial nature of the tort is of vital importance, as it supports the views of the minority in *OBG* that an extension of the tort of conversion to cover intangible property is warranted.

IV EXAMINATION OF KEY DEVELOPMENTS IN THE TORT OF CONVERSION

A Fictions – the Document Fiction: A Slight Erosion or Significant Exception?

> To those whose lives were spent in "the days of chivalry", horses, castles, and suits of armour – things they could feel and actually touch – represented wealth and value and were exclusively the subject of a law which concerned itself with the tort of conversion.[70]

As these words suggest, during the early years of trover it was assumed that there could be no conversion of intangible property. The most significant historical development in terms of the subject-matter of the tort of conversion, which challenged this assumption, was the creation of the document fiction. There was a definite reluctance to recognise a chose in action as property capable of conversion in the early stages of trover's development. This reluctance stemmed largely from fears that allowing assignment of rights to recover property would be open to abuse.[71] Indeed:[72]

> [i]n England in the Middle Ages the disorderly state of the country, the technicality of the common-law procedure, the expense of legal proceedings, and the ease with which jurors, sheriffs, and other ministers of justice could be corrupted or intimidated, made maintenance and kindred offences so crying an evil that it was necessary to prohibit sternly anything which could in the smallest degree foster them.

Conversion's origins in the action of trover also initially encouraged the limitation to tangible property. The reluctance of the courts to expand the tort may in part be attributed to the tort's deep and ancient roots in trover and the restrictive pleading requirements of that action. At the outset of the tort, only property that could potentially be lost and found could be converted.[73] However, the

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69 See generally Hill, above n 18.

70 Lester Rubin "Conversion of Choses in Action" (1941) 10 Fordham L Rev 415, 415. See also Roy Goode *Commercial Law* (3 ed, Penguin Books Ltd, London, 2004) 47.

71 WS Holdsworth "The History of the Treatment of Choses in Action by the Common Law"" (1920) 33 Harv L Rev 997, 1006.

72 Ibid, 1007.

73 See W Page Keeton and William Prosser *Prosser & Keeton on the Law of Torts* (5 ed, West Publishing Co, Minnesota, 1984) 89.

requirements of losing and finding became recognised as a fiction in the case law at the turn of the seventeenth century, with the essence of the action being the act of conversion itself.[74] Indeed, once these allegations were acknowledged as fictional, the scope of the action greatly increased. It is of note then, that when assignable choses in action were eventually developed in the seventeenth and eighteenth centuries, the courts created a further fiction to allow recovery in trover in respect of those choses.[75] The document fiction treats the thing converted to be not the valuable chose in action, but the piece of paper which represents it, attributing to that piece of paper the value of the chose.

The document fiction was originally applied to negotiable instruments, which were later defined in the Bills of Exchange Act 1882 (UK).[76] But the doctrine has since expanded its reach to cover non-negotiable documents evidencing a debt or obligation. In the 1818 case of *Wills v Wells* the Judge allowed a claim for conversion of a life insurance policy; while in 1858, in *Watson v MacLean* the document fiction was applied to a guarantee.[77] The Court of Appeal in *Bavins Junr and Sims v London and South Western Bank* subsequently unanimously held that there could be a conversion of a non-negotiable instrument evidencing a debt and allowed recovery to the full value of the document.[78] The current position, as outlined in *Clerk and Lindsell on Torts*, is that the document fiction encompasses "any document specially prepared in the course of business as evidence of a debt or obligation."[79]

For the sake of completeness, it is worth mentioning that the document fiction, as extended to all manner of documents evidencing an obligation, covers more than documents which themselves form title to goods. "Documents of title" are difficult to exhaustively define. At common law, the only document recognised as a document of title is a bill of lading.[80] However, section 1 of the Factors Act 1889 (UK) extends the term to include:[81]

> Any bill of lading, dock warrant, warehouse keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or

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74 See Part III C The Origin and Early History of Trover.

75 See *OBG Ltd v Allan*, above n 2, para 309 Baroness Hale.

76 Bills of Exchange Act 1882 (UK), s 3.

77 *Wills v Wells* (1818) 2 Moore CP 247; *Watson v MacLean* (1858) EB & E 75.

78 *Bavins Junr and Sims v London and South Western Bank* [1900] 1 QB 270.

79 Clerk and Lindsell, above n 30, 1022, para 17-35.

80 Goode, above n 70, 886.

81 Factors Act 1889 (UK), s 1. Exact replicas of this definition exist in New Zealand statute, in the Sale of Goods Act 1908, s 2(1) and the Mercantile Law Act 1908, s 2(1).

> control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

Documents of title to goods, such as bills of lading, embody a right to control the goods, thereby giving constructive possession of the goods to the holder of the document.[82] This right of control over the goods can be transferred by delivery, with any necessary endorsement. Since documents of title give the holder such extensive rights, the documents are in effect treated as the goods themselves.[83] Therefore, if the document fiction purely covered documents of title, it is arguable that it would not be a fiction at all, for conversion of a document of title is for all practical purposes a conversion of the goods allied to the document. The case law and relevant commentary on the fiction contain no reference to the question of documents of title. The lack of attention paid to this point is peculiar. Nevertheless, the current position on the fiction, as noted above, appears to go further than coverage of documents of title.

The creation of the document fiction was a victory for the commercial world, marking a significant concession to the needs of commerce. However, it was criticised by Baroness Hale in *OBG* as being "at once too wide and too narrow".[84] It is too wide in the sense that the debt or obligation embodied in the document may be personal, as opposed to proprietary, and therefore should not be afforded the protection of the tort of conversion. Conversely, it is too narrow as the fiction excludes debts or obligations which carry many of the characteristics of property, such as the ability to be alienated, pledged or assigned, but which are not represented by a specific document.

The document fiction makes substantial inroads into the rule requiring tangible property, a rule which in itself has largely been assumed due to the original fictional allegations in trover of a loss and a finding.[85] The historical tie to the fiction of losing and finding cannot be a valid reason for restricting expansion, where such a fiction was only ever a convenient mechanism to allow plaintiffs to achieve a more desirable remedy, and the true gist of the action lay in the act of conversion. In a spirited passage, Lord Nicholls submitted that fiction must not be piled upon fiction, stating:[86]

> I would like to think that, as a mature legal system, English law has outgrown the need for legal fictions. There was a time when John Doe and Richard Roe were popular characters. They had to be parties to some forms of action. When they were in their prime their names appeared again in the law reports. English law has moved on. John Doe and Richard Roe are no more.

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82 Goode, above n 70, 48.

83 Ibid, 49.

84 *OBG Ltd v Allan*, above n 2, para 310 Baroness Hale.

85 See Part III C The Origin and Early History of Trover.

86 *OBG Ltd v Allan*, above n 2, para 229 Lord Nicholls.

For a substantial period of history, the effect of the fiction has meant that plaintiffs have been allowed to recover the full value of a chose in action or an intangible property interest where it is evidenced by a document. Through the mechanism of the document fiction the courts have in *substance* already begun to protect intangible property interests. This constitutes a significant exception to the rule, and paves the way for an expansion to cover intangible property assets, like the contractual rights in *OBG*. But the document fiction is not an appropriate mechanism for dealing with intangible property interests. The unsuitability of the document fiction will be argued on the basis of the importance of the protection of property interests, the ties between possession and convertibility, and the tort's historical emphasis on dominion, inconsistency and the seriousness of the interference with the plaintiff's possessory interest.

B Possession, Property and Ownership – Conversion as a Tort "Founded on Property"[87]

> In a logical world, there would be such a proprietary remedy for the usurpation of all forms of property. The relevant question should be, not "is there a proprietary remedy?", but "is what has been usurped property?"[88]

As expressed above, trover or conversion is often spoken of as a wrong against possession.[89] However, there are a number of authorities which indicate that although ostensibly tortious in form, conversion is a remedy to protect property rights, and is therefore particularly concerned with ownership.[90] For example, one commentator stated that "unlike trespass, conversion is *essentially an offence to property* 'it is and always has been, primarily an action for the protection of ownership.'"[91] The Law Reform Committee in their extensive 1976 report on detinue and conversion observed that "[t]he action of conversion has long been established in English law as a vehicle for the protection of proprietary rights."[92] And in the important case of *Hollins v Fowler*,

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87 *Hambly v Trott* (1776) 1 Cowp 371, 374 Lord Mansfield CJ.

88 *OBG Ltd v Allan*, above n 2, para 309 Baroness Hale.

89 See Part III C The Origin and Early History of Trover.

90 It is true that possession usually comes with ownership, but, as one of the more popular modern day metaphors of property explains, property may be viewed as a "bundle of rights". Property is no longer viewed in Blackstonian terms as requiring absolute dominion over an object. In consequence, possession consists of only one of those rights, albeit a fundamental one, and may be split from the other rights in the "bundle". James and Brown, above n 12, 146; Tyler and Palmer, above n 13, 45; William Blackstone *Commentaries on the Laws of England* (Vol 2, Clarendon Press, Oxford, 1765) 2.

91 Palmer, above n 11, 209 (emphasis added).

92 Conversion and Detinue: Report of the Law Reform Committee, above n 24, 6. It should be noted that the Committee qualified this general statement with the rule that it does not apply to a reversionary owner with no right to immediate possession who cannot sue in conversion.

the Judge held the tort was founded on "a salutary rule for the *protection of property*, namely, that persons deal with the property in chattels or exercise acts of ownership over them at their peril."[93]

Baroness Hale's well-reasoned proposition is a more sound way of conceptualising the question of intangible property than the document fiction. This is because asking first whether the subject-matter of a claim in conversion may validly be defined as property is crucial to the question of whether conversion should provide a proprietary remedy. By contrast, one concern with the approach taken by Lord Nicholls in his forceful dissent in *OBG* is that his judgment, in its close attention to the lack of necessity for legal fictions, does not adequately address the question of whether the extension argued for will only cover subject-matter carrying sufficient characteristics to constitute property. The extension argued for by his Lordship would appear to apply to all contractual rights.[94] This may merely be a case of loose judicial language, and may not be representative of his Lordship's true view, but if it is correct it is troublesome, for not all contractual rights will constitute a property interest.

It is clear that the tort has both possession and property at its heart. The primacy placed on the protection of these interests throughout the long history of conversion supports an extension to cover valuable property interests in intangible assets like those in the *OBG* case. The value of the intangible assets in *OBG* present just one example of the growing importance of such intangible property rights in modern society. One key text observes that "in today's economy property and wealth take an increasingly intangible form."[95] In the case of *Aryes v French*, Park CJ in the Supreme Court of Errors in the State of Connecticut articulated the illogical nature of drawing a distinction between tangible and intangible property in the tort of conversion:[96]

> There is really no difference in any important respect between [a share of stock] and other kinds of personal property. A man purchases a share of stock and pays one hundred dollars for it. He afterwards purchases a horse, and pays the same price. The one was bought in the market as readily as the other and can be sold and delivered as readily. The one can be pledged as collateral security as easily as the other; as easily attached to secure a debt; and its value as easily estimated. The one enriches a man as much as the other, and fills as important a place in the inventory of his estate. It is considered personal property of as substantial value as the other, both in law and in the transactions of men.

This passage highlights the need for an extension in the law to achieve the tort's aim of protecting proprietary interests. The current fiction does not go far enough to protect plaintiffs who

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93 *Hollins v Fowler* [1872] 7 LR 616, 639 (QB) Baron Cleasby (emphasis added).

94 See *OBG Ltd v Allan*, above n 2, paras 232-233, 237 Lord Nicholls.

95 Fowler V Harper and Fleming James *The Law of Torts* (2 ed, Little, Brown & Company, Boston, 1986) 173, para 2.13.

96 *Ayres v French* (1874) 41 Conn 142, 150 (Conn SC) Park CJ.

suffer interference with their intangible proprietary rights. A consistent approach calls for an application of the tort to cover both tangible and intangible forms of property capable of conversion. Whether intangible property interests such as the contractual claims in *OBG* are amenable to possession is central to this question and will now be addressed.

C Possession, Tangibility and Convertibility

Lord Brown in the majority in *OBG* reasoned that as the tort of conversion is closely tied with a wrongful taking of physical possession of property (whether a chattel or document), intangible property cannot be subject to the tort.[97] This proposition raises the question of whether the intangible property at issue in *OBG* was capable of possession, and thus capable of conversion.

What is possession? One may clearly "possess" a tangible object, like a pen, by demonstrably taking hold of it, but can one not also "possess" knowledge? Possession is the origin of property at common law and is the major attribute of property.[98] It is difficult to define, as one commentator remarks:[99]

> Possession, like ownership, is incapable of precise definition; indeed, its meaning varies according to the nature of the issue in which the question of possession is raised. Moreover, there is not even an agreed terminology as to the different forms of possession.

Possession at common law has two essential elements: physical control and an intention to possess. Historically, personal property falls into two broad categories: choses in action and choses in possession. Choses in action include all personal property which can only be claimed or enforced by an action rather than by taking physical possession; whereas choses in possession are tangible personal property or chattels.[100] At first glance, one might think the majority in *OBG* were indisputably correct in their analysis that choses in action cannot be possessed, as the definition of a chose in action sets out that such choses must be enforced by an action precisely because they are incapable of physical possession. This however is possibly too short-sighted. The issue depends on whether possession of property at common law is a fluid enough concept to include possession of an interest in intangible property.

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97 *OBG Ltd v Allan*, above n 2, para 321 Lord Brown. Again, this requirement of a physical taking can be traced back to conversion's roots in an action in trover and the allegations of a loss and a finding required by the old forms. See earlier discussion at Part IV A Fictions – the Document Fiction: A Slight Erosion or Significant Exception?

98 See generally Alison Clarke and Paul Kohler *Property Law: Commentary and Materials* (Cambridge University Press, Cambridge, 2005) 259-261.

99 Goode, above n 70, 42.

100 Rubin, above n 70, 415. See also Howard W Elphinstone "What is a Chose in Action?" (1893) 9 LQR 311; T Cyprian Williams "Property, Things in Action and Copyright" (1895) 11 LQR 223.

The intention to possess the contractual assets in *OBG* is the easier of the two requisite elements to satisfy. In *OBG* the claimants clearly viewed the contractual claims as theirs to the exclusion of others and were aware of the precise form and value of the contractual claims.[101] The element of physical or manual control is more difficult. One commentator lists the factors to be taken into account when assessing whether the plaintiff has sufficient possession as being physical custody, ability to retain control, and the intention to exclude others from such control.[102] All these factors are said to be important, with no general agreement as to the relative importance of each factor. In his seminal work on ownership in property, Honoré describes the right to possess as meaning to have exclusive physical control, or *to have such control as the nature of the thing admits.*[103] This view finds support in another influential work on possession by Harris, where he states that the degree of physical control should not be considered in isolation, but in relation to the *greatest degree of physical control* possible.[104] In an insightful commentary on this question, Green sets out that there are two core factors to be considered when distinguishing between subject-matter which is capable of manual control and that which is not: exclusivity and exhaustivity.[105] Green states that:[106]

> if a thing is amenable to exclusive custody, and can be exhausted so as to deprive the claimant substantially of its value, then it can be possessed by one party to the detriment of another and can, therefore, be converted.

1 Exclusivity

When the receivers in *OBG* took over the claimants' assets, they acquired exclusive control of the claimants' contractual claims. On the basis of this control, the receivers were able to wind up the company, terminating and otherwise disposing of the company's contracts with its customers. They were therefore exercising control of the assets to the fullest extent possible.[107] Here, the contracts were evidence of debts owed to the company, and in terms of exclusivity the important factor was that the receivers were "recognised as the sole party to whom the debtor considers himself indebted."[108] This was shown on the facts of the case, with OBG's main customers settling their

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101 Sarah Green "To Have and to Hold? Conversion and Intangible Property" (2008) 71 MLR 114, 116.

102 GHL Fridman *Modern Tort Cases* (Butterworths, London, 1968) 247.

103 AM Honoré "Ownership" in AG Guest (ed) *Oxford Essays in Jurisprudence: First Series (*Clarendon Press, Oxford, 1961) 107, 113.

104 DR Harris "The Concept of Possession in English Law" in AG Guest (ed), above n 103, 69, 75.

105 Green, above n 101, 116-117.

106 Ibid, 117.

107 See *Ward v Duncombe* [1893] AC 369, 386 (HL) Lord Macnaghten.

108 Green, above n 101, 117.

contractual claims and obligations with the receivers plainly under the impression that the receivers were standing in the place of the claimants as the party with authority to make such arrangements.[109]

2 Exhaustivity

Once the contractual claims were settled, the property interests in those claims were exhausted. As Green commented "[i]f the destruction of a tangible asset can amount to a conversion, the complete extinction of an intangible piece of property should attract the same consequences."[110]

To conclude, by standing in the place of the claimants in *OBG*, the receivers acquired exclusive control of the claimants' intangible assets and exhausted those assets completely. In doing so, the receivers denied the claimants of a significant extent of the value in the intangible assets which they would have had but for the receiver's actions. Thus in this case, although physical possession was not possible, the utmost that could be done to the assets was done, resulting in the presence of exclusivity and exhaustivity. The requisite common law elements of intention to possess and control were arguably both present, and the assets were therefore capable of possession. In other words, despite their intangibility, the assets were in fact possessed of the necessary elements of "convertibility".

D Essence of Trover – Dominion, Interference and Inconsistency

There is much judicial authority attesting to the importance of the concept of "dominion" in the law of trover.[111] It has been said however, that the concept is a "negative aid" and that the case law actually focuses on the nature of the interference with the plaintiff's possessory rights.[112] In essence, the interference is most often committed by dealing with the property in a manner inconsistent with a right held by the plaintiff in respect of that property. The seriousness of such interference is what justifies the severe sanction imposed by conversion, the mechanism of a forced judicial sale.[113] If the essence of trover lies in an act of interference, the reasons for restricting trover to tangible property appear weak. Practically, an assertion of an inconsistent right may be exercised over intangible property just as effectively as over tangible property. The effect for the plaintiff remains the same. The question must now be asked: who should assume the task of any proposed expansion to the law?

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109 *OBG v Allan*, above n 2, paras 73-78 Lord Hoffmann.

110 Green, above n 101, 117.

111 *Fouldes v Willoughby*, above n 47; *Kuwait Airways Corporation v Iraqi Airways Co (No 3)*, above n 4, para 41 Lord Nicholls. See also Faust, above n 33, 269; Margaret Brazier and John Murphy *Street on Torts* (10 ed, Butterworths, London, 1999) 46.

112 Prosser, above n 1, 171-172; Faust, above n 33, 270; Brazier and Murphy, above n 111, 54.

113 Prosser, above n 1, 173, 184.

E A Job for Parliament or the Common Law?

Whether expansion of the law of conversion should be effected through the means of the common law to cover intangible property, or whether such expansion should be left to Parliament, was discussed by each of their Lordships in *OBG*. Most of the discussion was tied to the main piece of legislation relating to conversion, the Torts (Interference with Goods) Act 1977 (UK) (the Act).

The Act was enacted following an extensive report on the law of conversion and detinue by the Law Reform Committee in 1976.[114] However, the Committee's recommendation that all the torts relating to interference with goods be replaced with a single tort of "wrongful interference with chattels" was only realised to a limited extent in the Act. Detinue was abolished by the Act, but the destruction of goods in breach of a duty by a bailee (the clearest instance of detinue at common law) became a statutory conversion under the Act.[115] Although the Act provides a single description, "wrongful interference with goods",[116] to cover conversion, trespass to goods and negligence resulting in damage to goods or to an interest in goods, the Act largely leaves the substance of the common law unchanged.[117] In short, the Act is by no means a codification of this area of the law.

The Law Reform Committee specifically confined their report to torts relating to interference with goods. The subject of whether conversion might be applied to intangible property therefore fell outside of the scope of their inquiry. Thus the assertion of the majority, that it would be inconsistent with the basis on which the Act was enacted to provide an extension to conversion to cover intangible property through the means of the common law, with the greatest respect, is flawed.[118] Conversion is a creature of the common law, as evidenced by its long history and expansive development from an action in trover; it is thus indeed arguable that the question of extension squarely falls within the proper role of the courts. A lack of clear authority for such expansion should not be a justification for inaction where such action would be consistent with the role of the court. Hence the following statement by Lord Hoffmann should not have stood in the way of expansion:[119]

> [a]s to authority for such a change, it hardly needs to be said that in English law there is none. I need go no further than 45(2) Halsbury's Laws (4th edn reissue) para 547, which says 'The subject matter of conversion or trover must be specific personal property whether goods or chattels.'

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114 Conversion and Detinue: Report of the Law Reform Committee, above n 24.

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

116 Ibid, s 1.

117 Brazier and Murphy, above n 111, 43-46.

118 See *OBG Ltd v Allan*, above n 2, para 100 Lord Hoffmann; para 271 Lord Walker; para 321 Lord Brown.

119 Ibid, para 100 Lord Hoffmann.

The common law effects change gradually through judicial expansion based on both principle and precedent. Therefore the absence of clear precedent in a case which in principle calls for extension, cannot stand in the way of such extension. If this attitude was always taken, the development of the common law would be stifled in an insupportable manner. The stance taken by the minority, as evidenced by Lord Nicholls comment that "Parliament cannot be taken to have intended to preclude the courts from developing the common law tort of conversion if this becomes necessary to achieve justice",[120] is surely the more appropriate attitude to be taken by the courts, and is more in keeping with the ever-evolving, expansive nature of the tort.[121]

Accordingly, expansion to cover intangible property properly falls within the realm of the common law, and action by the courts would thus be warranted based on the historical roots of the tort, the modern conception of legal possession, and the tort's true essence in an act of interference with a right held by the plaintiff.

V NEW ZEALAND – TO EXTEND OR NOT?

A Situation in New Zealand

It appears the issue of an extension of conversion to cover intangible property has not yet come before a New Zealand court. The common law relating to conversion in New Zealand has developed along much the same lines as that in the United Kingdom. The conceptual basis for the tort has remained stable since its establishment, and is regularly called upon by claimants in our courts.[122] However, unlike the United Kingdom, there is no impediment to expansion in the form of equivalent or similar legislation to the Torts (Interference with Goods) Act 1977.[123]

In *OBG* attention was drawn to the developments taking place in both the United States and Canada by way of contrast to the law in the United Kingdom. In assessing whether an expansion to the common law is desirable in the New Zealand context, the approaches taken in both of these jurisdictions should be reflected upon.

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120 Ibid, para 235 Lord Nicholls.

121 See also *OBG Ltd v Allan*, above n 2, para 313, 317 Baroness Hale; Part III C The Origin and Early History of Trover.

122 For example, in 2007 there were almost 50 cases where conversion was alleged. LexisNexis NZ Online Database www.lexisnexis.com (accessed 9 September 2009).

123 Although note that it is argued in this paper that the Torts (Interference with Goods) Act 1977 (UK) did not constitute a barrier to extension as the majority alleged. See Part IV E A Job for Parliament or the Common Law?

1 The United States – a current example of a "profligate extension of tort law"[124]

The commentary in one of the leading texts on tort law in the United States, the *Second Restatement of the Law: Torts* states:[125]

> It is at present the prevailing view that there can be no conversion of an ordinary debt not represented by a document, or of such intangible rights as the goodwill of a business or the names of customers. The process of extension has not, however, necessarily terminated; and nothing that is said in this Section is intended to indicate that in a proper case liability for intentional interference with some other kind of intangible rights may not be found.

The case of *Kremen v Cohen* in 2003 may present one such proper case.[126] It was referred to by Lord Hoffmann in *OBG* as "perhaps the most remarkable"[127] example of the recent development in the United States in claims alleging conversion of choses in action. The facts of the case are colourful, with the Court allowing a claim by Kremen, the registered owner of the internet domain name "sex.com", against a company who, on the basis of a forged letter, transferred the name to a third party. The principles at stake in *Kremen* were essentially the same as that in *OBG*. The domain name had a substantial monetary worth and the claimant was able to argue that the domain name was intangible property that could be converted in the same way as a chattel (unlike the claimants in *OBG*). The Court relied on earlier authority laid down in *Payne v Elliot* in 1880 where the Californian Supreme Court considered whether shares in a corporation (as opposed to the share certificates themselves) could be converted. It held that shares were capable of conversion, boldly reasoning "[t]he action no longer exists as it did at common law, but has been developed into a remedy for the conversion of every species of personal property."[128] This view of the tort has not been accepted across all states, but it is one example of the shift in some parts of the United States in judicial attitudes towards conversion of intangible property.[129]

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124 *OBG Ltd v Allan*, above n 2, para 101 Lord Hoffmann.

125 *Second Restatement of the Law: Torts* 2d Volume 1: 1-280, above n 66, 242, 475.

126 *Kremen v Cohen* (2003) 337 F 3d 1024 (9th Cir).

127 *OBG Ltd v Allan*, above n 2, para 101 Lord Hoffmann.

128 *Payne v Elliot* (1880) 54 Cal 339, 341 (Cal SC). Although the Court in *Kremen v Cohen*, above n 126, determined that Californian law no longer required that the intangible interest be merged with a document, the Court concluded that the document fiction would still have been satisfied on the facts of the case.

129 It should be noted that the case law in the United States had been extended further than contractual obligations to computer records and data. See for example *Thyroff v Nationwide Mutual Insurance Co* (22 March 2007) 8 NY 3d 283(NY Ct of Apps) cited in *OBG Ltd v Allan*, above n 2, para 317 Baroness Hale. In *OBG,* Baroness Hale issued a note of caution on this issue stating that careful consideration of whether subject-matter of this type "has sufficient proprietary quality to attract a proprietary remedy" would be necessary before the scope of conversion could be extended to such subject-matter in the United Kingdom.

2 Canada – invalidly appointed receivership and the question of conversion

In Canada, the courts have dealt with this issue in a somewhat different fashion. There, the courts have established that where an invalidly appointed receiver wrongfully takes control and the company suffers a resulting loss, then the value of the company's intangible assets is included in the measure of damages.[130] In one of the more recent cases, *Royal Bank of Canada v W Got & Associates Electric Ltd*, the reasoning for including intangible assets in a damages claim in conversion harked back to the fundamental principle of tort law, that "any award of damages should be designed to put the plaintiff into the position it would have been in today but for the wrong committed by the bank [the tortfeasor here]."[131]

B Recommendations

The strong dissent in the House of Lords in *OBG* and the developments in other jurisdictions may be viewed as an indication that the rule limiting conversion to tangible property is disintegrating. In the United States, the conversion of some types of intangible personal property has clearly been allowed. Canadian courts have taken the company's intangible assets into account in the measure of damages, affording a victory for commercial reality. History does not stand in the way of such development as although tangible property has alone enjoyed the protection of the tort in both New Zealand and the United Kingdom, the essence of the law of conversion throughout its long history, the act of conversion, can be applied equally to intangible property. Furthermore the document fiction has eroded the principle that conversion must only be applied to tangible subject-matter. In light of the shift in wealth from tangible to intangible personal property in modern society, a principled expansion by a New Zealand court, if and when a proper case arises to provide relief, would therefore be welcome.

VI CONCLUSION

Although the current formulation of the tort of conversion in the United Kingdom requires that the property converted be tangible, there are strong reasons to hope that a New Zealand court may take a different stance. Trover or conversion has been seen to be of a flexible, remedial nature, placing a potent and effective remedy within the reach of plaintiffs. The task of expansion falls squarely within the proper realm of the courts. Despite the assumption throughout the tort's history that only tangible property may be subject to an action in conversion, the historical context by no

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130 See *McLachlan v Canadian Imperial Bank of Commerce* [1987] 13 BCLR (2d) 300 (BCSC), confirmed on appeal in *McLachlan v Canadian Imperial Bank of Commerce* [1989] 57 DLR (4th) 687 (BCCA); *Bradshaw Construction Ltd v Bank of Nova Scotia* [1993] 1 WWR 596; *Royal Bank of Canada v W Got & Associates Electric Ltd* [1994] 150 AR 93 (ABQB), confirmed on appeal by the Alberta Court of Appeal in *Royal Bank of Canada v W Got & Associates Electric Ltd* [1997] 196 AR 241 (Alta CA) and by the Supreme Court of Canada in *Royal Bank of Canada v W Got & Associates Electric Ltd* [1999] 3 SCR 408 (SCC).

131 *Royal Bank of Canada v W Got & Associates Electric Ltd* [1994] 150 AR 93, para 45 (ABQB) McDonald J.

means prevents an extension to cover intangible property. The original requirements of a loss and a finding have long been a fiction, and remain only as a legacy of the old forms of action. The core of the action lies in the act of conversion or interference with the plaintiff's interest in the property, which may be applied to intangible and tangible property alike. The document fiction stands as the most relevant historical development to the question of extension, and has gone some of the way towards ensuring intangible property interests are protected, but it is an inadequate mechanism to satisfactorily achieve this.

Thus, there appears to be room for an expansion of the tort of conversion to meet situations which properly call for relief. The result reached in *OBG* highlights the unsatisfactory state of the current law of conversion. The decision meant that the receivers, who had taken control and disposed of the entirety of the claimants' business and assets, were held liable in conversion for some parts of the property, but not all. Speaking of the arbitrariness of this distinction, Lord Nicholls stated "[t]his distinction makes no sense. It lacks any rhyme and reason."[132] These wise words should be heeded in the New Zealand context; in order to bring about rhyme and reason in the age-old tort of conversion an extension to cover intangible property in a proper case would be warranted. Would such an expansion be a "modest but principled extension of the scope of the tort of conversion"?[133] It may be an understatement to label an extension allowing conversion of intangible property as "modest". In fact, such an extension would cover ground-breaking territory in the New Zealand context. However, that is not to say such an extension would not be sound in principle; indeed, the expansion of the scope of conversion would be just that.

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132 *OBG Ltd v Allan*, above n 2, para 221 Lord Nicholls.

133 Ibid, para 233 Lord Nicholls.