Torts

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The many developments in the field of torts in the last two years mean that only some can be selected for discussion and some have to be omitted. Decisions deserving consideration but which are not discussed below include: *Michael v Chief Constable of South Wales*[1] (no duty owed by the police to protect a woman at risk of being murdered by her ex-boyfriend); *Campbell v Peter Gordon Joiners Ltd*[2] (availability of the action for breach of statutory duty); *Montgomery v Lanarkshire Health Board*[3] (failure by an obstetrician to inform a patient about the risks involved in her medical treatment); *Wu v Body Corporate 366611*[4] (actions for trespass to land and for nuisance between co-owners); *ParkingEye Ltd v Beavis*[5] (unauthorised parking and the question of consent to the risk of a trespass to, or a conversion of, a vehicle by detention or towing or clamping); *Wagner v Gill*[6] ("unlawful means" in the tort of conspiracy); *Starbucks (HK) Ltd v British Sky Broadcasting Group (No 2)*[7] (need for business goodwill within the jurisdiction in passing off claims); *Vidal-Hall v Google Inc*[8] (distinction between the action for breach of confidence and action for misuse of private information); *Cruddas v Calvert*[9] (applying the requirement of malice in injurious falsehood claims where words have more than one meaning); *Willers v Joyce*[10] (whether there can be an action for the malicious institution of civil proceedings); *Currie v Clayton*[11] (whether a Crown prosecutor is a "public officer" for the purpose of the tort of misfeasance in a public office); *Zurich Insurance plc UK Branch v International Energy Group Ltd*[12] (difficulties with the special rule of causation in *Fairchild*); *Bilta (UK) Ltd v Nazir (No 2)*[13] (attribution of a director's illegal conduct to a company); *Body Corporate 160361 (Fleetwood Apartments) v BC 2004 Ltd and BC 2009 Ltd*[14] (whether a council settling a leaky building claim can take an assignment of the plaintiff's cause of action against other defendants).

Defective products in leaky buildings

A significant question for owners of a leaky building, and indeed for builders, councils and other persons or bodies involved in leaky building litigation, is whether a manufacturer can be liable in negligence for supplying defective material used in constructing such a building. In *Carter Holt Harvey Ltd v Minister of Education*[15] the Supreme Court determined that a claim of this kind was arguable and should proceed to trial.

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[1] *Michael v Chief Constable of South Wales* [2015] UKSC 2, [2015] 2 WLR 343.

[2] *Campbell v Peter Gordon Joiners Ltd* [2016] UKSC 38, [2016] 3 WLR 294.

[3] *Montgomery v Lanarkshire Health Board* {2015] UKSC 11, [2015] AC 430.

[4] *Wu v Body Corporate 366611* [2014] NZSC 137, [2015] 1 NZLR 215.

[5] *ParkingEye Ltd v Beavis* [2015] UKSC 67.

[6] *Wagner v Gill* [2014] NZCA 336.

[7] *Starbucks (HK) Ltd v British Sky Broadcasting Group (No 2)* [2015] UKSC 31, [2015] 1 WLR 2682.

[8] *Vidal-Hall v Google Inc* [2015] EWCA Civ 311, [2015] 3 WLR 409.

[9] *Cruddas v Calvert* [2015] EWCA Civ 171.

[10] *Willers v Joyce* [2016] UKSC 43.

[11] *Representative Claimants v MGN Ltd* [2014] NZCA 511, [2015] 2 NZLR 195.

[12] *Zurich Insurance plc UK Branch v International Energy Group Ltd* [2015] UKSC 33, [2015] 2 WLR 1471.

[13] *Bilta (UK) Ltd v Nazir (No 2)* [2015] UKSC 23, [2015] 2 WLR 1168.

[14] *Body Corporate 160361 (Fleetwood Apartments) v BC 2004 Ltd and BC 2009 Ltd* [2014] NZHC 1514, [2014] 3 NZLR 758.

[15] *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95.

The appellant, Carter Holt Harvey Ltd (CHH) manufactured building cladding, known as "Shadowclad", that had been installed in the respondents' schools throughout New Zealand. The respondents alleged that the schools were affected by weathertightness failures and that the problems had arisen because the cladding supplied by CHH was defective. The respondents brought a number of claims against CHH alleging, inter alia, negligence in manufacturing cladding containing inherent defects which caused damage to the buildings on which it was installed, negligence in giving descriptions and making representations about the cladding, and breach of the guarantees of acceptable quality and correspondence with description contained in the Consumer Guarantees Act 1993. Asher J declined CHH's application to strike out,[16] as did the Court of Appeal save in relation to the negligent misstatement claim.[17] CHH applied to the Supreme Court for leave to appeal on the negligence claim, and the respondents sought leave to cross-appeal on the misstatement claim. CHH did not seek leave to appeal as regards the claim under the Consumer Guarantees Act. The Supreme Court granted leave to appeal and to cross-appeal, on the questions whether the Court of Appeal was correct to conclude (i) that the claims in negligence were arguable, (ii) that the claims in negligent misstatement were not arguable, and (iii) that the 10 year limitation period in s 393 of the Building Act 2004 did not apply to the claims against CHH.[18]

Common law claim in negligence

As regards the claims in negligence, O'Regan J, giving the judgment of the Court, accepted the (unchallenged) view of the Court of Appeal that CHH should be taken to have foreseen that its product could lead to the damage that was alleged to have occurred. On the question of proximity, CHH argued, relying primarily on *Rolls Royce NZ Ltd v Carter Holt Harvey Ltd*,[19] that where there was an indirect contractual relationship between plaintiff and defendant, it was generally appropriate for the contracts entered into by the parties to control the allocation of risk. But his O'Regan J noted that the contractual regime in *Rolls-Royce* was specifically designed for the particular project. The parties were legally advised throughout. They chose how the risks and responsibilities would be allocated. His Honour considered that the terms of supply applying between CHH and merchants and between merchants and building contractors were not likely to be seen in the same light as the carefully calibrated contractual regime that applied in *Rolls-Royce*, particularly if they were standard form contracts.[20]

CHH's second proximity argument was that a significant factor in the decisions of the Supreme Court imposing a duty of care on councils in relation to both domestic and commercial leaky buildings was the fact that the Building Act 2004 imposed statutory obligations on councils. That meant that the imposition of a duty of care did not add to the obligations of the councils, but rather supplemented those statutory obligations by providing a regime for a remedy where the council failed to meet the required standards. The absence of this factor in the instant case was said to be a significant difference in relation to those decisions. O'Regan J accepted that CHH was not under any direct

[16] *Minister of Education v Carter Holt Harvey Ltd* [2014] NZHC 681.

[17] *Carter Holt Harvey Ltd v Minister of Education* [2015] NZCA 321.

[18] *Carter Holt Harvey Ltd v Minister of Education* [2015] NZSC 182.

[19] *Rolls Royce NZ Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324

[20] Above n 15 at [20]-[28].

statutory duty under the 2004 Act at the time it supplied its products,[21] but the cladding sheets and cladding system were building elements and building materials to which certain requirements of the building code applied. Even though those requirements were not directly imposed on manufacturers, they defined the standards manufacturers were required to meet in products, so that when they were used in a building the building would be code compliant. The duty of care sought to be imposed on CHH was, arguably, no greater than that of which it would already have been aware because of the building code requirements.[22]

A further question related to the impact of the Consumer Guarantees Act 1993 and the Contracts (Privity) Act 1982, providing special statutory regimes for the benefit of, respectively, consumers of goods and services and third parties to contracts between others. However, O'Regan J did not see the existence of these statutes as precluding liability in tort.[23]

Next, counsel argued on CHH's behalf that the respondents were not "vulnerable" and that this counted against a finding of proximity. Even though the respndents were not protected by contractual rights, they could, it was said, have insisted that the head contractor provided warranties that would have provided protection against the losses for which the respondents now claimed from CHH. However, O'Regan J noted that the refusal of the Supreme Court in *Spencer on Byron*[24] to draw a distinction between vulnerable and non-vulnerable or commercial and non-commercial property owners was on the basis that the question of vulnerability had to be looked at not in relation to the plaintiff in the case at hand but in relation to likely plaintiffs as a class. And in the instant case it was not realistic to expect all those entering into building contracts to protect themselves by contract. There was no other available form of protection, given that the defects in this case were latent defects that had only been able to be identified with specialist assistance. The respondents could not have been expected to know of the defects and to have taken steps to protect themselves against them.[25]

Turning to policy factors, O'Regan J noted that they overlapped substantially with the proximity factors. CHH contended that the major public policy factor against the imposition of a duty of care would be that this would cut across the law of contract, creating commercial uncertainty and making the common law incoherent. And the duty of care sought to be imposed on CHH would provide the respondents with greater legal protection than those who purchased cladding sheets and cladding systems from CHH directly, and who could therefore rely on their contractual rights against CHH. Such an outcome would, it was said, "reduce the common law to incoherence."[26] But O'Regan J

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[21] See now Building Act 2004, s 14G(2), which came into effect on 28 November 2013, providing that a product manufacturer or supplier "is responsible for ensuring that the product will, if installed in accordance with the technical data, plans, specifications, and advice prescribed by the manufacturer, comply with the relevant provisions of the building code".

[22] Above n 15 at [29]-[40].

[23] Above n 15 at [41], [42].

[24] *Body Corporate No 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297 [*Spencer on Byron*]. at [197]-[198].

[25] Above n 15 at [43]-[55].

[26] Citing *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36, (2014) 254 CLR 185 at [69], [132].

agreed with the Court of Appeal that these issues could not be resolved at the strike-out stage. The arguments were not decisive but would need to be explored fully at the trial, once the contractual relationships had been clearly established.[27]

Counsel for CHH also raised argument about the nature of the respondents' claim. This was that the the cladding sheets had not, in any meaningful sense, caused damage to school buildings but had simply failed to perform, with the result that the building was not watertight. This might have led to damage to other parts of the relevant school buildings, which could have implications for the scope of the remedial work required, but did not alter the basic nature of the claim. That claim was that the cladding sheets were not suitable for the purpose for which they were supplied and was a matter for bargaining in contract or taking remedial action. The respondents relied on *Spencer on Byron* in countering this line of argument, it having been held in that case that a building owner might claim for the costs of repairing a defect before it caused damage to property or health. In evaluating this question, O'Regan J said that the Court was given to understand that the claim by the respondents was, for the most part, a claim not only that the cladding sheets were defective, but that they had caused damage to structures. Similarly, the creation of spores from rotting wood had given rise to health risks. It might be that when the facts were fully known, it would become apparent that at least some claims were only in relation to the defectiveness of the cladding sheets themselves, which might give rise to an issue as to whether liability in negligence should arise for what was essentially a "quality issue". But if the defects in the cladding sheets created a health and safety issue, the argument would be confronted by the recognition of health and safety concerns in *Spencer on Byron*. It was not possible to evaluate this in the absence of the facts established at trial.[28]

Finally, as regards the statutory framework, the Court of Appeal saw the applicable statutes, particularly the 2004 Act, as informing the policy assessment, and O'Regan J agreed. Similarly, as had been indicated, statutory obligations in relation to health and safety were important factors. They would need to be evaluated once the full context was clear.[29]

Limitation

CHH further argued that the claim was statute-barred by s 393 of the Building Act 2004, providing for a 10 year long-stop limitation period in respect of civil proceedings relating to "building work". But the Supreme Court thought that the essence of the claim by the respondents was that the cladding sheets were inherently defective, because of their proneness to absorb moisture. The fact that the buildings to which the cladding sheets had been affixed did not comply with the building code, if it was proven to be the case, did not alter the essential nature of the claim which related to

[27] Above n 15 at [59-[61].

[28] Above n 15 at [63]-[68].

[29] Above n 15 at [71]. The respondents argued in addition (i) that CHH owed a separate duty to warn about the potentially harmful qualities or dangerous propensities of its products, and (ii) that CHH had negligently represented that its cladding would meet recognised building standards and the requirements of the building code. O'Regan J thought that it was not clear whether either claim added much to the negligence cause of action, but considered that neither should be struck out. So the respondents' cross appeal on the second point was allowed.

the allegedly defective quality of cladding sheets and the cladding system. The key concept in the definition of building work was that it involved work for the construction of a building. In the instant case the claim related to the acts or omissions of CHH, and CHH did not undertake any work for the construction of a building: rather it supplied a product to a third party which affixed it to a building.[30]

Claim under the Consumer Guarantees Act 1993

In the proceedings before the Court of Appeal[31] the respondents alleged that CHH was in breach of the guarantees of acceptable quality and correspondence with description in the Consumer Guarantees Act 1993[32] which were owed by manufacturers to consumers of their goods.[33] In support of this argument the respondents pointed to the definition of "goods" as including "goods attached to, or incorporated in, any real or personal property (although not a whole building attached to land unless easily removable and not designed for residential accommodation)".[34] But CHH argued that it was not liable as a manufacturer where the goods it supplied were used to produce a different product. It contended that the end-consumer of a product with multiple components could not pursue the manufacturer of each individual component: there was no obligation owed by those manufacturers, because they had not manufactured the relevant good. On this question the Court of Appeal determined that whether liability applied under any one or more of the guarantees would ultimately depend on the nature of the supply of the cladding and cladding systems and the circumstances in which those occurred. These required evidence and careful examination at trial. On the evidence before the court as to the variety of contractual arrangements and circumstances of supply, it was not untenable to propose cladding was supplied in a manner bringing it within the ambit of the 1993 Act and that it constituted a good to which the Act applied. So the claim should not be struck out.

CHH did not appeal from this decision, perhaps because the argument does not appear to be easy to refute. Certainly the Minister of Education and the other building owners acquired the cladding for personal use and not for trade or similar purposes as identified in the definition of "consumer",[35] and on this basis the guarantees in the Act can, in principle, apply.

Evaluation

If the supplier of defective goods is to owe a duty in tort to take care, the content of the obligation must be objectively ascertainable. In building cases the builder's obligation is to comply with the building code. The builder is not liable to a subsequent owner simply for failing to meet any particular terms as to quality in the contract with the original owner. As regards defects in chattels generally, it is likely to be hard to draw this kind of distinction and to hive off mere defects of quality founded on contractual warranties. But there may, perhaps, be a duty in leaky building and similar cases where actual damage is done by defective components to other parts of a building or other property. Even

[30] Above n 15 at [86]-[103].

[31] Above n 17.

[32] Consumer Guarantees Act 1993, ss 6 and 9 respectively.

[33] Consumer Guarantees Act 1993, s 27.

[34] Consumer Guarantees Act 1993, s 2.

[35] Above n 34.

so, looking at the matter broadly, we might question whether there ought to be a tort remedy. As noted, the Supreme Court thought that the existence of statutory remedies under the Consumer Guarantees Act 1993 and the Contracts (Privity) Act 1982 did not preclude liability in tort. As regards the latter statute this certainly seems right: the same argument might be advanced against a duty being owed by a builder, and it is far too late to question a duty in that context. But an argument based on the former statute seems stronger. The Consumer Guarantees Act lays down a "carefully tailored" regime for the protection of consumers of defective goods (adopting the words of counsel for CHH). It gives a right of action covering wasted expenditure and consequential losses against the manufacturer in favour of consumers who buy defective goods. In these circumstances any potentially wider tort action covering commercial claimants could be seen as operating inconsistently with the limits imposed by the legislature on the statutory remedy, which is owed only to "consumers". On this argument, a manufacturer of goods does not owe any common law duty of care with respect to financial loss suffered by a later purchaser of the goods, even where damage is done to other parts of the building. But a manufacturer may still owe duties under the 1993 Act in cases like *Carter Holt Harvey Ltd*, on the basis that the schools are "consumers" and covered accordingly.

If we go back to core principle, and even in light of all the building construction cases, it would still be startling for the courts to uphold a common law tort action by the ultimate purchaser of goods back against the manufacturer. The need for an action is greater in building cases, it is possible in that context to set the requisite standard of care by reference to the building code (as in *Spencer on Byron*), and the action under the Consumer Guarantees Act in the case of defective goods caters for the arguably deserving class of "consumers", but not for all purchasers.

Secondary victims of mental injury

Background

A cause of action often seen as troublesome by common law courts is a claim for mental injury suffered by a secondary victim of an accident, that is, a person who suffers such injury from perceiving or hearing about the death or injury of another or others. A claim of this kind in New Zealand is not compensable under the Accident Compensation Act 2001, so a common law claim by a secondary victim remains available. A key source of the trouble is the difference in view between the House of Lords and the High Court of Australia concerning the requirements for recovery. On the one hand there is the restrictive view taken in *Alcock v Chief Constable of the South Yorkshire Police*,[36] where the House of Lords held that a secondary plaintiff must establish that the defendant should have foreseen psychiatric injury, and also a tie of love and affection with the injured person, proximity to the accident in both time and space and a "sudden" shock as a result of the accident. On the other hand there is the wider view taken in *Tame v New South Wales: Annetts v Australian Stations Pty Ltd*,[37] where the High Court of Australia held that the factual considerations mentioned in *Alcock* might be relevant to assessing reasonable foreseeability, causation and remoteness, but that ultimately the test was simply foreseeability of psychiatric injury. The test to be applied has not

[36] *Alcock v Chief Constable of the South Yorkshire Police* [1992] 1 AC 310 (HL); applied in *Taylor v A Novo Ltd* [2013] EWCA Civ 194, [2014] QB 150.

[37] *Tame v New South Wales: Annetts v Australian Stations Pty Ltd* [2002] HCA 35, (2002) 211 CLR 317.

been finally determined in New Zealand, the Court of Appeal in *van Soest v Residual Health Management Unit*[38] having left the question open.

Australian approach

In *King v Philcox*,[39] a claim by a secondary victim has been considered once again in the High Court of Australia. SP was a passenger in a car driven by GK, the appellant, and was fatally injured in a collision with another vehicle caused by GK's negligence. RP, the respondent, who was SP's brother, heard of the accident a few hours later. He then realised that he had driven past the location of the accident earlier that day while the car in which his brother was trapped and dying was still there. He subsequently developed a major depressive disorder and brought proceedings against GK seeking damages for his mental injury. The claim succeeded before the Full Court of the Supreme Court of South Australia,[40] whereupon GK appealed on two grounds. The first was that he did not owe RP a duty of care, and this is the ground with which we are concerned here.[41]

All members of the Court seemed to agree that a duty of care was owed by GK to RP,[42] although only Nettle J made a specific finding to this effect.[43] His Honour observed that the question whether a duty was owed in particular circumstances fell to be resolved by a process of legal reasoning, by induction and deduction by reference to decided cases and, ultimately, by value judgments of matters of policy and degree. The concept of proximity gave focus to the inquiry, by directing attention towards, and the judicial evaluation of, the features of the relationships between the parties and the factual circumstances of the case. This was not an invitation to engage in "discretionary decision-making in individual cases".[44] Rather, it reflected the reality that it was neither possible nor desirable to state "an ultimate and permanent value"[45] according to which the

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[38] *van Soest v Residual Health Management Unit* [2000] 1 NZLR 179. The Court did, however, accept the "love and affection" requirement from *Alcock*.

[39] *King v Philcox* [2015] HCA 19.

[40] *Philcox v King* (2014) 119 SASR 71.

[41] The case was actually determined on the second ground, which was based on the provisions of the Civil Liability Act 1936, s 53(1) (SA). This provided that damages might only be awarded for mental harm if the injured person (a) "was physically injured in the accident or was present at the scene of the accident when the accident occurred" or (b) was "a parent, spouse or child" of the person killed or injured. Sub-paragraph (a) did not apply, the respondent being the victim's brother. As for sub-paragraph (b), all members of the Court thought that the provision was clear, that the "scene of the accident" was different to the "aftermath", and that since RP was not there "when" the collision occurred he could not recover.

[42] It was not strictly necessary to decide the point in light of their Honours' determination concerning s 53 of the 1936 Act, as explained in the preceding footnote. A further point arose by reason of s 33(1) of that Act, requiring that, for there to be a duty of care, "a person of normal fortitude in the plaintiff's position" might suffer psychiatric illness. This was not a requirement of the common law, as explained in *Tame v New South Wales: Annetts v Australian Stations Pty Ltd* above n 37, but their Honours held that in the circumstances of the case it was not a barrier to a duty being found. Further relevant factors to which a court should have regard are identified in s 33(2), but these simply reflect the position in Australia at common law.

[43] Above n 39 at [75]-[103].

[44] Citing *Sullivan v Moody* [2001] HCA 59, (2001) 207 CLR 562 at [49] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ.

[45] Citing *Vairy v Wyong Shire Council* [2005] HCA 62, (2005) 223 CLR 422 at [67] per Gummow J.

question of when a duty arose in a particular case might be comprehensively answered. And the relevant considerations, applied in the instant case, pointed in favour of the recognition of a duty.[46]

Taking first the threshold inquiry into foreseeability, and approaching the matter as one of common sense and ordinary human experience, his Honour considered that there could surely be little doubt that it was reasonably foreseeable that close relatives of a motor accident victim might be at, or later come to the aftermath of, the accident. While it was perhaps less likely that such a relative might fortuitously stumble upon the aftermath, that did not mean that it was any less reasonably foreseeable that the relative might suffer mental harm. It was beside the point that, in a given case, this might happen in a statistically unlikely manner.

Nettle J proceeded to mention other considerations bearing upon the reasonableness of a duty. They included: whether the mental condition was limited to that in the nature of or resulting from a sudden nervous shock;[47] whether it was limited to mental harm suffered as a result of presence at the scene of the accident or its aftermath;[48] any pre-existing relationships between the defendant and the victim and the defendant and the plaintiff;[49] and the nature of the relationship between the victim and the plaintiff.[50] Further, in terms of deduction, there was little point of principle to distinguish between the instant case and the decision in *Jaensch v Coffey*.[51] In that case a duty was owed to the victim's wife when she later learned of and saw some of the effects of his physical injury. Here the causal proximity between the accident and the harm was comparable if not closer. The relationship between the deceased and the claimant and the ordinary expectation as to ties between siblings made mental injury from the death of a brother just as foreseeable as mental injury to a wife from the death of a husband. It was not unreasonable that a driver should have in contemplation a close relative of the victim, such as a sibling, who might suffer mental harm as a result of what he or she saw or learned of the victim's injuries.

His Honour recognised that reasonableness needed to be judged in light of contemporary social conditions and community standards, to which conceptions of legal responsibility needed constantly to adapt. Yet it was submitted that to recognise a duty to a sibling of a motor accident victim when the sibling did not see or hear the accident and did not until later comprehend that the victim had died would be to go beyond the bounds of proximity repeatedly emphasised in earlier cases. It would place an unreasonable burden on human activity by requiring people to guard against all kinds of psychiatric injury suffered as a consequence of learning, after the event, of the death or serious injury of a relative. However, in his Honour's opinion there were a number of reasons why that submission should be rejected. (i) The respondent did see something of the aftermath of the accident. (ii) Where the relationship between the claimant and the physical victim was close, reasonable foreseeability did not require the same degree of temporal and physical proximity

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[46] In reaching this conclusion his Honour drew upon the judgment of Deane J in *Jaensch v Coffey* [1984] HCA 52, (1984) 155 CLR 549 at 584.

[47] *Tame v New South Wales: Annetts v Australian Stations Pty Ltd* above n 37 at [204]-[213] per Gummow and Kirby JJ.

[48] *Jaensch v Coffey* above n 46.

[49] *Tame v New South Wales: Annetts v Australian Stations Pty Ltd* above n 37 at [3] per Gleeson CJ, [54] per Gaudron J, [144] per McHugh J, [239]-[240] per Gummow and Kirby JJ, [304] per Hayne J.

[50] *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33, (2003) 214 CLR 269, at [47]-[50] per McHugh J.

[51] *Jaensch v Coffey* above n 46.

between the accident and the harm as where the relationship was more remote. (iii) On the facts there was a direct temporal link and a causal relationship between the motor vehicle accident death and the development of the condition. (iv) Judged by contemporary social conditions and community standards of what was reasonable, the sort of psychological injury likely to be suffered by a claimant by reason of being exposed to the aftermath of a motor accident in which his or her sibling had been killed was surely worthy of compensation. (v) There was no relevant distinction between cases in which a duty of care arose because of an employment relationship between the defendant and the victim and a case like the present where the duty arose because of a relationship of driver and passenger between the defendant and the victim. (vi) Where the legislature had enacted restrictions on the scope of liability,[52] it was not apparent why the Court should, as a matter of common law, impose different or additional limitations within the rubric of the duty of care. (vii) To recognise that a motorist in the position of the appellant was under a duty of the kind in question required no more of the motorist to satisfy the duty than the motorist was already bound to do to satisfy his or her duty of reasonable care to his or her passengers. Nettle J held, accordingly, that the appellant owed the respondent a duty to take reasonable care in the driving of his vehicle not to cause the respondent mental harm of the kind he suffered.

Overview

Nettle J's reasoning must surely be recognised as right in principle. Seemingly the same conclusion would be reached even on the *Alcock* approach in the United Kingdom. But the path was made easier in *King* by reason of the High Court of Australia's decision in *Tame* and *Annetts*. Indeed *King* helps reinforce the argument that *Tame* and *Annetts* is the better approach. Whether there is a duty to take care not to cause pure mental harm turns on whether in all the circumstances the defendant should reasonably have foreseen that a person in the position of the plaintiff would sustain a recognisable psychiatric injury. In secondary victim cases, physical and temporal proximity, suddenness and even a close and loving relationship with a physical victim are simply circumstances bearing on reasonable foreseeability. But the absence of one or more should not mandate a decision in favour of the defendant.

Taking this approach admittedly expands the boundaries of liability, but arguably only to a limited extent. The *Alcock* factors remain relevant in determining whether mental injury is foreseeable in the circumstances, and certainly any case where a close relationship between the plaintiff and the physical victim is lacking is unlikely to succeed. Indeed, as observed by Gummow and Kirby JJ in *Tame* and *Annetts*,[53] many of the concerns underlying recovery for psychiatric injury tend to recede if full force is given to the distinction between emotional distress and a recognisable psychiatric illness. Their Honours noted that the requirement of actual injury or illness reduced the scope for indeterminate liability or increased litigation, restricted recovery to those disorders capable of objective determination, and posited a distinction grounded in principle rather than pragmatism that was illuminated by professional medical opinion rather than fixed by purely idiosyncratic judicial perception. A further concern perhaps is increased uncertainty in determining whether an action can lie. But *Alcock* itself has hardly excelled in formulating rules that are certain. The inquiry into physical and temporal proximity, the ambit of the "aftermath" of an accident, the need to show a shock that

[52] In this case, in the Civil Liability Act 1936, s 53(1) (SA); above n 41.

[53] *Tame v New South Wales: Annetts v Australian Stations Pty Ltd* above n 37 at [193]-[194].

is “sudden” all create uncertainty and also lead to arbitrary and unsatisfactory distinctions between broadly similar cases. So the law in both the United and Kingdom and Australia may be somewhat uncertain, but in different respects. The Australian approach at least is grounded in principle and avoids the arbitrariness of many of the decisions in the United Kingdom.

The rule in *Wilkinson v Downton* explained

In the well-known decision in *Wilkinson v Downton*[54] Wright J laid down a form of residuary liability for intentionally inflicted harm that was not a trespass to the person. In this case the defendant, as a “joke”, told the plaintiff that her husband had met with a serious accident and that both his legs were broken. He intended that the plaintiff should believe what he said. The plaintiff did believe him and suffered a violent nervous shock rendering her ill. She could not sue in trespass because the damage was indirect, and at that time the courts had not permitted any recovery in negligence for nervous shock and psychiatric injury. Wright J, however, maintained that the defendant had “wilfully done an act calculated to cause physical harm to the plaintiff — that is to say, to infringe her legal right to personal safety”, and had in fact thereby caused physical harm to her. He thought that that proposition without more stated a good cause of action, there being no justification alleged for the act. And, applied to the facts, he was satisfied that an intention to harm ought to be imputed to the defendant and that the claim should succeed.

Further exploration of *Wilkinson v Downton* in the context of claims for psychiatric injury soon was rendered unnecessary by developments in the law of negligence,[55] with the consequence that the application of the principle has been considered in the courts on few occasions, at least at appellate level. However, there was some, inconclusive, discussion in the decision of the House of Lords in *Wainwright v Home Office*.[56] The claimants had been strip-searched for drugs during a prison visit in circumstances which did not comply with the Prison Rules 1964 (UK). Their claim against the prison service alleged that they had suffered humiliation and depression caused by the search, and one of the questions in issue before their Lordships was whether, pursuant to *Wilkinson v Downton*, they could recover damages for harm falling short of psychiatric injury if there was an intention by the defendants to cause it. Lord Hoffmann recognised that the policy considerations which limited the heads of recoverable damage in negligence did not necessarily apply to torts of intention, but thought that if one was going to draw a principled distinction which justified abandoning the rule that damages for mere distress were not recoverable, imputed intention as in *Wilkinson v Downton* would not do. The defendant must have acted in a way which he knew to be unjustifiable and intended to cause harm or at least acted without caring whether he caused harm or not. And the facts did not support a claim on this basis. The judge made no finding that the prison officers intended to cause distress or realised that they were acting without justification in asking the Wainwrights to strip. Further, even on the basis of a genuine intention to cause distress, Lord Hoffmann reserved his opinion on whether compensation should be recoverable. The harassment legislation[57] showed that Parliament was conscious that it might not be in the public interest to

[54] *Wilkinson v Downton* [1897] 2 QB 57 (QB).

[55] For the developing principles see *Dulieu v White & Sons* [1901] 2 KB 669 (CA); *Hambrook v Stokes Bros* [1925] 1 KB 141(CA); *Bourhill v Young* [1943] AC 92 (HL); *McLoughlin v O’Brian* [1983] 1 AC 410 (HL).

[56] *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406; see Todd, “Torts” [2004] NZ Law Rev 585 at 602.

[57] Protection from Harassment Act 1997 (UK).

allow the law to be set in motion for one boorish incident. His Lordship contemplated that any development in the common law might need to show similar caution.[58]

Elements to the rule

The ambit of *Wilkinson v Downton* has now been considered once again, this time by the UK Supreme Court, in *Rhodes v OPO*.[59] A father proposed to publish a book describing, inter alia, his tormented childhood and, in particular, his suffering of sexual abuse, leading to episodes of mental illness and self-harm. The book was dedicated to his son, who suffered from Asperger's Syndrome and other vulnerabilities. However, he, through his litigation friend, brought proceedings based on *Wilkinson v Downton* to prevent publication, on the ground that it would cause him psychiatric injury and the risk of self-harm should he read it. The Court of Appeal granted an injunction pending trial,[60] but the Supreme Court considered that this decision was unduly far-reaching and unanimously allowed the father's appeal.

Lady Hale and Lord Toulson (Lord Clarke and Lord Wilson agreeing) said that *Wilkinson v Downton* had three elements: a conduct element, a mental element and a consequence element. The conduct element required words or conduct directed towards the claimant for which there was no justification or reasonable excuse. However, in the instant case, there was every justification for the publication. The father had the right to tell the world about his story, and the law placed a very high value on freedom of speech. There was no general law prohibiting the publication of facts which would distress another person. Indeed, it was hard to envisage any case where words which were not deceptive, threatening or (possibly) abusive could be actionable under this tort. The mental element required an intention to cause physical harm or severe mental or emotional distress. Recklessness was not enough. There was no evidence that the father intended to cause harm of this kind to his son, and there was no justification for imputing an intention to cause the harm on the basis of it being foreseeable. Intention was a matter of fact. It might be inferred in an appropriate case from the evidence, but it was not to be imputed as a matter of law. There was no real prospect of establishing either the conduct element or the mental element of the tort. The consequence element was physical harm or recognised psychiatric injury, and this was common ground and not in issue. Lord Hoffmann in *Wainwright* had left open whether intentional causation of severe distress might be actionable, but in the instant case no-one had suggested that the question be reopened.

Need for the rule

It is reasonably clear that there was no room for the application of the *Wilkinson v Downton* rule on the particular facts of the case. The conclusion that the publication should be seen as justified in light of the implications of the contrary view on freedom of speech seems unassailable. Nor can we quibble with their Lordships' strictures about the concept of imputed intention, and it seems patent from the facts that the father had no actual intention to cause harm. Indeed, now that its elements have been authoritatively spelled out, we might ask whether we actually need the rule any more.

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[58] Above n 56 at [44]-[46]. Lord Scott, expressing full agreement with Lord Hoffmann, was satisfied that the infliction of humiliation and distress by conduct calculated to humiliate and cause distress was not without more, and should not be, tortious at common law: above n 56 at [62].

[59] *Rhodes v OPO* [2015] UKSC 32, [2016] AC 219.

[60] *OPO v MLA* [2014] EWCA Civ 1277

Lady Hale and Lord Toulson remarked that negligence and intent were very different fault elements, and there were principled reasons for differentiating between the bases (and possible extent) of liability for causing personal injury in either case. So their Lordships obviously think that we do. However, let us consider whether the circumstances in which *Wilkinson v Downton* may provide a remedy are better or more conveniently covered by other torts.

First, the conduct element is said to be unjustified words or conduct which is directed towards the claimant. In cases where conduct of this kind is intentional and causes physical harm or recognised psychiatric injury, are there any circumstances where a claim in either negligence or trespass would not lie? Lady Hale and Lord Toulson suggested that threatening or, possibly, abusive words could be actionable, yet surely there would be a claim for assault or battery where the harm was directly inflicted, and any doubt about a negligence claim would likely turn on whether the other two elements were satisfied. So let us turn to the mental element to the tort.

Wilkinson v Downton is a general tort aimed at intentional harm falling outside the ambit of trespass, because the harm is not directly inflicted. As with the tort of negligence, its origins lie in the old action upon the case. It was decided before the modern expansion of negligence, starting with *Donoghue v Stevenson*, was under way and, in particular, before the development of negligence principles governing liability for mental injury. But now negligence *has* developed, we must ask what role remains for a tort of intention. One might think that if the circumstances of a claim would satisfy the requirements for liability in negligence, a court would hardly reject the claim because the conduct concerned was intentional. In *Paterson Zochonis & Co Ltd v Merfaken Packaging Ltd*[61] Goff LJ said that the action for negligence lies not only for carelessness but for intentional conduct. Certainly it would be bizarre if a wrongdoer guilty of intentionally causing harm was in some way better off than a wrongdoer guilty of mere negligence. And there is no real difficulty of principle. If you deliberately run someone over, you certainly fall below the standard required by the law of negligence.

Perhaps, however, the rule in *Wilkinson v Downton*, now affirmed as a tort requiring intentional wrongdoing, can be seen to have symbolic value. From the point of view of a plaintiff, establishing that a defendant intended to cause harm may matter a lot. A pertinent illustration is the decision of the House of Lords in *Ashley v Chief Constable of Sussex Police*.[62] In this case a naked and unarmed occupier was shot and killed by a police officer during a drugs raid on his flat. The deceased's father and son brought actions as dependants and for the benefit of the deceased's estate, seeking damages for, inter alia, assault and battery, false imprisonment and negligence. The defendant Chief Constable admitted liability for false imprisonment and negligence and agreed to pay full compensatory damages, but refused to admit liability for assault and battery. The question was whether the relatives' claim raised a live issue and should be allowed to proceed, and their Lordships held by a majority (Lord Bingham, Lord Scott and Lord Rodger) that the claim could still properly be maintained for a vindicatory purpose even though there was no dispute about compensation.

If the rule in *Wilkinson v Downton* is to have value for this purpose, it might be desirable to rename it. Calling it a tort of intentional infliction of harm would be simple and to the point.

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[61] *Paterson Zochonis & Co Ltd v Merfaken Packaging Ltd* [1986] 3 All ER 522 at 541.

[62] *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25, [2008] 1 AC 962.

The possibility remains that *Wilkinson v Downton* could apply where negligence could not if the requirement of damage were held to be different and less exacting. So let us turn now to the third element of the tort. In *Rhodes* neither party disputed that the consequence element was physical harm or recognised psychiatric injury, and as regards the latter, of course, this also is the rule in negligence.[63] But maybe there ought to be scope for a wider rule allowing recovery for intentionally inflicted mental harm falling short of actual psychiatric injury. The point is of particular consequence in New Zealand, where the Accident Compensation Act 2001 usually will apply in the case of personal injury, but often it will not in the case of a psychiatric injury amounting to a clinically significant behavioural, cognitive or psychological dysfunction,[64] and it will not at all in the case of mental harm falling short of that state or condition. A tort of intentional infliction of emotional distress is well established in the United States,[65] and neither *Wainwright* nor *Rhodes* categorically rules out such a development. So does good policy support the introduction of a cause of action of this kind in New Zealand? Possibly, but the question whether the Harassment Act 1997 should be seen as intended to cover the ground would need to be brought into account. This might suggest that a single instance of harassing or similar conduct causing emotional harm ought not to be actionable. The argument would be a little stronger in New Zealand than in England, for the New Zealand Act, unlike that in England, allows only for a restraining order for a civil litigant and does not provide for damages. But the question whether emotional upset standing alone should in any event justify a tort claim remains to be determined in light of the objections noted in *Wainwright*.

There is one particular type of claim involving such loss which very arguably ought to be supported, but whether this should be by virtue of the rule in *Wilkinson v Downton* is another question. An alternative argument in *Wainwright* was that the wrongful strip search was actionable as an invasion of the claimants' privacy. This was accepted by the trial judge, but in the Court of Appeal it was held that requiring the claimants to remove their clothes without any bodily contact did not constitute trespass, and apart from one instance involving a touching of the second claimant, which was conceded to be a battery, the prisoner officers had committed no wrongful acts. On the claimants' further appeal the House of Lords declined to create a "high level" principle of privacy as giving rise to a right of action. Lord Hoffmann said that there was a critical difference between privacy as a value that underlay the existence of a rule of law, which might indicate the direction in which the law should develop, and privacy as a principle of law in itself. In the instant case, the strip searches about which the plaintiffs complained could not be actionable on the latter, essentially indeterminate, basis. Rather, a remedy, if any, had to be found in existing and accepted principles of law, guided by privacy as an important underlying value.

It is apparent that *Rhodes* also raised a privacy issue, but of a different nature to that which is normally the subject of a claim. The action failed because of its potential impact on freedom of speech and because the father did not intend to cause harm, but it remains possible that the rule in *Wilkinson v Downton* could provide a cause of action in respect of deliberate and unjustified conduct

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[63] *McLoughlin v O'Brian* [1983] 1 AC 410 (HL) at 418; *van Soest v Residual Health Management Unit* [2000] 1 NZLR 179 (CA) at 197–199; *Tame v New South Wales*; *Annetts v Australian Stations Pty Ltd* [2002] HCA 35, (2002) 211 CLR 317 at [7] and [192]–[194]; *Odhavji Estate v Woodhouse* 2003 SCC 69, [2003] 3 SCR 263 at [41].

[64] Accident Compensation Act 200, s 27. For the circumstances where there is cover for such injury, see Todd *The Law of Torts in New Zealand* Thomson Reuters, Wellington, 7th ed 2016, at [2.4.03].

[65] Dobbs, *The Law of Torts* West Group, St Paul (Minn), 2000, at [303]-[307].

intruding upon another person's peace of mind, solitude or seclusion. However, once again the consequence element would have to be relaxed, and it is not in any event clear that there is any need, or that it would be desirable, for *Wilkinson v Downton* to develop in this direction. The kind of debate that is needed today very arguably needs to focus on whether we should recognise a free-standing tort of intrusion upon seclusion and whether we can set principled limits to the ambit of any such tort. In *Wainwright* the House of Lords clearly thought that the answer to both questions should be no, but in *C v Holland*[66] we have recognition by Whata J of the existence in New Zealand of this new tort. It goes to the heart of the notion of privacy, because it requires us to consider closely the circumstances in which one has the legal right to be left alone. This is the core question in issue, and it needs to be resolved specifically by determination of the proper ambit of a privacy tort.[67]

Remoteness of damage in tort and in contract

Back in 1973, in *McLaren Maycroft & Co v Fletcher Development Co Ltd*,[68] the Court of Appeal held, applying then existing UK authority,[69] that a contracting party who acted carelessly and in breach of an express or implied contractual duty to take care had to rest content with his or her contractual rights, and could not seek to rely on an alternative claim in tort. But subsequently, in *Henderson v Merrett Syndicates Ltd*,[70] the House of Lords abandoned the rule. Lord Goff observed that the common law was not antipathetic to concurrent liability and that there was no sound basis for a rule that automatically restricted the claimant to either a tortious or a contractual remedy. *McLaren Maycroft* could hardly have survived for long in the light of this development. After expressing doubt about it on several occasions, the Court of Appeal eventually accepted, in three decisions, that it should not be followed and that a contracting party should no longer be confined to suing the other party in contract when a concurrent cause of action was available in negligence.[71] This change in the law was indeed bound to happen. The contract only rule was both unprincipled and outmoded.

Test for determining the remoteness issue

The tort/contract question has now resurfaced, in the context of the choice between the negligence and the contract tests for determining whether the damage about which a plaintiff complains is too remote. In tort, Viscount Simonds laid down in *The Wagon Mound (no 1)*[72] that the test is whether the kind of harm suffered by the plaintiff was reasonably foreseeable, and Lord Reid in *The Wagon Mound (no 2)*[73] held that a foreseeable risk of harm was a "real risk", being "one which would occur to the mind of a reasonable man in the position of [the defendant] and which he would not brush aside as

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[66] *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672.

[67] For a detailed discussion see Todd, "Tortious Intrusions upon Solitude and Seclusion – A Report from New Zealand" (2015) 27 S Ac LJ 731.

[68] *McLaren Maycroft & Co v Fletcher Development Co Ltd* [1973] 2 NZLR 100 (CA).

[69] *Bagot v Stevens Scanlan & Co* [1966] 1 QB 197 (CA) at 204.

[70] *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL).

[71] *Riddell v Porteous* [1999] 1 NZLR 1 (CA) at 9; *Allison v KPMG Peat Marwick* [2000] 1 NZLR 560 (CA) at 582; *Price Waterhouse v Kwan* [2000] 3 NZLR 39 (CA) at 44.

[72] *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* [1961] AC 388 (PC) (*The Wagon Mound (No 1)*).

[73] *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd* [1967] 1 AC 617 (PC) (*The Wagon Mound (No 2)*), at 643.

far-fetched". In contract, Alderson B in *Hadley v Baxendale*[74] maintained that the damages which the other party ought to receive should be such as might fairly and reasonably be considered either arising naturally, ie, according to the usual course of things, from the breach of contract, or such as might reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach.[75]

Applying the contract test as a rule of law

It is apparent that the tort test of reasonable foreseeability is wider than the contract test based on the contemplation of the parties. So can a contracting party seeking damages rely on the tort test in circumstances where the other party is liable under both heads? In *Wellesley Partners LLP v Withers LLP*[76] the Court of Appeal in England thought not and held that the contractual rule should apply. Floyd LJ said that where contractual and tortious duties to take care in carrying out instructions existed side by side, the test for recoverability of damage for economic loss should be the same, and should be the contractual one. The basis for the formulation of the remoteness test adopted in contract was that the parties had the opportunity to draw special circumstances to each other's attention at the time of formation of the contract. So there existed the opportunity for consensus between the parties as to the type of damage (both in terms of its likelihood and type) for which it would be able to hold the other responsible. The parties were assumed to be contracting on the basis that liability would be confined to damage of the kind which was in their reasonable contemplation. It made no sense at all for the existence of the concurrent duty in tort to upset this consensus, particularly given that the tortious duty arose out of the same assumption of responsibility as existed under the contract.[77] Roth J, reaching the same conclusion, also inclined to the view that even where liability arose only in tort, if there was a relationship "equivalent to contract" under the *Hedley Byrne* rule[78] then the contractual test should apply.[79]

What we should make of *Wellesley* arguably depends on whether an "assumption of responsibility" really is the basis for the tort duty. In *Attorney-General v Carter* [80] Tipping J recognised a difficulty with the concept of an assumption of responsibility, which suggested a voluntary act. In tort obligations were imposed, not assumed as they were in contract. But he considered that the expression "deemed assumption of responsibility" had value and was conceptually consistent with the conventional difference between tort and contract. His Honour observed that in some relatively rare cases the defendant's assumption of responsibility was voluntary, in that the defendant was found to have undertaken to exercise reasonable care. In such circumstances it was both reasonable and foreseeable that the plaintiff would rely on the undertaking. But in most cases there would be no voluntary

[74] *Hadley v Baxendale* (1854) 9 Exch 341 at 354.

[75] See also *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, [2009] 1 AC 61, where Lord Hoffmann and Lord Hope considered that the *Hadley v Baxendale* rule represented only a prima facie assumption about what the parties might be taken to have intended, and this could be rebutted in cases in which the context and circumstances showed that a party would not reasonably have been regarded as assuming responsibility for the loss in question

[76] *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146, [2016] 2 WLR 1351.

[77] Above n 76 at [80].

[78] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL).

[79] Above n 76 at [112].

[80] *Attorney-General v Carter* [2003] 2 NZLR 160 at [22]-[32].

assumption of responsibility. The law would, however, deem the defendant to have assumed responsibility and find proximity accordingly if, when making the statement in question, the defendant foresaw or ought to have foreseen that the plaintiff would reasonably place reliance on what was said. This would depend on the purpose for which the statement was made and the purpose for which the plaintiff relied on it.

Something similar was said by Lord Bingham in the House of Lords in *Customs and Excise Commissioners v Barclays Bank plc*.[81] His Lordship maintained that the test of assumption of responsibility was to be applied objectively: it was not answered by consideration of what the defendant thought or intended. Yet the further it was removed from the actions and intentions of the actual defendant, the more notional the assumption of responsibility became and the less difference there was from the threefold test of *Caparo Industries plc v Dickman*.[82]

There was general agreement in *Barclays Bank* that the notion of an assumption of responsibility could be of some help in a *Hedley Byrne* action, where the plaintiff sues in respect of his or her reliance on a defendant's negligent statement, but that the concept could not be used as a general touchstone for liability in negligence for financial loss. But even in a *Hedley Byrne* context it is difficult to understand what it means beyond the defendant having chosen to speak without disclaiming responsibility, as contemplated by Lord Reid.[83] And having spoken, the defendant's duty ultimately rests on a close relationship with the plaintiff founded on the advice being given for a purpose known to the defendant, with the intention that it be used for that purpose by the defendant or a class of persons including the defendant, and likely to be acted on without independent inquiry.[84] Defendants frequently can "assume responsibility" in this sense, by speaking or acting in such a way as to take on responsibility towards a sufficiently proximate plaintiff or group of plaintiffs. Well known examples are *Home Office v Dorset Yacht Co Ltd*,[85] where the UK Prison service assumed responsibility to persons in the vicinity of its escaping borstal trainees, and *Couch v Attorney-General*,[86] where the probation service arguably assumed responsibility to persons at special risk of violence by a criminal on parole.

If a tort duty arises on this kind of basis then tort rules should apply to it. And if a defendant is indeed concurrently liable in contract then, in principle, the plaintiff can choose that cause of action which is the more advantageous. That is the normal rule, and it is hard to see why it should not apply. But maybe, where the parties are dealing with each other and can make provision for damages issues, the defendant may be able to rely on an implied limit on the recoverable damages for breach of duty, by pointing to the contract rules and any apparent intention of the parties that they should apply. Whether expressly or impliedly, they may have chosen by contract to limit the damages, which, in principle, they are free to do.

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[81] *Customs and Excise Commissioners v Barclays Bank plc* [2006] UKHL 28, [2007] 1 AC 181.

[82] *Caparo Industries plc v Dickman.* [1990] 2 AC 605 (HL).

[83] Above n 78 at 486.

[84] *Caparo Industries plc v Dickman.* [1990] 2 AC 605 (HL), at 638; *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 (*The Grange*), at [189].

[85] *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL).

[86] *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725.

Application of the *ex turpi causa* principle

Negligence by the plaintiff is a ground for apportioning the loss between plaintiff and defendant. Misconduct by the plaintiff of greater turpitude may mean that the claim fails altogether. In certain ill-defined circumstances the maxim *ex turpi causa non oritur actio* (no right of action arises from a shameful cause) may be said to apply. However, expressed a little emotively, in cases where the courts invoke the maxim the effect is to make the plaintiff an outlaw. The courts will not assist the plaintiff in upholding the claim or in granting the remedies which normally would be available. So they need to be very careful before holding that a claim is barred on this basis.

Justifications for the principle

In *Gray v Thames Trains Ltd*[87] Lord Hoffmann recognised that the maxim expressed not so much a principle as a policy, and also that that policy was not based upon a single justification but on a group of reasons, which varied in different situations. There are in fact at least nine justifications to be found in the cases, so let us review what they are.

First, there is a reliance test, so a plaintiff who needs to rely on his or her own illegal conduct is barred. Second, illegal conduct by the plaintiff has been seen as going to the question whether in the circumstances the defendant owes the plaintiff a duty to take care. Third, assuming a duty, courts may hold that they cannot lay down an appropriate standard of care. Fourth, it is said that the statutory purpose of legislation proscribing the plaintiff's conduct may bar recovery. Fifth, the plaintiff's illegality may be a bar to his or her claim where its recognition would lead to inconsistency with other principles of law. Sixth, the illegality may bear upon a determination as to the cause of the plaintiff's loss. Seventh, the plaintiff's claim may be seen as "closely connected" or "inextricably linked" with his or her criminal behaviour. Eighth, the turpitude of the plaintiff's conduct may be such as to raise a bar on him or her recovering damages. And finally, the courts may embark upon a policy analysis, balancing the policy involved in allowing the claim with that involved in denying it.

Let us see how these justifications might apply in the classic case of the two safebreakers put forward in *National Coal Board v England*.[88] Lord Asquith said in that case that if two burglars, A and B, agreed to open a safe by means of explosives, and A so negligently handled the explosive charge as to injure B, B might find some difficulty in maintaining an action against A. Why this might be so? Perhaps A owes B no duty to take care or it cannot be determined whether A is in breach of any duty. But we need a reason for denying a duty or a breach of duty beyond the bald assertion that A was engaged in criminal activity, which simply shifts the question to the other possible justifications. Maybe an action by B is contrary to the intent of the statute creating the criminal offence of which he is guilty. Here the argument may lack any sound basis in reality. Almost certainly there will be no express provision to the effect that a person guilty of the offence in question should be denied any civil redress against another person that might otherwise be available. A court will indeed need to infer a statutory intention that may not exist in fact. Perhaps B's claim can be seen as inconsistent with him having committed a breach of the criminal law. Yet B is not claiming to be compensated in respect of a criminal penalty nor relying on his own criminality. He is seeking a compensatory remedy in respect of A's negligence. A more plausible argument may be that B's criminal behaviour is the cause of his

[87] *Gray v Thames Trains Ltd* [2009] UKHL 33, [2009] 1 AC 1339 at [30].

[88] *National Coal Board v England* [1954] AC 403 at 429; and see *Hounga v Allen* [2014] UKSC 47, [2014] 1 WLR 2889 per Lord Hughes at [57].

injury. This is possible, depending on whether the criminal enterprise can be seen as giving rise to a special or increased risk of harm from the handling of explosives, or whether that handling can be recognised as tortious and actionable independently of the commission of the offence. However, even assuming A's conduct *is* a cause, this does not mean that B's conduct is not. They both may be. An associated contention is that B's conduct is "inextricably linked" with that of A, which is more a conclusion than an argument and tells us little about what actually counts in reaching that conclusion. Next, it may be contended that B suffered an injury in the course of criminal conduct which was of such seriousness that a court should not be seen as condoning the conduct by granting a remedy. This question can be seen to have some traction in determining B's claim. Finally, a different approach is to balance the policy which founds the defence with any other policy running counter to it. It is not immediately obvious how this approach should be applied to B's claim, and in any event the argument seems contrary to principle.[89]

Let us consider in more detail some key arguments and see where they take us.

Consistency with other principles of law

First, there is the need for consistency between the award of a tort remedy and other areas of law, and in particular the criminal law. In *Gray v Thames Trains Ltd* the plaintiff suffered major psychological harm and post-traumatic stress disorder after being involved in a train accident caused by the defendant's negligence. However, before his claim against the defendant had been resolved, he stabbed a drunken stranger to death after having been annoyed by him, and was ordered to be detained in a mental hospital after pleading guilty to manslaughter on the grounds of diminished responsibility. The defendants argued that they were not liable for loss of earnings after the date of the killing, on the basis that the plaintiff's imprisonment was the consequence of his own criminal conduct. The argument was rejected in the Court of Appeal,[90] where Sir Anthony Clarke MR thought that damages might be recoverable in respect of tortious acts resulting in a law-abiding citizen becoming a criminal. But the decision was reversed on appeal to the House of Lords.[91] Lord Hoffmann referred to a special rule of public policy saying, in its wider form, that you cannot recover for loss which you have suffered in consequence of your own criminal act, and in its narrower form, 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. Here, applying the narrower rule, it was the criminal 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.

The objection to the view of the Court of Appeal is that tort comes to play the criminal law's conscience. The criminal conviction is premised on the offender's free will, and awarding damages in respect of its consequences jeopardises the relationship between the criminal and the civil law by subverting the objects of the criminal law. So, to generalise a little, a claim ought to be dismissed if it seeks to make a profit from illegal conduct, or is in respect of a liability to pay exemplary damages, or amounts to an evasion or rebate of a criminal penalty.[92] But while the inconsistency argument is a convincing one, it gives a reasonably clear answer only on Lord Hoffmann's narrow view. In its wider

[89] See below

[90] *Gray v Thames Trains Ltd* [2008] EWCA Civ 713, [2009] 2 WLR 351 at [49].

[91] *Gray v Thames Trains Ltd* [2009] UKHL 33, [2009] 1 AC 1339 at [51].

[92] *Hall v Hebert* [1993] 2 SCR 159 at 177, per McLachlin CJ.

form the question remains as to what precisely it means to say that "you cannot recover for loss which you have suffered in consequence of your own criminal act".

The cause of the harm

It is clear that the question whether a plaintiff's own wrongdoing was a cause cannot provide us with a single test for determining whether a claim should succeed or should be rejected. But this does not mean that a causal test is never of any help. The courts quite frequently ask, in one way or another, whether the wrongful conduct caused or was sufficiently connected with the harm suffered by the plaintiff. In making this kind of inquiry they are seeking to draw the familiar distinction between causing a loss and providing the opportunity for it to happen. In the present context, then, the question is whether the injury was truly a consequence of the plaintiff's unlawful act, in that both claimant and defendant were involved in the criminal enterprise and the injury was part of the risk engendered by that enterprise, or whether it was incidental to the unlawful act and a consequence of it only in the sense that it would not have happened if the plaintiff had not been committing that act. *Joyce v O'Brien*[93] is an example of the former case and *Delaney v Pickett*[94] of the latter.

A causal inquiry may be relevant, and helpful. But it need not follow from a conclusion that a plaintiff's illegal conduct was a cause of his or her injury that the defendant's conduct was *not* a cause. Indeed, if both the plaintiff and the defendant have caused the injury, then the principles of contributory negligence can come into play. The decision of the Court of Appeal of England and Wales in *McCracken v Smith*[95] needs to be considered in this light. The plaintiff (M) was travelling as a pillion passenger on a trials bike, which was not designed for passengers, being ridden by the first defendant (S) at speed, on a path reserved for cyclists, and without a driving licence or insurance. Both plaintiff and defendant were injured in a collision with a minibus being driven by the third defendant (B). After examining the authorities, Richards LJ[96] was satisfied that the court should follow the statement of principle formulated by Elias LJ in *Joyce v O'Brien*,[97] where his Lordship said:

> 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.

Richards LJ was satisfied that applying the principle to M's claim against S should lead to a denial of recovery. Since there was a joint enterprise between M and S to ride the bike dangerously, and the increased risk of harm as a consequence of such riding was plainly foreseeable, M's injury could properly be said to have been caused by his own criminal conduct even though it resulted from the negligent act of S. Another way of expressing the point was that although as a matter of fact the

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[93] *Joyce v O'Brien* [2014] 1 WLR 70 (claimant trying to hang on to stolen goods at the back of a van and falling off while defendant driver was seeking to make speedy escape from the scene of the crime).

[94] *Delaney v Pickett* [2012] 1 WLR 2149 (negligent driving of dealer while transporting drugs with the view to selling them injuring his passenger and partner in crime).

[95] *McCracken v Smith* [2015] EWCA Civ 380.

[96] Underhill and Christopher Clarke LJJ both agreeing.

[97] Above n 93 at [29].

negligent act was that of S, M was jointly responsible in law for it and he could not bring a claim in respect of his own negligent act. However, it by no means followed that the same conclusion applied to M's claim against B. Since M was jointly responsible for the dangerous driving, he was in the same position as S, the actual rider of the bike, as regards a claim in negligence against B. The question in each case was whether the fact that the bike was being ridden dangerously provided a defence to the claim. Applying a causation analysis, the accident had two causes, properly so called – the dangerous driving of the bike and the negligent driving of the minibus – and it would be wrong to treat one as the mere "occasion" and the other as the true "cause". M's injury was the consequence of both, not just of his own criminal conduct and not just of B's negligence. The fact that the criminal conduct was one of the two causes was not a sufficient basis for the *ex turpi causa* defence to succeed, and cases involving a claim by one party to a criminal joint enterprise against another party to that joint enterprise were materially different. The right approach was to give effect to both causes by allowing M to claim in negligence against B, but reducing any recoverable damages in accordance with the principles of contributory negligence so as to reflect M's own fault and responsibility for the accident.[98]

There can be little doubt that the Court of Appeal was right in treating M's claim against B simply as involving contributory negligence. It is commonplace for drivers guilty of road traffic offences to sue each other, without any mention of the *ex turpi causa* principle. Further, as regards M's claim against S, the conduct involved was exactly the same as in the claim against B, yet here it was held that *ex turpi causa* applied. But one may wonder whether this is right. There is no difference as regards M's conduct or turpitude. Indeed, a similar issue could arise in the case of joint negligence without any criminal overlay. Nor is there a difference as regards the causal impact of M's conduct. The true issue seems to be whether a party to a joint venture can sue another party in respect of conduct for which they are both responsible. The orthodox answer is no. As was recognised by Richards LJ, M could not sue in respect of his own act. But it is worth asking whether this must always be so. An action between joint tortfeasors certainly is a novel concept, but in a case like *McCracken* there is something to be said for allowing the claim, by a severance of the unity of the conduct and by invoking the principles of contributory negligence.

Plaintiff's turpitude

Next, let us consider the relevance of the plaintiff's turpitude. In *Gray v Thames Trains* Lord Hoffmann asked whether it would be "offensive to public notions of the fair distribution of resources that a claimant should be compensated (usually out of public funds) for the consequences of his own criminal conduct".[99] In *Hounga v Allen* Lord Hughes referred to the need to consider the gravity of the illegality of which the claimant was guilty and her knowledge or intention in relation to it.[100] There are, indeed, many judicial references to the question whether the plaintiff's illegal conduct is of such moral turpitude as to require recovery to be denied on the grounds of public policy.

Objection may be taken to a "sufficient moral turpitude" test on the grounds that its content cannot be ascertained with any degree of precision, that the application of the defence is rendered highly

[98] Above n 95 at [47]-[52].

[99] Above n 91 at [51].

[100] Above n 88 at [55].

uncertain and that all depends ultimately on an ad hoc value judgment of the court concerned. In *Les Laboratoires Servier v Apotex Inc*[101] Lord Sumption, delivering a majority opinion in the UK Supreme Court (Lord Neuberger and Lord Clarke agreeing, Lord Mance concurring, Lord Toulson concurring in the result but not the reasoning), sought to meet the difficulty by defining "turpitude" as meaning acts which engaged the interests of the state or, to put it another way, the public interest, irrespective of the interests or rights of the parties. The paradigm case was a criminal act. In addition, the rule was concerned with a limited category of acts which, while not necessarily criminal, could conveniently be called "quasi-criminal" because they engaged the public interest in the same way. Leaving aside the special case of contracts prohibited by law, which could give rise to no enforceable rights, the category included cases of dishonesty or corruption, some anomalous categories of misconduct, such as prostitution, and the infringement of statutory rules enacted for the protection of the public interest and attracting civil sanctions of a penal character. Torts (other than those of which dishonesty was an essential element), breaches of contract, statutory and other civil wrongs, offended against interests which were essentially private, not public. There was no reason in such cases for the law to withhold its ordinary remedies.[102] So in the instant case, involving the sale of a drug in England in breach of the claimant's patent rights in Canada, the illegality defence was not engaged.[103]

In some cases, of which Lord Asquith's instance of the two safebreakers may be an example, it is difficult for the courts to avoid making a judgment about the degree of turpitude involved in the plaintiff's conduct. Lord Sumption's words in *Apotex* are helpful to some degree, but they do not resolve the problem of uncertainty. His Lordship recognised that there might be exceptional cases where even criminal and quasi-criminal acts would not constitute turpitude, noting that some offences might be too trivial to engage the defence. But what is "trivial" may be very much a matter of dispute. Seemingly it will be necessary to take into account factors such as the nature and gravity of the defendant's conduct and the penalty involved. So in looking to the public interest we have, perhaps, a clearer focus for the inquiry, but a judgment about the degree of turpitude involved still must be made.

Proportionality

In *Hounga v Allen*[104] the appellant (H), when aged about 14, came from Nigeria to the United Kingdom under fraudulent arrangements made by the family of the respondent (A) in which H knowingly participated. H then worked for A, in the circumstances unlawfully, for about 18 months before being dismissed and evicted from A's house. H brought an action complaining, inter alia, of unlawful discrimination relating to her employment, and her claim was taken all the way to the UK Supreme Court on the question whether it was barred by reason of the *ex turpi causa* rule.

Lord Wilson, giving the majority view (Baroness Hale and Lord Kerr agreeing), adopted a new approach to the illegality question, by seeking to balance relevant policy concerns.[105] His Lordship recognised that the defence of illegality rested on the foundation of public policy, and said that it was necessary,

[101] *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55, [2015] AC 430.

[102] Above n 101 at [23]-[29].

[103] Above n 101 at [30].

[104] Above n 88.

[105] Above n 88 at [42].

first, to ask "What is the aspect of public policy which founds the defence?" and, second, to ask "But is there another aspect of public policy to which application of the defence would run counter?" As regards the first question, his Lordship saw a concern to preserve the integrity of the legal system as a helpful rationale. Here an award of compensation to the claimant (H) did not allow her to profit from her fraud or permit evasion of a criminal penalty. It was an award of compensation for injury to her feelings consequent upon her dismissal. The considerations of public policy which militated in favour of applying the defence so as to defeat H's complaint scarcely existed.[106] As regards the second question, his Lordship thought that A either was guilty of "trafficking" in bringing H from Nigeria to the United Kingdom and into her home, or her conduct was so close to it that the distinction would not matter for the purpose of determining H's claim. By the 2005 Council of Europe Convention on Action against Trafficking in Human Beings, which had been ratified by the United Kingdom, each party was obliged to provide in its internal law for the right of victims to compensation from the perpetrators. In his Lordship's opinion, it would be a breach of the United Kingdom's international obligations for its law to cause H's complaint to be defeated by the defence of illegality. The public policy in support of the application of that defence, to the extent that it existed at all, should give way to the public policy to which its application was an affront.[107]

Lord Hughes (Lord Carnwath agreeing) did not accept this reasoning, saying that the cases did not establish a separate trumping test of public policy. When a court was considering whether illegality barred a civil claim, it was essentially focusing on the position of the claimant vis-à-vis the court from which she sought relief. It was not primarily focusing on the relative merits of the claimant and the defendant. It was in the nature of illegality that, when it succeeded as a bar to a claim, the defendant was the unworthy beneficiary of an undeserved windfall. But this was not because the defendant had the merits on his side; it was because the law could not support the claimant's claim to relief.[108] In the case of human trafficking the internationally recognised rule was clear: the trafficked victim was not relieved of criminal liability for an offence which she had committed. If, however, she was compelled to commit it as a direct consequence of being trafficked, careful consideration had to be given to whether it was in the public interest to prosecute her. In the instant case H no doubt was under the influence of A, and that would constitute very real mitigation if punishment were in question. But what the trafficking did not do was take away the illegality of what H knowingly did.[109]

The approach of the majority in this case appears to be inconsistent with that taken shortly afterwards in the *Apotex* decision by a different Supreme Court bench,[110] leaving the law in a state of some confusion. Then, in *Patel v Mirza*,[111] the Supreme Court revisited the question and resolved the conflict

[106] Above n 88 at [43]-[45].

[107] Above n 88 at [46]-[52].

[108] Above n 88 at [55]-[[56].

[109] Above n 88 at [64].

[110] Above n 101. The split of opinion is manifested in *Bilta (UK) Ltd v Nazir (No 2)* [2015] UKSC 23, [2015] 2 WLR 1168. Lord Sumption held here that the *ex turpi* defence would arise automatically whenever the claimant engaged in illegal activity, relying on his own judgment in *Apotex*, whereas Lord Hodge and Lord Toulson thought that a judge would have to make an assessment of all the circumstances, relying on Lord Wilson's judgment in *Hounga*.

[111] *Patel v Mirza* [2016] UKSC 42, [2016] 3 WLR 399.

broadly in accordance with the majority view in *Hounga*. Although determined as a claim in restitution, the decision certainly will now control claims in tort, at least in the UK.

The facts of the case were simple. The plaintiff (P) paid £620,000 to the defendant (M) for the purposes of an illegal agreement for insider dealing in shares in the Royal Bank of Scotland. In the event, the agreement could not be and was not carried out, because the expected inside information was not forthcoming. P sued for the return of the money, and the question for the Supreme Court (once again) was whether the claim was barred by the *ex turpi causa* rule, on the basis that P had conspired to engage in insider trading. A bench of nine justices was assembled, and in the result all agreed that P could recover his money. However, their Lordships did not agree on the reasoning leading to that conclusion.

Lord Toulson, (with who Lady Hale, Lord Kerr, Lord Wilson and Lord Hodge agreed), recognised that the law was at a crossroads, and that the choice for the Court lay between a rule-based and a "range of factors" approach – between *ex turpi causa non oritur actio* ('no action arises from a disgraceful cause') and *in pari delicto potior est conditio defendentis* ('where both parties are equally in the wrong the position of the defendant is the stronger'). Looking behind the maxims, there were two broad discernible policy reasons for the common law doctrine of illegality as a defence to a civil claim. One was that a person should not be allowed to profit from his own wrongdoing. The other, linked, consideration was that the law should be coherent and not self-defeating, condoning illegality by giving with the left hand what it took with the right hand. So how was the Court to determine the matter? One could not judge whether allowing a claim which was in some way tainted by illegality would be contrary to the public interest, because it would lead to inconsistency and be harmful to the integrity of the legal system, without a) considering the underlying purpose of the prohibition which had been transgressed, b) considering conversely any other relevant public policies which might be rendered ineffective or less effective by denial of the claim, and c) keeping in mind the possibility of overkill unless the law was applied with a due sense of proportionality.[112]

Lord Toulson thought that the relevance of taking into account the purpose of the relevant prohibition was self-evident,[113] and he gave *Hounga* as an illustration where there were countervailing public interest considerations. Salutary warnings had been given about the dangers of overkill[114] and disproportionality,[115] and in considering whether it would be disproportionate to refuse relief to which the claimant would otherwise be entitled, as a matter of public policy, various factors might be relevant. His Lordship would not attempt to lay down a prescriptive or definitive list because of the infinite possible variety of cases, but potentially relevant factors included the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability. The integrity and harmony of the law permitted - and required - such flexibility. The broad principle was not in doubt that the public interest required that the civil courts should not undermine the effectiveness of the criminal law; but nor should they impose what would amount in substance to an additional penalty disproportionate to the nature and seriousness of any wrongdoing. The courts obviously had to abide by the terms of any statute, but it

[112] Above n 111 at [82]-[101].

[113] Citing *Hardy v Motor Insurers' Bureau* [1964] 2 QB 745.

[114] Citing *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 per Lord Wright at 293.

[115] Citing *Saunders v Edwards* [1987] 1 WLR 1116 per Bingham LJ at 1134.

was right for a court which was considering the application of the common law doctrine of illegality to have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in denial of the relief claimed.[116]

In the present case his Lordship was content to endorse the approach of Gloster LJ in the Court of Appeal, who was satisfied that the policy underlying the rule which made the contract between P and M illegal would not be stultified if P's claim in unjust enrichment were allowed. Her Ladyship's reasons, in brief, were: (i) the mischief at which the insider trading provisions were aimed was market abuse, rather than some hypothetical mischief lying in the return of unutilised funds intended to be used for the purpose; (ii) the actual securities contract entered into on the basis of illegal insider information was not void or unenforceable; (iii) the claim was not to enforce the criminal conspiracy or to gain a benefit from the wrongdoing but merely to recover the payment to the agent; (iv) there was no finding that P actually knew that taking advantage of insider information was unlawful; (v) the degree of causal connection between the wrongful conduct and the claim for repayment was tenuous; (vi) there was no warrant for concluding there was some wider public policy consideration that required that the claim be rejected on the grounds that the original arrangements involved a criminal conspiracy or that insider trading was inherently morally reprehensible.[117] She concluded that requiring P to forfeit the moneys would not be a just and proportionate response to the illegality, and Lord Toulson said that he agreed.[118]

His Lordship concluded that a claimant, such as P, who satisfied the ordinary requirements of a claim for unjust enrichment, should not be debarred from enforcing his claim by reason only of the fact that the money which he sought to recover was paid for an unlawful purpose. There might be rare cases where for some particular reason the enforcement of such a claim might be regarded as undermining the integrity of the justice system, but there were no such circumstances in the instant case.[119]

Lord Sumption took a quite different approach. His Lordship recognised that, in practice, the illegality principle had almost invariably been raised as a defence to a civil claim based on a breach of the criminal law. In *Apotex* the Supreme Court had held that with immaterial exceptions the defence was only available in such cases. This conclusion tended to reinforce the significance of the principle of consistency as a rationale. The civil courts of the state could not coherently give effect to legal rights, whether lying in contract or tort, founded on criminal acts which were contrary to the state's public law. So when was a civil claim "founded" on an illegal act? The test which had usually been adopted was the reliance test – whether the person making the claim was obliged to rely in support of it on an illegal act on his part. In a tort case or a property case it was generally enough to identify the illegal act and demonstrate the dependence of the cause of action upon the facts making it illegal. The way the test had been applied was problematic, in that it had made the illegality principle in property cases depend on adventitious procedural matters, such as the rules of pleading, the incidence of the burden

[116] Above n 111 at [102]-[109].

[117] *Patel v Mirza* [2014] EWCA Civ 1047, especially at [65]-[76].

[118] Above n 111 at [115].

[119] Above n 111 at [121].

of proof and the various equitable presumptions.[120] But the true principle was that the application of the illegality principle in property cases depended on what facts the court had to be satisfied about in order to find an intention giving rise to an equitable interest in the property. It did not depend on how those facts were established. Shorn of the arbitrary refinements introduced by the equitable presumptions, the reliance test accorded with principle. First, it gave effect to the basic principle that a person may not derive a legal right from his own illegal act. Second, it established a direct causal link between the illegality and the claim, distinguishing between those illegal acts which were collateral or matters of background only, and those from which the legal right asserted could be said to result. Third, it ensured that the illegality principle applied no more widely than was necessary to give effect to its purpose of preventing legal rights from being derived from illegal acts. The reliance test was the narrowest test of connection available.[121]

In Lord Sumption's view, the exceptions to the principle that a person could not rely on his own illegal act in support of his claim were broadly summed up in the proposition that the illegality principle was available only where the parties were *in pari delicto* in relation to the illegal act. This principle did not authorise a general enquiry into their relative blameworthiness. The question was whether they were legally on the same footing. There were two categories of case. One was where the claimant's participation in the illegal act was treated as involuntary, as where it was brought about by fraud, undue influence or duress on the part of the defendant,[122] or where the illegality consisted in the act of another for which the claimant was responsible only by virtue of a statute imposing strict liability.[123] The other was where the application of the illegality principle would be inconsistent with the rule of law which made the act illegal. The paradigm case was a rule of law intended to protect persons such as the plaintiff against exploitation by the likes of the defendant.[124] Such a rule would commonly require the plaintiff to have a remedy notwithstanding that he participated in its breach.[125]

Lord Sumption considered that the "range of factors" test supported by the majority was unprincipled, in that it lost sight of the reason why legal rights could ever be defeated on account of their illegal factual basis. First, the illegality principle was manifestly designed to vindicate the public interest as against the interests and legal rights of the parties: it could not depend on an evaluation of the equities as between the parties or the proportionality of its impact upon the claimant. Second, the "range of factors" test largely devalued the principle of consistency, by relegating it to the status of one of a number of evaluative factors, entitled to no more weight than the judge chose to give it in the particular case. Third, and extremes apart, the notion that there might be degrees of illegality and that the principle was to depend on the court's view of how illegal the illegality was or how much it

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[120] His Lordship cited *Tinsley v Mulligan* [1994] 1 AC 340 as demonstrating the problem. T and M contributed equally to buying a house but had it conveyed into T's sole name to enable M to perpetrate a fraud, by pretending she was not the owner. Equity presumed a resulting trust in her favour by virtue of her contribution to the price, and she did not have to plead or prove the reasons why the property had been conveyed into T's sole name. So M's claim succeeded. But if T had been a man and M his daughter then the presumption of advancement would have applied, and M would have had to rebut it by reference to the actual facts. So M's claim would have failed.

[121] Above n 111 at [231]-[239].

[122] Citing *Burrows v Rhodes* [1899] 1 QB 116.

[123] Citing *Les Laboratoires Servier v Apotex Inc* above n 101.

[124] Citing *Hounga v Allen* above n 88.

[125] Above n 111 at [241]-[243].

mattered, as the test seemed to envisage, was difficult to reconcile with any kind of principle. Fourth, the test discarded any requirement for an analytical connection between the illegality and the claim, by making the nature of the connection simply one factor in a broader evaluation of individual cases and offering no guidance as to what sort of connection might be relevant. His Lordship accordingly considered that the test was unacceptably, and unnecessarily, uncertain. An evaluative test dependent on the perceived relevance and relative weight to be accorded in each individual case to a large number of incommensurate factors left a great deal to a judge's visceral reaction to particular facts. And when the law of illegality was looked at as a whole, it was apparent that although governed by rules of law, a considerable measure of flexibility was inherent in those rules. Properly understood and applied, those exceptions substantially mitigated the arbitrary injustices which the illegality principle would otherwise produce.[126]

In the present case it was entirely clear that the transaction into which the parties entered was affected by the illegality principle. There was an agreement for M to commit a criminal offence. It was also a criminal conspiracy to that end. However, restitution still being possible, none of this was a bar to P's claim. An order for restitution would not give effect to the illegal act or to any right derived from it. It would simply return the parties to the status quo ante where they should always have been. The only ground on which that could be objectionable was that the court should not sully itself by attending to illegal acts at all, and that had not for many years been regarded as a reputable foundation for the law of illegality.[127]

What should we make of *Patel v Mirza*? To begin with, the objections to the proportionality approach are cogent. The majority view abolishes *ex turpi causa* as any kind of rule, and allows considerations relating to the plaintiff's illegal behaviour to be thrown into the pot together with all other considerations deemed to be relevant in favour of or against the claim. So the plaintiff's conduct becomes a factor in the exercise of the court's discretion in determining whether to allow the claim. As Lord Sumption points out, this is inconsistent with the very nature of the *ex turpi causa* plea. Its essence is well summed up in Lord Hughes' judgment in *Hounga* – that the law cannot support the plaintiff's claim, not that the merits favour the defendant. A rule that the courts will not assist plaintiffs asserting certain base causes surely deserves to be supported, notwithstanding the difficulty in defining its ambit.

Secondly, it is helpful to ask whether there is inconsistency between the requirements of the criminal law and the award of a civil remedy. The majority abandoned the reliance rule, at least as applied in the leading cases,[128] but Lord Sumption's explanation of the rule is based upon the notion that there should be no inconsistency between the criminal and the civil law, and in this sense it ought to be retained.

Thirdly, some kind of evaluation of the plaintiff's turpitude very arguably is inescapable. In one way or another all of the judges accept this, although there may have been some reluctance to say so expressly. The view of the majority undoubtedly brings the plaintiff's turpitude into account. The relevant factors in determining whether a remedy for P was "proportional" were founded on the seriousness, culpability and intentional nature of the plaintiff's conduct. So also, the conclusion that

[126] Above n 111 at [261]-[264].

[127] Above n 111 at [266]-[268].

[128] Above n 111 at [110].

the policy of the statutory provisions about insider trading – that there was no logical basis why considerations of public policy should require P to forfeit the moneys – was based, at least substantially, on the view that the offence was not *serious enough*. Lord Sumption also contemplated that this was so. As we have seen, he recognised in *Apotex* that some offences were too trivial to engage the illegality defence, although in *Patel* he said that one would expect that most if not all such offences would be covered by the exception where the application of the illegality principle would be inconsistent with the legal rule which made the act illegal. Be that as it may, and again as we have seen, he thought that, "extremes apart", the notion that there might be degrees of illegality was quite unprincipled.[129] But the *ex turpi causa* principle is not simply about illegality: it is about turpitude, or base causes. The notion that there are degrees of turpitude is perfectly easy to understand and to accept. Lord Sumption's extremes contemplate precisely that. And there needs to be room for a turpitude principle in addition to the question whether a claim introduces inconsistency between the criminal and the civil law.

Let us take the example of the hitman who fails to murder the proposed victim, whereupon the hirer demands his money back. Such a claim could be based upon restitutionary principles, as in *Patel*, and indeed Lord Neuberger, somewhat remarkably, thought that if a claimant paid a sum to the defendant to commit a crime, such as a murder or a robbery, the claimant should normally be able to recover the sum, irrespective of whether the defendant had committed, or even attempted to commit, the crime.[130] This view is very hard to accept: how could a court conceivably lend its aid to enforce such a claim?[131] The turpitude of the plaintiff's conduct must necessarily bar any relief. The courts need to grasp the nettle and to return to a test which asks whether the claim would be shocking to the public conscience,[132] or some similar test. It should be possible for the courts to develop a reasonably consistent approach to the question.

It is suggested that where the *ex turpi causa* principle is sought to be invoked as a defence to a tort claim, the courts should ask two questions. (i) Is the civil claim inconsistent with the criminal law in such a way that allowing the claim would undermine the integrity of the legal system? (ii) If not inconsistent, is the turpitude involved in the plaintiff's conduct such that the grant of relief by a court would constitute an affront to the public conscience?

Vicarious liability on the move

In *Various Claimants v The Catholic Child Welfare Society*[133] (hereafter the *Christian Brothers* case) Lord Phillips said that the law of vicarious liability was on the move. In *Cox v Ministry of Justice*[134] (hereafter *Cox*) Lord Reed observed it had not yet come to a stop and that the instant appeal, and the

[129] Above n 111 at [262(iii)].

[130] Above n 111 at [176].

[131] In New Zealand the claim would be covered by the Illegal Contracts Act 1970, but our concern here is with the common law.

[132] *Euro Diam Ltd v Bathurst* [1990] QB 1 (CA).

[133] *The Catholic Child Welfare Society v Various Claimants* [2012] UKSC 56, [2013] 2 AC 1 at [19].

[134] *Cox v Ministry of Justice* [2016] UKSC 10 at [1].

accompanying decision of the Supreme Court in *Mohamud v WM Morrison Supermarkets plc*[135] (hereafter *Mohamud*) provided an opportunity to take stock of where it had got to so far.

Policy

In the *Christian Brothers* case Lord Phillips said that the policy objective underlying vicarious liability was to ensure, insofar as it was fair, just and reasonable, that liability for tortious wrong was borne by a defendant with the means to compensate the victim. Such defendants could usually be expected to insure against the risk of such liability, so that this risk was more widely spread. It was for the court to identify the policy reasons why it was fair, just and reasonable to impose vicarious liability and to lay down the criteria that had to be shown to be satisfied in order to establish vicarious liability. Where the criteria were satisfied the policy reasons for imposing the liability should apply. His Lordship considered that there was no difficulty in identifying a number of policy reasons that usually made it fair, just and reasonable to impose vicarious liability on an employer where an employee committed a tort in the course of his employment. They were: (i) the employer was more likely to have the means to compensate the victim than the employee and could be expected to have insured against that liability; (ii) the tort would have been committed as a result of activity being taken by the employee on behalf of the employer; (iii) the employee's activity was likely to be part of the business activity of the employer; (iv) the employer, by employing the employee to carry on the activity would have created the risk of the tort committed by the employee; (v) The employee would, to a greater or lesser degree, have been under the control of the employer. Importantly, his Lordship subsequently added that where the defendant and the tortfeasor were not bound by a contract of employment, but their relationship had the same incidents, that relationship could properly give rise to vicarious liability on the ground that it was "akin to that between an employer and an employee".[136]

In *Cox* Lord Reed discussed and commented on these views. He maintained that the five factors which Lord Phillips mentioned were not all equally significant. The first - the defendant's means and the likelihood he was insured - did not feature in the remainder of the judgment and was unlikely to be of independent significance in most cases, for neither was a principled justification. The mere possession of wealth was not in itself any ground for imposing liability. As for insurance, employers insured themselves because they were liable: they were not liable because they had insured themselves. On the other hand, given the infinite variety of circumstances in which the question of vicarious liability might arise, it could not be ruled out that there might be circumstances in which the absence or unavailability of insurance, or other means of meeting a potential liability, might be a relevant consideration. As for the fifth of the factors – the employer's control over the tortfeasor – this no longer had the significance that it was sometimes considered to have in the past, as Lord Phillips made clear. It was not realistic in modern life to look for a right to direct how an employee should perform his duties as a necessary element in the relationship between employer and employee, and nor indeed was it in times gone by. Accordingly, as Lord Phillips stated, the significance of control was that the defendant could direct what the tortfeasor did, not how he did it. So understood, it was a factor which was unlikely to be of independent significance in most cases. On the other hand, the absence of even that vestigial degree of control would be liable to negative the imposition of vicarious liability.[137]

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[135] *Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11.

[136] Above n 133 at [34]-[35], [47].

[137] Above n 134 at [20]-[21].

The remaining factors – (1) activity by the tortfeasor on behalf of the defendant, (2) which was likely to be part of the business activity of the defendant, (3) which would have created the risk of the tort being committed – were inter-related. The first had been reflected historically in explanations of the vicarious liability of employers based on deemed authorisation or delegation. The second contemplated that, since the employee's activities were undertaken as part of the activities of the employer and for its benefit, it was appropriate that the employer should bear the cost of harm wrongfully done by the employee within the field of activities assigned to him. The third factor was very closely related to the second: since the risk of an individual behaving negligently, or indeed committing an intentional wrong, was a fact of life, anyone who employed others to carry out activities was likely to create the risk of their behaving tortiously within the field of activities assigned to them. The essential idea was that the defendant should be liable for torts that might fairly be regarded as risks of his business activities, whether they were committed for the purpose of furthering those activities or not. The result of this approach was that a relationship other than one of employment was in principle capable of giving rise to vicarious liability where harm was wrongfully done by an individual who carried on activities as an integral part of the business activities carried on by a defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party), and where the commission of the wrongful act was a risk created by the defendant by assigning those activities to the individual in question.[138]

It is apparent from Lord Reed's analysis that the suggested policies in *Christian Brothers* concerning the vicariously liable employer's likely means and the availability of insurance have been put to one side, although not entirely discounted. This must be right, for the reasons explained by Lord Reed. Rather, the core policy favouring the imposition of vicarious liability and identified in *Christian Brothers* and *Cox* is founded on the defendant's business or activity having created the risk of the harm, rendering it just that the defendant should pay for it. Crucially, that policy can be seen as driving the expansion in the reach of vicarious liability that was achieved in *Christian Brothers* and applied in both *Cox* and *Mohamud*. It also tends to promote a coming together or fusion of the orthodox requirements for the imposition of vicarious liability, viz, establishing (i) the kind of relationship between the defendant and the wrongdoer and (ii) the kind of link between that relationship and the conduct of the wrongdoer which is necessary to found such liability.

Relationships analogous to employment

In *The Christian Brothers* case the question was whether the Institute of the Brothers of the Christian Schools (the Institute), founded by Jean-Baptiste De La Salle in 1680, was responsible for sexual and physical abuse of children committed by its brothers at a residential institute for boys (St William's) who were in need of care and protection. Claims had been brought by the victims against two groups of defendants. The first (called the Middlesbrough Defendants), who were the managers of the school and the employers of the brother teachers, were held at first instance to be vicariously liable in respect of abuse by those teachers. The second (the De La Salle Defendants) were found not to be vicariously liable, on the basis that the Institute did not employ the brothers at St William's. Rather, it sent its brothers to teach there. The Court of Appeal upheld the judge's decision,[139] and

[138] Above n 134 at [22]-[24].

[139] *Various Claimants v Catholic Child Welfare Society* [2010] EWCA Civ 1106.

the Middlesbrough Defendants appealed, on the ground that the Institute should share joint vicarious liability for the acts of its brother members. The Supreme Court was unanimous in upholding this contention. The relationship between the defendant and the tortfeasor had the same incidents as that of a contract of employment and could properly give rise to vicarious liability, on the ground that it was "akin to that between an employer and an employee".[140]

Let us turn now to *Cox*. The question in this case was whether the UK Ministry of Justice could be held vicariously liable for the negligence of a prisoner assisting with work in the prison kitchen who dropped a heavy bag of rice onto the prison catering manager and injured her. Here, then, the wrongdoer was not an employee of the prison authority. Lord Reed affirmed that the general approach in *Christian Brothers* was not confined to some special category of cases, such as the sexual abuse of children. By focusing upon the business activities carried on by the defendant and their attendant risks, it directed attention to the issues which were likely to be relevant in the context of modern workplaces, where workers might in reality be part of the workforce of an organisation without having a contract of employment with it, and also reflected prevailing ideas about the responsibility of businesses for the risks which were created by their activities. It extended the scope of vicarious liability, but not to the extent of imposing such liability where a tortfeasor's activities were entirely attributable to the conduct of a recognisably independent business of his own or of a third party. That extension enabled the law to maintain previous levels of protection for the victims of torts, notwithstanding changes in the legal relationships between enterprises and members of their workforces which might be motivated by factors which had nothing to do with the nature of the enterprises' activities or the attendant risks.[141]

His Lordship said that it was not necessary that the defendant be carrying on activities of a commercial nature, nor that the benefit which it derived from the tortfeasor's activities should take the form of a profit. It was sufficient that the defendant be carrying on activities in the furtherance of its own interests. The individual for whose conduct it might be vicariously liable should carry on activities assigned to him by the defendant as an integral part of its operation and for its benefit. The defendant must, by assigning those activities to him, have created a risk of his committing the tort. A wide range of circumstances could satisfy those requirements.[142]

Applying this approach, Lord Reed was satisfied that the requirements laid down in the *Christian Brothers* case were met. The prison service carried on activities in furtherance of its aims. The fact that those aims were not commercially motivated, but served the public interest, was no bar to the imposition of vicarious liability. Prisoners working in the prison kitchens were integrated into the operation of the prison, so that the activities assigned to them by the prison service formed an integral part of the activities which it carried on in the furtherance of its aims: in particular, the activity of providing meals for prisoners. They were placed by the prison service in a position where there was a risk that they might commit a variety of negligent acts within the field of activities assigned to them. That was recognised by the health and safety training which they received. Furthermore, they worked under the direction of prison staff. The claimant was injured as a result of negligence by a prisoner in carrying on the activities assigned to him. The prison service was therefore vicariously liable to her. It

[140] For more detail about the *Christian Brothers* case see Todd, above n 64, at [22.3.02], [22.4.05].

[141] Above n 134 at [29].

[142] Above n 134 at [30].

made no difference that a primary purpose of the prison service, in setting prisoners to work in prison, was not to advance any business or enterprise of the prison or to make a profit, but to support the rehabilitation of the prisoners as an aim of penal policy, nor that the prisoners had no interest in furthering the objectives of the prison service. Rehabilitation was not the prison service's only objective: it was also an aim of penal policy to ensure that convicted prisoners contributed to the cost of their upkeep. And more importantly, when prisoners worked in the prison they were integrated into the operation of the prison. The activities assigned to them were not merely of benefit to themselves. Their activities formed part of the operation of the prison, and were of direct and immediate benefit to the prison service itself.[143]

Cox has affirmed that the question whether the relationship between the defendant and the wrongdoer is analogous to that between an employer and an employee may be asked in any case: it is not confined to sexual abuse or similar cases. A court is likely to find such a relationship in many or most cases where the defendant has been instrumental in placing the tortfeasor in a position where he or she is able to exercise significant power or influence over the victim. In the very nature of things the defendant will necessarily have had influence and control in respect of the wrongdoer acquiring that position of power vis-a-vis the victim. And as will be explained, a position involving such power is a key factor in finding the requisite close connection between the defendant's relationship with the wrongdoer and the tortious conduct involved.

A close connection between the relationship and the wrongdoing

In *Christian Brothers* the UK Supreme Court affirmed the view taken by the House of Lords in *Lister v Hesley Hall Ltd*,[144] an earlier sexual abuse case, that a test asking whether there was a "close connection" between the relationship and the abuse should be applied. The Court also took a further step and held, adopting the approach taken in the seminal Canadian decision,[145] that there needed to be proof that the defendant caused a material increase in the risk that abuse would occur. The relationship between the Institute and the brothers enabled the Institute to place the brothers in teaching positions and, in particular, in the position of headmaster at St William's. So there was a very close connection between the relationship between the brothers and the Institute and the employment of the brothers as teachers in the school. Living cloistered on the school premises were boys who were vulnerable because they were children in the school, because they were virtually prisoners, and because their personal histories made it very unlikely that if they attempted to disclose what was happening to them they would be believed.[146]

Clearly the close connection test could be seen as satisfied on the facts, for the brothers were placed in a position giving rise to precisely the risk that did in fact happen. On the one hand they were able to exercise power, influence and control over the children, particularly as regards private and intimate matters, and on the other the children were vulnerable and in no position to protect themselves from the abusive and criminal conduct. But if the wrongdoer is a person whose job

[143] Above n 134 at [32]-[34].

[144] *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215.

[145] *Bazley v Curry* [1999] 2 SCR 534 at 559–560 per McLachlin J.

[146] Above n 133 at [86]-[94].

simply allows him to come into contact with children but creates no risk of the wrongdoing, such as a gardener, seemingly the test is not satisfied.[147]

The cases considered so far have concerned wrongdoing by way of sexual abuse. But might, or should, a test asking whether there is a close connection between a person's wrongdoing and his or her relationship with another also be applied in other cases? This question was determined in the *Mohamud* decision.[148] The claimant, who was of Somali origin, inquired at the defendant's petrol station about printing documents from a USB stick, but the defendant's employee, who worked in the kiosk, abused him using foul, racist and threatening language. The claimant then returned to his car but the employee followed him and subjected him to a violent assault, ignoring instructions to stop by the employee's supervisor. The claimant sued the defendant employer, seeking damages in respect of this unprovoked assault. The claim failed both at first instance and in the Court of Appeal, and the claimant appealed to the Supreme Court.[149]

Lord Toulson observed that Salmond's formula had been cited and applied in many cases, sometimes by stretching it artificially; but even with stretching, it was not universally satisfactory. The difficulties in its application were particularly evident in cases of injury to persons or property caused by an employee's deliberate act of misconduct. One line of argument was to ask whether an employee had been charged with keeping order, so that an assault by the employee could be described as an improper mode of performing the work. But the cases were conflicting and not entirely satisfactory, and his Lordship thought that it was more helpful to ask whether conduct was "within the field of activities" assigned to the employee.[150] At all events he considered that in *Lister* the Salmond formula was stretched to breaking point, for even on its most elastic interpretation the sexual abuse of the children could not be described as a mode, albeit an improper mode, of caring for them. Lord Steyn had posed the broad question whether the warden's torts were so closely connected with his employment that it would be just to hold the employers liable, and concluded that the employers were vicariously liable because they undertook the care of the children through the warden and he abused them. There was therefore a close connection between his employment and his tortious acts. To similar effect, Lord Clyde had said that the warden had a general duty to look after the children, and the fact that he abused them did not sever the connection with his employment; his acts had to be seen in the context that he was entrusted with responsibility for their care, and it was right that his employers should be liable for the way in which he behaved towards them as warden of the house.[151]

Lord Toulson recognised that the court in *Lister* was was mindful of the risk of over-concentration on a particular form of terminology, and thought there was a similar risk in attempting to over-refine, or lay down a list of criteria for determining, what precisely amounted to a sufficiently close connection to make it just for the employer to be held vicariously liable. Simplification of the essence was more desirable. Taking this approach, the court had to consider two matters. The first question, to be addressed broadly, was what functions or "field of activities" had been entrusted by the employer to the employee, or, in everyday language, what was the nature of his job. Secondly, the court had to

[147] For example *Jacobi v Griffiths* [1999] 2 SCR 570.

[148] Above n 135.

[149] The claimant died from an unrelated illness before his appeal was heard.

[150] Above n 135 at [25]-[36].

[151] Above n 135 at [39].

decide whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice going back to decisions in the 17th century. To try to measure the closeness of connection, as it were, on a scale of 1 to 10, would be a forlorn exercise and would miss the point. The cases in which the necessary connection had been found were cases in which the employee used or misused the position entrusted to him in a way which injured the third party. [152]

In the instant case it was the employee's job to attend to customers and to respond to their inquiries. His conduct in answering the claimant's request in a foul mouthed way and ordering him to leave was inexcusable, but within the "field of activities" assigned to him. What happened thereafter was an unbroken sequence of events. Following the claimant to the forecourt was all part of a seamless episode. Further, when the employee again told the claimant in threatening words that he was never to come back to the petrol station, this was not something personal between them; it was an order to keep away from his employer's premises, which he reinforced by violence. In giving such an order he was purporting to act about his employer's business. It was a gross abuse of his position, but it was in connection with the business in which he was employed to serve customers. His employers entrusted him with that position and it was just that as between them and the claimant, they should be held responsible for their employee's abuse of it. The employee's motive was irrelevant. It looked obvious that he was motivated by personal racism rather than a desire to benefit his employer's business, but that was neither here nor there.[153]

No doubt their Lordships were correct in drawing attention to the uncertainties. The wider approach seems to ask whether, in some fairly broad sense, the employee (or person in an analogous position) is in fact performing his or her employment or similar task at the time of the wrongful act and whether there is a connection with the task beyond the mere coincidence of time and place which meant that the wrongful act happened to occur at the workplace. We might ask whether the employment created a risk of "this sort of thing". The inquiry has some affinity with the question whether conduct can be said to be the cause of loss where it is precipitated by an intervening act or event. As has been judicially remarked, there is a material, and crucial, distinction between causing a loss and providing the opportunity for its continuance.[154] A helpful method of approach in drawing this distinction is to ask whether the plaintiff's loss is within the scope of the risk created by the defendant's conduct.[155] In the present context we must ask whether the employment or task created the risk of the conduct: and in *Mohamud* it did because the employment involved dealing with customers and the assault occurred as part of that dealing. But if, say, the employee simply saw a Somali man passing in the street and ran out and assaulted him for racist reasons the result would be different. Certainly all kinds of situations can be posited where the answer will be uncertain, but, as Lord Dyson remarked, this is an area of the law in which imprecision is inevitable. To search for certainty and precision in vicarious liability was, he said, to undertake a quest for a chimaera.[156]

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[152] Above n 135 at [43]-[45].

[153] Above n 135 at [47]-[48]. Lord Dyson, at [53]-[57], was similarly happy with the test.

[154] *Price Waterhouse v Kwan* [2000] 3 NZLR 39 (CA) per Tipping J at [28].

[155] *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883 per Lord Nicholls at [71].

[156] Above n 135 at [54].

Non-delegable duties of care

Sometimes the courts hold that a defendant is under a duty to take care and that the duty cannot be delegated to another person. This means that the defendant cannot delegate legal responsibility in respect of the duty, rather than that the defendant cannot delegate actual performance of a task to another person. In *Woodland v Essex County Council*[157] Lord Sumption said that English law had long recognised that non-delegable duties exist, but did not have a single theory to explain when or why. However, his Lordship identified two broad categories of case in which such a duty had been held to arise.[158]

Extra-hazardous activities

The first concerned so-called “extra-hazardous activities”. The basis of a leading decision was that, in the context of inherently dangerous activity on its land, the defendant had been under a non-delegable duty to "use all reasonable precautions”.[159] However, it is not easy to understand how an activity can be classified as carrying inherent risk independently of the precautions taken to minimise the risk. Indeed, the principle has been judicially described as anomalous and unsatisfactory, to be applied as narrowly as possible.[160] In *Woodland* Lord Sumption described this category as varied and anomalous, adding that many of the decisions were founded on arbitrary distinctions between ordinary and extraordinary hazards which might be ripe for re-examination. He thought that their justification, if there was one, should probably be found in a special rule of public policy for operations involving exceptional danger to the public.[161] But it is by no means obvious that the courts should strain to retain the principle, and very arguably it ought to be abandoned completely.

Protective relationships

Given his doubts about the first, Lord Sumption’s second category accordingly lies at the heart of the concept of a non-delegable duty as he saw it. His Lordship said that it comprised cases where the common law imposed a duty upon the defendant which had three critical characteristics.[162] First, the duty arose not from the negligent character of the act itself but because of an antecedent relationship between the defendant and the claimant. Second, the duty was a positive or affirmative duty to protect a particular class of persons against a particular class of risks, and not simply a duty to refrain from acting in a way that foreseeably caused injury. Third, the duty was by virtue of that relationship personal to the defendant. The work required to perform such a duty might well be delegable, and usually was. But the duty itself remained the defendant's. His Lordship observed that in these cases the defendant was assuming a liability analogous to that assumed by a person who contracted to do

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[157] *Woodland v Essex County Council* [2013] UKSC 66, [2014] AC 537 at [6]–[7].

[158] Lord Sumption also mentioned other possibilities (at [8]-[9]). These concerned the non-delegable duty owed by landowners to prevent the escape of water onto the neighbours’ land pursuant to the rule in *Ryland v Fletcher* (1866) LR 1 Ex 265, or not to withdraw support from the land pursuant to *Dalton v Henry Angus & Co* (1881) 6 App case 740. His Lordship explained these cases on the basis of an antecedent relationship between the parties as neighbouring landowners, from which a positive duty independent of the wrongful act itself could be derived.

[159] *Black v Christchurch Finance Co Ltd* [1894] AC 48 (PC).

[160] *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH* [2008] EWCA Civ 1257, [2009] QB 725 at [73]-[78] per Stanley Burnton LJ.

[161] Above n 157 at [6].

[162] Above n 157 at [7].

work carefully. The contracting party would normally be taken to contract that the work would be done carefully by whomever he might get to do it. Likewise, in certain tort cases, the defendant could be taken not just to have assumed a positive duty, but to have assumed responsibility for the exercise of due care by anyone to whom he may have delegated its performance.

Five factors were identified by Lord Sumption in establishing a personal duty of this kind.[163] They were the vulnerability of the claimant, the existence of a relationship between the claimant and the defendant by virtue of which the defendant had a degree of protective custody and control over the claimant, the claimant having no control over how the defendant chose to perform its obligations, the delegation of that custody and control to another person, and negligence by that person in the performance of the very function assumed by the defendant and delegated to him or her. A clear instance was the non-delegable duty of an employer to maintain a safe system of work, and in his Lordship's opinion the time had come to recognise that the relationships between hospitals and their patients and local education authorities and their pupils fell into the same category. In *Woodland* itself, applying the above principles, the duty of a local education authority was held to be non-delegable, in circumstances where a pupil suffered serious injury in the course of a school swimming lesson conducted by swimming instructors provided by an independent contractor at a pool run by another local authority.[164]

In essence the duty arises out of an assumption of protective control by the defendant and a lack of control and of an ability to take self-protective measures by the plaintiff. Indeed, his Lordship said that other examples were likely to be prisoners and residents in care homes,[165] bearing out this argument. Both are placed in situations where they are highly vulnerable to harm or abuse.

Vicarious liability or non-delegable duty?

In the case of vicarious liability the focus is on the relationship between the defendant and the wrongdoer, whereas in the case of a non-delegable duty the focus is on a protective relationship assumed by a defendant over a vulnerable plaintiff. Sometimes the principles can overlap. This will or may be so in a sexual abuse case where vicarious liability is imposed on a defendant for the conduct of an employee or of a person in a position "akin to employment" and there is a close connection between the creation or enhancement of a risk inherent in the defendant's enterprise and the wrongdoing in question. In *Lister*, for example, it seems that the school could have been held to owe a non-delegable duty to the abused child, unless the view is taken that a non-delegable duty cannot apply in the case of an intentional tort.[166] However, the foundation for the imposition of liability is different. Seemingly *Christian Brothers* could not have been argued as a case of a non-delegable duty, unless the De La Salle Institute could be treated as having assumed a degree of protective custody over the claimant and having delegated performance to its brothers. But, on the face of it, no such relationship existed, the claimant being in fact in the custody of the Middlesbrough defendants. On

[163] Above n 157 at [23].

[164] The case was remitted for trial, and in *Woodland v Maxwell* [2015] EWHC 273 (QB) the claimant established that her injuries were caused both by a lifeguard employed at the pool and by a teacher in failing to notice that she was in difficulties in the water.

[165] See, for example, *GB v Home Office* [2015] EWHC 819 (QB) (detainee who had received medical treatment in an immigration removal centre run by an independent organisation on behalf of the United Kingdom Home Office owed a non-delegable duty of care).

[166] As to which see below.

the other hand, *Woodland* clearly could not be argued as a case of vicarious liability, which cannot extend to the conduct of independent contractors.[167]

Let us see how the relevant principles can apply in the case of fostering of children. In *S v Attorney-General*[168] the Court of Appeal held that the Crown was vicariously liable in respect of abuse committed by foster parents on a foster child placed with those parents by the New Zealand Department of Social Welfare (DSW). The majority view was that the foster parents were the agents of the DSW, albeit that the agency was of an unusual, indeed, unique, nature. However, applying the approach in *Christian Brothers*, this does not look like a case of vicarious liability, for there was no relationship "akin to employment" between the DSW and foster parents. Indeed, foster parents are expected to act as natural parents, with the independence that that role entails, and this is the view that has been taken in the Supreme Court of Canada.[169] Even so, it might be argued that the DSW was under a non-delegable duty vis-a-vis the plaintiff, having assumed a positive duty to protect the vulnerable plaintiff from harm. Yet recent authority in the United Kingdom throws doubt on this conclusion.

The question arose in *NA v Nottingham County Council*,[170] where the Court of Appeal held that a local authority was not vicariously liable for the abusive acts of foster parents, because there was no relationship akin to employment and because the provision of family life by foster parents was not and could not be part of the activity or enterprise of the local authority,[171] and also held, for differing reasons, that no non-delegable duty could be imposed. Tomlinson LJ maintained that in order to be non-delegable a duty had to relate to a function which the purported delegator, here the local authority, had assumed for itself to perform. Fostering was an activity which the authority had to entrust to others. By arranging the foster placement the authority discharged rather than delegated its duty to provide accommodation and maintenance for the child.[172] Burnett LJ took the view that there could be no non-delegable duty to found a cause of action for an assault, as opposed to negligence. If, applying the principles summarised in the *Christian Brothers* case (with their carefully calibrated policy considerations) there was no vicarious liability for an assault upon a child in care, the common law should not impose liability via this different route.[173] Black LJ held that no non-delegable duty should be imposed, even though the *Woodland* features were present, on the ground that it would not be fair, just and reasonable to do so. Key reasons were that it would impose an unreasonable financial burden on local authorities and would be likely to provoke the channelling of even more of the local authorities' scarce resources into attempting to ensure that nothing went wrong and, if possible, insuring against potential liability; there was a fear that it would lead to defensive practice in relation to the placement of children, who might be placed in local authority run homes instead in order that the authority could exert greater control over their day-to-day care; it

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[167] Although there was vicarious liability in respect of the negligence of the teacher who went to the pool; see above n 164.

[168] *S v Attorney-General* [2003] 3 NZLR 450 (CA).

[169] *KLB v British Columbia* [2003] SCC 51, [2003] 2 SCR 403.

[170] *NA v Nottinghamshire County Council* [2015] EWCA Civ 1139, [2016] 2 WLR 1455.

[171] Above n 170 at [15] per Tomlinson LJ, [28] per Burnett LJ, [45] per Black LJ.

[172] Above n 170 at [23]–[25].

[173] Above n 170 at [29]-[42]. His Lordship cited *New South Wales v Lepore* [2003] HCA 4, (2003) 212 CLR 511 as giving powerful support.

would be difficult to draw a principled distinction between liability for abuse committed by foster parents and liability for abuse committed by others with whom a local authority decided to place a child, including its own parents; and a parent would not have a strict liability for harm caused by someone to whom he or she had entrusted the child's care, such as a nanny or friends or relations, and it was difficult to see why the local authority's liability should be more onerous.[174]

Black LJ's opinion that Lord Sumption's five indicia for the instant form of non-delegable duty were satisfied certainly is supportable. The first two were accepted by the local authority, and the third — lack of control by the child — also was met. Contrary to Tomlinson LJ's view, the fourth — delegation of a function which was an integral part of the assumed duty — arguably was present, as the local authority had delegated the obligation to care for a child as a parent or guardian would. The fifth — negligence in the performance of the very function that was assumed by the defendant and delegated to another — arguably was satisfied as well. Burnett LJ's opinion that deliberate assaults could not involve any breach of delegated duty is not convincing. If, as has been suggested, the focus of this form of non-delegable duty is the relationship between the defendant and the victim of harm, then it should not matter how the duty to see that reasonable care is taken of the victim was breached, whether through carelessness or intentional act of the wrongdoer. Indeed, it creates a perverse incentive to defendants to plead that conduct was intentional rather than negligent in order to avoid the imposition of the duty. So we are left with the view that it was not fair, just and reasonable in all the circumstances to impose a non-delegable duty. This involves a weighing of the policy implications, and these certainly can point both ways. In *NA v Nottingham County Council* the duty was established by statute and was different in nature to that in *Woodland*, and the policy objections to a non-delegable duty in respect of wrongdoing by foster parents, noted by Black LJ and supported by Tomlinson and Burnett LJ, seemingly should prevail.[175] But outside that particular context the *Woodland* principles usually will apply.

Contribution under the Law Reform Act 1936 and in equity

In contribution proceedings under s 17(1)(c) of the Law Reform Act 1936 the defendant claiming contribution (D1) from another defendant (D2) must prove that D2 is or would have been liable to the plaintiff (P) in respect of the "same damage", whether as a joint tortfeasor or otherwise. The courts also have recognised a principle of equitable compensation between parties who were not "wrongdoers" but who shared "co-ordinate liabilities" or a "common obligation" to make good the same loss.[176] What exactly "same damage" means in the context of claims under the statute and what "common obligation" or "co-ordinate liabilities" mean in the equitable jurisdiction has been considered by the Supreme Court on two occasions. In *Marlborough District Council v Altimarloch Joint Venture Ltd*,[177] the first of these cases, the differing views expressed by the five members of the Court left the law in an undesirable state of uncertainty. However, the more recent decision in *Hotchin v New Zealand Guardian Trust Co Ltd*[178] has placed the law on a firmer foundation.

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[174] Above n 170 at [46]-[65].

[175] We have not heard the last word. The decision is being taken on appeal to the UK Supreme Court.

[176] *Dering v Earl of Winchelsea* (1787) 1 Cox 318, 29 ER 1184 (Ch); *Burke v LFOT Pty Ltd* [2002] HCA 17, (2002) 209 CLR 282.

[177] *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726.

[178] *Hotchin v New Zealand Guardian Trust Co Ltd* [2016] NZSC 24

A common liability?

Altimarloch concerned a claim for equitable compensation. Vendors of land were liable to the purchasers for damages for breach of contract on account of misrepresentations by their agents concerning the extent of water rights associated with the land, and the local council also was liable to the purchasers for a negligent misstatement in issuing a Land Information Memorandum containing the same error about the extent of the water rights. The vendors sought contribution from the council, but it was held in a majority decision that no order ought to be made. Four members of the Court agreed that the test to apply was whether the liabilities were "of the same nature and extent", but they could not agree on what this required. Tipping J (Blanchard J agreeing) thought that the liabilities were clearly independent, because the causes of action were different and the loss was not the same. There was no coordinate liability for the same loss, no single claim for which both parties were liable, and unless the Court was substantially to extend the principles of equitable contribution the vendors' claim could not succeed.[179] Elias CJ considered that the liability for damages of the council was dependent on the net position reached on the liability of the vendors for breach of contract. Since the remedy obtained from the vendors would eliminate the loss flowing from the negligence of the council, there was no occasion for contribution between them.[180] McGrath J (Anderson J agreeing) took the view that contribution could be ordered. Each party induced the purchaser to enter the contract under a mistaken belief as to the extent of the water rights, neither was misled by the other, and the errors of each caused loss of the same nature. Although the measure of the purchaser's loss could differ according to whether it was detriment-based (as against the council) or reliance-based (as against the vendors), the purchasers had no absolute entitlement to reliance damages. The Court's decision on the measure of damages would be a very narrow basis upon which to determine whether the loss was of the same extent under the test for coordinate liability.[181] In the result, then, two members of the Court would have allowed the claim for contribution, and there was no single reason supported by a majority of the Court for denying it.

The same damage

In *Hotchin* the Supreme Court looked at the question again. The Financial Markets Authority (FMA) alleged that H (hereafter D1) and the other directors of three companies had authorised the distribution of misleading company prospectuses, and sought compensation for the subscribers under s 55G of the Securities Act 1978. D1 argued that the trustees of the companies' trust deeds (hereafter D2) were liable to contribute to any compensation he was ordered to pay to the FMA, both under s 17(1)(c) of the Law Reform Act 1936 and under the common law regime for equitable compensation, and joined them as third parties to the proceedings. The trustees applied to strike out the claims against them. The Court of Appeal[182] held that the harm suffered by the subscribers as a result of D1's alleged breach of duty was the loss of their deposits made in reliance on the statements in the prospectuses, whereas D2's duties were to protect investors against harm arising from breach of the companies' obligations under the trust deeds. Accordingly, D1 and D2 did not share a co-ordinate liability to pay compensation for inflicting the same harm. D1's identifying of D2's breaches in a general

[179] Above n 177 at [129], [139].

[180] Above n 177 at [47], [56].

[181] Above n 177 at [226]-[231].

[182] *Hotchin v New Zealand Guardian Trust Co Ltd* [2014] NZCA 400, [2014] 3 NZLR 685.

way was not enough. D1 had to identify something specific by way of a common or shared obligation giving rise to common liabilities where the nature of the harm was indivisible, and he had not done that. But the Supreme Court, by a 3-2 majority (Glazebrook J, Elias CJ and William Young J, Arnold and O'Regan J dissenting) allowed D1's appeal, holding that in principle D1 should be allowed to make his claim for contribution.

Glazebrook J looked first at the background to the claim and the decisions of the lower courts. Her Honour also noted that after the Supreme Court hearing had concluded D1 had settled the claim brought against him by the FMA, and that in the settlement agreement and also in press statements he had in fact denied any liability. It was, she said, hard to reconcile D1's pursuit of D2, which involved a requirement that D1 prove that he was a tortfeasor, with these statements and denials. This dissonance between those statements and the underlying basis of D1's claim against D2 created an air of artificiality about the continuation of the present appeal. However, in the context of his strike out application it was necessary to proceed on the basis that D1 would amend his pleading and that he would be able to prove liability to the FMA.

Glazebrook J was satisfied that the claim by D1 against D2 with regard to new investors and "rollover" investors[183] would likely be for the whole of the loss.[184] Turning, then, to the test for contribution under the 1936 Act, she considered that the cases were confusing and that they drew fine distinctions that were hard to understand, let alone to justify. The words of the statute required only the same damage. These words should not be given a strained or narrow meaning but should be interpreted in line with the policy of the 1936 Act, which was a remedial statute intended to provide a broad basis for contribution. It did not have any added overlay of the same damage as analysed on the basis of the same liability. It was only in respect of the common liability that the same damage requirement subsisted. The issue was whether there was commonality, in the sense of the same damage, in the area where the claims overlapped. It would not matter if D1 was liable for negligent misstatement because of the untrue statements in the prospectus and D2 was only liable for negligently failing to monitor and undertake enforcement action. There would still be a single harm (loss in value of the investments) to which the directors and the trustee had contributed in different ways. In so deciding Glazebrook J agreed with the approach of William Young J (considered below), which was simple and principled and preferable to the current position.[185]

Elias CJ similarly was satisfied that contribution did not turn on the cause of action. It was available between tortfeasors under s 17(1)(c) whenever liability was in respect of the "same damage", and it was a question of fact and degree whether the harm for which a claim was made was in substance the same. It did not matter that the liability of the defendant and the third party might not be coextensive. There might be overlapping liability in respect of part only of the same damage. In such a case it was the overlap only that constituted the "same damage" in respect of which contribution was available. Here, as Glazebrook J had pointed out, potentially the liability of D2 to the investors was for the loss of the whole investment, at least in respect of new investors and rollover investors, and with respect to existing investors the claim was for so much of the loss as was attributable to the deterioration in the security after D2 should have "pulled the plug". It was not inconceivable that

[183] Investors whose deposits were due for repayment but who decided to re-invest.

[184] Above n 178 at [68], [69], [70].

[185] Above n 178 at [71]-[89].

that too could amount to the entire loss. The loss incurred by the depositors while D2 failed to act and the loss resulting from the fact that the depositors invested in a company in reliance on untrue statements in both cases was the loss of funds invested. The different basis of liability in tort was irrelevant. Once tortfeasors had a common liability to a plaintiff in respect of the same damage, no further commonality was needed.[186]

Elias CJ noted that it remained to be determined whether the FMA claim was properly treated as one in tort, so it was necessary to deal with the alternative claim for equitable contribution. On this question her Honour took the same approach as with the statutory claim. She considered that whether contribution was available ought not to turn on close classification of wrongs or measurement of damages, although inquiries in the cases into "coordinate liability" and "common obligation" had often prompted such analysis and had led to confusion in the case-law. Perhaps this was because words such as "liability" and "obligation" might equally be used in relation to harm and in relation to source of responsibility. Contribution was an equitable principle which expressed natural justice in its recognition that it was unjust for the burden of meeting a loss for which others shared responsibility to be borne by one party, to the benefit of those who escaped liability. The obligations of D1 and D2 did not need not be identical in their source or extent. Nor was it necessary that they should have the same legal character. It was enough that the responsibility for the harm was shared. This was an inquiry that was practical and directed at the substance of the matter in the particular case. The statutory requirement of liability for the "same damage" reflected the principles of the common law of contribution, from which it was derived. "Coordinate liability" in this context was liability for the same harm. It was sufficient if the parties were liable to another person in respect of the same damage. The principles upon which contribution was based were equally applicable whether contribution fell within s 17(1)(c) or the common law.[187]

William Young J sought to elucidate the principles at stake by giving a simplified version of the facts. (a) An investor invested $100 on the basis of a false prospectus. (b) The value of the security when acquired was $40 (meaning that the immediate loss was $60). (c) Nothing was ultimately realised on the security. (d) The investor had a claim against the directors for either the full loss (of $100) or perhaps just for $60 (on the basis that only the immediate loss was recoverable because losses associated with subsequent deterioration of the company's position were not caused by the falsity of the prospectus). And: (e) the trustee ought to have intervened earlier. Had there been an appropriately timed intervention, the amount realized on the security would have been $40. The investor thus had a claim against the trustee for $40.

William Young J said that it followed that if the investor's claim against the directors was confined to the immediate loss of $60 there was no overlap with the claim against the trustee. But if the investor could recover the full loss against the directors, there was an apparent overlap with the claim against the trustee in relation to the last $40. And his Honour thought it distinctly arguable that the investor did have a claim against the directors for the last $40, and approached the case on that basis.[188] He

[186] Above n 178 at [139]-[145].

[187] Above n 178 at [152]-[153].

[188] Above n 178 at [169]-[170]. As noted, Glazebrook J and Elias CJ did not consider that the claim against the trustee was limited to the $40: the claim would likely be for the whole $100.

saw references in the cases to "common liability" as denoting nothing more than shared liability in relation to the same damage. Faithfulness to the text of the statute required the focus to be only on whether the damage each tortfeasor was liable for was the same and not on the nature of the liabilities. Here the liability of the directors was for the loss suffered by the investor as a result of investing on the basis of the prospectus, whereas the liability of the trustee was for negligent supervision. On O'Regan J's dissenting view,[189] the damage caused by the negligence of the directors was the making of an unwise investment and the loss caused by the trustee was the diminution in the value of the investment resulting from the failure to intervene earlier. This meant that the same damage requirement was not met unless there was some additional commonality of liability. But his Honour disagreed. In each case the relevant damage was the consequence for the investor. The damage for which the directors and trustee were liable included all the consequences in respect of which compensation was payable. To the extent that these consequences overlapped the damage for which each was liable was the same. S 17(1)(c) of the 1936 Act required only the same damage, and there was nothing to suggest that such liability should also be additionally "common" or "co-ordinate". Shared liability for the same damage was sufficient. It did not matter if the defendants would be liable for different amounts.[190]

The minority judgment of Arnold and O'Regan JJ (given by O'Regan J) would have rejected the claim for contribution. Their review of these cases led them to conclude that the inquiry as to whether two tortfeasors were liable for the same damage required a legal analysis of the claims against each of them to determine whether the tortfeasors had a common liability to the plaintiff. Assuming the claims as pleaded were substantiated, the damage suffered by the investors as a result of D1's negligent misstatements in the offer documents and that suffered as a result of D2's negligent monitoring was not the same damage. Their Honours examined leading authorities favouring that view, and thought that policy supported it. They noted that Glazebrook J acknowledged in her reasons that the broad approach to "same damage" might mean there was much more scope for contribution claims that would not be able to be addressed at the strike out stage, and suggested that this problem was the price necessary to secure conceptual simplicity and a just result. But they did not think it could be assumed it would lead to a just result. A plaintiff seeking to pursue a simple tort claim for economic loss against a tortfeasor might be confronted with contribution claims that, however remote and unmeritorious, would not be able to be resolved except at trial. That might reduce the chances of a settlement between the plaintiff and the tortfeasor and might make the resulting litigation more complex, expensive and lengthy. It would also mean that contribution claims would stand or fall on the assessment of what was just and equitable under s 17(2) of the 1936 Act. While that might be conceptually simple, it was inherently uncertain and unpredictable. If the broad approach provided "conceptual simplicity", these consequences were a high price to pay.[191]

In the instant case the claim against D2 for negligent delay in taking enforcement action would not lead to the same damage as that caused by D1 because it could not be suggested that D2's negligence had led to any misleading of the investors who relied on the negligently misleading statements in the prospectus. D1's liability in respect of the FMA's claim was the damage sustained by reason of the

[189] As to which see below.

[190] Above n 178 at [178]-[188].

[191] Above n 178 at [260]-[263], [317].

untrue statement in the offer documents. D2 had no liability for that damage, just as D1 had no liability for damage caused by D2's negligent failure to intervene by using its powers under the trust deed. D2's failure to intervene created the opportunity for the directors' misstatements to mislead the investors, but that did not make it liable for those misstatements. As D2 did not have a common liability with D1 for the damage caused by D1's misstatements, D1 and D2 were not liable for the same damage. And the position as regards equitable contribution was the same[192]

Evaluation

The majority view does seem preferable here. What ought to matter is whether the damage overlaps, independently of any question about the nature of the liabilities concerned. Maybe one can ask simply whether a payment discharges or diminishes another's liability. If the answer is yes then in principle a claim for contribution can be made. This approach is consistent with the majority view in *Hotchin*. It gives effect to the general principles of justice underlying contribution claims, based ultimately on the idea of unjust enrichment. It does not resolve every problem, as the judgment of William Young J makes clear.[193] But it is a simple and conceptually coherent question and it avoids the problems left by the *Altimarloch* decision. The former law was indeed incoherent and almost impossible to understand.

One might, perhaps, have doubts about taking a broad approach in view of the apparent lack of merit of D1's claim, which the Court has held should not be struck out. But all the court has decided is that D1 can make it, not that it will succeed. Glazebrook J pointed to the argument that, in light of the limited role of the trustee, the information imbalance and warranties in the trust deed, an award of contribution under s 17(2) of the 1936 Act would not be just and equitable, and also to the possibility of a Court, under s 17(1)(c), directing a complete indemnity. Her Honour thought as well that it was highly arguable that an order for contribution would be contrary to the statutory scheme in the Securities Act, as relieving D1 from the statutorily imposed consequences of his wrongdoing. Further, she described D1's public statements following the settlement with the FMA (noted above), when coupled with his need in claiming contribution to prove he was a tortfeasor, as at best hypocritical. The suspicion was that this was a cynical attempt to force a settlement with D2. If this was the case the courts should not be party to what would be a misuse of the court processes.[194] Again, Elias CJ noted the apparent incongruity between D1's public denial of responsibility and his claim for contribution, and recognised that the question whether the claim by the FMA was properly characterised as a claim in tort still needed to be addressed. She thought also that the bar on a person seeking contribution from someone entitled to be indemnified by him might well prove to be a formidable obstacle to the claim for contribution at any trial. These matters meant that the claim for contribution might be viewed with some scepticism.[195]

A key objection to the view of the minority, to which Glazebrook J drew attention, is that it could deny contribution from the directors if the investors chose only to sue the trustee. This would be a most unjust result. Conversely, the objections of policy to the majority view, that it may lead to uncertainty,

[192] Above n 178 at [323],]326], [345].

[193] Above n 178, in particular at [217]-[228].

[194] Above n 178 at [98]-[106].

[195] Above n 178 at [129]-[132].

reduce the chances of a settlement and allow unmeritorious defendants to put pressure on others to make a contribution are not without any weight but also are not especially convincing. The Courts can be vigilant in guarding against improper conduct, and the principled determination of contribution claims will cater for any fear of excessive uncertainty.