

11|SB



Tort Update 2008-9
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ECONOMIC TORTS

Do 'unlawful means' always have to give rise to an independent cause of action?

Revenue & Customs Commissioners v. Total Networks et al, HL [2008] 2 WLR 711

The Revenue had been held by the CA (see **2007-8 Tort Bulletin**) to have no *locus standi* when claiming damages for the tort of unlawful conspiracy against a number of companies allegedly involved in VAT 'Carousel Fraud' – selling zero-rated mobile phones in one country and reclaiming £2m of VAT in another. The unlawful means alleged were common law cheating of the Revenue. The CA agreed with D that, until and unless overturned by the HL, *Powell v. Boldaz* 1998 Lloyd's Rep Med 116 (negligent misdiagnosis allegedly compounded by a cover-up between the doctors and health authority) was binding authority requiring the unlawful means themselves to be actionable at the suit of the plaintiff. But for that decision there seemed to be no reason why the Commissioners should not be able to rely on such a tort.

NB this reasoning does not apply to lawful means conspiracies which do, however, require a predominant intention to cause damage to the claimant. But what sets conspiracy apart from all other torts is that 'motive or intention is everything'. That - and not independent actionability - had been the real issue in *Lonrho v. Shell* [1982] AC 173.

The Lords agreed on the first issue (3-2) that a common law cause of action did lie as a means of recovering unpaid tax. This case was no different in principle from the hijacking of a vehicle containing collected taxes in cash and its recoverability through the robbers' bank accounts. But they reversed the CA on the issue whether the 'unlawful means' have

to give rise to an independent cause of action against one or more conspirators; and the invitation to overrule *Powell v. Boldaz* was unanimously accepted.

The law needed to be clarified since criminal conduct can in itself constitute unlawful means, provided those means are instrumental in the intentional infliction of harm on the claimant. It is not enough that there is an element of unlawfulness somewhere in the story. The 'unlawful means' variety of conspiracy shares features of the tort of inflicting intentional economic harm, but it is not identical: instead of one party striking at another's commercial interests through a third party, the essence of conspiracy is intentional harm inflicted by people who combine for that purpose; and it does not require the claimant to be a trader. It was wrong to regard unlawful means conspiracy as a form of secondary liability, one of which a separate actionable wrong was an essential ingredient. That argument merely assumes what it sets out to prove. The question, rather, was how far downwards to go in the scale of blameworthy conduct, given that criminal conduct was at the top end of 'unlawfulness'.

To clarify: the position is not anomalous but rests on the distinction between a 'two-party' tort and a tripartite one. For the general tort of deliberate infliction of economic harm by unlawful means, those means must be actionable in the sense that the affected third party would have a right to sue if he suffered damage (whether or not he did in fact suffer damage). The majority view of the HL in *OBG* remains unchanged. But this definition does not apply where the unlawful means are a criminal conspiracy aimed directly at the claimant.

Nevertheless, as Lord Walker observed, the development of these principles "has been a long and difficult process and may not yet be complete."

Intention to gain does not necessarily constitute intention to cause loss, even when loss is readily foreseen:

Meretz Investments & Britel v. ACP Ltd, CA [2008] 2 WLR 904

This action resulted from complex arrangements underlying a scheme to build penthouses on an existing block behind the Royal Albert Hall. In essence, M and its sister company B granted (for a nominal £1 plus £1 p.a. ground rent) a lease to the developers, the profits to be shared, and the lease was mortgaged in turn to the developers' parent company. The developers granted (again for nominal consideration) a leaseback option to B, as freehold owner, in the event that they failed to fulfil their obligations according to an agreed timetable. When the development did run into difficulties the mortgagee took possession and sold the lease to a third party. The developers were thus unable to fulfil the option they had granted to B. They were sued for breach of the leaseback option and also, together with the third party, conspiracy and inducement of breach.

Held, the Defendants were liable for breach of contract but not for any economic tort. The exercise of a power of sale had not been for an improper purpose and in any event the third party had no improper motive even if the developers did. They had all received legal advice that the leaseback option would be lawfully overreached by the mortgagee's power of sale. The developer's breach was therefore not intended to be induced and was merely a pre-agreed consequence of that power of sale. Nor were there any unlawful means.

It is thus a defence to an action for conspiracy to injure by unlawful means if the defendant not only acted to protect his own interests but did so in the belief that he had a lawful right to act as he did. The tort of inducing breach of contract requires an intention to induce that breach, and the tort of conspiracy by unlawful means requires an intention to cause loss by unlawful means. Neither was made out here.

NEGLIGENCE

The duty of care: owed by and to whom?

The police owe no general duty to a victim of crime:

Vicario v. Commissioner of Police for the Metropolis, CA, Times 4.1.08

V alleged negligent failure by the police to investigate allegations of indecent assault and cruelty made against her step-father by V and her sisters, including failure to consult them and to refer the papers to the CPS. On D's application to strike out, the Judge considered part of the claim arguable to the extent that a limited duty of care had been assumed by the decision not to prosecute.

The CA agreed that the claim could not succeed at all. There were sound policy reasons for the rule that no general duty of care was owed to the public, and not even a 'limited' duty could affect how decisions to investigate and / or prosecute might be made. Authorities such as *Hill v. Chief Constable of W. Yorks* [1989] AC 53 (the Yorkshire Ripper case) and more recently *Brooks v. Met Police Commissioner* [2005] 1 WLR 1495 were indistinguishable.

Hill is still good law:

Van Colle v. Chief Constable of Herts; Smith v. Chief Constable of Sussex, HL [2008] 3 WLR 593

In the first appeal the police had been held liable when a witness was threatened and then shot dead by a former employee against whom, in 5 days' time, he was about to give evidence at a trial for theft (of equipment worth £500 from his optical practice in Mill Hill).

The victim's parents sued under the HRA ss. 6-7, in reliance on Art 2 of the ECHR.

In the second, a negligence claim at common law, despite S repeatedly informing the police of threats to kill him (by a man with whom he had broken off their relationship) they had made no arrest until after an assault with a claw-hammer, resulting in serious injury. On CC's application to strike out, the Judge ruled that causation was arguable but that there was no sufficient proximity between the police and a member of the public such as to call for special protective measures founding a duty of care. The CA however considered S's case was arguable.

The HL has ruled in favour of the police in both cases.

Under ECHR Art 2 - the obligation to protect life - the test per *Osman v. UK* [1999] 1 FLR 193 ECHR was whether the authorities knew or ought to have known at the time of a real and immediate risk to the life of an identified individual. That test was not met in the first case. The murder had been the action of a seriously disturbed and unpredictable individual. The test was also invariable, and could not be qualified by the argument that by requesting him to be a witness the police had exposed the victim to risk in some special category, to which a lower threshold applied than to other members of the public.

As for *Smith*, despite a "regrettable failure to react to a prolonged campaign" the majority (4-1) found that the claim was precluded by the core principle of *Hill* and *Brooks*, a retreat from which would have serious and detrimental effects on law enforcement: whilst focusing on investigating crime and arresting suspects, police officers would in practice be required to ensure that in every contact with a potential witness or a potential victim time and resources were deployed to avoid the risk of causing harm or offence. It was possible for a particular duty of care to be owed to an individual, or class of individuals, but only where responsibility had specifically been assumed to prevent a specific and immediate threat to life or physical safety.

No duty of any kind is owed to parents suspected of child abuse:

L v. Reading BC, CA [2008] 1 FLR 295

After interviewing B's daughter, a local authority social worker suspected child abuse. These allegations were rejected at a lengthy trial of care proceedings. B's claim against the authority alleging vicarious liability in negligence was struck out on the basis that, following the Lords' Judgment in *JD v. E. Berks* [2005] 2 AC 373, it was not fair, just or reasonable to impose on the social worker a duty of care towards a parent suspected of child abuse. The Judge however allowed B to amend so as to allege breach by the authority of a direct duty owed by it to B to have appropriate systems and policies in place.

The CA agreed that no direct duty was arguable either. In either case B had to establish a breach of duty by at least one social worker. In either case there was a potential (or actual) conflict between the interests of the child and the interests of the parent. If the social worker owed no duty, neither could his/her employer.

The Inland Revenue owes no general duty of care - but may assume one, even unwittingly:

Neil Martin Ltd. v. Revenue & Customs Commissioners, Times 1.1.08

NM applied for a CIS6 sub-contractor's tax certificate. The staff at the local tax office mistakenly treated it as an application for a CIS4 registration card and amended it accordingly, issuing duplicate forms to him and sending him, after some 3 months' delay, both a registration card and a certificate. This delay resulted in losses pleaded at about £45,000. (He had earlier sought ten times as much and HMRC offered him £3,000.) His action in negligence (and breach of the statutory duty under the Income and Corporation

Tax Act 1988, s.561 to issue a certificate) failed on the basis that no duty of care existed to process the application with reasonable expedition.

The CA agreed that the statutory duty did not intend to confer a private law cause of action (as opposed to rights of appeal and judicial review) where no ascertainable period was laid down, nor did that duty give rise to a common law duty to avoid delay. But here the tax office employee who chose to complete the form as an application for a registration card, without the authority of NM, did not merely make an administrative mistake but assumed an authority to make an application that had not been made. In assuming that authority, the employee assumed a responsibility to NM and it was accordingly fair, just and reasonable to impose a duty of care for breach of which the commissioners could be liable.

Prison authorities:

Davies v. Secretary of State for Justice, QB 5.3.08

D, serving a life imprisonment for murder after the end of the 17-year tariff period, applied for judicial review of the government's decision to move him from an open to a closed prison, alleging that this was negligent, a breach of ECHR Art 5 and false imprisonment. The SS agreed that the move was made in the mistaken belief that D was a foreign national (which he had claimed to be in order to obtain more telephone cards in prison).

Held, the false imprisonment claim had to fail because of the HL decision in *R v. Deputy Governor of Parkhurst Prison ex p Hague* [1992] 1 AC 58: once liberty is restrained "in any prison" (i.e. lawfully under the Prison Act 1952, S.12) the actual form of restraint is immaterial. The same authority showed that the statutory regime under the Prison Rules - which are purely regulatory and do not protect prisoners against injury or loss - did not give rise to a cause for breach of statutory duty. It followed that no common-law duty could be

owed either. Art 5 addressed the right to liberty subject to exceptions prescribed by law and was not concerned with either the location or the conditions of detention which was lawful.

Mental health authorities:

There is no rule that the statutory duty to provide mental health-care under S. 117 of the MHA 1983 exempts authorities from common-law negligence:

AK v. (1) Central & North West London Mental Health NHS Trust (2) Kensington & Chelsea Royal London BC, QB 30.5.08

A paranoid schizophrenic approved for community psychiatric help leapt out of the window of his b & b accommodation. His action for common-law negligence and breach of human rights (Arts 2, 3 & 8) was struck out by the Master on the basis that S. 117(2) gives rise to no after-care obligations and the claim was in any case precluded by *Clunis v. Camden & Islington HA*, CA [1998] QB 978.

The Judge upheld the ruling on Art 2 (the right to life, which required evidence of gross negligence) but allowed the rest of the action, fraught with difficulty though it was, to continue. It was open to K to establish a far closer relationship of proximity than in *Clunis* and to prove that the Defendants were still directly responsible on a continuing basis for someone they knew to be vulnerable and reliant upon them. The law was still developing, and the same was true of the human rights aspect.

Bookmakers:

Calvert v. William Hill, QB 12.3.08

C was a greyhound trainer whose gambling habit had first been successful – he made a

profit of some £50,000 p.a. between 2000 and 2005. He was less lucky when he started to bet on horses, football and golf. In the good days he had set up a telephone betting account with various bookies, including WH, which as his fortunes turned he had subsequently tried to close, re-open and close again. WH's staff failed to follow his instructions to put him on its internal self-exclusion scheme, as well as their promise that they would, the effect of which would prevent access to the account for 6 months. After increasing losses he was ruined. He sued for negligence, arguing the need for special protection for the small defined class of 'problem gamblers' who became 'pathological gamblers', and also a voluntary assumption of responsibility.

The claim failed. Firstly, as regarded a general duty of care, there might in exceptional circumstances be a common-law duty to prevent or mitigate the consequences (or aggravation) of self-inflicted harm. This was a novel action which took English law to "*the outermost reaches of the tort of negligence, to the realm of the truly exceptional*". (Note that there are no fewer than 4 Australian authorities on the point.) But where pure economic loss is concerned the test of 'self-harm' is far more rigorous than for personal injury. Problem gamblers did not, as a class, suffer uniformly from impairment of an ability to control their gambling such as to justify special treatment, and it was unrealistic to expect bookmakers to identify a sub-class for whom self-control had become impossible. Furthermore, this self-exclusion policy would have involved a disclaimer of legal liability for the consequences of any gambling while the gambler was excluded. As for proximity, the law should be very slow to require a gambler to refrain from exercising his liberty to gamble at his own responsibility, especially when his problem might be an occasional and mild difficulty of control.

On the specific facts, there had been an assumption of responsibility here, akin to contract, proximity was satisfied and financial and psychiatric harm was foreseeable; but WH's negligence had merely affected the manner in which and the rate at which C's gambling disorder had caused his own financial and social ruin. It had facilitated ruin,¹¹

which C would have caused himself in any event - if only by using other bookmakers including on-line betting sites, or even opening another account with WH - and the claim therefore failed on the grounds of causation.

Damages – Remoteness and Public Policy

Foreseeability of injury may include suicide:

Corr v. IBC Vehicles, HL [2008] 2 WLR 499

C was the widow of a maintenance engineer injured at work when struck on the head by a metal panel. After reconstructive surgery on his ear he suffered post-traumatic stress and growing depression. 6 years after the accident he took his own life by jumping from a multi-storey car park. It was agreed that the depressive illness resulted from the accident and the suicide resulted from the depressive illness, but IBC argued that it was too remote, fell outside the scope of its duty of care, broke the chain of causation or was a voluntary act precluded by the principle *volenti non fit injuria*, or else amounted to contributory negligence.

The CA rejected these arguments (2-1) in 2006 and so, too, have the Lords. C had not been insane in *M'Naghten* terms but was not fully responsible for his actions either. Severe depression was a foreseeable consequence of breach of duty and C did not have to prove that suicide was in itself foreseeable or the precise form which damage might take (*Hughes v. Lord Advocate*) provided that form of damage was not so unusual or unpredictable as to be outside the bounds of what was reasonably foreseeable.

A deduction for contributory negligence could in principle be appropriate in a case of deliberate suicide by a person of sound mind in a state of accident-induced depression – by 50% in *Reeves v. Met Police Commission* [2000] 1 AC 360 HL – and Lord Scott

would have reduced damages by 20%; but the courts below had on that issue made no findings on fact and the majority declined to reduce at all.

Criminal conduct is not necessarily a bar to damages:

Gray v. Thames Trains & Network Rail, CA, Times 9.7.08

G suffered a severe post-traumatic stress disorder and personality change after the Ladbroke Grove rail crash in 1999. 2 years later he stabbed a complete stranger to death and was detained under the MHA after pleading guilty to manslaughter. He did not make a claim for his detention, since it was consequent upon his admission of crime. He did however make a loss earnings claim, alleging that he did not earn as much as he would have done but for the accident. At trial this claim was allowed up to the date of the crime but rejected thereafter, equally on the basis *ex turpi causa non oritur actio*.

His appeal succeeded. His damages claim was not “founded upon illegality” – it was not inextricably linked or even closely connected with his crime. But for the tort he would have earned more money than he did both before and after the date of homicide, and the latter did not break the chain of causation. Further, in a case of contributory negligence - which might need to be remitted since it only arose as a result of *Corr* - there would be nothing inherently contrary to public policy in apportioning such damages.

Contrast *Smyly Agheampong v. Allied Manufacturing, CLCC 30.6.08*

Ex turpi Corsa...?

C’s vehicle (actually a Fiat Bravo) was hit by D’s lorry while parked and damaged beyond repair. D agreed the pre-accident value (£1,505) and minor expenses but nothing more, arguing that the claim for 341 days’ car-hire (£34,000) was based on illegality and contrary

to public policy, as C had had no third-party insurance. The Judge agreed. He had been driving without insurance (and had also obtained a tax disc by deception) and, but for the accident, would have continued to do so. He had equally been committing an offence while driving the substitute car throughout the hire period. The *turpis causa* principle is not one of discretion, but fact-specific.

Professional Negligence

Solicitors' drafting: the claimant bears the burden of proving the lack of good reason for amending a draft contract: it is not for the solicitor to prove that there was good reason:

Fulham Leisure Holdings v. Nicholson Graham & Jones, CA [2008] PNLR 22

NGJ appealed against a finding of professional negligence (though damages were assessed at £6,750 - a negligible fraction of the £7.75m claimed) arising out of their drafting of a shareholders' agreement for Mohammed Al-Fayed and his Football Club. They wanted to be entitled to subscribe for new ordinary 'A' shares in the corporate acquisition vehicle without diluting the vendor's minority interest in 'B' shares. The Articles of Association therefore included important restrictions on the steps that could be taken without the prior written consent of 'B' shareholders owning at least 10% of issued share capital. One draft dispensed with the need for such consent, when subscribing for further 'A' shares at par, once A-F had invested £60m. But this provision did not appear in the Agreement as executed.

A-F did invest £60m but had to pay £7.75m to reduce the Vendor's interests below 10%. He won his claim that NGJ had negligently removed the draft clause without appreciating the consequences - but recovered only trivial wasted legal costs since there was no

evidence that £7.75m represented the cost of cure. F appealed against quantum. NGJ cross-appealed on liability: the core of the Judgment was that loss of the right to dilute was accidental and inadvertent unless justified by NGJ.

The CA held that this wrongly reversed the burden of proof. The question for the Judge was whether, prior to the deletion of those words, something had happened to alter NGJ's understanding that there was a consensus between the parties as to the right to dilute at a certain stage and to lead them to understand that the right to subscribe required consent. The burden of proof lay on F to satisfy the court that nothing had happened. One possible explanation, advanced by NGJ but not accepted as proven by the oral evidence, was that in the course of negotiations the Vendor had sought it and the buyers had conceded it. Once this had been accepted as at least plausible (since no careful and conscientious solicitor would have altered the draft inadvertently) F had the onus of showing that such an explanation should nonetheless be rejected, indeed that the deletion was wholly inexplicable. It had failed to do so.

The date of damage suffered in consequence of negligent advice:

Watkins v. Jones Maidment Wilson, CA [2008] PNLR 23

W alleged negligent advice by JMW leading to the execution of a building agreement in April 1998 and also in the loss of a contractual right to terminate (paying only the independently assessed value of work already completed) if the builder failed to complete the works by 31.8.98. This clause 21(ii) was waived on 6.8.98. They commenced proceedings on 26.8.04. In answer to JMW's limitation defence, they argued that they had suffered no loss at the time they entered into the transaction, since the net position was beneficial to them and only become disadvantageous in September 1998, when a merely contingent loss matured. The loss resulting from the waiver of clause 21(ii) did not arise

unless and until the builder failed to complete by 31 August. In any event there was an alternative claim, brought within 6 years, for loss of a residual chance.

The CA dismissed Ws' appeal from the preliminary determination that the whole claim was statute-barred. When W entered into the building agreement they acquired various rights. On their case that bundle of rights was of lesser value than they were led to believe it would be, rather than contingent damage which might or might not materialise. Those rights were an asset capable of valuation. Thus W suffered measurable loss when they acted on the allegedly negligent advice to enter into the later transaction. In much the same way, the negligent advice alleged in *Forster v. Outred* [1982] 1 WLR 86 had led to loss as soon as the plaintiff mortgaged her property to pay for her son's debts, even though the mortgage was only enforced 2 years later, since it was at that earlier point that she had detrimentally affected her the value of her property. Similarly, in *Bell v. Peter Browne* [1990] 2 QB 495 damage was suffered at the moment when the husband's solicitors failed to register a caution, not when the wife sold the property and spent the proceeds in disregard of that right.

If the advice had not been negligent they would have had a chance of negotiating a better agreement. That chance also was an asset with a measurable value. Its absence meant that there was an immediate loss. It was not possible to say that there was one cause of action which accrued immediately the contract was entered into (clearly statute-barred) and another residual claim for the loss of a chance. There was one cause of action and it was complete when W entered into the transaction. The same applied even if the advice should have included advice to renegotiate the agreement, since it was that same event which constituted the breach of duty. As for the waiver of Clause 21(ii), the fact that it could not be used before August 31, 1998 did not mean that it did not have a value prior to that date.

Damage distinguished from purely contingent liability:

Shore v. Sedgwick Financial Services, CA 23.7.08

On D's advice in 1997 C transferred accrued pension benefits to a personal pension fund withdrawal scheme and allegedly suffered loss. In his negligence action, commenced in 2005, the Judge accepted that loss was not suffered immediately on entering the PFW scheme, since C had then only been exposed to the risk of loss and it was 2 years later, when annuity rates fell, that his rights were of demonstrably less value. His action was therefore in time.

The CA ruled to the contrary. The PFW was immediately less advantageous and caused detriment, in that it offered an uncertain income stream instead of a safe investment with fixed and certain income. This was not purely contingent damage, and the fact that the risk to which he was exposed might not eventuate did not mean that he did not suffer loss as a result of being exposed to that risk. The damage consisted of the possibility of actual financial harm, along with the possibility of being better off, which was inherent in the acquisition of a bundle of rights which, from the outset, were less advantageous than previous rights under the occupational pension scheme. As for his knowledge of the right to sue, this had been acquired more than 5 years before proceedings were actually commenced

Post-trial events should not be ignored if relevant to just compensation:

Whitehead & Others v. Hibbert Pownall & Newton, CA 4.4.08

W was administrator of the estate of his partner Paula. HPN had acted for her in a wrongful birth claim arising out of a doctor's failure to diagnose *spina bifida* but had negligently failed to set down for trial 6 years after commencing proceedings, when she

committed suicide. No claim could have been made for loss or expense after her death, though premature death would not of course have been foreseen at the notional trial of the main action. In a professional negligence claim against the firm, the Judge ruled that the action would have had 85% prospects of success and awarded damages of £113,000 to her estate; but ruled that although the firm owed a duty of care to her it owed none to W in his own right. He thus rejected the argument that the firm's negligence had deprived W of the opportunity to recover prospective damages (calculated on the premise that his partner was still alive at trial). Both sides appealed.

The CA agreed with HPN that they were not liable for failing to secure for W an uncovenanted benefit which exceeded what the law would allow. The principle of restoring the Claimant to the position in which he would have been had there been no negligence should not be applied so narrowly that post-trial events should not be left out of the reckoning if relevant to just compensation: the law should not speculate when it has knowledge. In any case H was owed no duty of care in a personal capacity, nor was he a putative beneficiary, nor had any responsibility towards him been voluntarily assumed. It was not fair, just and reasonable to impose on the firm a duty to advise W as to his own potential claim against the health authority.

The duty of care in tort and contract are not necessarily coterminous:

Platform Funding v. Bank of Scotland Plc, CA 31.7.08

It is a breach of a surveyor's duty to value the wrong property.

The argument which failed was that he needed to exercise only reasonable care in all aspects of his engagement, including going to the right place. (The surveyor had arrived at a plot of unnumbered houses and the intended borrower had deliberately directed him to one almost completed instead of the right one, where construction had only just begun.)

The CA held 2-1 that a qualified common-law duty of that kind was not inconsistent with, and did not exclude, an unqualified contractual duty to report to the proposed lender on the specific property certified as having been inspected, and none other.

FATAL ACCIDENTS

The "benefits" trap:

FAA s. 4: "*benefits which have accrued or will or may accrue to any person from his estate or otherwise as a result of his death shall be disregarded.*"

Arup v. MW White Ltd, CA 7.5.08

After the death at work of A's husband she received a death-in-service benefit of £130,000 and another £100,000 under the company's "Employee Benefit Trust". The Judge deducted the former from damages, on the basis that it had not accrued "as a result of his death", but decided that the latter - to which the same applied - fell under the common-law 'benevolence' exemption and should be disregarded. Both sides appealed.

Held, the expression "or otherwise as a result of his death" was wide enough to cover benefits in kind whether or not identified. The rule that such benefits were not to be deducted from the dependant's damages was clear and absolute, and *McGregor on Damages* (17th edn, 4th supplement) was right to argue that if they did not accrue "as a result of death" they had to be disregarded anyway precisely because they were causally unrelated. The word "accrue" did not apply only to benefits to which there was an entitlement as of right – or in other words, only to those of which death was the cause rather than a cause - and the Judge had been wrong in any case to rule that neither benefit resulted from death.

Accordingly, the days of artificially construing S. 4 in the Defendant's favour are over: all benefits which come to the claimant must be disregarded, whether by statute or, if the statute does not apply, at common law.

LIMITATION

The rule in *Stubbings v. Webb* has gone – the court has a discretion to extend time in all injury cases even where the tort is deliberate

But “Judges should not have to grapple with the notion of the reasonable unintelligent person.”

A v. Hoare (& conjoined appeals), HL [2008] 2 All ER 1

These 6 actions by victims of sexual abuse in childhood had all been held to be statute-barred insofar as they relied on the tort of assault rather than breach of duty (which could be brought within the language of S.11 of the Limitation Act 1980 and thus be amenable in principle to discretionary extension under S.33). The HL unanimously accepted the invitation to rule that its decision in *Stubbings v. Webb* [1993] AC 498 had been wrong.

S. 2 requires actions in tort to be commenced within 6 years of the date of accrual. S. 11 qualifies this, in cases of personal injury, where the action is for “negligence, nuisance or breach of duty”, so as to allow 3 years from the date of accrual or, if later, the date of “knowledge” (as defined by S. 14). In turn, S. 11 (only) is subject to discretionary extension under s. 33. Until *Stubbings* the courts had tended to give a wide meaning to “breach of duty” (as they continued to do in several commonwealth cases). After it, there had been no real difficulty while vicarious liability for sexual assault seemed impossible. The abuser

himself was always assumed to be worthless, as he was in *Stubbings* - when the National Lottery had not been invented - so that the House might have been unduly influenced by the appearance of a litigious motive other than compensation.

This perception changed with *Lister v. Hesley Hall* [2002] 1 AC 215. Claims proliferated against institutions and local authorities based on vicarious liability, and so did anomalies and absurd distinctions of the kind already noted in *S v. W* [1995] 1 FLR 862, where a child could not sue her father for sexually abusing her but could sue her mother for negligently failing to prevent it. Artificial distinctions had ensued in order to prove “systemic” negligence, leading to “arid and highly wasteful litigation”.

On the other hand the HL rejected the argument that the date of knowledge of “significant injury” under S. 14(2) allowed account to be taken of the claimant’s personal characteristics – whether pre-existing or consequent upon the injury suffered. The test was entirely impersonal and objective: not whether the claimant himself would have considered the injury sufficiently serious to justify proceedings but whether he would “reasonably” have done so. Impersonal standards could not vary with the person to whom they were applied. The effect of the claimant’s injuries was relevant to the steps he could reasonably have been expected to take, in terms of gaining knowledge under S. 14(3), but not to the impersonal standard under S. 14(2).

This did not mean that the law treated as irrelevant the question whether the claimant could reasonably have been expected to commence proceedings given his psychological state in consequence of the injury. Rather, that related to the specific issue, raised in S. 33(3)(a), of the “reasons for delay on the part of the plaintiff”. Consideration of the Claimant’s particular circumstances, including subjective circumstances, was pre-eminently the field of the discretion under S. 33.

Two notes of caution remain to be sounded: firstly, this ruling applies only to S.11 - claims for or including damages for personal injury - and has no effect on the question whether limitation periods generally should be subject to a discretionary extension. Secondly, it has no effect on the breadth of that discretion. Applications will be no easier, or harder, to bring under S. 33 except in the sense that the court is enjoined to consider the psychological effects of the injury as one of the relevant circumstances.

Footnote 1: On 8.7.08 the Court did exercise its discretion to allow the claim to proceed under S. 33, where the Defendant had won £7m on the lottery 16 years after the attack. The reason for the delay was simply that any judgment would be worthless during a life sentence of imprisonment. The floodgate argument - reliance on a defendant's impecuniosity - was considered unrealistic.

Footnote 2: The CA ruled in *Albonetti v. Wirral MBC* 4.7.08 that knowledge of "significant injury" was incontestable in a case of rape, and especially anal rape, at the age of 15. It remitted the question of a S. 33 extension.

S. 32 - Postponement of Time for "Fraud, Concealment or Mistake"

For the purpose of 32(2) deliberate breach of duty amounting to concealment includes a claim under the Insolvency Act:

Giles v. Rhind, CA [2008] 3 All ER 697

In 2000 G had obtained judgment (for diverting business in breach of a contractual duty of confidence in 1993/4) against R's husband, and a charging order was later made over his house. The house was sold and the proceeds divided 80% in R's favour, under the terms of a deed ostensibly dated 2 April 1992. In an action commenced in January 2006

G alleged that this deed was in fact executed in 1998 as a device to defraud creditors, hence liable to be set aside under S. 423 of the Insolvency Act 1986. G was permitted, under an application made in January 2007, to amend so as to plead that the deed was executed later in 1992 or in 1994, hence more than 12 years previously, but that this concealment was not reasonably ascertainable until 2003. R appealed.

Held, "breach of duty" was wide enough to include the present claim under the Insolvency Act. It was not to be equated with the more restricted meaning covered by S. 11 and meant (in the context of fraud, concealment or mistake) legal wrongdoing of any kind giving rise to a right of action, as opposed to a breach of an equitable or fiduciary obligation in the tortious or contractual sense.

The CA rejected the alternative argument (under s.35) that retrospective amendment was permissible as arising out of substantially the same facts as the existing case. In this instance the nature of the transaction, and the facts supporting it, would be quite different.

CONVERSION

Statutory conversion - Torts (Interference with Goods) Act 1977 - requires an unequivocal demand and an unequivocal refusal:

Schwarzschild v. Harrods, QB 19.3.08

S inherited some jewellery kept in a safe-deposit box at Harrods. After 5 years' of non-payment of the rentals H opened the box and listed its contents. It was entitled to do so in the circumstances because of provisions in the agreement with S's mother made in 1955, and also to sell the contents. The contents were not sold, however. Another 6 years

later H made another list before consigning the contents to general storage together with those from other boxes (though S also alleged that Mr. Al-Fayed had picked out the best pieces for his wife). 8 years after that S's private investigator demanded the "immediate commencement of the process to return my Client's jewellery". H did not respond but held a without prejudice meeting with inspection. 8 years later S sued and the proceedings were summarily dismissed as time-barred.

The CA accepted her argument that where statutory conversion (formerly 'detinue') was concerned it did not normally suffice merely to neglect to comply with a demand. There had to be an unequivocal demand followed by an unequivocal refusal. Here there had been neither. Accordingly H was not certain to succeed on limitation.

DECEIT & MISREPRESENTATION

A machine can be deceived:

Renault UK v. Fleetpro Technical Services, QB 13.11.07

F entered into an agreement for an affinity scheme under which members of the British Airline Pilots Association and their immediate families could buy Renault cars at a special discount. Using the appropriate fleet code F placed 217 orders in 10 months, all but 3 of which R alleged were fraudulent representations that they were placed by qualifying members when they were not. F was in fact selling them as an internet broker for a £300 profit each time. R sued to recover discounts amounting to about £700,000. One of F's defences was that no representation had been to any person employed by R or on its behalf, but rather through dealers whose orders were processed without human supervision by R's computer system.

This defence failed. The machine was set up in such a way as to process certain information in a particular way and not to query the transaction if the correct information were transmitted. A misrepresentation was made to R at the moment when its computer system was commanded, by the appropriate code, to process a transaction as one to which the discount applied. The fact that these fraudulent orders were placed through agents made no difference. F's sole director and shareholder was equally liable for fraud.

On the other hand, R knew within the a month of the first sale that the scheme was being abused, or else turned a blind eye to the obvious (not least since the sales figures looked good and its salesman received bonuses on them), and had therefore not relied on any misrepresentation after a very short time. Furthermore, R had not suffered any loss: none of the vehicles had been supplied at less than cost, R had made some sort of profit on all of them, and if no order had been placed for a particular vehicle it would not have been produced. An account of profits was not clearly available in cases not based on a fiduciary relationship and in any case was an equitable remedy which R did not deserve. "One does not normally find a willing victim of fraudulent misrepresentation who has actually profited from being deceived."

Directors' personal liability:

Contex Drouzhba v. Wiseman, CA, Times 8.1.08

W, on behalf of his company, signed an agreement with C containing a promise to pay by bank transfer for goods to be ordered over 2 years at the rate of 3,000 garments per month. The Judge found that this was an implied representation by W that the company had the capacity to meet its obligation to pay, when in fact he knew the company to be insolvent and with no chance of an injection of capital from elsewhere. W appealed

against his liability in deceit, arguing that he had not signed in a personal capacity as “*the person to be charged*” and thus had a defence under the Statute of Frauds Amendment Act 1828 S. 6.

W’s appeal failed. He was effectively the mind of the company, and where the document he signed made a representation which was false to his knowledge he had personal liability even if the company was liable: *Standard Chartered Bank v. Pakistan National Shipping Co* [2003] 1 AC 959. The mischief at which the 1828 Act was aimed was to require writing as proof of representations as to credit or solvency. There was thus no reason why his signature on the document would not suffice to comply with the Act if it contained a fraudulent representation by the director, for which the director would otherwise be personally liable. S. 6 applied to a representation implied by the terms of a written document as well as an express one; it merely defeated a representation by conduct alone. Not every contract signed by a director would contain an implied representation by him personally, but this agreement contained a promise of payment on certain terms on which C would naturally rely before accepting further orders. The existence of remedies for fraudulent trading under the Insolvency Act Ss. 213 / 214 was irrelevant. By promising such terms W was representing a capacity to pay which he knew to be untrue.

A company may only complain of fraud by its individual alter ego if the company is the target of the fraud.

Stone & Rolls Ltd. (in liquidation) v. Moore Stephens, CA 18.6.08

This was an action alleging professional negligence action against the company’s accountants in not uncovering its MD’s frauds over the course of 3 annual audits (see **2007-8 Tort bulletin**). The proceeds were filtered through the company’s books though

the company neither gained nor lost. The Judge had refused to strike out the action on the basis of attribution - i.e. barred by the ex turpi causa rule in the same way as an action by its sole directing mind - since even though it was not a fraud upon the Company, it had exposed the Company to liabilities (towards the cheated banks).

MS succeeded in their appeal. The Company’s action was inextricably linked with a fraud perpetrated on banks by its alter ego. Attribution of fraudulent knowledge - and by extension the ex turpi causa bar – would not apply where the fraud was being practised upon the Company itself and the Company was the intended target (*Re Hampshire Land Co.* [1896] 2 Ch 743); but it was not enough that the fraudulent agent’s acts might result in harm to the Company. Here, because the Claimant’s sole directing mind and will had procured it to defraud the banks, his dishonesty was imputed to the Company and the Company itself was the fraudster. Moreover, the illegality principle could not be overridden by the argument that it was the very thing the Defendants had a duty to prevent.

‘Paternity fraud’:

A v. B [2007] 2 FLR 1051

A and B began a relationship and two years later B had a son. She already had a daughter aged 7. A always believed he was the boy’s father and supported him financially. When the relationship ended and he sought a contact order (implacably opposed by B) B denied that A was the father. A DNA test proved her right.

A now sued for deceit, alleging that ever since B had discovered she was pregnant she had assured him that he was the boy’s father and that since their cohabitation she had never had sexual relations with any other man (and her name was not Mary). A’s claim was that he had only provided financial support for mother and child in reliance on fraudulent representations. B denied the existence of a cause of action and in any case damage.

Held, all the ingredients of the tort of deceit were made out. B had made representations on many (about 130) occasions, those representations were untrue and B knew they were untrue, and they had been made with the intention that A should rely on them. As a result of these fraudulent representations A had suffered damage. Even if made for more than one motive, A's payments were procured by fraud and ceased as soon as the DNA results were known. He had also suffered real distress and it was not contrary to public policy to award general damages (£7,500) – though NB these were not to compensate him for the refusal of contact. A was also entitled to special damages for money spent on B, but not for any money, such as nappies and public school fees, spent for the sole benefit of the child: *McFarlane v. Tayside Health Board* [2000] 2 AC 59. These special damages (£14,900) were assessed as 50% of the sums spent on joint holidays, meals etc. during infancy, which were for the parties' sole benefit. They could not extend to sums like maintenance payments, which were to the child's joint but indivisible benefit: damages do not lie for looking after and caring for children.

Foreseeability is wholly irrelevant when assessing damages for fraudulent misrepresentation:

4 Eng Ltd v. Harper & Simpson, Ch 29.4.08

E acquired the shares in an engineering company in reliance on H & S's fraud: employees of its main customer had been bribed to pay out on bogus invoices and the company, sold for £1.2m, was in reality worthless. D were convicted of conspiracy to corrupt and defraud. E claimed 5 heads of loss: the purchase price; costs of acquisition; liabilities after acquisition such as salaries, pensions, NIC; the cost of investigation; and finally loss of opportunity to buy and to profit from another company, which it would otherwise have done. H & S argued that this last head, claimed at over £10m, was impermissible either as double recovery (direct loss plus loss of a chance) or as too remote since unforeseeable

to them; they also contended that damages could not be recovered for both a capital and an income element.

Held, damages for loss of an alternative purchase were recoverable in principle if caused by deceit and reliance upon it, whether or not direct loss was also claimed, and foreseeability was irrelevant: *Smith New Court v. Citibank* [1997] 2 AC 254 HL. Remoteness could be properly argued where the loss was not directly caused by the Defendant's deceit, but that was not the case here. Nor was E claiming loss of capital in acquiring another company, but rather the loss of opportunity to make a capital profit from that company as well as income. These were cumulative, not alternative, losses and on the evidence E was entitled to 80% of the fifth head of loss. Against that, the salaries etc claimed under the third head would have been double recovery and were disallowed.

The individual victim of fraud does not need to be known:

Abu Dhabi Investment Co.& Ors. v. H Clarkson & Ors, CA 26.6.08

C3 invested \$81m, through special purpose vehicles C1 & C2, in a joint venture to operate fast container ships of allegedly revolutionary design. The scheme had been based on fraudulent assurances by D5-6, but C lost its deceit claim because the individual defendants (a) would not have known what precise role each special purpose vehicle would play and (b) had not intended their representations to be acted upon by C.

The CA accepted C's argument that this did not matter. The Claimant did not need to be known in order to prove liability for deceit, provided he belonged to a class of persons within the Defendant's contemplation as likely and intended to be deceived. Here, D knew that C3 intended to invest through spvs which in turn would subscribe to their shares in the venture company with money borrowed from a syndicate of banks. Precisely why it arranged matters in that way was of no importance. The fact was that D intended, by their

dishonest misrepresentations, to deceive the controlling minds of the special purpose vehicle.

OCCUPIERS' LIABILITY

Where the risk of injury arises from a voluntary activity on someone's land, the occupier is not required to prevent the victim from engaging in that activity or to supervise or train him:

Poppleton v. Portsmouth Youth Activities Committee, CA 12.6.08

P was injured at an indoor activity centre when 'bouldering' – simulated rock-climbing up to 16' without ropes. He was an inexperienced climber but was not referred either to the rules or to notices (commonly ignored) prohibiting jumping. He tried to leap onto a buttress facing the back wall, fell awkwardly on his head and was paralysed. The Judge found there was nothing wrong with the state of premises, that the club was under no duty to assess competence, but found it liable (as to 25%) for failing to warn P that thick safety matting did not make a climbing wall any safer. Both sides appealed.

The CA found P wholly responsible for his own misfortune. It was extremely rare for an occupier to be under a duty to prevent people from taking risks which were inherent in activities they had freely chosen to undertake. The Judge was wrong to hold, in effect, that the risk of inadequate protection from the matting was not obvious. It was, and no amount of matting would have made any difference. Moreover, if the Defendant were under a duty to train and / or supervise, this would equally apply to a multitude of other commonplace leisure activities (whether charged for or not) which included any inherent element of risk.

It would be wise to avoid the cliché “as safe as a bouncy castle” – they can be dangerous too:

Harris v Perry, CA, 'Times' 25.8.08

P had hired a bouncy castle and a bungee-run for their triplets' 10th birthday party. Both inflatables were intended for use by adults as well as children, and were set up on a school playing-field outside their back garden. H, age 11, had not been invited to the party but was allowed to play on the bouncy castle beforehand. He was accidentally kicked on the head when a much taller and older boy (who lived next door) did a somersault, just at the moment when Mrs. P had gone to help another child with his bungee belt. P were found liable at trial for negligently failing to exercise uninterrupted supervision of the bouncy castle and for allowing older children on it at the same time.

The CA found for P. It was impossible to preclude the risk that children might injure themselves, or each other, when playing together. It was neither practicable nor in the public interest to impose a duty of constant supervision on parents. Boisterous behaviour on a bouncy castle was reasonably foreseeable, but serious injury was not. The appropriate standard of care here was therefore to protect children against a foreseeable risk of physical harm that fell short of serious injury. That meant being in the vicinity of the bouncy castle but not continuous observation in case the children grew boisterous. The accident would probably not have been avoided anyway even if there had been uninterrupted supervision.

NUISANCE

Caveat lessee:

Jackson v. JH Watson Property Investment Ltd., Ch 7.1.08

W was J's reversionary landlord under a 125-year lease in a mansion block in Liverpool. The concrete to the light wells adjoining J's flat, but outside the demise, had been laid defectively, so that water leaked into the flat causing damage which J had had to repair. J did not allege breach of any repairing covenant in the lease and accepted that the defects arose when the building had been converted into flats, hence before his lease commenced. Nonetheless he alleged that they constituted a continuing nuisance which W had adopted and had failed to take steps to abate.

The claim failed. The Tenant took the demised premises as they were and could not complain about pre-existing defects, as opposed to nuisances created after the commencement of the tenancy where the principle caveat lessee did not apply. The principle applied to nuisance involving physical interference with the physical enjoyment of land and physical damage due to defective premises, whether the complaint related to the state of the demised premises or of other parts of the building in which they were located.

A nuisance claim requires some form of proprietary interest:

Hong Cheok Cheung v. Southwark BC and others, Ch 19.12.07

C's restaurant occupied 4 units under the brick arches of London Bridge. She claimed that the street was a public highway which had been obstructed, with the result that passing

trade had dropped off. She alleged private and public nuisance, breach of duty under the Highways Act 1980 s.130 and misfeasance in office.

C was held to have no locus standi. She had no proprietary interest in the street, in the units in question or any other relevant land and was merely a shareholder in the owner of the restaurant, which had never actually opened. She had suffered no damage over and above the general inconvenience allegedly suffered by the public. She likewise had no standing to claim breach of statutory duty, or misfeasance, and in any case no special damage had been identified.

Footnote 1: Fear and apprehension of apparent danger from a neighbouring property is not enough, without proof that it is well-founded, i.e. that danger actually exists on the balance of probabilities:

Birmingham Development Co. v. Tyler, CA 24.7.08

Footnote 2: Nuisance does not give rise to claims for an account of profits:

Forsyth-Grant v. Allen, CA 8.4.08 – where F's hotel had been blighted by the loss of light from two residential properties built next door.

Footnote 3: But public nuisance can give rise to damages for personal injury:

Corby Group Litigants v. Corby Borough Council, CA, 'Times' 28.5.08 – a strike-out application in class action alleging exposure of expectant mothers to toxic waste on contaminated land, leading to upper limb deformities in their children. Suggestions to the contrary in *Transco Plc v Stockport MBC* [2004] 2 AC 1 were obiter since that case did not involve either public nuisance or personal injury.

MISFEASANCE IN PUBLIC OFFICE

Malice is an essential element – but all too commonly overlooked

Carter v. Chief Constable of Cumbria, QB 15.5.08

C and 8 other police officers had their use of police vehicles and claims for travelling expenses investigated and referred to a misconduct panel. Some of the 104 charges were then withdrawn and the rest were dismissed for lack of evidence. The officers, who had refused to co-operate throughout, immediately launched a damages claim for misfeasance (and negligence, though this was subsequently abandoned). They argued that the element of bad faith or malice on the part of the investigating officers (2 Assistant Chief Constables and a Chief Inspector) was to be inferred from the weakness of the case against them. The defendant argued that this imputed reckless indifference to the merits but that was only one possibility and not the most logical.

The Court agreed with the CC and struck out the claim. This action looked very much like - and was - an attempt to get around his general immunity towards his officers in negligence. Even assuming his errors to be unlawful, reckless indifference was not necessarily to be inferred, and C's own obstruction had hindered the whole investigation. They had no prospect of proving malice.

TRESPASS TO THE PERSON

Wrongful arrest and false imprisonment: an officer does not have reasonable grounds for suspicion if he merely believes that his superior does:

Sonia & Mohamed Raissi v. Met Police Commissioner, QB 30.11.07

On 21.9.01 S & R were arrested and detained for 4½ and 2 days respectively, without being charged, on suspicion of involvement in the terrorist attacks in the USA 10 days previously. They were wife and brother of another Algerian suspect wanted by the FBI. The arresting officers believed that more senior officers might well have more information than they were privy to.

This belief was held to constitute inadequate grounds for the arrest. If information given to the officers at a briefing was not sufficient to constitute reasonable grounds for suspicion under the Terrorism Act 2000 s. 41 - suspicion that a person has been concerned in the commission, preparation or instigation of acts of terrorism - the suspicion that someone else did have reasonable grounds could not avail them. Otherwise there would be no safeguard against arbitrary arrest and detention, and it would be a short step to the "obeying orders" defence which was emphatically rejected in *O'Hara v. RUC* [1997] AC 286. The officer arresting S did personally have reasonable grounds for suspicion (she had been told that S was with her husband in Phoenix, Arizona, while he was undergoing flight training, shared an account into which large payments had been made, and worked for an airline at Heathrow) but the officer arresting M had none beyond surmise that his superiors did. The Court rejected D's argument that the defence of necessity (on which neither arrest had been ostensibly based) applied.

Necessity as a defence to false imprisonment:

Austin & Saxby v. Met Police Commissioner, CA [2008] 2 WLR 415

The police had a simple tactical answer to a surprise Anti-Capitalist May Day rally in 2001: they put a cordon round 6,000 demonstrators at Oxford Circus and kept them there for 7 hours. A plan for controlled release was delayed by violence on the part of other groups converging on the area, and though some individuals were gradually released A's and S's pleas fell on deaf ears. A, indeed, was due to collect her infant from the child-minder at tea-time and only just had time to fit in a few tirades on behalf of the SWP. They sued for false imprisonment and breach of Art 5 of the ECHR – effectively a test case for about 150 similar cases (all publicly funded). The MPC accepted that neither of them had been threatening a breach of the peace but submitted that others had and this justified detention as part of a duty to maintain the peace. The Judge agreed.

So did the CA. There had been an interference with the Appellants' liberty which amounted to false imprisonment unless it were lawful. But the lawful exercise of their rights might be lawfully restricted by the police where (and only where) there was a reasonable belief that there were no other means whatever whereby a breach of the peace could be avoided: in other words, necessity. This applied throughout the whole period, even though the police knew that not everyone in the crowd was a demonstrator. Nor was the situation (unlike the traffic) static: it was "a dynamic, chaotic and confusing situation" in which there were also many other protesters outside the cordon threatening serious disorder and posing a threat both to the cordon and within it. In the circumstances it could not sensibly be held that what was originally something less than a deprivation of liberty subsequently became a deprivation of liberty within the meaning of Art.5(1).

Note: the defence of necessity was rejected on narrow grounds in Raissi (supra) and ridiculed by the Appellants' Counsel as "worthy of Mugabe". The paradoxical result

appears to be that the more people imprisoned, and the longer the period of imprisonment, the better the chances of pleading necessity.

Assault and self-defence - the assailant's mistaken belief that he is about to be attacked must be reasonably as well as honestly held:

Ashley v. Chief Constable of Sussex, HL [2008] 2 WLR 415

A, suspected of having drugs and firearms, was shot dead on a bungled dawn raid at his house in Hastings. The officer who fired the shot was acquitted of murder and manslaughter on the Judge's direction. Sued by the estate for a range of tortious acts, the CC conceded negligence and false imprisonment; misfeasance in public office was struck out in relation to the shooting itself; assault and battery were also struck out on the grounds of self-defence but restored on appeal.

The issue in the Lords was whether a higher test applies to self-defence than in criminal law, where a mistaken fear of imminent attack must be genuine but need not be reasonable: *R v. Gladstone Williams* [1987] 3 All ER 411.

Held, the civil law does apply a different test. Its main function is to identify and protect the right that every person is entitled to assert against, and require to be respected by, others. It thus has to strike a balance between the right not to be subjected to intentional physical harm and the right to protect oneself against imminent attack, and in civil law that balance had a quite different purpose from a punitive one. As with mistaken belief in sexual consent, mistaken belief as to imminent assault gave grounds for a defence in criminal law whether justified or not, but this could not be true without more in civil law.

There was also the question whether the action should go to trial at all in the light of CC's extraordinary (and poorly formulated) concession of all compensatory damages flowing

from the shooting, and also of negligence, damages for which would be the same as for assault. The House held 3-2 that, the Defendant being determined to avoid a trial at all costs and the Claimant to have one at all costs, it was not an abuse of process to press for a vindicatory Judgment and it was not a collateral attack on the Constable's acquittal.

Vicarious liability for assault: a “reasonably incidental risk” of rugby?

Gravil v. (1) Carroll (2) Redruth Rugby FC, CA, ‘Times’ 22.7.08

In a National League Division 2 rugby match with Halifax C, one of R's second row forwards, punched G in a melee after the whistle had blown. Was the Club liable as well as the player? Yes it was. C's wrongful act passed the *Lister v. Hesley Hall* test of being sufficiently closely connected with his employment. The melee was the kind that often occurred and had been part of the game – it was an “ordinary incident”. Indeed, by expressly forbidding physically assaults, his contract actually contemplated it as such. “On any view” he had been acting in the course of his employment when punching G in the face.

Adrian Salter

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Adrian Salter specialises in all aspects of contract litigation, commercial disputes, fraud and professional negligence. His forensic strengths are in advocacy, rapid assimilation of facts and immediate identification of the critical issues of a dispute. Adrian's fluency in French, Italian and German is often usefully deployed in multi-national and cross-border business disputes. He acts extensively for SIF, Zurich Professional, St. Paul's and other insurers, particularly in relation to solicitors' negligence, and has arbitrated several apportionments of liability. He is an avid amateur pianist and singer (baritone). His dream case materialised when acting for the Fire Brigade after its appliance collided with an opera singer outside Harrods. She tore her vocal cords as she screamed, claimed galactic damages for the loss of her career, and after musicological cross-examination recovered £3,000.



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