

RECENT DEVELOPMENTS IN TORT

Professor Ewan McKendrick
Herbert Smith Professor of English Private Law and Pro Vice Chancellor,
University of Oxford
3 Verulam Buildings, Gray's Inn

1. NEGLIGENCE

Negligence: police and failure to prevent harm

Van Colle v Chief Constable of the Hertfordshire Police and *Smith v Chief Constable of Sussex Police* [2008] UKHL 50; [2008] 3 WLR 593

The case concerned two appeals and we are concerned with the second appeal (i.e. *Smith*). The claimant reported to the police that he had received a number of threats from his former partner after the break up of their relationship. The threats were serious, including a threat to kill. The police did not look at the information provided by the claimant but they did inform him that they were investigating the matter. The claimant suffered serious injury when his former partner attacked him. He brought a claim against the police but his claim failed. By a majority (Lord Bingham dissenting) the House of Lords held that the defendant did not owe a duty of care to protect the claimant from harm caused by his former partner. Lord Bingham adopted what he termed a 'liability principle.' According to this principle, if a member of the public (A) furnishes a police officer (B) with apparently credible evidence that a third party whose identity and whereabouts are known presents a specific and imminent threat to his life or physical safety, B owes A a duty to take reasonable steps to prevent it being executed.' The majority were not, however, persuaded that the scope of this principle was easily identifiable and preferred to deny the existence of a duty of care by reference to the public policy reasoning which found favour with the House of Lords in cases such as *Hill v Chief Constable of West Yorkshire*.

Negligence: actions of third parties and omissions

Mitchell v Glasgow City Council [2009] UKHL 11, [2009] 2 WLR 481

Mr Mitchell and Mr Drummond were neighbours, and both of them were tenants of the defenders. Mr Drummond behaved in an anti-social manner on a number of occasions and had threatened Mr Mitchell on a number of occasions. On 31 July 2001 the defenders invited Mr Drummond to a meeting in order to discuss an incident in which Mr

Drummond had been charged with a breach of the peace. At the meeting Mr Drummond became abusive and, after he left the meeting, he attacked Mr Mitchell who subsequently died from the injuries which he received. His widow brought the present claim against the defenders. Her claim failed. Counsel for the pursuer based the claim on the ground that the defenders were under a duty to warn Mr Mitchell about the 31 July meeting and that, had they done so, the attack would not have occurred. The House of Lords declined to impose a duty of care, even of this (limited) nature.

In so concluding the House of Lords affirmed that foreseeability is a necessary but not a sufficient condition for the imposition of a duty of care, that it was not fair, just and reasonable to impose a duty of care and that the defenders had not assumed a responsibility to Mr Mitchell to protect him from the criminal activities of Mr Drummond. Nor had the defenders created a source of danger or had they assumed a responsibility for the actions of Mr Mitchell. As a general rule, a duty to warn another person that he is at risk of loss, injury or damage as the result of the criminal act of a third party will arise only where the person who is said to be under that duty has by his words or conduct assumed responsibility for the safety of the person who is at risk.

Duty of care and public authorities:

Jain v Trent Strategic Health Authority [2009] UKHL 4, [2009] 2 WLR 248

The claimants were the owners of a nursing home, the registration of which was cancelled as a result of an ex parte application to the magistrates made by the defendants under section 30 of the Registered Homes Act 1984. The cancellation order was made by the magistrate. The claimants were given no prior notice of the application or the grounds on which it was made and had no opportunity to contest the closure of the home. The claimants did appeal and their appeal was upheld. Further the appellate tribunal was scathing in its criticism of the way in which the defendants had handled the matter. Unfortunately, for the claimants the appeal was too late to save their business. They brought a claim in negligence against the defendants but the claim failed.

Had the Human Rights Act been in force at the time at which the registration was cancelled, the claimants may well have had a claim for damages under the Act (see in particular the speech of Lord Scott). But the Act was not in force at that time and so they had to bring their claim in negligence. The claim failed for two principal reasons. First, the courts are reluctant to recognise the existence of a duty of care owed by one party to another in the context of litigation and, second, the 1984 Act was enacted in order to protect the interests of residents in the home. To conclude that a duty of care was owed to the owners of such homes would have created a potential conflict of interest. As Lord Scott observed,

where action is taken by a State authority under statutory powers designed for the benefit or protection of a particular class of persons, a tortious duty of care will not be held to be owed by the State authority to others whose interests may be

adversely affected by an exercise of the statutory power. The reason is that the imposition of such a duty would or might inhibit the exercise of the statutory powers and be potentially adverse to the interests of the class of persons the powers were designed to benefit or protect, thereby putting at risk the achievement of their statutory purpose.

That said, the House of Lords were sympathetic to the plight of the claimants. But their sympathy did not extend to the recognition of a duty of care. Their Lordships pointed out the need for procedural reforms in order to ensure, as far as possible, that there was no repetition of the unfortunate chain of events which led to the closure of the claimants' business.

Calvert v William Hill Credit Ltd [2008] EWCA Civ 1427, [2008] All ER (D) 155 (Dec),

The claimant was a pathological gambler. He asked the defendant bookmakers to close his account and not to permit him to take any further telephone bets from him for a period of time. The defendants failed to implement the procedure. The claimant was able to resume gambling by telephone and suffered losses on a massive scale. He sought to recover his losses from the defendants. The trial judge rejected the submission that the defendants owed a common law duty of care to a customer known or suspected of being a problem gambler. The law generally does not impose a duty upon a person to prevent his neighbour from harming himself. But he held that, as a result of the telephone conversation between the claimant and an employee of the defendants, the defendants had assumed a responsibility to exclude the claimant from telephone gambling with them for a 6 month period. It was also found that the particular losses which the claimant suffered would not have been suffered but for the negligence of the defendants. However, the trial judge held that the claimant was not entitled to recover damages on the ground that he would have suffered financial ruin in any event because he would have continued his gambling career with other bookmakers.

The Court of Appeal upheld the decision of the trial judge. The court stated that the search for the causal connection which the law requires cannot be undertaken without reference to the liability which the defendant has undertaken and the damage which the liability is taken to have caused. Thus it was necessary to consider whether the scope of the duty of care extended to include damage of the kind which the claimant claimed to have suffered. On the facts, the defendants had not assumed a responsibility to prevent the claimant from gambling. They only assumed a responsibility not to permit him to place telephone bets with them. Given that the duty of care did not extend to the prevention of gambling and, because the quantification of his loss could not ignore other gambling losses which the claimant would probably have sustained but for the defendants' breach of duty, his claim was bound to fail. As the court observed, 'the law not only prescribes the appropriate causal connection, but also the scope of the duty and the scope of the loss which the causal connection links.'

One final matter considered by the Court of Appeal concerned the application of the defence of contributory negligence. This did not arise on the view of the law which the

court adopted, but, given that the issue had been argued, it expressed its view. It held that the fact that the claimant was a pathological gambler was not a ground for reducing his damages for contributory negligence. To reduce damages on this ground would be to negate the duty of care assumed by the defendants. On the other hand it would be appropriate to reduce damages to reflect 'the periods of clarity' which the claimant had during which he could take steps to deal with his habit. Assuming that the claimant had a claim, the court would have reduced damages by 30% to reflect his share in the responsibility for the loss he suffered through telephone gambling with the defendants.

Suicide, scope of the duty and contributory negligence

Corr v IBC Vehicles Ltd [2008] UKHL 13, [2008] 1 AC 884

The claimant was seriously injured in an accident at work caused by the negligence of the defendants, his employers. Had he not moved his head he would have been decapitated by a malfunctioning machine. As it was he suffered injuries to his head, and his ear was largely severed. He was disfigured, suffered persistent unsteadiness, mild tinnitus, severe headaches and had difficulty in sleeping. But it was the psychological trauma which had the greatest impact. Prior to the accident, he was a happily married man of equable temperament, phlegmatic disposition and ordinary fortitude. But he began to suffer from post-traumatic stress disorder which caused him to lapse deeper and deeper into depression. This led him to complete suicide when he jumped from the top of a car park. His widow brought a claim for damages. The principal issue was whether the defendants were liable for the suicide. The claim was brought by his widow under section 1 of the Fatal Accidents Act. The House of Lords concluded that they were liable.

However, a difference of view emerged over whether it was appropriate to make a reduction for contributory negligence. Given that the issue had not been argued it was not necessary for their Lordships to resolve the issue. However, it did give rise to a difference of view. Lord Bingham said that he would absolve the deceased from any causal responsibility for his own death. So he assessed contributory negligence at 0%. Lord Walker agreed [44]. On the other hand, Lord Scott was of the view that contributory negligence should apply on the facts of the present case. He would have reduced damages by 20% [32]. Lord Mance thought it was inappropriate to reduce damages on facts of the case given the way the case had been argued but otherwise had considerable sympathy for the view of Lord Scott. Lord Neuberger was of the same view as Lord Mance. He considered that a defendant employer could, in principle, succeed in an argument for a reduction in damages based on contributory negligence and was of the view that there was a spectrum. Where a claimant's mind has not been overborne as a result of the negligence of the defendant, the reduction may be 50% but, where it has been effectively overborne, there will be no reduction.

Contributory negligence:

St George v Home Office [2008] EWCA Civ 1068, [2008] 4 All ER 1039

The claimant suffered injury when he suffered from a seizure, fell from the top bunk of his prison cell and suffered a head injury. The claimant had a history of drug and alcohol abuse which commenced at the age of 16. He had previously disclosed to the prison authorities that he was a heroin user, that he drank heavily and that he had suffered from withdrawal seizures. The trial judge found that the Home Office had been negligent in allocating him to a top bunk when they knew about his condition. No appeal was made from that finding.

Two issues were raised before the Court of Appeal. The first was whether the judge had been entitled to find that the fall had been the cause of the brain damage from which the claimant now suffered. The Court of Appeal concluded that the trial judge had been entitled to make this finding. The second issue was whether the judge had been entitled to conclude that the claimant had been guilty of contributory negligence and that his damages should be reduced by 15%.

The Court of Appeal held that the judge had been entitled to hold that the claimant was at fault in becoming addicted to drugs or alcohol when he was 15 or 16 years old. The claimant must have known that the abuse was dangerous to his health. But they held that the addiction had not been a potent cause of the injury so that it was too remote in time, place and circumstance and was not sufficiently connected with the negligence of the prison staff. His addiction was no more than part of the history which led to his being a person whose medical and psychological conditions were as they were when he was admitted to prison. It therefore followed that the claimant's injury was not partly the result of his becoming addicted to drugs and alcohol as a teenager. The Court of Appeal also held that it would not be just and equitable to reduce his damages. In their view the position of the claimant was analogous to that of a patient who is admitted to a rehabilitation clinic for the express purpose of being weaned off his addiction to drugs. Such a patient would not suffer a reduction in damages if he fell out of the top bunk while suffering from a seizure and the same principle applied to the claimant in the present case.

Ex turpi causa:

Gray v Thames Trains Ltd [2008] EWCA Civ 713; [2009] 2 WLR 351

The claimant was one of the victims of the Ladbroke Grove rail crash. While his physical injuries were relatively minor, the psychological implications were much greater and resulted in him suffering PTSD. Almost two years after the crash the claimant stabbed a stranger to death. He pleaded guilty to manslaughter on the ground of diminished responsibility and was ordered to be detained in a hospital under the Mental Health Act. He did not seek to recover damages for the consequences of being detained

in hospital but he sought to recover the loss of earnings he had suffered as a result of the PTSD, including the losses suffered after the manslaughter. The trial judge held that the claim to recover damages post the manslaughter was barred by the *ex turpi causa maxim*.

The Court of Appeal allowed the appeal and held that the maxim did not bar the claim. The test to be applied was whether the relevant loss was inextricably linked with the claimant's illegal act or was so closely connected or inextricably bound up with the criminal or illegal conduct that the court could not permit him to recover without appearing to condone the conduct. The Court of Appeal concluded that the present claim was not inextricably linked with the claimant's illegal act. The claim brought was one for loss of earnings suffered as a result of the negligence of the defendants and the manslaughter was not inextricably bound up with that claim.

This requires a distinction to be drawn between the claim for incarceration and the claim for loss of earnings. Authority would deny the former claim, but not the latter. But even in respect of the former claim, the Court of Appeal questioned whether it was necessary to invoke public policy issues in this context. In their view, the ends of justice were adequately served by the principles of foreseeability, causation and contributory negligence.

One final issue concerned the impact of the decision of the House of Lords in *Corr v IBC Vehicles Ltd* [2008] UKHL 13. The decision was considered at some length and the Court of Appeal concluded that there was 'much to be said' for the conclusion that there was contributory fault on the part of the claimant in the present case. But it was not possible for the Court of Appeal to consider the issue on the facts because the issue had not been considered in any detail. Thus if the issue was to be considered, it would have to be remitted to the High Court.

The House of Lords has since allowed a petition by the defendants for leave to appeal

2. VICARIOUS LIABILITY

Vicarious liability and liability for 'extra hazardous activities'

Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH [2008] EWCA Civ 1257,

The Court of Appeal concluded that Mr Justice Ramsey had erred in finding that one employer was vicariously liable for the negligence of employees who were generally employed by another employer. In so concluding the Court of Appeal affirmed that 'the burden on a party seeking to show a transfer or assumption of liability to or by the hirer of an employee is a heavy one.' Second the Court of Appeal held that one employer was not liable for the activities of the employees of another employer on the ground that the employees had been undertaking work of an 'extra hazardous' nature. Liability for such 'extra hazardous' activities is 'anomalous' and should only be imposed in 'truly

exceptional' cases. The present case was not such an exception because the activity in question was welding and it could not be said to be an extra hazardous activity.

In reaching the conclusion that the defendants were not vicariously liable, the Court of Appeal attached importance to the 'heavy' burden of proof which is on the general employer to show that there has been a transfer or assumption of liability to or by the hiring employer. It is necessary to establish 'exceptional facts' before a contractor can be held vicariously liable for the negligence of his sub-contractor. The present case was held not to be such an exceptional case.

The error made by Mr Justice Ramsey in reaching the conclusion that the defendants were vicariously liable was to focus on the supervisory role of the defendants and to assume that supervision could be equated with control. However, as the Court of Appeal pointed out

'Supervision is not control. An architect or a clerk of the works may supervise the work of a contractor's employees, but he does not exercise control for the purposes of vicarious liability....the right to supervise does not, without more, carry with it the entitlement to instruct how to do the work, particularly where the employees are not unskilled but skilled welders.'

The second issue considered by the Court of Appeal was whether the defendants were liable on the basis that the work being done was 'extra-hazardous.' The issue here is not vicarious liability but whether there is a non-delegable duty imposed upon the defendants. The leading authority in this area is the decision of the Court of Appeal in *Honeywill v Larkin* [1934] 1 KB 191. Mr Justice Ramsey had derived the following principle from the case:

'a person who employs an independent contractor will be liable for the negligence of that independent contractor where the independent contractor is engaged to carry out "extra-hazardous or dangerous operations." Such operations are those which, in their very nature, involve in the eyes of the law special danger to others and include removing support from adjoining houses, doing dangerous work on the highway, or creating fire or explosion. Such operations are inherently dangerous although if carefully and skilfully performed they will cause no harm. The employer is under a non-delegable duty to see that all reasonable precautions are observed, otherwise he will be responsible for the consequences. The employer is liable even if he has stipulated that all reasonable precautions should be taken by the independent contractor, together with an indemnity.'

The Court of Appeal noted that the decision in *Honeywill* has been the subject of 'substantial criticism.' However, it was not open to the Court of Appeal in the present case to depart from *Honeywill*, given that it had been decided by the Court of Appeal. Thus the decision remains binding unless and until it is overruled by the House of Lords. But the Court of Appeal concluded that

‘the doctrine enunciated in *Honeywill* is so unsatisfactory that its application should be kept as narrow as possible. It should be applied only to activities that are exceptionally dangerous whatever precautions are taken.’

In the judgment of the Court of Appeal the activity to be judged in the present case was welding and not welding in the vicinity of unwetted combustible organic material. Welding was not in itself an extra hazardous activity. The error made by Mr Justice Ramsey was to take account of factors which were not the responsibility of the defendants when deciding whether or not the activity was extra hazardous at the same time as leaving out of account factors which should have rendered the welding safe. The Court of Appeal therefore concluded that the defendants should not have been held liable for the damage caused by the welding having been carried out without the taking of proper precautions.

Vicarious liability and the ‘close connection’ test

Gravil v Carroll [2008] EWCA Civ 689; [2008] All ER (D) 234 (Jun)

The Court of Appeal held that a rugby club was vicariously liable for the injury suffered by the claimant as a result of a punch thrown by a member of the team during a rugby match. Crucially, the player who threw the punch was an employee of the defendant, albeit on a part-time basis. In finding that the defendants were vicariously liable, the court attached importance to the ‘close connection’ test developed in cases such as *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215. The test to be applied was whether the employee’s tort was so closely connected with the employment that it would be fair and just to hold the employers vicariously liable. In applying the test the court must take account of all the circumstances of the case.

In finding the existence of a close connection on the facts of the case, the Court of Appeal attached significance to the fact that the punch was thrown in the context of a *melée* of the type that occurs not infrequently in rugby matches. They observed that throwing of punches was ‘not uncommon in situations like this, where the scrum is breaking up after the whistle has gone.’ It was an ‘ordinary’, albeit undesirable, incident of a rugby match. It was not a case of ‘private retaliation.’ The court also had regard to the terms of the player’s contract of employment with the club. The contract required him to abide by the rules of the game, provided that he must not physically assault an opponent and entitled the club to an indemnity from the player in the event that they were vicariously liable for his actions. The terms of the contract were held further to evidence the link between the tort and the player’s employment.

Having decided that there was a close relationship between the punch and the employment, the court then considered whether it would be fair and just to hold the club liable. The court considered that it was plainly fair and just. There was a risk of

very serious injury and clubs should take all reasonable steps to eradicate, or at least minimise, the risk of foul play.

3. NUISANCE

Private nuisance, planning permission and injunctions

Watson v Croft Promo-Sport Ltd [2009] EWCA Civ 15, [2009] All ER (D) 197 (Jan),

The claimants were home owners who lived in properties adjacent to a motor circuit which was occupied and managed by the defendants. The site was first used for car race meetings in 1949 and intermittent use of the site for this purpose was made between 1949 and 1957. In 1962 the then owner applied for planning permission for a change of use so as to permit motor trials, motor and motor cycle races and other sporting events. After an appeal, planning permission was granted. Between 1963 and 1979 the site was used for motor racing on not more than 20 racing days a year with additional days of practice associated with the racing days. In 1979 the land was sold and there was very little motor racing on the land until the defendants acquired the land in 1994. In September 1998 there was a public inquiry in relation to a deemed refusal of permission for the removal of the conditions imposed in 1963. After the hearing the defendants executed a unilateral undertaking under s 106 of the Town and Country Planning Act 1990 for the regulation of the circuit for motor and motor cycle events, for driving tuition and as a sports centre. The defendants agreed to ensure that no vehicle using the circuit should exceed certain maximum noise levels and that the use of the circuit for motor and motor cycle events should be limited by reference to noise levels measured at a defined point on the circuit. These levels were greater than those that had previously been permitted. The inspector granted planning permission to the defendants subject to the conditions undertaken in the s 106 agreement.

The claimants in the present proceedings alleged that the use made by the defendants of their site amounted to a nuisance. The Court of Appeal held that the use did amount to a nuisance and, allowing an appeal from the decision of Simon J, held that the claimants were entitled to an injunction.

In so concluding that the use amounted to a nuisance, the Court of Appeal affirmed two principles of law relating to the tort of nuisance. First, they held that it is 'well established that the grant of planning permission as such does not affect the private law rights of third parties' (*Gillingham Council v Medway Dock* [1993] QB 343). Second, they held that 'the implementation of that planning permission may so alter the nature and character of the locality as to shift the standard of reasonable user which governs the question of nuisance or not' (*Wheeler v JJ Saunders* [1996] Ch 19).

The Court of Appeal declined to interfere with the finding of Simon J that the nature and character of the neighbourhood had not been changed by the grant of planning permission in 1963 and 1998 or the terms of the s 106 agreement. Simon J had had the benefit of

visiting the site (which advantage was not available to the Court of Appeal). Thus it was held that the use did amount to a nuisance and that the grant of planning permission did not have the effect of insulating the defendants from a claim in nuisance.

In relation to the jurisdiction to award damages in lieu of an injunction, the Court of Appeal affirmed that the decision in *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 267 had established that damages in lieu of an injunction should only be awarded under 'very exceptional circumstances' and that the circumstance that the wrongdoer was in some sense a public benefactor was not a sufficient reason for refusing an injunction. The type of case in which a court might not grant an injunction is one where to do so would be oppressive to the defendant and where the loss suffered by the claimant as a result of the refusal of an injunction is small (see *Regan v Paul Properties* [2007] Ch 135). This was a case in which there was substantial injury to the claimants in the enjoyment of their property and the grant of an injunction would not be oppressive to the defendants.

Therefore the Court of Appeal allowed the appeal and held that the claimants were entitled to an injunction. However, it should be noted that the effect of the injunction was not to prohibit the defendants from using the land for motor racing. Rather its effect was to confine the defendants to their core activities, in essence a level of activity significantly below the level of the s 106 agreement and closer to the level of activity between 1963 and 1979. It is important to note that an injunction is not an all or nothing remedy. Courts can and do grant injunctions on terms which enable the defendant to engage in activity at some level but not at a level which unreasonably impacts on the claimants' use and enjoyment of their property.

Damages for personal injury remain recoverable in public nuisance claim

The Claimants Appearing on the Register of the Corby Group Litigation v Corby Borough Council [2008] EWCA Civ 463; [2008] BLR 411

The Court of Appeal held that it remains possible to recover damages for personal injury in a public nuisance claim. While case law has established that it is not possible to recover personal injury damages in a private nuisance claim, these cases neither expressly nor impliedly overruled those cases in which personal injury damages have been recovered in a public nuisance claim. This being the case, the Court of Appeal held that such damages remained recoverable in a public nuisance claim and it was only open to the House of Lords to depart from that rule. The outcome of any such re-examination by the House of Lords cannot be predicted with any degree of certainty. While the claim that the rule should be the same for both public and private nuisance has an intuitive appeal, the Court of Appeal in the present case points out that the scope of public nuisance is broader than private nuisance; in particular public nuisance is not confined to the protection of the use or enjoyment of land. On this basis, it could be argued that the functions of the two torts are different so that there is nothing necessarily incongruous in

the conclusion that personal injury damages are recoverable in a public nuisance claim but not in private nuisance.

Private nuisance, assessment of damages and human rights

Dobson v Thames Water Utilities Ltd [2009] EWCA Civ 28, [2009] All ER (D) 252 (Jan)

The Court of Appeal held that the function of an award of damages in nuisance is to compensate persons with an interest in land for the injury to the property and not to protect the sensibilities of the occupiers of the property. Further, a claimant must prove that she has suffered a loss of amenity before substantial damages can be awarded. Nor does the person who recovers damages do so on behalf of other occupiers of the property. A claimant who recovers damages for private nuisance is unlikely to be able to bring a claim for additional damages under the Human Rights Act 1998 in respect of an alleged violation of Article 8 of the European Convention on Human Rights. But a claimant who does not have an interest in land, and who therefore cannot bring a claim in private nuisance, may be able to bring a claim for damages under the Human Rights Act 1998 in respect of a violation of Article 8.

However, it is important to recall that the principles which underpin a claim for damages under the Human Rights Act 1998 are very different from those which underpin a claim for damages at common law. A claim for damages under the Act is not brought as a matter of right; the court has a much broader discretion to exercise when deciding whether or not to make an award of damages. In particular, section 8(3) of the Act provides that ‘no award of damages’ shall be made unless ‘the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.’

4. ECONOMIC TORTS

OBG Ltd v Allan [2007] UKHL 21; [2007] 2 WLR 920

The House of Lords clarified a number of points in relation to the scope of the economic torts. First, they drew a sharp line of distinction between the tort of inducing breach of contract and the tort of causing economic loss by unlawful means. The former is an example of accessory liability, while the latter is an example of primary liability. Thus they rejected the so called ‘unified theory’ of the economic torts according to which inducing breach of contract is part of the tort of causing loss by unlawful means.

In relation to inducing breach of contract, the House of Lords confirmed that the tort is based on intention. In order to be liable the defendant must know that it is inducing a breach of contract. It does not suffice that the defendant knew that he was procuring an act which, as a matter of law or construction of the contract, is a breach: the defendant must actually realise that it will have this effect. Intention extends to recklessness but not to negligence (even gross negligence). But if the breach of contract is neither an end in

itself nor a means to an end, but merely a foreseeable consequence, then it cannot be said to have been intended. Thus this is a tort, the aim of which is to protect contract rights – treats contract rights as a species of property which deserve special protection, not only by giving a right of action against the party who breaks his contract but by imposing secondary liability on a person who procures him to do so.

Turning now to the tort of causing economic loss by unlawful means, the critical question has long been: what constitutes unlawful means? Lord Hoffmann stated that acts against a third party count as unlawful means only if they are actionable by that third party. However there is a qualification to this principle which is applicable if the only reason that the act is not actionable is that the third party has suffered no loss. In such a case the unlawful means requirement is satisfied despite the absence of any loss. Lord Nicholls took a broader approach. At [162] he included ‘all acts which a defendant is not permitted to do, whether by the civil law or the criminal law.’ Lord Hoffmann rejected this on the basis that it was arbitrary and illogical to make liability depend upon whether the defendant has done something which is wrongful for reasons which have nothing to do with the damage inflicted on the claimant (see [59]).