TORT

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Introduction

This survey of developments in the field of tort liability over the last two years or so looks at significant decisions concerning the following matters: the relevance of planning permission for an activity creating a nuisance, including the question of the appropriate remedy; the application of the rule in *Rylands v Fletcher* in the case of fire; the existence and ambit of the duty of care in the case of claims alleging negligence by the Crown in the procurement and supply of military equipment and by the police in seeking to arrest an offender; special rules applying to claims for psychiatric injury suffered by secondary victims; negligence in pre-contract negotiations; invasion of privacy by intrusion into seclusion; *ex turpi causa non oritur actio*, defence of another and necessity as defences to tort actions; and the question of joint liability in "common design" cases.

Not everything can be included. In *Body Corporate 207624 v North Shore City Council (Spencer on Byron*) [2012] NZSC 83, [2013] 2 NZLR 429 the Supreme Court held that the defendant council owed a duty of care in issuing building consents and in inspecting and approving a large commercial building. The decision is of the first importance and is discussed in Todd (ed) *The Law of Torts in New Zealand*, 6th ed, 2013, paras 6.4.04 and 6.4.06. There have been major developments in the field of vicarious liability, the UK Supreme Court holding in *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56, [2013] 2 AC 1 that such liability can be founded on a relationship "analogous to employment" and, at least in sexual abuse cases (as this was), that the "close connection" test should be applied in determining whether that liability exists in the particular circumstances. These developments also are covered in *The Law of Torts in New Zealand*, at paras 22.3.02 and 22.4.05. An associated development is the decision of the same court in *Woodland v Swimming Teachers Association* [2013] UKSC 66, [2013] 3 WLR 1227, recognising the concept of the non-delegable duty in the case of a claim against a school authority on account of the negligence of its independent contractor. There have been a number of cases concerning the application of the principles of defamation in the context of publications on the internet. *Cairns v Modi* [2012] EWCA Civ 1382, [2013] 1 WLR 1015, *The Lord McAlpine of West Green v Bercow* [2013] EWHC 1342 and *Wishart v Murray* [2013] NZHC 540 all Illustrate the application of ordinary principles of defamation to defamatory "tweets". *Wishart v Murray* also held that the defendant Facebook host could be liable in certain circumstances for allegedly defamatory comments posted on his Facebook page by anonymous users. In *Crawford Adjusters (Caman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17, [2013] 3 WLR 927 the Privy Council recognised that the malicious institution of civil proceedings was actionable as a tort, distinguishing *Gregory v Portsmouth City Council* [2000] 1 AC 419 and coming to the same view as that taken in New Zealand in *New Zealand Social Credit Political League Inc v O'Brien* [1984] 1 NZLR 84 and *Rawlinson v Purnell, Jenkinson & Roscoe* (1997) 15 FRNZ 681, [1999] 1 NZLR 479. The Supreme Court in *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 1 has considered when litigation funding may be stayed as amounting to an abuse of process, but left for another day the question of the future of the torts of maintenance and champerty. In *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 the Court of Appeal held, applying *Leerdam v Noori* [2009] NSWCA 90 and not following dicta in *New Zealand Defence Force v Berryman* [2008] NCZA 392, that a lawyer acting for the Inland Revenue was acting on instructions in a solicitor/client relationship as a private legal practitioner for the Department and that he did not hold public office for the purposes of the tort of misfeasance in

public office. Finally, *Westland District Council v York* [2014] NZCA 59 is another decision on the date when damage is suffered for the purposes of the Limitation Act 1950.

Planning permission for an activity creating a nuisance

We all know that a defendant cannot avoid liability in nuisance by claiming that the plaintiff chose to acquire or build on the land knowing that it was subject to the interference constituting the nuisance. As the point is usually expressed, coming to the nuisance is no defence (*Bliss v Hall* (1838) 4 Bing NC 183, 132 ER 758; *Sturges v Bridgman* (1879) 11 Ch D 852; *Miller v Jackson* [1977] QB 866, at 986-987). Again, it cannot be said that an activity causing a nuisance is statutorily authorised if it only began following the grant of planning or resource consent, even if the use of that consent means that a nuisance is inevitable or highly likely (*Hunter v Canary Wharf Ltd* [1997] AC 655 at 669, 710; *Wheeler v JJ Saunders Ltd* [1996] Ch 19; *Barr v Biffa Waste Services Ltd* [2012] EWCA Civ 312, [2012] 3 WLR 795). Rather, in such a case the question whether a nuisance exists must be determined on ordinary bases, balancing the interest of one occupier in using land as he or she thinks fit with a neighbour's interest in the quiet enjoyment of his or her property. The interference is actionable only if it is "unreasonable", in the sense that it exceeds what an ordinary person in the plaintiff's position can reasonably be expected to tolerate (*Bamford v Turnley* (1860) 3 B & S 62, 122 ER 25 at 83, 33; *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 2 AC 264 at 299). In making this judgment the court takes into account the character of the neighbourhood, which may change over time in a way which leads to a reduction in the level of freedom from interference which the plaintiff can reasonably expect (*Hunter v Canary Wharf Ltd* [1997] AC 655 at 669). If a nuisance is established, the plaintiff is prima facie entitled to an injunction to restrain the interference, but the court has power to award damages in lieu of such injunction (in England originally by the Chancery Amendment Act 1858 and now by the Senior Courts Act 1981, s 50).

The application of all of the above propositions was in issue before the UK Supreme Court in its recent decision in *Lawrence v Fen Tigers Ltd* [2014] UKSC 13, [2014] 2 WLR 433. In 1975 an owner of land, acting pursuant to planning permission, constructed a stadium to be used for motor sports. In 1992 he obtained temporary planning permission to use adjoining agricultural land as a motocross track, and in 2002, following several temporary renewals, he was granted permanent permission. The conditions attached to the permissions limited the frequency and times of activities at the stadium and track, but not the level of noise. In 2006 the claimants bought a house nearby, and shortly thereafter complained about the noise. The local planning authority served abatement notices on the organisers of events at the stadium and the lessee of the track, causing work to be done to reduce the noise. However, the claimants alleged that the noise remained unacceptable and issued proceedings in nuisance against, inter alia, the owners, the organisers and the lessee. The trial judge upheld the claims and ordered injunctive relief, but the Court of Appeal allowed appeals by the organisers and the lessee (*Lawrence v Fen Tigers Ltd* [2012] EWCA Civ 26, [2012] 1 WLR 2127), on the basis that the noise of motor sports had become an established part of the character of the neighbourhood and so the nuisance claim fell to be dismissed. The claimants appealed to the Supreme Court , which allowed the appeals and restored the order of the trial judge.

The leading judgment was delivered by Lord Neuberger of Abbotsbury. (The other members of the court – Lord Sumption, Lord Mance, Lord Clarke and Lord Carnwath – delivered judgments of their own, with some differences in emphasis or reasoning, but all agreed with Lord Neuberger's

conclusions.) His Lordship held first, contrary to the view expressed in a leading text (*Clerk and Lindsell on Torts*, 20th ed (2010), para 20-85), that an easement to commit a nuisance by noise could be acquired over 20 years by prescription. Problems in showing consent or acquiescence by the owner of the servient tenement and in indentifying the extent of the easement were largely practical in nature. They might present the owner of the alleged dominant land with difficulties in making out his case, but that was no reason for holding that he should not be entitled to on appropriate facts. The precise extent of the right would be fact-sensitive, and the servient owner would have cause for complaint if he could show a greater amount of injury arising from an increase in the level or frequency of noise. On the facts, however, the noise from the defendants' activities had not caused a nuisance to the claimants' land for sufficient period to establish a right by prescription. (In New Zealand the question cannot arise, for by s 296 of the Property Law Act 2007 a person can no longer acquire a prescriptive right to an easement).

Lord Neuberger considered then the question of "coming to the nuisance". The law was, he said, clear, at least in a case such as the instant one: where the claimant used her property for essentially the same purpose as that for which it had been used by her predecessors since before the alleged nuisance started, the defence of coming to the nuisance had to fail. This was consistent with the fact that nuisance was a property-based tort, so that the right to allege a nuisance should, as it were, run with the land. But there was much more room for argument that a claimant who changed the use of her property after the defendant had started the activity alleged to cause a nuisance should not have the same rights to complain. That raised the question whether the alteration could give rise to a claim if the activity would not have been a nuisance had the alteration not occurred. It might well be that it should normally be resolved by treating any pre-existing activity as part of the character of the neighbourhood. So it might well be wrong to hold that the activity constituted a nuisance, provided that it only affected the senses of those on the claimant's land, it was not a nuisance beforehand, it was otherwise a reasonable and lawful use of the land carried out in a reasonable way, and it caused no greater nuisance than when the claimant first changed the use of the land. This possible qualification did not apply in the instant circumstances, as the claimants always used their property as a residence.

Next, Lord Neuberger focused on reliance on the defendant's own activities in defending a nuisance claim. This brought into consideration an assessment of the character of the locality or, if the concept was thought too monolithic, the "established pattern of uses" in the locality. His Lordship accepted that one started with the proposition that the defendant's activities were relevant when assessing this question, but to the extent that they were a nuisance to the claimant they should be left out of account, or to put it another way, they should be notionally stripped out of the locality when assessing its character. Otherwise the defendants would be invoking their own wrong against the claimants in order to justify their continuing to commit that very wrong. But the position would be different if the activities had been held to be a nuisance but the court had refused an injunction and awarded damages instead. Here the activities would have effectively been sanctioned by the court. If the activities could not be carried out without creating a nuisance, they would have to be entirely discounted when assessing the character of the neighbourhood.

This brought his Lordship to consider the effect of planning permission on an allegation of nuisance. The implementation of a planning permission could give rise to a change in the character of the locality, but for the most part this was no different from any other change of use which did not

require permission. Thus if implementation of the permission resulted in the creation of a nuisance to the claimant, then it could not be said that the implementation had led to a change in the character of the locality (save in the ways already explained). But this conclusion was subject to the extent, if any, to which the defendant could rely on the fact that the grant or its terms and conditions permitted the very noise or other disturbance which was alleged by the claimant to constitute the nuisance. The grant of permission for a particular development did not mean that the development was lawful. All it meant was that a bar to the use imposed by planning law in the public interest had been removed. It would be wrong in principle that a planning authority should be able to deprive a property owner of a right to object to what would otherwise be a nuisance without providing compensation. So his Lordship was satisfied that the mere fact that an activity had the benefit of planning permission was normally of no assistance to the defendant in a nuisance claim alleging loss of amenity. A planning authority had to balance various competing interests in the overall public interest, bearing in mind relevant planning guidelines. Some of the factors, such as many political and economic considerations, would play no part in the assessment of whether a particular activity constituted a nuisance. And a planning authority would be entitled to assume that a neighbour could enforce private rights in a nuisance action; it could not be expected to take on itself the role of deciding a neighbour's common law rights. However, there would be occasions when the terms of a planning permission could be of some relevance. So the fact that the planning authority took the view that a noisy activity was acceptable at certain times or at a certain level might be of real value, at least as a starting point. While the decision whether the activity caused a nuisance was not for the authority but for the court, the existence and terms of the permission were not irrelevant as a matter of law. In many cases they would be of little or no value, in others rather more.

Applying these principles, Lord Neuberger determined that the trial judge's conclusion, that nuisance was made out, ought to be restored. The concern was over the level of noise, which was not a matter specifically covered by the planning permissions. Their grant was not normally a matter of much weight, and this was not an exceptional case. The evidence showed that it was not an easy decision whether to grant the permissions, as was demonstrated by the planning officers' cautious approach. There was a wealth of evidence put before the judge, all of which he took into account.

Finally, there was the issue of the award of damages instead of an injunction. Lord Neuberger recognised that prima facie a claimant who had established a nuisance was entitled to an injunction to restrain the conduct in the future. However, the court had power to award damages instead, their quantum being conventionally based on the reduction in the value of the claimant's property as a result of the continuation of the nuisance. AL Smith LJ in *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 had maintained as "a good working rule" that damages might be given if the injury was small, was capable of being estimated in money and could be adequately compensated by a small money payment, and the case was one in which it would be oppressive to grant an injunction. Some recent cases (notably *Regan v Paul Properties PDF No 1 Ltd* [2006] EWCA Civ 1319, [2007] Ch 135 and *Watson v Croft Promosport Ltd* [2009] EWCA Civ 15, [2009] 3 All ER 249) made an almost mechanical application of AL Smith LJ's four tests and required very exceptional circumstances for damages to be awarded in lieu of an injunction. However, his Lordship thought that the approach to be adopted should be much more flexible. The court's power involved a classic exercise of discretion which should not be fettered in the way suggested. The prima facie position was that an injunction should be granted, so the legal burden was on the defendant to show why it should not. Subject to

that, there should be no inclination either way and the outcome should depend on all the evidence and arguments.

A particular question for the court to consider in deciding on a remedy was the public interest. Lord Neuberger found it hard to see how there could be any circumstances in which the question arose where it could not, as a matter of law, be a relevant factor. So the fact that a defendant's business might have to shut down if an injunction was granted should obviously be a relevant fact, and it was hard to see why relevance should not extend to the fact that a number of the defendant's employees would lose their livelihood or, conversely, that other neighbours were badly affected by the nuisance. The grant of planning permission also was relevant and could provide strong support for the contention that the activity was of benefit to the public. This factor would have real force in cases where it was clear that the planning authority had been reasonably and fairly influenced by the public benefit of the activity, and where the activity could not be carried out without causing the nuisance. But even in such cases the court would still have to weigh all the competing factors. Sometimes the court might be impressed by a defendant's argument that an injunction would involve a waste of resources on account of what might be a single claimant, or that the financial implications of an injunction for the defendant would be disproportionate to the damage done to the claimant if she was left to her claim in damages. In such cases an injunction might well not be the appropriate remedy.

The trial judge had not been asked to award damages rather than an injunction, and accordingly he did not address the issue. In the result all members of the court agreed that the Judge's order for injunctive relief should be restored. It was varied in one respect, however, by giving the defendants liberty to apply to have the order discharged and damages awarded in lieu.

Their Lordships' decision can be seen to have ranged over a number of significant issues. Let us consider some key points. First, while the fact that a plaintiff has "come to the nuisance" is not a defence, the court expressed the opinion that the position may be different if he or she changes the use or uses of the land. The reason for this difference is obscure. If the right to allege a nuisance is property-based, as stated by Lord Neuberger, why should plaintiffs not be able fully to protect the right to change or develop their property as they wish and defendants be able to avoid paying compensation for their interference with a new use? If, say, a plaintiff's land is used for agricultural purposes, when the plaintiff has no basis for complaining about sensory matters, and then is developed for residential building, the defendant seemingly may now have acquired an immunity from liability for an interference which otherwise would constitute a clear nuisance. This suggested qualification to the old rule is the more unacceptable in light of the changed approach towards the granting of an injunction, about which more below.

Second, the approach to the question whether a nuisance exists perhaps may be open to criticism for appearing to treat the character of the neighbourhood as a decisive factor, so if the activity fits the locality then it follows that there cannot be a nuisance. It might be preferable to treat the character of the area simply as providing the context for deciding the orthodox inquiry into whether the interference was substantial and unreasonable, taking into account the need for give and take between neighbours. But maybe their Lordships did not intend to suggest any more than this. As for any grant of planning permission, we certainly can agree that it should be of little relevance. In Lord

Sumption's view, it may at best provide some evidence of the reasonableness of the particular use of the land in question.

Third, we come to the critical question of the appropriate remedy where a nuisance is made out. Their Lordships have made a major change by effectively bypassing *Shelfer*, by affirming that the court's discretion in determining whether to give damages or grant an injunction is flexible and unfettered, and by emphasising that the "public interest" should be taken into account in the exercise by the court of its discretion. Indeed, Lord Sumption (with Lord Clarke agreeing) favoured a more radical approach to the question of remedy. His Lordship considered that *Shelfer* was out of date and that it was unfortunate that it had been followed so recently and so slavishly. It was devised for a time in which England was much less crowded, when comparatively few people owned property, when conservation was only beginning to be a public issue, and when there was no general system of statutory development control. The whole jurisprudence in this area needed to be reviewed, and there was much to be said for the view that damages were ordinarily an adequate remedy for nuisance and that an injunction should not usually be granted in a case where it was likely that conflicting interests were engaged other than the parties' interests. In particular, it might well be that an injunction should as a matter of principle not be granted in a case where a use of land to which objection was taken had received planning permission. But Lord Mance considered that the right to enjoy one's home without disturbance was one which many, indeed most, people valued for reasons largely if not entirely independent of money. He saw Lord Sumption's views as putting the significance of planning permission and public benefit too high and preferred Lord Neuberger's nuanced approach.

In New Zealand a court can award damages in lieu of an injunction pursuant to the Judicature Act 1908, s 16A. In determining whether to make such an award the principle of *Shelfer* has been approved and applied (*Attorney-General v Abraham and Williams Ltd* [1949] NZLR 461 at 479, 498). Now, in light of *Lawrence*, we will need to re-assess the often-cited words of Hardie Boys J in *Bank of New Zealand v Greenwood* [1984] 1 NZLR 525 at 535: "To the extent that this is an appeal to set the public interest ahead of the private interests of the plaintiffs, then I regret that authority requires me to close my ears to it". In making any such reassessment we should take into account Lord Mance's timely reminder of the value placed by most people on the ease and comfort of their home.

A commentator on recent developments has said that the continued strength of private nuisance in a regulatory state probably depends on a more flexible approach to remedies (Lee, "Tort law and regulation: planning and nuisance" (2011) 8 JPL 986, 989-990, cited by Lord Carnwath at [240]). It is difficult to disagree. It is true that a problem with Lord Neuberger's judgment, let alone that of Lord Sumption, is the evident difficulty in determining what the public interest requires. How should a landowner's interest in the undisturbed enjoyment of his or her land be balanced against the interest of others in watching motor races or the interest of stadium employees in keeping their jobs? Perhaps all one can say, somewhat unsatisfactorily, is that the judge must do his or her best in the light of the evidence presented. The abandonment of *Shelfer* will at least encourage the parties to adduce all relevant evidence bearing upon the financial implications of granting or denying an injunction.

***Rylands v Fletcher* and the escape of fire**

Whether the rule of strict liability laid down in *Rylands v Fletcher* (1866) LR V1 Ex 265 ought to be retained today is a much debated question. In *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 the High Court of Australia thought it should not, and held that the rule had been absorbed by the principles of ordinary negligence. (However, the Court went on to hold that the dangerous activities that would previously have attracted liability under the rule were such as to require a non-delegable duty of care, so the defendant occupiers were liable for the negligence of their independent contractor.) The courts in England and New Zealand, by contrast, have not been persuaded to abandon the rule (*Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 2 AC 264; *Autex Industries Ltd v Auckland City Council* [2000] NZAR 324). However, the recent decision of the England and Wales Court of Appeal in *Gore v Stannard* [2012] EWCA Civ 1248, [2013] 3 WLR 623 has limited the potential application of the rule.

The defendant supplied and fitted car and van tyres and kept about 3000 tyres on his premises. A fire broke out as a result of an electrical fault, igniting the tyres. Although not highly inflammable, once alight the tyres fed the ferocity of the fire, which spread to and destroyed the claimant's neighbouring premises. The claimant brought an action alleging that the defendant had been negligent, and alternatively that he was strictly liable under the rule in *Rylands v Fletcher*. The trial judge held that there was no evidence of negligence, but upheld the claim based on *Rylands v Fletcher* on the grounds that the volume and method of storage of the tyres was dangerous, that there had been an escape of the fire and that the defendant's use of the land was non-natural. On the defendant's appeal the Court of Appeal held, allowing the appeal, that the rule in *Rylands v Fletcher* did not apply. The three members of the court (Ward, Etherton and Lewison LJJ) each delivered a separate judgment, but were in agreement on key issues.

Ward LJ ranged over the leading judgments in the field – notably *Rickards v Lothian* [1913 AC 263, *Read v J Lyons & Co Ltd* [1947] AC 156, *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264 and *Transco plc v Stockport Metropolitan Borough Council* [2003] UKHL 61, [2004] 2 AC 1 – and extracted what he saw as the proper approach from these authorities. (1) The defendant must be the owner or occupier of land. (2) He must bring or keep or collect an exceptionally dangerous or mischievous thing on his land. (3) He must have recognised or ought reasonably to have recognised, judged by the standards appropriate at the relevant place and time, that there is an exceptionally high risk of danger or mischief if that thing should escape, however unlikely an escape may have been thought to be. (4) His use of his land must, having regard to all the circumstances of time and place, be extraordinary and unusual. (5) The thing must escape from his property into or onto the property of another. (6) The escape must cause damage of a relevant kind to the rights and enjoyment of the claimant's land. (7) Damages for death or personal injury are not recoverable. (8) It is not necessary to establish the defendant's negligence but an Act of God or the act of a stranger will provide a defence.

His Lordship was satisfied, once again after considering the relevant authorities, that there was no different or special principle for cases involving damage caused by the spread of fire. Accordingly, such cases were likely to be very difficult to bring within the rule. This was because it was the "thing" which had been brought onto the land which had to escape, not the fire which was started or increased by the "thing". While fire might be a dangerous thing, the occasions when fire as such was brought onto the land might be limited to cases where the fire had been deliberately or negligently started by the occupier or one for whom he was responsible. In any event, starting a fire on one's

land might well be an ordinary use of the land. In the instant case, the "thing" brought onto the defendant's premises was a large stock of tyres, which was not exceptionally dangerous or mischievous and did not escape. What escaped was the fire, the ferocity of which was stoked by the burning tyres. Furthermore, keeping a stock of tyres on the premises of a tyre-fitting business, even a very large stock, was not for the time and place an extraordinary or unusual use of the land. So *Rylands v Fletcher* liability was not established and the claim should fail.

Etherton LJ agreed that the facts of the instant cases did not satisfy the basic requirement of the *Rylands v Fletcher* principle that there must have been an escape of something which the defendant had brought onto his or her land. If there was a different requirement for so-called "fire" cases, where what had escaped from the defendant's land was fire generated from something that the defendant had brought onto his or her land, the principle still did not apply in the present case because tyres were not easily set alight and so did not pose any inherent danger of catching or causing fire. In any event, the defendant's use of his property was not a non-natural use of his land for the purposes of the *Rylands v Fletcher* principle.

Lewison LJ agreed with Ward LJ, but was prepared to go further in limiting the scope of strict liability in relation to fire. His Lordship gave a closely argued historical account of the development of tort liability for fire, as modified by statute. In summary, in the case of fires that were deliberately kindled, the liability of the occupier in mediaeval law did not depend on proving that the defendant was negligent in the modern sense, nor that he was engaged in any particularly dangerous activity. Liability was strict and was based on the custom of the realm. Section 86 of the Fires Prevention (Metropolis) Act 1774 was enacted against this background. It provided that “[n]o action, suit or process whatever shall be had, maintained or prosecuted against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall … accidentally begin … any law, usage or custom to the contrary notwithstanding…”. It was later held that “accidentally” was not used in contrast to “wilfully”: rather, it meant a fire that had begun without negligence (*Filliter v Phippard* (1847) 11 QB 347). So fires started by negligence did not attract the protection of s 86. Parliament must, then, have intended to abolish liability without proof of negligence, and whether such liability arose because of custom or because of some other principle of common law did not matter. Both were overridden by s 86.

Turning to *Rylands v Fletcher* itself, Lewison LJ thought that it was striking that despite all the examples of the application of the principle that Blackburn J gave (escaping cattle, flood, filth, noisome vapours), fire was not among them. He must have taken the view that s 86 had displaced strict liability. However, on the supposition that fire was a dangerous thing and that the principle could apply, as formulated it was consistent only with a fire deliberately kindled. A fire that started accidentally and which damaged the place where it began could hardly be said to have been brought on to the land by the occupier "for his own purposes", nor indeed, without straining language, to have been brought onto the land at all. As regards fires that were not deliberately kindled, these fell outside the rule of strict liability. Here the law was as stated in *Goldman v Hargrave* [1967] 1 AC 645. An occupier of land was not liable for the initial outbreak of fire, whether due to natural causes or human agency, unless he himself had brought the fire onto the land. The occupier had a duty to do what was reasonable to prevent the spread of the fire. If he failed to do what was reasonable he was negligent, in which case the statutory defence under section 86 would fail. If not, it would succeed.

The decision in *Gore* has comprehensively rejected the long-standing decision of the Court of Appeal in *Musgrove v Pandelis* [1919] 2 KB 43, applying *Rylands v Fletcher* to the escape of a fire caused by an unexplained explosion in the carburettor of a car and negligence by the defendant's servant in not immediately turning off the petrol tap. Serious doubt also is cast on the more recent decision in *Mason v Levy Auto Parts Ltd* [1967] QB 530. In this case McKenna J, following *Musgrove* with some reluctance, articulated a modified and extended version of the principle of *Rylands v Fletcher*. The principle that he formulated was that an occupier of land was liable if (1) he brought onto his land things likely to catch fire, and kept them there in such conditions that if they did ignite the fire would be likely to spread to the plaintiff's land, (2) he did so in the course of some non-natural use, and (3) the things ignited and the fire spread. The decision is inconsistent with the elements to *Rylands v Fletcher* liability formulated by Ward LJ, as outlined above, and Lewison LJ stated specifically that he would overrule it. Certainly, on Ward and Lewison LJJ's view, if *Rylands v Fletcher* can still apply to fire it is only where the defendant started it. The reasoning leading to this view is logical and difficult to refute. Accordingly, and notwithstanding first instance authority accepting *Mason* (*Hill v Waimea County Council* 12/3/87, Heron J, HC, Nelson, A8/84), the decision is likely to be accepted in New Zealand. There is a possible complication in that s 86 of the Fires Prevention (Metropolis) Act 1774 was repealed for New Zealand by s 365(3)(a) of the Property Law Act 2007. However, the reason was that s 86 was seen as unnecessary, and that remains true after *Gore v Stannard*. We can summarise the position as follows. To the extent that the *Rylands* rule of strict liability remains, it can apply to dangerous things brought onto land (arguably including a deliberately kindled fire) in the course of a non-natural use of the land. In all other cases liability will depend on proof of negligence. (There is a further question about the application of s 43 of the Forest and Rural Fires Act 1977, as to which see Todd (ed) *The Law of Torts in New Zealand*, 6th ed, 2013, para 11.6.02.)

Ward LJ said in *Gore* that the moral of the story was taken from the speech of Lord Hoffmann in *Transco* : make sure you have insurance cover for losses occasioned by fire on your premises. Indeed, one may strongly suspect that the litigation was a subrogated claim by the claimant's insurer.

Psychiatric injury to secondary victims

It is hardly startling to assert that the law in England governing liability for negligently caused psychiatric harm is unsatisfactory. Even the Law Lords recognise this. Lord Steyn has described the relevant law as a patchwork quilt of distinctions that are difficult to justify. There were, he said, no refined analytical tools enabling the courts to draw lines by way of a compromise solution in a way that was coherent and morally defensible (*Frost v Chief Constable of the South Yorkshire Police* [1999] 2 AC 455 at 500). What indeed should we make of a rule which requires a negligently inflicted shock to be "sudden", thus allowing recovery by a mother for her pathological grief reaction after waking at her baby's bedside in hospital when the child was having an epileptic seizure following a negligent misdiagnosis and then, some 36 hours later, having the child die in her arms (*North Glamorgan NHS Trust v Walters* [2002] EWCA Civ 1792), yet denying recovery by a father for psychiatric illness after he sat for two weeks by his son's bedside watching him deteriorate, this due allegedly to a failure to provide appropriate medical treatment, and eventually seeing him die (*Sion v Hampstead Health Authority* [1994] EWCA Civ 26)? Or what about the rule that requires the plaintiff to be sufficiently proximate in time and space to the happening of the shocking accident or its

"immediate aftermath", leading to bizarre debates about when an accident, taken as a whole, can be seen to have come to an end? It has been held, for example, that a relative going to a mortuary to identify the body of a loved one cannot qualify (*Alcock v Chief Constable of South Yorks Police* [1992] 1 AC 310 at 424), yet a claim by a mother who went to an accident scene and was told her daughter had been killed and who then saw her badly injured body in a mortuary was allowed to succeed (*Galli-Atkinson v Seghal* [2003] EWCA Civ 697).

Taylor v A Novo (UK) Ltd [2013] EWCA Civ 194, [2013] 3 WLR 989 is a recent addition to this field of jurisprudence. The claimant's mother was injured at work in an accident caused by the admitted negligence of her employer. Three weeks later, when she was at home apparently making a good recovery, she unexpectedly collapsed and died. This was due to deep vein thrombosis and consequent pulmonary emboli, which themselves were due to the injuries that she had sustained in the accident. Her daughter did not witness the accident, but she did witness her mother's death. The question in issue was whether the daughter satisfied the requirement of proximity in time and space by being sufficiently involved in the aftermath of the accident.

Lord Dyson MR said that there was a single accident or event (the falling of a stack of racking boards) which had two consequences which were separated by three weeks in time. The first was the injury to the mother's head and arm and the second was her later death. In his Lordship's view, to allow the claimant to recover as a secondary victim would be to go too far, for two inter-related reasons.

First, if the claimant could succeed on the instant facts then, subject to proving causation, she would equally be able to do so even if her mother's death occurred months, and possibly years, after the accident. This suggested that the concept of proximity to a secondary victim could not reasonably be stretched that far. But if the mother had died at the time of the accident and the claimant did not witness the death but suffered shock when she came on the scene shortly after the "immediate aftermath", she would not have been able to recover damages. The idea that she could recover in the instant situation but not in the other would strike the ordinary reasonable person as unreasonable and incomprehensible.

The second reason was closely connected with the first. The effect of allowing the claim was potentially to extend the scope of liability to secondary victims considerably further than had been done hitherto. The courts had been astute for policy reasons – notably the danger of greatly increasing the class of persons who could recover in tort and the disproportionate burden of liability which would likely be placed on defendants – to confine the right of action of secondary victims by means of strict control mechanisms. These same policy reasons militated against any further substantial extension, which should only be done by Parliament.

Accordingly the mother's death was not the relevant "event" for the purpose of deciding the proximity question. The relevant event was the accident. It was not a later consequence of the accident. The claimant would have been able to recover if she had suffered shock and psychiatric illness as a result of seeing her mother's accident. She could not recover for shock and illness as a result of seeing her mother's death three weeks after the accident.

Applying the existing principles laid down in the authorities in England, notably *Alcock v Chief Constable of the South Yorkshire Police* [1992] 1 AC 310, it was probably correct for the court to conclude that the claim should fail. Fortunately the courts in New Zealand are not constrained by

binding authority in the same way. In *van Soest v Residual Health Management Unit* [2000] 1 NZLR 179 the majority judgment reserved the position on the need for secondary victims to establish their physical and temporal proximity to the accident concerned. Blanchard J considered that it might well be that these restrictive rules should be removed or relaxed, and that *Alcock* and subsequent English cases would be seen to be unnecessarily restrictive. All that presently needed to be said was that the plaintiffs' claims were not being struck out for want of physical proximity to the relevant operation and its aftermath. (In fact they were struck out because the plaintiffs could not show that they had suffered actual psychiatric illness). Thomas J would have abandoned the whole inquiry. He pointed out the problems with the "aftermath" doctrine and that there was no diagnostic or medical difference in the anxiety state caused through witnessing an accident or simply learning about it from another.

In *Tame v New South Wales: Annetts v Australian Stations Pty Ltd* [2002] HCA 35, (2002) 211 CLR 317 a majority in the High Court of Australia rejected a "proximity" requirement for Australian law. Gummow and Kirby JJ recognised that a rule that rendered liability conditional on the geographic or temporal distance of the plaintiff from the distressing phenomenon, or on the means by which the plaintiff acquired knowledge of that phenomenon, was apt to produce arbitrary outcomes, to exclude meritorious claims and to mandate differential treatment of plaintiffs in substantially the same position. They thought that these factual considerations might be relevant to assessing reasonable foreseeability, causation and remoteness, but were not themselves decisive of liability.

It is strongly arguable that this is the better, principled, approach and that the New Zealand courts should adopt it. To the extent that the “floodgates” argument has merit, it is substantially met by the requirement that plaintiffs must always show that they have suffered actual physical or psychiatric injury, and by the requirement, accepted in *van Soest*, that as secondary victims they must establish a relationship of love and affection with the physical victim. To the extent that reliance simply on reasonable foreseeability extends the ambit of liability, we should not fear the consequences. In Australia the sky does not seem to have fallen in. And there is clear injustice in denying secondary victims’ claims in respect of death or injury to a loved-one. Does policy really require that, say, a claim by a parent who learns of the shocking death of a child due to another person’s negligence but who does not perceive the accident or its aftermath is doomed to fail?

Duty of care in physical injury cases

Negligence by the Crown in procuring military equipment

It is broadly true to say that, applying common law principle, in cases where a person’s positive negligent conduct has caused actual physical injury to a victim the courts are likely to hold that there is a duty of care. But of course this is not an invariable rule, and sometimes policy may point the other way. The decision of the UK Supreme Court in *Smith v Ministry of Defence* [2013] UKSC 41, [2013] 3 WLR 69 provides a good example of a special duty problem in a personal injuries case. (A similar claim in New Zealand would be covered by the accident compensation scheme, but the case deserves noting for its reasoning and its intrinsic importance and interest.)

The claims in *Smith* were based on alleged failings by the Ministry of Defence in providing adequate equipment for service personnel engaged in military operations in Iraq. One set of claims (the Challenger claims) concerned servicemen operating Challenger tanks who were killed or injured by

"friendly fire", it being alleged that the Ministry was in breach of its common law duty by failing to ensure that the tanks were equipped with devices that would have prevented the accident. The defendant argued, inter alia, that the claims should be struck out under the doctrine of "combat immunity" or on the basis that it would not be fair, just and reasonable to impose a duty in all the circumstances of the case. However, the Supreme Court held, by a majority (Lord Hope, Lord Walker, Lady Hale and Lord Kerr, Lord Mance, Lord Wilson and Lord Carnwath dissenting) that the claims should be allowed to proceed.

Lord Hope, giving the majority view, referred to a number of authorities recognizing that there was no common law liability for negligence in respect of acts and omissions on the part of those engaged in armed combat (*Shaw Savill & Albion Co Ltd v Commonwealth* (1940) 66 CLR 344; *Groves v Commonwealth* (1982) 150 CLR 113, [3]; *Mulcahy v Ministry of Defence* [1966] QB 732; *Multiple Claimants v The Ministry of Defence* [2003] EWHC 1134). The justification was that the interests of the state should prevail over the interests of the individual. The question raised by the instant claims was whether combat immunity should be extended from actual or imminent armed conflict to failures at an earlier stage in training and in the provision of technology and equipment. However, his Lordship was satisfied that the doctrine should be narrowly construed and that any extension had to be shown to be necessary. At the stage when men were being trained or decisions were being made about equipment, there was time to think things through, to plan and exercise judgment. These activities were sufficiently far removed from the pressures and risks of active operations against the enemy for it not to be unreasonable to expect a duty of care to be exercised, so long as the standard of care that was imposed had regard to the nature of those activities and their circumstances. So the claims should not be struck out on this ground.

The alternative argument was that imposing a duty would not be fair, just and reasonable. It was maintained in support of this view that the police did not owe legal duties to victims or witnesses in performance of their function in keeping the Queen's peace (*Hill v Chief Constable of West Yorkshire* [1989] AC 53; *Brooks v Commissioner of Police of the Metropolis* [2005] UKHL 24, [2005] 1 WLR 1495), that the Crown Prosecution Service did not owe a duty of care to those it was prosecuting (*Elguzouli-Daf v Commissioner of Police of the Metropolis*[1995] QB 335), and that there was no duty on defendants in battle conditions to maintain a safe system of work (*Mulcahy v Ministry of Defence* [1966] QB 732). Lord Hope recognised, once again, that the question depended on the circumstances and that these would vary greatly from theatre to theatre and from operation to operation. They could not all be grouped under a single umbrella as if they were all open to the same risk, which had of course to be avoided, of judicialising warfare. Whether any of the claims fell within a public policy exclusion could not be properly determined without hearing evidence. It would be easier to find a breach of duty where the failure could be attributed to decisions about training or equipment taken before deployment, when there was time to assess the risks to life that had to be planned for, than where they were attributable to what was taking place in theatre. Great care needed to be taken not to subject those responsible for decisions at any level that affected what took place on the battlefield to duties that were unrealistic or excessively burdensome.

Lord Mance, dissenting, regarded combat immunity not as a separate principle but as part of the *Caparo* inquiry. And on the substance of the matter he thought that claims that the Ministry failed to ensure the army was better equipped and trained involved policy considerations of the same character as those which were decisive in the cases where a duty of the police to victims or witnesses was rejected. They raised issues of huge potential width, which would involve courts in

examining procurement and training policies and priorities over years. These involved predictions as to uncertain future needs, the assessment and balancing of multiple risks, and the setting of difficult priorities for the often enormous expenditure required, to be made out of limited resources. They were often highly controversial and not infrequently political in their nature. They might also be influenced by considerations of national security which could not be openly disclosed or discussed. To offer as a panacea the injunction that the courts should be very cautious about accepting such claims was to acknowledge the problem but to offer no real solution. There would be deaths and injuries occurring during active service which were unconnected with the risks of active combat, and in these cases there could be a duty of care. But the Challenger claims should be struck out in their entirety, on the basis that the state owed no duty with regard to the provision of technology, equipment or training to avoid death or injury in the course of active military operation.

A second set of claims made in the same litigation (the Snatch claims), by relatives of servicemen who had been killed in an explosion near their Snatch Land Rovers, was that the Ministry was in breach of article 2 of the European Convention on Human Rights, protecting the servicemen's right to life, in failing to provide and deploy appropriately armoured vehicles that would have provided the men with better protection. The Supreme Court held, first, that the UK's article 1 jurisdiction under the European Convention on Human Rights (ECHR) extended to securing the protection of the rights and freedoms secured by the Convention to members of the armed forces serving overseas (not following *R (on the application of Smith) v Oxfordshire Deputy Coroner)* [2010] UKSC 29, [2011] 1 AC 1) and second, that the application of article 2 in the case of injuries suffered by servicemen would vary according to context and that the claims should not be struck out.

Lord Hope recognised that military operations conducted in the face of the enemy were inherently unpredictable. There was a fundamental difference between manoeuvres conducted under controlled conditions in the training area which could be accurately planned for, and what happened when troops were deployed on active service in situations over which they did not have complete control. Further, although procurement decisions were taken remote from the battlefield, they would not always be appropriate for review by the courts. The court had to avoid imposing positive obligations on the state in connection with the planning for and conduct of military operations which were unrealistic and disproportionate. But it should give effect to those obligations where it would be reasonable to expect that the individual to be afforded the protection of the article. As regards the particular claims before the court, the circumstances in which the various decisions had been made had to be investigated before it could be determined with complete confidence whether or not there was a breach of the implied positive obligation. It was a classic case where the decision on liability should be deferred until after trial.

Once again Lord Mance dissented. His Lordship thought that the court should proceed on the basis that the policy considerations which guided domestic law in the area would find an echo in Strasbourg, and not invade a field which would involve extensive and highly sensitive review with the benefit of hindsight the UK's policy, strategy and tactics relating to the deployment and use of its armed forces in combat. The majority approach was likely to lead to an unprecedented judicialisation of war in circumstances where there was a dearth of any authority for any like claim in the Strasbourg jurisprudence. The court should proceed on the basis that the outcome under the ECHR would be no different from the outcome at common law, and the upshot was that the Snatch claims should be rejected as well.

Lord Carnwath agreed generally with Lord Mance, differing only in that he would apply different considerations to the Snatch claims which were based on events after major combat operations had ceased. If the policy reasons for excluding liability were related to the special features of war or active hostilities, it would be wrong to apply the same approach to peace-keeping operations, however intrinsically dangerous. Ordinary principles were likely to mean that such claims would fail, but they should not be regarded as necessarily excluded as matter of general policy, either at common law or under article 2.

Which opinion should we prefer? In the view of the majority, the claims against the Ministry of Defence should not be struck out, whether based on the common law or on article 2, because they required close factual scrutiny before it could be determined whether relevant policy concerns were such that they could not succeed. Yet the courts certainly have been prepared to exercise their power to strike out in analogous cases. As regards the common law, a clear example is found in claims against the police alleging negligent failure to prevent criminal behaviour or the negligent prosecution of offenders. Lord Hope mentions the relevant cases in passing, but does not explain why a similar principle should not apply. Indeed, Lord Carnwath in his dissent asked whether, if this was an appropriate exercise in relation to the purely domestic policy concerns arising from police powers of investigation, how much more was this so in relation to issues of vital national security raised by the preparation for and conduct of war? As for article 2, there was no authority on the ECHR holding that article 2 could apply. Lord Mance saw the prospect of the Strasbourg court reviewing the conduct of combat operations by making the state liable for alleged negligence as sufficiently striking for it to be impossible to give the question a positive answer.

So the basis for *Smith* in the authorities can be seen at least as very shaky and arguably as lacking any convincing foundation at all. And if we turn to policy concerns underlying the decision, they certainly can be seen as favouring the view taken by the dissenters. We must ask whether a court ought to be making determinations about the procurement or allocation of resources for the armed services, especially where these involve decisions about, say, whether to order technologically advanced and very expensive equipment, or how much of such equipment to order, or when or how quickly to deploy it. There are many decisions emphasising that the courts cannot pronounce on or review matters which are not justiciable (for example, *Takaro Properties Ltd v Rowling* [1987] 2 NZLR 700; *Barrett v Enfield London Borough Council* [2001] 2 AC 550) or which are essentially political (for example, *Graham Barclay Oysters Pty Ltd v Ryan* (2003) 211 CLR 540, at [6]; *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, at [29]). The justification arises out of the proper relationship between judicial and executive power. Negligence actions should not be used to impugn discretionary decisions which are properly for a public body to make. Indeed, a court is in no position to make informed decisions about political and budgetary matters, and nor is the adversary procedure a suitable mechanism for eliciting an appropriate answer. Rather, the necessary decisions need to be made by way of the political process. The majority view in *Smith* largely ignores the implications of these arguments.

Further, the practical consequences of judicial intrusion into questions about military procurement and deployment are likely for the most part to be negative. Lord Hope recognised that it was of "paramount importance" that the work of the armed forces should not be impeded by having to prepare for or conduct active operations against the enemy under the threat of litigation if things should go wrong. But the danger was met only by an exhortation to the decision-maker to exercise

care and caution. Lord Mance expressed the opinion that the approach taken by the majority would make extensive litigation almost inevitable after, quite possibly during, and even before, any active service operations undertaken by the army. It was likely to lead to the judicialisation of war. Indeed, consistently with the majority view, a full trial of the action seemingly will be needed in any future case before it can be determined whether or not there is liability. Without doubt litigation is now far more likely even though the claim concerned may ultimately fail. Further actual litigation is already coming following the decision in *Smith* itself, and the threat of litigation will be an ever-present reality.

The solution is to abandon the reasoning in *Smith* and to strike out all claims concerning acts or omissions which are alleged to have caused death or injury in the course of combat operations, and at the same time seek to ensure that where service personnel are killed or injured in military operations, the victim or his or her dependants are properly and fully compensated. (See Morgan, "UK Armed Forces Personnel and the Legal Framework for Future Operations", submission to Parliament, available at http://www.publications.parliament.uk/pa/cm201314/cmselect/cmdfence/writev/futureops/law8.htm). In New Zealand, fortunately, should the question arise in some form, the courts can indeed reject *Smith*, with the accident compensation scheme providing the necessary financial compensation.

Negligence by the police in apprehending an offender

It is already clear that there is no enthusiasm in the UK for applying the approach taken by the majority in *Smith* to cover the work of the police. In *Robinson v Chief Constable of West Yorkshire Police* [2014] EWCA Civ 15 the claimant was walking along a street when she was injured in a mêlée involving two police officers who were struggling to arrest a criminal. She alleged that the police officers were negligent in making the arrest, but the Court of Appeal held that they owed no duty to the claimant to take care.

Hallett LJ drew attention to the basic principle that where there was a wrong there should be a remedy, yet recognised that there were cases where it would not be fair, just and reasonable to impose a duty and that the interests of the public at large might outweigh the interests of the individual allegedly wronged. The *Caparo* test applied to claims in negligence generally, including those involving direct physical harm: the idea that the common law would impose a duty in circumstances where it was unfair, unjust or unreasonable to do so was nonsensical. Her Ladyship quoted Lord Carnwath in *Smith* (interestingly a dissenting judgment, as we have seen) as observing that the scope of any so-called "immunity" necessarily overlapped with the question whether it was fair, just and reasonable to impose a duty of care at all. And the argument that *Caparo* did not apply in cases of direct physical harm was disposed of once and for all in Lord Steyn's speech in *Brooks v Commissioner of Police of the Metropolis* [2005] UKHL 24, [2005] 1 WLR 1495 at [32] and again in *Marc Rich & Co AG v Bishop Rock Marine* [1996] 1 AC 211 at 235. Turning to the particular case of claims against the police, there were a number of authorities, based ultimately on *Hill v Chief Constable of West Yorkshire Police*, establishing that the police were not liable for their acts and omissions in the course of investigating and suppressing crime and apprehending offenders (citing *Elguzouli-Daf v Commissioner of Police of the Metropolis* [1995] QB 335, *Brooks v Commissioner of Police for the Metropolis* and *Van Colle v Chief Constable of the Hertfordshire Police* [2008] UKHL 50,

[2009] AC 225). It would fundamentally undermine the rationale of the *Hill* principle, which was designed to prevent defensive policing and better protect the public, to make the police liable for direct acts but not indirect acts. Indeed, the line between direct and indirect harm might be a very fine one. The point was in dispute in the instant case, and whether or not the police should be held liable should not depend on who was responsible for knocking into the claimant, the officer or the offender. It made no sense to hold the Chief Constable liable in the former case but not the latter.

However, Hallett LJ recognised that the *Hill* principle did not impose a blanket "immunity". No judge had attempted a definitive list of possible exceptions, but some claims against the police might not offend the principle. They included those which did not relate to core functions, for example, claims based on negligent traffic management decisions (*Knightley v Johns* [1982] 1 WLR 349), and claims where police officers had assumed responsibility for a claimant (*Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242; *An Informer v A Chief Constable* [2012] EWCA Civ 197, [2013] QB 579). A careful analysis of the case law should provide a sufficient degree of certainty.

Applying these principles, Hallett LJ was satisfied that it would not be fair, just and reasonable to impose a duty on police officers doing their best to get a drug dealer off the street safely. Had it been necessary, her Ladyship would also have held that the evidence did not justify the findings of the trial judge that the officers were in fact negligent in making the arrest. Arnold J gave a concurring judgment, and Sullivan LJ agreed with Hallett LJ.

The contrast between the decision in *Robinson* and that in *Smith* is stark. It is hard to understand how *Smith* could have reached the decision it did.

Negligence in pre-contract negotiations

It is well established that at common law a duty of care based on *Hedley Byrne & Co Ltd v Heller & Partners Ltd* may attach to representations made in the course of pre-contractual negotiations between the parties (for example, *Esso Petroleum Co Ltd v Mardon* [1976] QB 801). Indeed, this type of case is probably one of the least controversial applications of the *Hedley Byrne* principle.

A recent example, involving a variation on the simple case of two negotiating parties, is seen in the decision of the UK Supreme Court in *Cramaso LLP v Ogilvie-Grant* [2014] UKSC 9, [2014] 2 WLR 317. During the course of negotiations for the lease of a grouse moor the owner (OG) negligently misrepresented to the prospective tenant (E) the estimated grouse population of the moor. E later informed OG that he intended to use a new limited liability partnership (C) to take the tenancy. The question for the court was whether the representation was made to C and whether a duty of care was owed to C. Lord Reed determined that OG had made a pre-contract representation that continued after the identity of the prospective contracting party changed. The representation remained operative in the mind of E after he began to act in the capacity of an agent of C up until the time the lease was executed. So OG implicitly asserted to C the accuracy of the representation in circumstances where it continued to be foreseeable that the representation would induce the other party to the negotiations to enter into a contract. OG therefore assumed responsibility for the representation and owed C a duty of care. The decision thus illustrates that a defendant's representation, express or inferred, may be of a continuing nature, and its legal consequences are not necessarily fixed at the time when the representation was made.

Cramaso was an appeal from Scotland, where the common law continues to apply in the context of pre-contract negotiations. However, in New Zealand, the importance of the *Hedley Byrne* principle in this context is much reduced by s 6 of the Contractual Remedies Act 1979. This provides that if a party to a contract has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made to him by or on behalf of another party to that contract, (a) he shall be entitled to damages from that other party in the same manner and to the same extent as if the representation were a term of the contract that has been broken, and (b) he shall not, in the case of a fraudulent misrepresentation, or of an innocent misrepresentation made negligently, be entitled to damages from that other party for deceit or negligence in respect of that representation. Section 6 thus operates to the exclusion of any action founded on the rule in *Hedley Byrne* or for deceit. Liability for pre-contractual representations accordingly is dependent not on proof of negligence but simply on meeting the terms of the statute.

Section 6 would apply in circumstances such as those in *Cramaso*, for the representation induced C, through its agent, to make the contract with OG. However, s 6 does not apply if the person being sued is not a party to a contract made with the claimant. An example is where the action is against an agent who induces the representee to enter a contract with the principal (*Resolute Maritime Inc v Nippon Kaiji Kyokai, The Skopas* [1983] 1 WLR 857; *Shing v Ashcroft* [1987] 2 NZLR 154 at 158, where the point was assumed). In this case only the common law action is available. Section 6 also does not apply if no contract eventuates. In this type of case, however, a common law duty of care may be denied for good reasons of policy. In particular, a tort duty may tend to subvert the law of offer and acceptance. This reasoning underlies decisions in the Supreme Court of Canada that there can be no duty to take care owed to the other party to failed commercial negotiations (*Martel Building Ltd v Canada* [2000] SCC 60, [2000] 2 SCR 860 ; *Design Services Ltd v Canada* [2008] SCC 22, [2008] 1 SCR 737). The Court of Appeal has similarly held that an attempt to use the tort of negligence to make up for the lack of a process contract should be rebuffed on policy grounds (*Prime Commercial Ltd v Wool Board Disestablishment Co Ltd* (2006) 7 NZCPR 697). Again, in a first instance decision in England (*Daventry District Council v Daventry & District Housing Ltd* [2010] EWHC 1935 at [155]-[163] (appeal allowed on another point in *Daventry District Council v Daventry & District Housing Ltd* [2012] 1 WLR 1333)) it was held that an understanding between parties to negotiate a commercial contract in good faith did not give rise to any duty of care. If it did it would make the negotiation of commercial transactions unworkable, uncertain and risky. Whatever they might say to each other about behaving well, they would only owe duties of care to each other if their relationship went some way beyond that of arm's length.

Invasion of privacy by intrusion into seclusion

Hosking v Runting [2005] 1 NZLR 1 recognised that there can be a liability in tort in respect of an invasion of privacy by way of the wrongful publication of private information. Another form of an invasion of privacy is an intrusion into seclusion, and this, by contrast, involves an invasion of the victim's private space. Harassing conduct under the Harassment Act 1997 is one particular form of such invasion, but many others are possible. Cases of harassment involve patterns of behaviour where the wrongdoer in one way or another forces his or her attentions on another. But suppose there is no such pattern, or the victim does not know about the wrongdoer's conduct. In *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672 Whata J recognised for the first time in New Zealand that an intrusion into seclusion could be actionable as a tort in its own right.

C was an occupant in a house owned by her boyfriend and H, the defendant. H surreptitiously installed a recording device in the roof cavity above the shower and toilet. He videoed C while she was showering. The videos were never published but C discovered them and was deeply upset. She brought an action against H alleging that his conduct constituted an invasion of her privacy.

Whata J found a number of indicators favouring recognition of a liability in tort in the instant circumstances in existing statutes. In particular, the Broadcasting Standards Authority had included an "intrusion into seclusion" principle in developing its privacy principles pursuant to its obligation to maintain standards consistent with the privacy of the individual under the Broadcasting Act 1989; the information privacy principles in s 6 of the Privacy Act 1993 prohibited the collection of personal information by intrusive means; s 38 of the Residential Tenancies Act prohibited any interference with the tenant's peace, comfort or privacy; s 216H of the Crimes Act 1961 prohibited the making of an intimate visual recording; and s 46(1)(c) of the Search and Surveillance Act 2012 required a warrant before a surveillance device could be used to observe private activity on private premises. Certain court judgments also emphasised the need to protect reasonable expectations of privacy. In particular, in *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91, at [123], McGrath J referred to the complainant's right to be free from unwanted physical intrusion into the privacy of her home. And in Canada, in *Jones v Tsige* [2012] ONCA 32, (2012) 108 OR (3d) 241, the Ontario Court of Appeal awarded damages against a defendant who had used her workplace computer to access the account of the plaintiff, a fellow employee, more than 170 times.

In light of this background, Whata J was satisfied that an intrusion tort would give effect to a recognised value in protecting privacy and would be a compatible with, and a logical adjunct to, the decision in *Hosking v Runting*. As for the elements of the tort (set out at [94]-[96]), his Honour considered that the plaintiff had to show (a) an intentional and unauthorised intrusion, (b) into seclusion (namely intimate personal activity, space or affairs); (c) involving infringement of a reasonable expectation of privacy; and (d) that was highly offensive to a reasonable person. "Intentional" connoted an affirmative act, not an unwitting or simply careless intrusion. "Unauthorised" excluded consensual and/or lawfully authorised intrusions. Further, not every intrusion into a private matter was actionable. The reference to intimate personal activity acknowledged the need to establish intrusion into matters that most directly impinged on personal autonomy. As for the last two elements, these replicated the *Hosking* requirements and the tort thus remained consonant with existing privacy law. Only private matters were protected, and a right of action only arose in respect of an intrusion that was objectively determined, due to its extent and nature, to be offensive by causing real hurt or harm. Lastly, a legitimate public concern in the information might provide a defence to the privacy claim.

The ambit of this new tort obviously will need to be fleshed out. No-one can live so as to be free from all intrusions by others. We all have to rub shoulders with our fellow human beings. Indeed, one person's interest in seclusion has to be set against another's interest in being free to speak, to look or to act as he or she wishes. At the very least, distinguishing between permissible and impermissible intrusions into seclusion is no straightforward task and must require careful evaluation and discrimination. Whata J sought to give guidance by referring to intrusions into "intimate personal activity, space or affairs", and no doubt the particular facts of the case at hand can be seen as a fairly

straightforward example. But it is unlikely that there must be an intrusion into something "intimate", at least as that word is normally understood. Older examples from the US include unauthorised prying into the plaintiff's private bank account (*Zimmerman v Wilson* 81 F 2d 847 (1936) (and see also the recent decision in Canada in *Jones v Tsige* mentioned above); telephone tapping without disclosing the information to others (*Fowler v Southern Bell Telephone and Telegraph Co* 343 F 2d 150 (1965)); and highly personal questions and demands by a person in authority (*McSurely v McLellan* 753 F 2d 88 (1985)). It may be that the tort could be committed in a public place, such as by intrusive questioning or photographing of an accident victim (and see *Andrews v Television New Zealand Ltd* [2009] 1 NZLR 220). The appropriateness of video surveillance in shops and malls could come under scrutiny.

The *ex turpi causa* defence

Sometimes a claim by a plaintiff who suffers harm whilst committing a criminal offence is barred by the application of the common law doctrine known as *ex turpi causa non oritur actio*. However the jurisprudential basis for denying the claim for long has been a matter of debate, and there is no single justification that can be extracted from the cases. Illegal conduct by the plaintiff may be seen as going to the issue of duty or to whether the courts can lay down an appropriate standard of care, or as bearing upon the cause of a loss, or as raising a defence to an otherwise existing cause of action. The scope of the principle certainly remains disputed and its application frequently is unpredictable.

One context in which the question arises is where a participant in a joint criminal enterprise has been injured in the course of that enterprise. The High Court of Australia has considered this particular question on a number of occasions involving a plaintiff's participation in dangerous driving, holding initially that there could be no duty of care in circumstances where the plaintiff and defendant were engaged jointly in an illegal activity (*Smith v Jenkins* (1970) 119 CLR 397), and then asking whether it was possible for the court to establish an appropriate standard of care as between participants in criminal activity (*Jackson v Harrison* (1978) 138 CLR 438), *Gala v Preston* (1991) 172 CLR 243). In *Miller v Miller* [2011] HCA 9, (2011) 242 CLR 446, its most recent decision, the Court recognised that the "standard of care" reasoning was not convincing, there being a readily identified standard of care that could be engaged in driving cases. Rather, the central policy consideration at stake was the coherence of the law — whether it would be incongruous for the law to proscribe the plaintiff's conduct and yet allow recovery in negligence for damage suffered in the course of that unlawful conduct. The statutory purpose of a law proscribing dangerous or reckless driving or illegal use of a vehicle was not consistent with one offender owing a co-offender a duty to take reasonable care. The inconsistency or incongruity arose from the recognition that the purpose of the statute was to deter and punish using a vehicle in circumstances that often led to reckless and dangerous driving. In the instant case a passenger travelling in a stolen car initially was engaged in a joint illegal enterprise with the driver, but she withdrew from that enterprise when, prior to the accident, she asked to be allowed to get out. So when the driver ran off the road, he owed the passenger who was not then complicit in the crime which he was committing a duty to take reasonable care.

The reasoning in *Miller* can be seen to focus on the question of duty. Recent decisions in England, by contrast, have focused on questions of causation rather than on considerations of whether a duty of care can properly be said to exist. The courts often seek to draw a distinction between causing a loss

and providing the opportunity for it to happen. In the present context, the question is whether the injury was truly a consequence of the plaintiff's unlawful act or was a consequence of the unlawful act only in the sense that it would not have happened if the plaintiff had not been committing that act. *Delaney v Pickett* [2011] EWCA Civ 1532, [2012] 1 WLR 2149 provides a good illustration of this kind of reasoning. The claimant was seriously injured in an accident when travelling as a passenger in a car driven by the defendant. The purpose of the journey was the collection and transportation of illegal drugs for resale. The trial judge held that the claimant's action arose directly *ex turpi causa* and should fail, but his decision on this point was reversed on appeal. Ward LJ said that viewed as a matter of causation, the damage suffered by the claimant was not caused by his or their criminal activity. It was caused by the tortious act of the defendant in the negligent way in which he drove his motor car. In those circumstances the illegal acts were incidental and the claimant was entitled to recover his loss.

Let us compare the decision in *Joyce v O'Brien* [2013] EWCA 546, [2014] 1 WLR 70. The claimant was seriously injured when he fell from the back of van being driven by his uncle, the first defendant. The two men had stolen some ladders, and at the time of the accident they were seeking to make a speedy escape from the scene of their crime. At the time he fell the claimant was trying to keep the ladders in the van, by standing on the rear footplate and hanging on to the ladders and the rear of the van. The uncle subsequently pleaded guilty to a charge of dangerous driving. The uncle's insurer, the second defendant, argued that the uncle was not liable in tort to the claimant because both men were at the time involved in a common criminal enterprise. Elias LJ (with Rafferty LJ and Ryder J agreeing) upheld this contention, on the basis that the claimant's criminal wrongdoing was the cause of his injuries. His Honour examined the established jurisprudence on joint enterprise cases, and was satisfied that in certain cases the injury would still be treated as having been caused by the claimant, even though the direct cause of his injury was his co-defendant. He formulated the principle to be applied as follows (at [29]):

> Where the character of the joint criminal enterprise is such that it is foreseeable that a party or parties may be subject to unusual or increased risks of harm as a consequence of the activities of the parties in pursuance of their criminal objectives, and the risk materialises, the injury can properly be said to be caused by the criminal act of the claimant even if it results from the negligent or intentional act of another party to the illegal enterprise.

While this did not necessarily exhaust the situations where the *ex turpi causa* principle applied in joint enterprise cases, it would cater for the overwhelming majority of cases.

Applying the test, his Honour held that the claim had to fail. Having regard to the joint nature of the criminal enterprise, the trial judge was plainly entitled to conclude that although the damage might not have occurred but for the negligent driving of the first defendant, it was caused by the criminal activity in which the claimant was engaged. The injury resulted both from his personal conduct in placing himself in such a dangerous position and because he took the heightened risk of dangerous driving by his uncle. It was true that in some of the cases where the courts had denied that an injured party could recover for the negligent driving of a party to a joint criminal enterprise, the claimant had actively encouraged the dangerous driving, which did not happen in the instant case. *Pitts v Hunt* [1991] 2 QB 24 fell into that category. But active encouragement was not in all cases necessary. It was enough that the claimant and negligent driver were involved in the criminal

enterprise together and that the accident arose out activities which it could be foreseen might be committed in the course of the enterprise. Active encouragement might constitute the evidence of joint enterprise which would otherwise be lacking. But in this case the evidence of joint enterprise and of the implicit encouragement to bad driving was plain even in the absence of active encouragement.

In *Gray v Thames Trains Ltd* [2009] UKHL 33, [2009] 1 AC 1319 (discussed in "Tort", [2009] NZL Rev 743) Lord Hoffmann noted that the *ex turpi causa* doctrine in its narrower form stated that you cannot recover for damage which flows from loss of liberty, fine or other punishment lawfully imposed on you in consequence of your own unlawful act. It was the law which as a matter of penal policy caused the damage, and it would be inconsistent for the law to require a person to be compensated for that damage. This narrow view has the virtue of certainty and clarity. However, Lord Hoffmann recognised that there is a wider version of the concept which enunciates the principle that "you cannot recover for damages which is the consequence of your own criminal act." This could not be justified on the grounds of inconsistency in the same way as the narrower rule. Instead the wider rule had to be justified on the ground that it was offensive to public notions of the fair distribution of resources that a claimant should be compensated for the consequences of his own criminal conduct. In *Joyce* Elias LJ recognised that it would not be offensive to the public to permit recovery where a criminal offence was of a relatively trivial nature. He accepted that there should indeed be some flexibility in the operation of the doctrine and that it would not apply, for example, to minor traffic offences. But wherever the precise line was to be drawn, the theft of the ladders, involving an imprisonable offence with a seven year maximum sentence, would fall clearly on the side where the doctrine applied.

In other cases there may be greater uncertainty as to what kind or degree of turpitude should count. While a normative judgment is needed the question in issue is hardly unique in this respect. The judge no doubt attempts to apply community values and standards in this field as in others. And his or her determination is not made in a vacuum, without the assistance of any underlying principle. Very arguably the causal analysis adopted in *Delaney* and *Joyce* can be helpful in pointing the court in the right direction.

Defence of another, necessity and *ex turpi causa* in property cases

The decision of the Court of Appeal in *Leason v Attorney-General* [2013] NZCA 509, [2014] 2 NZLR 224 raises for consideration the application of three possible defences to a claim for liability for trespass to land and to fixtures attached to land. The defendants entered the Government Communications Security Bureau (GCSB) facility in Waihopai Valley and deflated a satellite dome cover by cutting it. They claimed that they were motivated by a desire to expose and prevent the harm caused by the second Iraq war, and in particular the deaths of civilians, to which they believed the operation of GCSB Waihopai was contributing. The Attorney-General sued them for trespass and sought summary judgment. The defendants argued that their actions were protected by the doctrine of defence of another under s 48 of the Crimes Act 1961, or by the application of the defence of necessity, or by the principle of *ex turpi causa non oritur actio*. The trial judge gave summary judgment in the plaintiff's favour, and the defendants appealed.

The Court of Appeal considered the application of the three defences on the assumption that the facts relied on by the defendants were correct. As we will see, the task of the court in determining the appeal was pretty straightforward.

Defence of another

Section 48 of the Crimes Act 1961 provides that an act of force is justified where it was committed in a person's own defence or in the defence of another, and the force used was reasonable in the circumstances as that person believed them to be. "Justified" means not guilty of an offence and not liable to any civil proceedings (s 2). The trial judge held that s 48 required that the relevant force should be against a person, relying on *R v Hutchison* [2004] NZAR 303, but on appeal the defendants argued that it might also be committed against property. Stevens J, delivering the judgment of the court, accepted that in some contexts damage to property might properly amount to force, but saw no need to revisit *Hutchison* because, viewed objectively, it was not arguable that the actions of the defendants were a reasonable and proportionate response. There was no imminent danger, particularly as the defendants could not link intelligence gained through Waihopai to any particular death. Even if they genuinely believed that the damage would positively impact on the situation in a remote foreign country such as Iraq, they did not know what form that impact would have. Moreover, lawful methods of protest clearly were open. In *R v Jones (Margaret)* [2006] UKHL 16, [2007] 1 AC 136 Lord Hoffmann made it clear that defences such as s 48 were intended to be strict exceptions to the general rule that citizens cannot use force in society. Changes in government policy had to be effected by lawful and not unlawful means. Those who suffered infringement of their lawful rights were entitled to the protection of the law. If others deliberately infringed those rights in order to attract publicity to their cause, however sincerely they believed in its correctness, they should bear the consequences of their lawbreaking.

The defendants also sought to rely on defence of another at common law. Stevens J doubted whether the defence had survived the enactment of s 48, and thought that in any event it was axiomatic that the force used had to be reasonable. So the defence failed for the same reason as under s 48.

Necessity and duress of circumstances

The trial judge noted that the defence of necessity was a carefully guarded exception to the general principle of law that rights of property were respected. There were two varieties: "duress of circumstances" concerned the difficulty of complying with the law in emergencies, and necessity "proper" concerned the avoidance of the greater harm or the pursuit of some greater good. Stevens J recognised that both required an element of reasonableness. In the context of an action in trespass, necessity was available only where the individual believed in good faith and upon grounds which were objectively reasonable that their actions were necessary to preserve life, prevent serious harm or render assistance to another. Similarly, duress of circumstances was only available if from an objective standpoint the defendant could be said to be acting in order to avoid a threat of death or serious injury. Once again, the issue had to be considered in the context of the case law concerning the legal limits of civil disobedience or direct action protest. It was not necessary to engage with a distinction sought to be drawn by the defendants as to whether the relevant peril had to be "immediate" or "imminent", because regardless of which test was applied the illegality needed to be proportionate to the peril involved. The defendants had no way of knowing whether any

immediate or imminent peril existed or of knowing whether their conduct in damaging the radome would impact on that supposed peril. In the circumstances of the case the defences were not arguable.

Ex turpi causa in property cases

The defendants claimed that it was reasonably arguable that the principle of *ex turpi causa* applied, on the bases that the operation at Waihopai was wrongful due to its role in supplying intelligence to the USA, that the use of that intelligence implicated the GCSB in the wrongful conduct of the USA, and that Waihopai did not adhere to regulatory requirements such as the Public Works Act 1981, the Building Acts 1991 and 2004, the Resource Management Act 1991 and the Defence Act 1990. Stevens J noted that no single formulation for the *ex turpi causa* defence had emerged from the cases (as indeed we have already seen), and saw merit in Lord Hoffmann's observation (in *Gray v Thames Trains*) that the application of the defence will depend on the particular situations in which it was sought to be applied. One of these was in the context of property claims, with the relevant principles calling to be applied in the instant case.

His Honour drew attention to an established line of authority to the effect that the courts would not on grounds of public policy or *ex turpi causa* refuse to enforce the rights of an owner of property where the claim rested solely on ownership (citing *Gordon v Chief Commissioner of Metropolitan Police* [1910] 2 KB 1080, *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65, *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1 and *R v Collis* [1990] 2 NZLR 287). Provided an individual was able to assert a proprietary or possessory title, it was not relevant that the title might be derived from an illegal contract. Accordingly, to the extent that the defence of *ex turpi causa* rested on the argument that the land and facilities at GCSB Waihopai were acquired illegally, it could not succeed. That was because the plaintiff's claim for trespass to the facilities on the land at Waihopai was based on the GCSB's ownership of the land, the radome and the satellite communications equipment.

However, his Honour recognised that part of the alleged illegality went beyond how the property in question was originally acquired and instead related to the ongoing *use* of the land and facilities. For example, the defendants submitted that the activities carried out at Waihopai were in breach of both New Zealand law (including the Resource Management Act), and international law. Stevens J said that it was, therefore, necessary to consider the application of the broader principles of the *ex turpi causa* defence. And while the limits of the doctrine were uncertain, the defendants could not succeed regardless of which formulation was adopted. If a "reliance" approach were adopted, the plaintiff would be entitled to succeed unless its claim could only be made in reliance on the illegal acts. Here the claim was in trespass, and it rested solely on ownership of the land. The plaintiff did not need to rely on any aspect of the alleged illegality contended for by the defendants to make it out. If a "conscience" test was adopted, allowing the plaintiff to succeed would not be an affront to the public conscience. Legal methods of protest were available to the defendants, and declining recovery would be akin to condoning vigilante behaviour. If principles of causation were applied, it could not be said that the allegedly illegal activities of the GCSB were the relevant cause of the damage to the radome. Instead, those activities merely provided the motive for the actions the defendants chose to take, in order to make and publicise their protest. The real and effective cause of the loss was the defendants' own actions in trespassing onto the plaintiff's land and inflicting the

damage to the GCSB's facilities. So the trial judge was right to conclude that the plaintiff had established that there was no arguable defence to the claim, and the appeal should be dismissed.

At the end of his judgment Stevens J noted that the High Court's assumption that the facts relied on by the defendants were correct meant that the approach taken in the High Court and on the instant appeal was the most favourable from the defendants' perspective. Yet all of the defences were doomed to fail. Maybe the defendants would have done better to have accepted responsibility for their conduct. The claims of the Crown were later dropped in any event.

Joint tortfeasors and "common design"

Joint tortfeasors are each liable in full for an entire loss. A tort is committed by several persons as joint tortfeasors either where the act giving rise to the tort is one for which all are responsible or where it is committed as a joint act. There is joint responsibility where a person commits a tort for which another is vicariously liable, or where a company is identified with the actions of directors who are its directing mind and will. As for joint acts, some concerted conduct in the course of a common enterprise or design is needed. The boundaries of liability in "common design" cases have been explored by the Court of Appeal in England in *Fish & Fish Ltd v Sea Shepherd UK* [2013] EWCA Civ 544, [2013] 1 WLR 3700.

Two vessels owned by the claimant Fish and Fish Ltd (hereafter F & F) were towing cages containing live bluefin tuna to F & F's fish farm near Malta when one was rammed by a vessel, the "Steve Irwin", owned by Sea Shepherd UK, the first defendant (hereafter SSUK). A cage was damaged and part of the catch was released into the sea by divers from the Steve Irwin. The attack occurred as part of a campaign (called "Operation Blue Rage") started by the second defendant, the Sea Shepherd Conservation Society (hereafter SSCS), against what SSUK and SSCS considered to be illegal fishing for bluefin tuna. The third defendant, Paul Watson (hereafter PW), was the founder of SSCS and the master of the Steve Irwin. The question for the court was whether SSUK was liable together with SSCS and PW as a joint tortfeasor. It was alleged by F & F that SSUK was so liable, because it acted in furtherance of a common design by making its vessel available to the "Blue Rage" campaign and, inter alia, paying the crew and processing and remitting donations received for the campaign.

Beatson LJ (with whom McCombe and Mummery LJJ agreed) sought to indicate the general approach of the courts and to summarise the relevant principles before turning to their application to the case at hand. He noted first that the fact that a person had facilitated the doing of a tortious act by another was not in itself sufficient to make him liable in tort. This was so even where the facilitation was done knowingly. Some distinguished commentators, drawing on the analogy of the criminal law, had argued that liability should be wider and that the rejection of tortious liability for knowing assistance was mistaken, yet there were a number of possible reasons of varying force to justify the difference. They included a greater emphasis on deterrence in the criminal law, and the traditional role of equity in protecting trusts and the beneficiaries of other fiduciary relationships. They also included the uncertainty of the law of knowing assistance in equity, and the difficulty of holding the line that only actual knowledge of the intent to commit the specific tort would suffice to establish liability against arguments that lesser forms of knowledge should suffice. There was also the fact that, whereas in the criminal law different degrees of culpability could be reflected in the sentence, a joint tortfeasor was fully liable for all of the claimant's loss. And drawing the boundaries

of joint tortious liability more widely might risk uncertainty and the inhibition of perfectly legitimate activities.

What then were the requirements for this sort of joint responsibility? The first was that there should be a common design that the acts relied on as tortious should be done by one or more of the alleged joint tortfeasors, the actual perpetrator or perpetrators (here SSCS and PW). This requirement of a common design meant that this form of joint liability was not accessory liability and provided protection against indeterminate and uncertain liability. The second was that the other alleged joint tortfeasor, "the alleged participator" (here SSUK) itself did acts in furtherance of the common design. There was, however, no need for the participator to commit an independent tort.

As to the first requirement – common design - it was not necessary that the secondary party had explicitly mapped out a plan with the primary offender. Their tacit agreement would be sufficient (*Unilever Plc v Gillette (UK) Ltd* [1989] RPC 583 at 609). This could lead to a blurring of the difference between the first and the second requirement. But the fact that there could be a tacit agreement and that there did not need to be a common design to commit the tort but to do acts which in the event proved to be torts, showed the potential breadth of this form of joint responsibility. Even so, there were limiting factors. First, the fact that knowing facilitation did not suffice meant that a common design would not be inferred merely because a person sold a product to another which he knew was going to be used to commit a tort. Secondly, a common design would not be inferred merely because two entities were closely related by shareholding, control or otherwise. Thirdly, a common design would not be inferred where one person or entity looked on with approval at what another person or entity was planning or doing.

As to the second requirement - the person who was not the actual perpetrator doing acts in furtherance of the common design – there was no need for physical presence, nor that the alleged joint tortfeasor's act in furtherance of the common design should play "an effective part" in the tort. What was required was that there be "concerted action to a concerted end" (applying the classic statement in *The Koursk* [1924] P 140), and that the defendant intended the act which in the event proved tortious. Once a common design had been established, the question was whether the defendant who was said to be a joint tortfeasor had done something that had furthered that common design. Since it was the requirement of a common design that provided protection against indeterminate and uncertain liability, providing that the act furthering an undoubted common design was more than *de minimis,* there was no further hurdle requiring it to have been "an essential part" of or of "real significance" to the commission of the tort. The cases which might appear to give support to such a requirement were cases which were concerned with the prior question of whether there was a common design.

Applying these principles to the facts, the evidence established that there was a common design. The purpose of the "Blue Rage" campaign was not only investigation, documentation, and exposing illegal activities: it encompassed violent intervention as well. The question then was whether SSUK made itself party to SSCS's purpose so that it became the common design of SSUK, SSCS and PW. SSUK's Trustees' Report prepared for the Charity Commission and setting out its activities included direct action and international activity in the Mediterranean, which had to be a reference to the Blue Rage campaign. Even if the contents of the Report did not mean that SSUK itself did those things, it was powerful evidence that SSUK joined in SSCS's campaign. It showed that SSUK had combined with

SSCS to secure the doing of acts which, in the event, proved to be tortious. And further evidence about the actions of SSUK showed that it had indeed joined in the common design by doing acts in furtherance of it.

The trial judge in this case had taken a stricter view (*Fish & Fish Ltd v Sea Shepherd UK* [2012] EWHC 1717), holding that although SSUK had made had made payments for the general maintenance and repair of the Steve Irwin and provided funds for SSCS, these had not been specifically for the Operation Blue Rage campaign. He decided that SSUK's participation in the attack had been of minimal importance and played no effective part in the commission of the tort and that it was not liable as joint tortfeasor. In allowing the appeal the Court of Appeal has steered a middle course, rejecting a general principle of knowing assistance yet limiting the circumstances in which any tacit agreement can be inferred and requiring the alleged joint tortfeasor actually to have done acts in furtherance of the common design. The UK Supreme Court has given leave to appeal (*Fish & Fish Ltd v Sea Shepherd UK* [2014] 1 WLR 444). The precise extent of the liability of those who facilitate the doing of tortious acts is relatively unexplored territory, and we can expect an interesting discussion about an important issue.