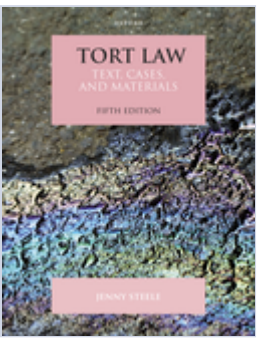

Tort Law: Text, Cases, and Materials (5th edn)
Jenny Steele

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2. Torts of Intention

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Abstract

All books in this flagship series contain carefully selected substantial extracts from key cases, legislation, and academic debate, providing able students with a stand-alone resource. This chapter deals with 'intentional torts' and their considerable variation that affects both the required target of intention (what must be intended?) and the required level of intention (what does it mean to intend something?). It first considers the meaning of intention before breaking down the 'intentional torts' into a number of groups, the first of which is trespass to the person and its three elements: battery, assault, and false imprisonment. The action in *Wilkinson v Downton* is discussed, as interpreted by the Supreme Court in *OPO v Rhodes* (2015), along with intentional economic torts. The chapter concludes by focusing on torts relating to intentional abuse of process (malicious prosecution) and of power (misfeasance in a public office).

Keywords: intentional torts, intention, trespass, battery, assault, false imprisonment, Wilkinson v Downton, intentional economic torts, malicious prosecution, misfeasance in a public office

Central Issues

i) This chapter explores the 'intentional torts'. The intentional torts arise in a wide variety of different contexts, but in all those contexts the law has been on the move in recent years.

ii) We begin by exploring intention itself. We will note considerable variation within the intentional torts. This variation affects both the required **target** of intention (*what* must be intended?) and the required **level** of intention (what does it mean to *intend* something?).

iii) We then break down the 'intentional torts' into a number of groups. The first of these, **trespass to the person**, comprises three torts: battery, assault, and false imprisonment. Trespass to the person has been confined in modern law to acts which are in some sense 'intentional' (*Letang v Cooper*). Even so, trespass torts do *not* depend on showing intentional infliction of harm. Rather, they concern acts whose *intended consequences* (for example, physical contact, or physical restraint) are judged to be unlawful. Trespass torts remain significant in situations where the 'lawfulness' of physical intervention or restraint is in issue. The potential overlap with issues of civil liberties and human rights is therefore considerable. What is the 'constitutional' role of tort in protecting from abuse of power?

iv) The action in *Wilkinson v Downton* is a damage-based tort of intention. A remedy may lie for physical and psychiatric harm which is 'intentionally' caused, and not through any physical impact. In England, courts have resisted academic argument that *Wilkinson v Downton* should be developed in order to provide remedies for injury falling short of psychiatric or physical illness, particularly in the form of 'anxiety and distress'. However, the **Protection from Harassment Act 1997** now provides civil remedies (as well as setting out criminal offences) in respect of a course of conduct that amounts to harassment.

v) The **intentional economic torts** require a higher level of intention than *Wilkinson v Downton*. Even so, in virtually all of the economic torts, intentional harm is not enough. Something additionally 'unlawful' or otherwise 'wrongful' about the defendant's acts is required. No uniform meaning of 'unlawful means' has emerged.

vi) Finally, we turn to torts concerning intentional abuse of process (**malicious prosecution**) and of power (**misfeasance in a public office**). The 'gist' of the latter tort is injurious *abuse of power*. Power exercised recklessly is power abused. Both, however, are damage-based torts. Again, intention alone does not suffice.

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1 'Intention'

There is considerable diversity in the meaning of 'intention' in the torts considered in this chapter. Intention has two dimensions:

1. The **target** of intention

   Here we ask, *what* must be intended? For example, in trespass to the person (assault, battery, and false imprisonment), neither harm nor unlawfulness needs to be intended. In battery, the target of intention is simply physical contact. In *Wilkinson v Downton* by contrast, the target of intention is harm: it must be shown that the tortfeasor intended to cause harm to the claimant.

2. The **level** of intention required

Once we have answered the first question (what must be intended?) we still have to ask, *what is the relevant state of mind*? What do we mean by 'intending' something? This is a more difficult question to answer. For example, must the outcome be a (or the) *goal* of the defendant's action? Or is it enough that it is almost certain to follow? Again the answer varies. In respect of the action in *Wilkinson v Downton*, it was thought until the decision of the Supreme Court in *OPO v Rhodes* [2015] UKSC 32 that a strong degree of likelihood was sufficient for intention to be 'imputed by law': it appears that it must now be the subjective intention of the defendant that harm should be caused, and degrees of likelihood, if relevant at all, will be relevant as evidence of intention. In the economic torts by contrast, it has long been understood that harm to the claimant must generally be a *goal* or *purpose* of the action, or at least a necessary means to the intended goal.

1.1 Is a General Definition of Intention Possible—or Desirable?

It follows from the above examples that no general definition of intention is shared by the English torts of intention. We will have to spell out the relevant meaning of intention in respect of each tort. In its 'Restatement' of the law of torts, the American Law Institute set out a general statement of the meaning of intention in American tort law as a whole. The project of 'restating' tort law in the United States has become more complex, and the Third Restatement is being published in volumes covering particular areas, rather than tort law as a whole. A Third Restatement on causing physical and emotional harm was published in 2010, and is extracted next; while work is under way on a further volume dealing with Intentional Torts to the Person: a First Tentative Draft was published in April 2015 and the most recent Tentative Draft in 2020.

> ### Section 1 Intent
>
> A person acts with the intent to produce a consequence if:
>
> (a) the person acts with the purpose of producing that consequence; or
>
> (b) the person acts knowing that the consequence is substantially certain to result.
>
> p. 35 ↵ **Comment:**
>
> a. *The dual definition*. For a variety of reasons, tort law must distinguish between intentional and nonintentional consequences and harms (including harms that may be negligent, reckless, or without fault). Harms that are tortious if caused intentionally may not be tortious if caused unintentionally; affirmative defences available in negligence cases may not be available when the underlying tort is intentional; the limitation period may vary depending on whether the tort is one of intent or instead one of negligence.
>
> ...
>
> There are obvious differences between the actor who acts with the desire to cause harm, and the actor who engages in conduct knowing that harm is substantially certain to happen. There is a clear element of wrongfulness in conduct whose very purpose is to cause harm. While there are circumstances in which acting in such a way is appropriate, tort law can fashion affirmative defences (such as necessity and defence of self and property) that take those circumstances into account...
>
> b. *Intentional consequences and intentional harms*. ... when tort-liability rules do attach significance to intended consequences, most of the time the consequence in question is the fact of harm, and it is the intention to cause such harm that under ordinary tort discourse renders the actor liable for an intentional tort...

Comparing this statement of US law with the law outlined in this chapter shows how far the tort law of England and Wales and of the United States have diverged, despite their common roots. The first point to make is that no such general comment could summarize the full range of torts referred to by English courts as 'intentional'. Comment b suggests that so far as *the target of intention* is concerned, 'intentional torts' in the US will generally involve an intention to bring about harm. This is by no means the case with all those torts described in English law as 'intentional', as is made clear by *Letang v Cooper* [1965] 1 QB 232, extracted in Section 2.3. English law may recognize a wrong where there is no intention to cause harm, or even to violate rights. However, there are torts where intention to cause harm is part of the definition of the tort: deceit provides an example (requiring intent that the claimant should rely to his or her detriment). English tort law does not begin with a defined approach to intent which can then be applied in a range of torts; rather, each tort in this chapter has its own intention requirement. This is certainly untidy, and there are signs that it may lead to confusion if principles are read across from one tort to another.[1] But it might nevertheless be justifiable, to the extent that the torts collected here protect a range of interests, and do so in different ways.

For example, protecting against *unlawful* interferences—including interferences in excess of public law powers—has become the hallmark of some aspects of the English law of trespass to the person. By contrast, in the tort of misfeasance in a public office, requirements as to a public officer's mental state are added to the notion of excess of power. This tort focuses on egregious conduct, where false imprisonment focuses on unlawful states of affairs.

In respect of the *level* of intention (our second question of intention, above), the US Restatement seems to be broader and less demanding than at least a number of English intentional torts. It includes some results which are merely the side-effects of action (though they must be 'substantially certain' to result) and not the actor's *purpose*. This is enabled by the 'dual definition', reflected in parts (a) and (b) of Section 1.[2] On the other hand,
p. 36 the ↵ definition excludes recklessness, which *is* sufficient to amount to intention at least in the English tort of misfeasance in a public office and (in respect of some of their elements) in deceit and malicious falsehood. Recklessness is separately defined in another section of the Restatement just extracted (Section 2). In US law, the implications of recklessness are quite separate from the implications of intent.

1.2 The Insufficiency of 'Intention'

The Restatement makes clear that the core meaning of intention in US tort law is intention to cause harm. No such general point can be made about English 'intentional torts'. But at the same time, it is also stated that it is generally easy to justify liability based on such intention. English law, however, often declines to treat even intentional harm as a *sufficient* 'wrong-making factor'.[3] A key case to this effect is *Allen v Flood* [1898] AC 1,[4] in which the House of Lords decided that bad motive did not suffice to render an otherwise lawful act 'unlawful'. American courts rejected *Allen v Flood* and the law took a different path still reflected in the Restatement: *Tuttle v Buck* 119 NW 946 (Minn, 1909). In the case of battery and false imprisonment (both aspects of 'trespass to the person'), the key 'wrong-making factors' lie not in intent nor fault, but in the unlawful or non-consensual nature of the physical interference.

Intentional infliction of harm is rarely a sufficient basis for liability in the English law of tort. At the same time, intention may be targeted at something other than the infliction of harm, yet tortious liability may follow. Intention does not have the same general significance as a 'wrong-making factor' in English tort law as it does in American tort law. Nevertheless, the torts included in this chapter are very significant and, in many cases, are still in the process of development despite their long history.

2 Trespass to the Person

2.1 The Relevant Torts and Their General Features

There are three torts which together make up 'trespass to the person'. These are **battery**, **assault**, and **false imprisonment**. In this section, we outline their basic features; more detailed discussion of each tort follows.

Battery

Battery requires an act of the defendant which directly and intentionally brings about contact with the body of the claimant, where the contact exceeds what is lawful. Battery is actionable without proof of damage (though see *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, Section 4.1). There need not be an intent to harm, nor even an intent to act unlawfully. In battery, the necessary intention is to bring about
p. 37 the physical contact. The unlawfulness of that contact creates the wrong. It is for this reason that very ↵ similar torts—battery, and false imprisonment—have been referred to as an 'intentional tort' and a 'strict liability tort' respectively,[5] without inaccuracy. Liability is strict because it does not require fault; at the same time, it is based on intention to the extent that an important aspect of the tort (the interference complained of) must be intended.

It has been argued that battery does not need even this limited intentional element and that it may be committed recklessly or even carelessly.[6] This would enable trespass to the person to be reunited with trespass to land and goods. We will see that the legacy of *Letang v Cooper* has been a requirement that the contact must be intentional. A major change would be needed to resurrect 'negligent trespass to the person' in English law; and it is likely the courts would be reluctant to allow trespass to emerge as an alternative to negligence in cases of careless personal injury.

Directness

The idea that the contact must be **direct** is a legacy of history. As Hale LJ put it in *Wong v Parkside* [2003] 3 All ER 932:

> 7 As every law student knows, the common law distinguished between an action in trespass and an action on the case. Trespass to the person consisted in the direct infliction of harm (or the threat of the immediate infliction of such harm) upon the claimant. But the law recognised that physical harm might be inflicted indirectly. If intentional, this was the tort recognised by the High Court in *Wilkinson v Downton* [1897] 2 QB 57. … If negligent, it was eventually recognised as the tort of negligence in *Donoghue v Stevenson* [1932] AC 562.

M. J. Prichard, 'Trespass, Case and the Rule in *Williams v Holland*' (1964) CLJ 234–53, places the origins of the tort of negligence (liability for carelessly caused harm outside a particular relationship) at a much earlier date than *Donoghue v Stevenson*, with the case of *Mitchil v Alestree* (1676). Prichard too particularly notes that trespass was limited by the need for directness or 'immediacy'. *Mitchil v Alestree* involved the dangers created by breaking unruly horses in Lincoln's Inn fields: when the horses bolted, they were no longer controlled by the defendant, and the damage was not directly or 'immediately' caused by the defendant's act.

F. A. Trindade, 'Intentional Torts: Some Thoughts on Assault and Battery' (1982) 2 OJLS 211, at 216–17

> The first ingredient of the tort of battery is that whatever has to be done to the plaintiff by the defendant to make the activity actionable as a battery must be done *directly*. It is an ingredient which is common to all three torts of trespass to the person, assault, battery and false imprisonment but it is not sufficiently emphasised in the textbooks ...
>
> p. 38 ↵ The example given by Fortescue CJ in *Reynolds v Clarke*[7] of tumbling over a log left unlawfully on the highway (consequential) and being hit by a log being thrown unlawfully onto the highway (direct) emphasised the element of immediate contact with which 'direct' acts came to be associated. But it was not only hits by something thrown at you which were regarded as 'direct'. An act which set in motion an unbroken series of continuing consequences, the last of which ultimately caused contact with the plaintiff was still regarded as sufficiently 'direct' for the purposes of trespass. So when the defendant rode his motorcycle into B who collided with the plaintiff who was thrown to the ground, it was held that the facts constituted a 'direct' act for an action in trespass.[8]

A consequence of the 'directness' requirement is that although the tort of battery might justify an action against a party who is generally 'blameless' (for example, a surgeon who carries out surgery having been falsely informed that a patient has consented), it does not tend to allow actions against 'peripheral parties' (for example, a local authority which does not spot that a builder has not complied with the approved plans; or a mother who fails to report criminal acts of abuse on the part of her husband). In particular, it does not appear to allow a claim for 'nonfeasance' (or failure to act).[9]

Intention

The target of intention in the tort of battery is *physical contact*.

F. A. Trindade, 'Intentional Torts: Some Thoughts on Assault and Battery' (1982) 2 OJLS 211, at 220

> ... In battery what is required is intentional contact not an intention to do harm—and it is not correct to say that trespass can be brought 'only for the direct physical infliction of *harm*'. As Talbot J said in *Williams v Humphrey* [*The Times* 13 February 1975; p. 20 (transcript)]: 'it was argued that for the act to be a battery, there must be an intent to *injure*. I do not accept this contention. The intention goes to the commission of an act of force. This seems to be the principle in many cases of trespass to the person'.

Assault

Assault requires no physical contact but is a direct threat by the defendant which intentionally places the claimant in reasonable apprehension of an imminent battery.

Assault is, therefore, a 'secondary' tort, which is defined in terms of apprehension of battery. The target of intention in assault is not entirely clear. In *Read v Coker* the requirement is said to be intent to commit a battery. In *Bici v Ministry of Defence* it was intent to put in fear of violence. The latter is more consistent with *R v Ireland* [1998] AC 147 (discussed later).

In *Stephens v Myers* (1830) 4 C & P 349, 172 ER 735, a member of the audience at a parish meeting threatened to hit the chairman. No assault was established because the defendant was at some distance from the plaintiff
p. 39 and surrounded by others, and was considered to ↵ have no 'present means' of executing his threat. By contrast, in *Read v Coker* (1853) 13 CB 850; 138 ER 1437, the plaintiff was threatened by a group of workmen who said they would break his neck if he did not leave the premises. An assault *was* established since they had the means of carrying out their threat.

The threat may of course take the form of words. But what of silence? In *R v Ireland* [1998] AC 147, a case of criminal assault occasioning psychiatric harm, the House of Lords held that a menacing *silence* could amount to an assault, provided it put the victim in reasonable fear of immediate violence. This is not inconsistent with the requirement for a positive act: a series of phone calls, consisting of silence, is what provided the occasion with its menace.

In *Bici v Ministry of Defence* [2004] EWHC 786, Elias J maintained that the defendant must *intend* to put the claimant in fear of imminent violence. In this particular case, although there was an intention to commit a battery, which it was held could be transferred to the unintended victim,[10] there was *no* intention to put anyone *in fear of violence*. This being the case, a claim in assault failed.

False Imprisonment

False imprisonment is unlawful and total physical confinement of the claimant, by the defendant.

Lord Bridge of Harwich, *R v Deputy Governor of Parkhurst Prison, ex p Hague*
[1992] 1 AC 58, 162

> The tort of false imprisonment has two ingredients: the fact of imprisonment and the absence of lawful authority to justify it.

What it means to be sufficiently confined to be 'imprisoned' was considered by the Supreme Court in *R (Jalloh) v Secretary of State for the Home Department* [2020] UKSC 4, reaching the conclusion that someone who is confined to their home through a curfew backed by a penalty is imprisoned, even if they have successfully broken that curfew on a number of occasions (see further Section 4). False imprisonment also retains the elements of directness and intention referred to in relation to battery, discussed earlier.

Intention

The target of intention is physical restraint of the claimant:

Smith LJ, *Iqbal v Prison Officers Association*
[2009] EWCA Civ 1312

> [72] … with false imprisonment, the loss of liberty is the essence of the tort and, in my view, the claimant must show not merely an intentional act or omission (to the extent that an omission will suffice …) but also an intention to deprive the claimant of his liberty. I can
> p. 40 illustrate the point as follows. If a security guard in an office block locks the door on the claimant's room believing that the claimant has gone home for the night and not realizing that he is in fact still inside the room, he has committed a deliberate act. However, he did not intend to confine the claimant. He may well be guilty of negligence because he did not check whether the room was empty but he would not be guilty of false imprisonment.

Intention therefore is different from 'volition' (intentional action), and relates to a significant component of the tort.

Other Features

All trespass torts are actionable without proof of damage. 'Consent' is a vital defence to each of them. Available remedies reflect the fact that trespass is not solely concerned with compensation. They include compensatory damages; punitive damages in appropriate circumstances (particularly if the tort is committed by a public official);[11] or a declaration that the contact, threat, or restraint is *unlawful*.[12] The role of such a declaration may perhaps be performed by an award of nominal damages, but not it seems by a substantial sum unless some harm flows from the trespass (as a consequence of the decision in *Lumba*, Section 4). In some circumstances, courts may issue a declaration that a planned intervention is lawful.[13]

The breadth of recoverable damages in trespass is not truly settled. Logically, recovery of 'all' harm flowing from a trespass could be extreme and one would expect some sort of remoteness rule to be applied, the question being which one? In *Smith New Court Securities v Citibank* [1997] AC 254, the 'foreseeability' test for recoverable damage, which applies in the tort of negligence, was not applied to another tort of intention, namely an action in deceit. We explain why not in Section 7.5 of the present chapter. The reasons for applying the more generous 'directness' rule in a case of deceit do not translate especially easily to trespass to the person, where there needs to be an 'unlawful' act but need not be any bad motive nor intentional harm. On the other hand, the fact that the interference is judged unlawful may itself be a good enough reason for all the *direct* consequences of the act to be attributed to the defendant.

It has been said that the main purpose of trespass torts is not to compensate for injury, but to identify and respond to actions of the defendant which transgress the acceptable boundaries of physical interference. In the following extract, Tony Weir relates the trespass torts to excess of authority and the vindication of constitutional rights:

Tony Weir, *A Casebook on Tort*
(10th edn, London: Sweet & Maxwell, 2004), 322–3

> The law of tort does not have one function only: few things do. It is true that most tort claimants want compensation for harm caused to them by someone else and that in this sense (and in this sense only) the main function of tort law is to ordain such compensation. It has ↵ another function, however, which, though traditional, has rarely been more important than now, namely to vindicate constitutional rights. Not every infraction of a right causes damage. That is precisely why the law of trespass does not insist on damage. But if jurists believe that damage is of the essence of a tort claim, they will regard trespass as anomalous, deride it as antiquated, ignore the values it enshrines and proceed to diminish the protection it affords to the rights of the citizen. When constitutional rights are in issue what matters is whether they have been infringed, not whether the defendant can really be blamed for infringing them. But if jurists think of negligence as the paradigm tort (and they do so for no better reason than that a great many people are mangled on the highway) they will regard it as the overriding principle of the law of tort that you do not have to pay if you were not at fault (and, equally, that you always have to pay if you were at fault…). If a defendant can say that he acted reasonably, a negligence lawyer will let him off, without bothering to distinguish the reasonable but erroneous belief that the projected behaviour was *authorised* from the reasonable but erroneous belief that it was *safe*.

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Weir's analysis explains why the focus of the trespass torts is not 'damage'; *and also* why these torts are not (despite their 'intentional' label) centrally concerned with the quality of the defendant's *conduct*. It is the unlawfulness of the intended outcome that matters, not the unreasonableness of the intention itself. Nevertheless, the Supreme Court in *Lumba* appears to have decided that in a case not involving harm, this unlawfulness is insufficient basis for an award of more than nominal damages. In terms of the function outlined by Weir, this is something of a disappointment.

The *distinctness* of trespass from negligence clearly emerges from the decision of the House of Lords in *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25; [2008] 1 AC 962. The claimants were relatives of an individual (J) who had been fatally shot by the police during an armed raid. In a criminal prosecution, the police constable who had fired the shot was acquitted of J's murder. The claimants turned to civil law, suing the police commissioner (S) in a number of torts: false imprisonment (during the raid); negligence in the planning and execution of the raid; misfeasance in a public office for conduct after the event; assault and battery in respect of the shooting.[14] S admitted liability in negligence and in false imprisonment, but defended the other claims. Because S had admitted liability in negligence, success in the claim for assault and battery could not increase compensatory damages payable to the claimants. They would not stand to be compensated twice merely because more than one cause of action was applicable to the loss.

The House accepted that although the defendant had accepted liability to compensate the claimant in full, the claim based on trespass to the person could still proceed to trial. The judges differed substantially in the reasons that they gave for finding legitimate space for the action in trespass; but the majority of judges accepted that 'vindication' was a legitimate aim to pursue through the trespass action. A finding of trespass would add distinctively to a finding of negligence.

In short, trespass is centrally concerned with the boundaries of legitimate physical interference. While the 'intentional' aspect of trespass torts is weak, the 'unlawfulness' element may lead defendants—particularly
p. 42 those exercising public functions—to resist a finding of ↵ liability more strongly than in the case of negligence, for example. That was the case in *Ashley*. However, we should note the conclusions of the Supreme Court in *Lumba v Secretary of State for the Home Department*, addressed in relation to false imprisonment (Section 4). Substantial, as opposed to nominal, damages will not be awarded to 'vindicate' rights, where no damage is suffered.

2.2 Trespass in History and Modern Law: Forms of Action and Causes of Action

During the medieval period, trespass *was* the law of (what would now be called) 'tort'. 'Trespass' meant little more specific than 'wrong'.

S. F. C. Milsom, *Historical Foundations of the Common Law*
(2nd edn, Oxford: Oxford University Press, 1981), at 305

> Had some lawyer in the late fourteenth century undertaken to write a book about what we should call tort, about actions brought by the victims of wrongs, he would have called his book 'Trespass'.

The *substantive* requirements of the law at this stage are shrouded in mystery, largely because the majority of issues, other than procedural issues, were treated as matters of fact to be determined by the jury. Also obscuring the nature of trespass is the habit of claiming that harm had been occasioned *vi et armis* (with force and arms), even if it clearly had not.[15] Whatever the reason for this (and it may have been perceived to be a necessary feature of a claim in trespass in the royal courts),[16] trespass became associated with *forcible* wrongs.[17]

The more directly relevant period of history for our purposes was to follow. A new form of action, 'the action on the case', began to develop, outside the jurisdiction of the royal courts. There were two forms of trespass, denoting different *forms of action*, and the two could not be mixed. The one was simply 'trespass'; the other was 'trespass on the case'. It was the action on the case which flourished, and from which the tort of negligence evolved.

Initially, the main distinctions between the forms of action called trespass and case were procedural. The drafting of writs was the principal skill of English civil lawyers. But actions 'on the case' also became distinct from trespass in substantive terms. On the one hand they required 'damage' to be shown (not a necessary feature of trespass then or now); on the other hand they allowed remedies for *indirect* or *consequential* harm,
p. 43 rather than purely for *direct* ↵ and *forcible* interference, as in trespass. The distinction between the action in trespass and the action 'on the case' seems to have focused upon these principles of directness and force.

The following extract outlines the situation which was reached by the eighteenth century, and which still leaves its mark today.

S. F. C. Milsom, *Historical Foundations of the Common Law*
(2nd edn, Oxford: Oxford University Press, 1981), 283–4

> By the eighteenth century almost all litigation at common law was being conducted in *ostensurus quare* actions of trespass and case. Trespass was now a term of art referring to *ostensurus quare* writs alleging a breach of the king's peace, which had become common during the thirteenth century. Although these writs covered various harms to persons, goods and land, they were understood as representing a single entity: the essence of trespass was direct forcible injury...
>
> Actions on the case by the eighteenth century covered the remainder of our law of torts and almost the whole of our law of contract; and by contrast with the direct forcible injury of trespass they were identified with consequential harm. They were begun by *ostensurus quare* writs which did not allege a breach of the king's peace, but did describe the factual background more fully in a preamble. ... Their full name 'trespass on the case' seemed to show that they were a development from trespass, a conscious reaching out from the central idea of direct forcible injury...

The procedural implications of the different 'forms of action' were eventually abolished by the Judicature Acts of 1873 and 1875. It is often said that courts should now be free to respond to *the merits of the case*. This does not mean, however, that it should make no difference which tort is argued. Torts are not forms of action (a procedural idea); but they do have different substantive principles. If this had not been misunderstood in the case of *Letang v Cooper* [1965] 1 QB 232 (extracted and discussed later in this chapter), the modern history of the trespass torts might have been quite different.

2.3 The Limited Role of Trespass in Actions for Personal Injury

Three modern cases progressively limited the role of trespass *in personal injury law*. The last of the three has now been 'departed from' by the House of Lords (which is to say, in effect, overruled, since it is no longer to be followed), preparing the way for growth in the use of trespass claims for harm caused by deliberate abuse and assault. This avenue is particularly relevant for claims of historic abuse, including sexual abuse.

Fowler v Lanning [1959] 1 QB 426

The statement of claim, which was expressed in terms of trespass to the person, asserted simply that 'the defendant shot the plaintiff'. No particulars of negligence (nor of intention) were set out. The defendant argued that this statement of claim 'disclosed no cause of action'; and that the plaintiff must at least allege negligence, setting out facts which would support such a finding.

p. 44 ↵ Diplock J interpreted the issue at stake in terms of burden of proof. In a trespass action, was the burden on the defendant to show that the injury was caused by 'inevitable accident'? This would treat 'due care' as (in effect) a *defence* to the action. Alternatively, was the burden on the plaintiff to show that the shooting was either intentional, or negligent? Diplock J decided the latter was the case, and the burden of alleging and showing carelessness was on the plaintiff.

Trespass had to be either intentional, or negligent, and the plaintiff had to establish that this was so. (It is important to note that *Letang v Cooper*, below, went a step further, and said that battery was an *intentional* tort.)

Diplock J, *Fowler v Lanning*, at 439

> I think that what appears to have been the practice of the profession during the present century is sound in law. I can summarise the law as I understand it from my examination of the cases as follows:
>
> (1) Trespass to the person does not lie if the injury to the plaintiff, although the direct consequence of the act of the defendant, was caused unintentionally and without negligence on the defendant's part.
>
> (2) Trespass to the person on the highway does not differ in this respect from trespass to the person committed in any other place.
>
> (3) If it were right to say with Blackburn J. in 1866 that negligence is a necessary ingredient of unintentional trespass only where the circumstances are such as to show that the plaintiff had taken upon himself the risk of inevitable injury (i.e., injury which is the result of neither intention nor carelessness on the part of the defendant), the plaintiff must today in this crowded world be considered as taking upon himself the risk of inevitable injury from any acts of his neighbour which, in the absence of damage to the plaintiff, would not in themselves be unlawful—of which discharging a gun at a shooting party in 1957 or a trained band exercise in 1617 are obvious examples...

Glanville Williams, noting this case at [1959] CLJ 33, wondered why this should not be an appropriate case for invoking the maxim *'res ipsa loquitur'* which applies in the tort of negligence (Chapter 3, Section 5): an injury of this nature would not generally occur *without* negligence. It might be argued that the mere fact of being shot by the defendant *does* disclose a cause of action, unless the defendant brings some evidence supporting an innocent explanation.[18]

Diplock J seemed to suggest that in trespass, the relevant *intention* or *carelessness* (if it exists) is intention or carelessness *as to the injury*. He argues that trespass does not lie 'if the *injury* to the plaintiff ... was caused unintentionally and without negligence on the plaintiff's part' (emphasis added). We have already proposed that the relevant intention relates only to *contact*.

It is suggested that not too much should be read into Diplock J's words in this respect, since the issue was not
p. 45 crucial to *Fowler v Lanning*. The case involved a shooting incident, ↵ and in such a case intention to injure or carelessness as to injury are ordinarily identical with the intention to have physical contact (i.e., to shoot C). If there is intention to shoot C then there typically is intention to injure;[19] if there is carelessness as to shooting, then there is surely carelessness in respect of injury. The same goes for accidents on the highway. The next case extracted effectively removed trespass from the law of 'accidents'.

Letang v Cooper [1965] 1 QB 232

It may be wondered why anyone would frame their action in terms of trespass, if the facts could also be said to support a claim in negligence. One reason is that the claimant may not have any knowledge at all about the incident and why it happened, so that they cannot prove lack of care. This probably explains the claim in *Fowler v Lanning* (extracted earlier in this section), but since Diplock J's decision in that case trespass torts will be unable to assist a claimant in these circumstances. Another, more technical reason explains our next case although, as we will go on to explain, the incentive to prefer trespass for this reason no longer exists.

In *Letang v Cooper*, the plaintiff alleged that she was sunbathing in the grounds of a Cornish hotel when the defendant drove his car over her legs, causing her personal injury. She brought her action in trespass to the person, rather than negligence, for the simple reason that she had run out of time to bring the negligence action. The claim was 'time barred'. To understand this case, we must therefore say something about 'limitation of actions'.

Limitation of Actions: The Problem in Letang v Cooper

In general, tort actions must be brought within a period of six years from the time that the action 'accrues' (in this case, the time of the impact and consequent injury).[20] However, according to the legislation in place at the time of this incident, the available time was reduced to a period of three years 'in the case of actions for damages for negligence, nuisance or breach of duty … where the damages claimed by the plaintiff … consist of or include damages in respect of personal injuries to any person'.[21]

A period of over three years had elapsed, so an action in negligence was plainly out of time, but what of an action in trespass to the person? This sort of action was not mentioned by name in the relevant statutory provision quoted above, and the first instance judge held that the action in trespass attracted the general six-year limitation period. The Court of Appeal reversed this decision.

Lord Denning MR, *Letang v Cooper*, at 238–40

> The truth is that the distinction between trespass and case is obsolete. We have a different sub-division altogether. Instead of dividing actions for personal injuries into trespass (direct damage) or
> p. 46 case (consequential damage), we divide the causes of action now according as ↵ the defendant did the injury intentionally or unintentionally. If one man intentionally applies force directly to another, the plaintiff has a cause of action in assault and battery, or, if you so please to describe it, in trespass to the person. 'The least touching of another in anger is a battery,' *per* Holt C.J. in *Cole v. Turner*. [(1704) 6 Mod. 149] If he does not inflict injury intentionally, but only unintentionally, the plaintiff has no cause of action today in trespass. His only cause of action is in negligence, and then only on proof of want of reasonable care. If the plaintiff cannot prove want of reasonable care, he may have no cause of action at all. Thus, it is not enough nowadays for the plaintiff to plead that 'the defendant shot the plaintiff.' He must also allege that he did it intentionally or negligently. If intentional, it is the tort of assault and battery. If negligent and causing damage, it is the tort of negligence.
>
> The modern law on this subject was well expounded by Diplock J. in *Fowler v. Lanning*, with which I fully agree. But I would go this one step further: when the injury is not inflicted intentionally, but negligently, I would say that the only cause of action is negligence and not trespass. If it were trespass, it would be actionable without proof of damage; and that is not the law today.
>
> In my judgment, therefore, the only cause of action in the present case, where the injury was unintentional, is negligence and is barred by reason of the express provision of the statute.

It is plain that Lord Denning sought to make trespass to the person depend upon 'intention'. This being the case, it is unfortunate that he slips here between references to 'inflicting injury intentionally', and 'intentionally applying force directly to another'. These two approaches specify different 'targets of intention'. The correct approach was clarified by a later Court of Appeal, in *Wilson v Pringle*:[22]

Croom-Johnson LJ, *Wilson v Pringle*
[1987] QB 237, at 249–50

> The judgment of Lord Denning M.R. [in *Letang v Cooper*] was widely phrased, but it was delivered in an action where the only contact between the plaintiff and the defendant was unintentional. … In our view, … [I] t is the act and not the injury which must be intentional. An intention to injure is not essential to an action for trespass to the person. It is the mere trespass by itself which is the offence.

To return to *Letang v Cooper*, Lord Denning turned next to the statutory wording. This part of his reasoning was subsequently disapproved by the House of Lords in *Stubbings v Webb* [1993] AC 498; but his approach has now been vindicated by the House of Lords in *A v Hoare* [2008] UKHL 6.

p. 47 **Lord Denning MR, *Letang v Cooper*, at 241–2**

> So we come back to construe the words of the statute with reference to the law of this century and not of past centuries. So construed, they are perfectly intelligible. The tort of negligence is firmly established. So is the tort of nuisance. These are given by the legislature as sign-posts. Then these are followed by words of the most comprehensive description: 'Actions for … breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under a statute or independently of any contract or any such provision).' Those words seem to me to cover not only a breach of a contractual duty, or a statutory duty, but also a breach of any duty under the law of tort. Our whole law of tort today proceeds on the footing that there is a duty owed by every man not to injure his neighbour in a way forbidden by law. Negligence is a breach of such a duty. So is nuisance. So is trespass to the person. So is false imprisonment, malicious prosecution or defamation of character. Professor Winfield indeed defined 'tortious liability' by saying that it 'arises from the breach of a duty primarily fixed by the law: this duty is towards persons generally and its breach is redressible by an action for unliquidated damages': See Winfield on Tort, 7th ed. (1963), p. 5.
>
> In my judgment, therefore, the words 'breach of duty' are wide enough to comprehend the cause of action for trespass to the person as well as negligence…
>
> I come, therefore, to the clear conclusion that the plaintiff's cause of action here is barred by the Statute of Limitations. Her only cause of action here, in my judgment, where the damage was unintentional, was negligence and not trespass to the person. It is therefore barred by the word 'negligence' in the statute. But even if it was trespass to the person, it was an action for 'breach of duty' and is barred on that ground also.

Diplock LJ took a different route to the conclusion that trespass and negligence were mutually exclusive.

Diplock LJ, *Letang v Cooper*, at 244–5

> The factual situation upon which the plaintiff's action was founded is set out in the statement of claim. It was that the defendant, by failing to exercise reasonable care, of which failure particulars were given, drove his motor car over the plaintiff's legs and so inflicted upon her direct personal injuries in respect of which the plaintiff claimed damages. That factual situation was the plaintiff's cause of action. It was the cause of action for which the plaintiff claimed damages in respect of the personal injuries which she sustained. That cause of action or factual situation falls within the description of the tort of negligence and an action founded on it, that is, brought to obtain the remedy to which the existence of that factual situation entitles the plaintiff, falls within the description of an action for negligence. The description 'negligence' was in fact used by the plaintiff's pleader; but this cannot be decisive for we are concerned not with the description applied by the pleader to the factual situation and the action founded on it, but with the description applied to it by Parliament in the enactment to be construed. It is true that that factual situation also falls within the description of the tort of trespass to the person. But that, as I have endeavoured to show, does not mean that there are two causes of action. It merely means that there are two apt
> p. 48 descriptions of the same ↵ cause of action. It does not cease to be the tort of negligence because it can also be called by another name. An action founded upon it is nonetheless an action for negligence because it can also be called an action for trespass to the person.
>
> … the subsection which falls to be construed is concerned only with actions in which actual damage in the form of personal injuries has in fact been sustained by the plaintiff. Where this factor is present, every factual situation which falls within the description 'trespass to the person' is, where the trespass is unintentional, equally aptly described as negligence. I am therefore of opinion that the facts pleaded in the present action make it an action 'for negligence … where the damages claimed by the plaintiff for the negligence … consist of or include damages in respect of personal injuries to' the plaintiff, within the meaning of the subsection, and that the limitation period was three years.

As we saw, Lord Denning proposed that 'trespass' is only an apt description where the act in question is 'intentional'. Diplock LJ (a little more obscurely) said that the facts should only be *described* in one way. If the contact was careless rather than deliberate, the facts should be described in terms of negligence, even if they could also be said to disclose a trespass; and the rules of negligence should apply. There should be no overlap between different torts with different reasoning. (He did not explain why it was the *negligence* reasoning that should prevail.)

The Diplock approach was pertinently criticized by J. A. Jolowicz in the following note. Jolowicz pointed out that the abolition of the 'forms of action' was meant only to banish *procedural* consequences. Indeed, the abolition of 'forms of action' was meant to have precisely the opposite of the effect proposed by Diplock LJ. It should now be possible to argue alternative torts *with different substantive rules* alongside one another, instead of choosing a single *procedure* and being restricted accordingly.

J. A. Jolowicz, 'Forms of Action—Causes of Action—Trespass and Negligence'
[1964] CLJ 200, at 202

> It is … true, or should be true, that no *procedural* consequences flow from the pleader's choice of description for his cause of action. It is not true, however, that no consequences flow from the fact that more than one description is appropriate for a given factual situation. If the *substantive* rules appropriate to one description entitle the plaintiff to succeed it is no answer for the defendant to say that according to the rules appropriate to a different but equally apt description the plaintiff's action fails. If for example I say that X, a trader, is selling goods which he knows to have been stolen, my words may be described as 'slander of title' (or 'injurious falsehood'), a tort in which actual malice is required. But they are also aptly described as slander actionable *per se* and therefore, if the words are in fact untrue, it is no defence for me to prove that I honestly believed what I said. This, indeed, is the principal consequence of the so-called abolition of the forms of action. It is not necessarily true that only one description of the factual situation is apt. And if the court proceeds to confine itself to one set of rules only where more than one apply, it is, in effect, restoring to the forms of action—these 'ghosts of the past'—much of their former prominence, not passing through them undeterred.

p. 49 ↵ A host of recent cases could be cited to prove Jolowicz's point. They allow a number of substantive torts to be argued on the same set of facts, leading to success in one and failure in others. For example, it is clear that a claimant may succeed in negligence or malicious falsehood while failing, or being otherwise unable to proceed, in libel: *Spring v Guardian Assurance* [1985] 2 AC 296; *Kaye v Robertson* [1991] FSR 92. The judgment of Diplock J in *Letang v Cooper* appears to state that negligence and trespass are mutually exclusive: the facts should give rise to a claim in negligence, or in trespass, but not both. This, however, is not the case, as is illustrated by *Ashley v Chief Constable of Sussex* (discussed earlier).

Summary: Trespass and Negligence in Personal Injury Cases

In the case of direct and *intentional* contact, both trespass and negligence can apply to the same facts, provided that (for the negligence action) a 'duty of care' was owed and breached. In the case of merely *negligent* contact, however, the effect of *Letang v Cooper* is that any action will be governed by the rules of negligence. In effect, only the negligence action may be pursued.

Stubbings v Webb [1993] AC 498

We have seen that in *Letang v Cooper*, Lord Denning argued that trespass involves a 'breach of duty' so that, in a case involving personal injury, it could not attract a more generous limitation period than negligence.

In *Stubbings v Webb* the House of Lords had to decide which limitation period applied to a case of alleged sexual abuse occasioning lasting psychiatric harm. The relevant acts, if proven, would clearly amount to trespass to the person as the physical contact was 'intentional'. But the impact of treating trespass the same as negligence would now be beneficial. This is because the applicable limitation period in *Stubbings v Webb* was determined by the Limitation Act 1980. This allows certain actions to benefit from extensions to the standard limitation period as of right (on conditions set out in section 14), or through exercise of the court's discretion

(section 33). Section 11(1) of this Act, which defines those actions to which sections 14 and 33 will apply, used the same wording as the earlier statutory provision considered in *Letang v Cooper* to define the actions which must be brought within three years. The plaintiff in *Stubbings v Webb* argued that the requirements of section 14 had not been satisfied in her case until some years after the acts of abuse themselves, which took place during childhood.

The House of Lords held, however, that trespass to the person in the form of rape and sexual abuse did *not* fall within section 11. Therefore, section 14 was also not applicable. Trespass was subject to a non-extendable limitation period of six years, which would begin to run when the victim reached adulthood; whereas a negligence claim would have been extended *at least* until three years from the plaintiff's date of knowledge. The claim was out of time. Lord Griffiths accepted an argument which had been rejected by Lord Denning in
p. 50 *Letang v Cooper*.[23] By reference to the recommendations of the Tucker Committee,[24] Lord ↵ Griffiths argued that the 'date of knowledge' qualifications applicable from 1954 onwards were *intended* (by their drafters) only to cover what he called 'accident cases', not *intentional* assaults. He also considered that Lord Denning had been wrong to say that 'trespass to the person' involves a 'breach of duty'.

Stubbings v Webb further limited the reach of trespass in cases of *actual personal injury*. While it can be argued that in an accident case such as *Letang* the job will be done instead by the tort of negligence, this argument does not help in the case of deliberate sexual assaults. In a case of sexual abuse, it is unlikely that a court would accept that the defendant has acted 'negligently'.[25] The problem is illustrated by cases where there is also a claim in negligence against a third party who *fails to prevent* abuse. A claim against such a person may benefit from an extended limitation period, thanks to section 14 and section 33.

This was notoriously illustrated in *S v W* [1995] 1 FLR 862. The plaintiff had been abused by her father (the first defendant) during childhood. Her father had been convicted on several charges of incest. The plaintiff brought civil actions both against her father (in trespass), and against her mother, the second defendant, for failing to protect her or to report the acts of abuse. The Court of Appeal held that the action against the mother was an action in negligence and was not out of time. The action against the father was statute-barred on the authority of *Stubbings v Webb*. Millett LJ criticized the reasoning in *Stubbings v Webb* but the Court of Appeal could not, of course, depart from a House of Lords decision.

The anomaly was removed by the House of Lords in *A v Hoare* [2008] UKHL 6, which is discussed in Chapter 8. For present purposes, we need only note that the conclusion in *Letang v Cooper* [1965] 1 QB 232 was reaffirmed. After *A v Hoare*, trespass will still only assist a claimant where the physical contact was intentional; but actions against deliberate abusers will no longer be time-limited where a claim in negligence would not be. Since the demise of *Stubbings v Webb*, many such cases have been argued in trespass. In this context at least, no longer does trespass appear to be a relic of a bygone age. Removal of this limitation problem has, indeed, opened the door to some large changes in the principles of vicarious liability for deliberate acts such as sexual abuse, explored in Chapter 10.

2.4 Battery: The Nature of the Required Contact

So far, we have said that intentional and direct touching of the claimant amounts to a battery. Consent, necessity, or self-defence will render lawful what would otherwise be a battery. But even so, this definition is very broad. How have the courts limited the scope of the tort?

Collins v Wilcock [1984] 1 WLR 1172

The claimant police officer had cautioned the defendant prostitute. When the defendant walked away, the officer took hold of her arm. The defendant scratched the officer's restraining arm. In the Court of Appeal, the *defendant* argued that the police officer had committed a battery in holding her. The Court of Appeal accepted the defendant's argument. There was no implied power upon the officer to detain the defendant for the purpose of the caution. The touching went beyond conduct which is generally accepted. It was a trespass, so
p. 51 that the ↵ officer could not be said to have been acting in the course of her duty. The conviction was quashed.

Robert Goff LJ analysed the older case law and presented it in an updated and clarified form. His formulation is adapted to define the limits of appropriate intervention by public officials such as police officers.

> **Robert Goff LJ, at 1177**
>
> We are here concerned primarily with battery. The fundamental principle, plain and incontestable, is that every person's body is inviolate. It has long been established that any touching of another person, however slight, may amount to a battery. So Holt C.J. held in *Cole v. Turner* (1704) 6 Mod. 149 that 'the least touching of another is anger is a battery.' The breadth of the principle reflects the fundamental nature of the interest so protected. As Blackstone wrote in his *Commentaries*, 17th ed. (1830), vol. 3, p. 120:
>
> > "the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner."
>
> The effect is that everybody is protected not only against physical injury but against any form of physical molestation.
>
> But so widely drawn a principle must inevitably be subject to exceptions. For example, children may be subject to reasonable punishment; people may be subjected to the lawful exercise of the power of arrest; and reasonable force may be used in self-defence or for the prevention of crime. But, apart from these special instances where the control or constraint is lawful, a broader exception has been created to allow for the exigencies of everyday life. Generally speaking consent is a defence to battery; and most of the physical contacts of ordinary life are not actionable because they are impliedly consented to by all who move in society and so expose themselves to the risk of bodily contact. So nobody can complain of the jostling, which is inevitable from his presence in, for example, a supermarket, an underground station or a busy street; nor can a person who attends a party complain if his hand is seized in friendship, or even if his back is, within reason, slapped: see *Tuberville v. Savage* (1669) 1 Mod. 3. Although such cases are regarded as examples of implied consent, it is more common nowadays to treat them as falling within a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of daily life. We observe that, although in the past it has sometimes been stated that a battery is only committed where the action is 'angry revengeful, rude, or insolent' (see *Hawkins, Pleas of the Crown*, 8th ed. (1824), vol. 1, c. 15, section 2), we think that nowadays it is more realistic, and indeed more accurate, to state the broad underlying principle, subject to the broad exception...

'Wrongful' touching, amounting to a battery, is here defined as touching which goes beyond that which is generally acceptable. It does not need to be hostile or (certainly) to be aimed at injuring the claimant. In *Wilson v Pringle* [1987] QB 237, a case of physical injury sustained in horseplay between school boys, a differently constituted Court of Appeal thought the above formulation too wide and impractical in application, and argued some 'hostility' was required.

Later, Lord Goff (now in the House of Lords) restored the authority of the views he had set out in *Collins*. This case has been central to the development of aspects of medical law and to the modern law of trespass to the person.

p. 52 **Re F (Mental Patient: Sterilization) [1990] 2 AC 1**

The patient, who had the mental age of a young child, had formed a sexual relationship with a male patient. It was thought undesirable to prevent the relationship from being conducted, but it was also thought that the patient would be unable to cope with pregnancy or childbirth should she conceive. Sterilization was judged to be in her best interests, but since she was unable to comprehend the procedure or its purpose (and therefore could not validly consent) could the proposed operation be carried out without committing a trespass?

Lord Goff, at 72–3

I start with the fundamental principle, now long established, that every person's body is inviolate. As to this, I do not wish to depart from what I myself said in the judgment of the Divisional Court in *Collins v. Wilcock* ..., and in particular from the statement, at p. 1177, that the effect of this principle is that everybody is protected not only against physical injury but against any form of physical molestation.

Of course, as a general rule physical interference with another person's body is lawful if he consents to it; though in certain limited circumstances the public interest may require that his consent is not capable of rendering the act lawful. There are also specific cases where physical interference without consent may not be unlawful—chastisement of children, lawful arrest, self-defence, the prevention of crime, and so on. As I pointed out in *Collins v. Wilcock* [1984] 1 W.L.R. 1172, 1177, a broader exception has been created to allow for the exigencies of everyday life—jostling in a street or some other crowded place, social contact at parties, and such like. This exception has been said to be founded on implied consent, since those who go about in public places, or go to parties, may be taken to have impliedly consented to bodily contact of this kind. Today this rationalisation can be regarded as artificial; and in particular, it is difficult to impute consent to those who, by reason of their youth or mental disorder, are unable to give their consent. For this reason, I consider it more appropriate to regard such cases as falling within a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of everyday life.

In the old days it used to be said that, for a touching of another's person to amount to a battery, it had to be a touching 'in anger' (see *Cole v. Turner* (1794) 6 Mod. 149, *per* Holt C.J.); and it has recently been said that the touching must be 'hostile' to have that effect (see *Wilson v. Pringle* [1987] Q.B. 237, 253). I respectfully doubt whether that is correct. A prank that gets out of hand; an over-friendly slap on the back; surgical treatment by a surgeon who mistakenly thinks that the patient has consented to it—all these things may transcend the bounds of lawfulness, without being characterised as hostile. Indeed the suggested qualification is difficult to reconcile with the principle that any touching of another's body is, in the absence of lawful excuse, capable of amounting to a battery and a trespass. Furthermore, in the case of medical treatment, we have to bear well in mind the libertarian principle of self-determination which, to adopt the words of Cardozo J. (in *Schloendorff v. Society of New York Hospital* (1914) 105 N.E. 92, 93) recognises that:

> "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault ..."

... It is against this background that I turn to consider the question whether, and if so when, medical
p. 53 treatment or care of a mentally disordered person who is, by reason of his incapacity, ↵ incapable of giving his consent, can be regarded as lawful. As is recognised in Cardozo J statement of principle, and elsewhere (see, e.g., *Sidaway v. Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] A.C. 871, 882, *per* Lord Scarman), some relaxation of the law is required to accommodate persons of unsound mind. In *Wilson v. Pringle* [1987] Q.B. 237, the Court of Appeal

> considered that treatment or care of such persons may be regarded as lawful, as falling within the exception relating to physical contact which is generally acceptable in the ordinary conduct of everyday life. Again, I am with respect unable to agree. That exception is concerned with the ordinary events of everyday life—jostling in public places and such like—and affects all persons, whether or not they are capable of giving their consent. Medical treatment—even treatment for minor ailments—does not fall within that category of events. The general rule is that consent is necessary to render such treatment lawful. If such treatment administered without consent is not to be unlawful, it has to be justified on some other principle.

The case raised a fundamental question for medical law. Given that valid consent could not be obtained, was there an *alternative justification* for treatment, which would render it *not unlawful*?

One possible alternative was that treatment could be performed on the basis of 'necessity' (a recognized defence to trespass). But necessity is not a sufficiently generous principle: it would only justify a narrow range of emergency treatment. This might be adequate for those suffering a *temporary* lack of consciousness. But what of those suffering long-term or permanent lack of capacity? Lord Bridge pointed out a significant problem that might arise if only necessary treatment could lawfully be carried out:

> **Lord Bridge, *Re F*, at 52**
>
> ... it seems to me of first importance that the common law should be readily intelligible to and applicable by all those who undertake the care of persons lacking the capacity to consent to treatment. It would be intolerable for members of the medical, nursing and other professions devoted to the care of the sick that, in caring for those lacking the capacity to consent to treatment they should be put in the dilemma that, if they administer the treatment which they believe to be in the patient's best interests, acting with due skill and care, they run the risk of being held guilty of trespass to the person, but if they withhold that treatment, they may be in breach of a duty of care owed to the patient. If those who undertake responsibility for the care of incompetent or unconscious patients administer curative or prophylactic treatment which they believe to be appropriate to the patient's existing condition of disease, injury or bodily malfunction or susceptibility to such a condition in the future, the lawfulness of that treatment should be judged by one standard, not two. It follows that if the professionals in question have acted with due skill and care, judged by the well-known test laid down in *Bolam v. Friern Hospital Management Committee* [1957] 1 W.L.R. 582, they should be immune from liability in trespass, just as they are immune from liability in negligence.

The solution was to say that all treatment which was *in the best interests of the patient* would be lawful.

Broadly this approach was codified by the Mental Capacity Act 2005. The Act does not repeal the principles of
p. 54 common law but aims to set out clearly the guiding principles which ↵ will apply. Even so these principles may be slightly different from those accepted at common law. The statute also expressly states that compliance with the approach set out in the Act will provide a defence to a civil action at common law, in the absence of negligence (s 5), and in this sense it takes priority over any common law principles. As Dyson LJ

pointed out in *H v Commissioner of Police of the Metropolis* [2013] EWCA Civ 69, where section 5 is concerned, 'reasonableness' is the prevalent idea and there is no room for strict liability. The actions of the police officers in that particular case, which involved the restraint of a severely autistic and epileptic teenager at a swimming pool, were found comprehensively unreasonable. Damages were awarded in battery, in false imprisonment, and under the HRA.

The general principles are set out in section 1. Section 1(5) states the 'best interests' principle.

Mental Capacity Act 2005

> **1 The principles**
>
> The following principles apply for the purposes of this Act.
>
> (1) A person must be assumed to have capacity unless it is established that he lacks capacity.
>
> (2) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
>
> (3) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
>
> (4) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
>
> (5) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

Persons who 'lack capacity' are defined by section 2, the key idea being that through mental impairment or disturbance in the functioning of the mind or brain, the person cannot make a decision for themselves. The meaning of 'best interests' is set out by section 4.

Analysis of the provisions is not possible within the constraints of space available here. But it should be noted that section 4(6) incorporates a range of considerations based not only on the objective welfare of the patient, but also on their likely views or wishes so far as these can be estimated or ascertained.

To return to *Re F*, the decision was also significant because of the order made by the court. The House of Lords found that where incompetent *adults* were concerned, the court had no jurisdiction to 'consent to' or 'approve' a particular operation as being in the patient's best interests.[26] However, the House of Lords decided that
p. 55 under the inherent jurisdiction ↵ of the High Court, it could make **a declaration** to the effect that the operation *was lawful*. Declarations of lawfulness have subsequently been widely used and were still developing at the time of the statutory reforms.

By section 4(9) of the Mental Capacity Act 2005, a 'reasonable belief' that the decision made is in the patient's best interest will now suffice to give the defendant the benefit of section 5 and thus to avoid civil liability (other than where there is negligence: section 5(3)). These provisions are also of importance in relation to false imprisonment and in contexts other than medical treatment.

3 Defences to Assault and Battery

3.1 Consent

It will be clear from *Re F* (Section 2.4) that consent is a defence of the first importance in trespass to the person. Indeed, battery could potentially be defined as a direct, intended and non-consensual physical invasion. This difference would be of some practical importance, because it is generally for a *defendant* to show that a defence is made out, while a claimant must establish the main elements of a tort. To treat 'lack of consent' as part of the definition of trespass would shift the burden of proof regarding consent from defendant, to claimant. Surprisingly perhaps, there is limited English authority on this point; though there is also some parallel discussion of proof of 'unlawfulness' in relation to false imprisonment (Section 4).

In *Freeman v Home Office (No 2)* [1984] QB 524, McCowan J (at first instance) ruled that the burden is on the *claimant* to establish his or her own *lack* of consent. His ruling seemed to contradict the various authorities he cited on the point (gleaned both from Commonwealth case law[27] and English textbooks). He was persuaded by an attractive argument put by counsel for the Home Office, to the effect that these authorities were principally concerned not with consent in the context of trespass, but with the rather different defence of *volenti* which can also be called 'willing acceptance of risk' (Chapter 7). It is true that 'consent' and *volenti* are separate defences, but this does not justify the conclusion that lack of consent is therefore not a defence at all. Therefore, we could accept the first three sentences of the following extract, while doubting the last four (presented here in italics).

McCowan J, *Freeman v Home Office (No 2)*, at 539–40

> Mr Laws submits that volenti is consent to the risk of injury and is accordingly a defence most apt to a claim in negligence. What a plaintiff consents to in a case of alleged battery is not risk but a specific intrusion on his body. Therefore, consent to a surgical operation is not properly an example of volenti. *The action fails not because of volenti but because there is no tort. Volenti, he submits, does not arise at all unless the tort of battery, which he defines as 'the unconsented to intrusion of another's bodily integrity' is made out. That definition, he says, meets the vice at which the tort is aimed. I accept Mr Laws' submission and rule that the burden of providing absence of consent is on the plaintiff.*

p. 56 ↵ If the definition of trespass accepted by McCowan J was right, there would be no obvious reason why other issues which go to lawfulness—including self-defence—should not also be a part of the definition of trespass. In *Ashley v CC Sussex* [2006] EWCA Civ 1985, the Court of Appeal noted this controversy (at para [31]). The court declined to say whether it regarded *Freeman* as correct, but held that whatever the correct position with consent, *self-defence* was for the *defendant* to establish (a conclusion also reached by the House of Lords

(above)). Similarly in *Austin v Commissioner of Police of the Metropolis* [2007] EWCA Civ 989; [2008] QB 660, an action in false imprisonment, the Court of Appeal held that the defence of 'necessity' was for the defendant to establish (though they imposed an onerous burden on claimants who wanted to say that in their particular case, the general necessity of the situation did not require their continued detention). The House of Lords did not consider this point as the appeal related only to a claim in respect of Article 5 ECHR. Both decisions are extracted in Section 4.1.

In *Freeman* too, this particular point did not fall for decision on appeal. It was treated as clear that the plaintiff *had indeed consented to* the administration of drugs.[28] However, Lord Donaldson pointed out that consent and *volenti* are separate, and may both arise in a trespass action.

Consent to Medical Treatment: Two Types of Problem Case

Consent to medical treatment has been a significant issue in two very different types of case. The first type of case concerns the lawfulness of treatment in the absence of consent. In fact this category is further divided into cases where treatment is *refused*; and other cases where valid consent simply cannot be obtained. The second type of case concerns treatment where consent is given, but that consent is not based on sufficient knowledge about the treatment or its likely consequences.

Type 1: Treatment without Consent

Refusal

The starting point is that where a competent adult refuses treatment, it is unlawful (amounting to the tort of battery and also potentially to a criminal offence against the person) to inflict that treatment upon him or her. This is the case even if the likely or inevitable result of refusal is the patient's death.[29] The patient does not need to have any rational grounds for refusal, nor any grounds for refusal at all. In other words, the *right of self-determination* (which is underpinned by the value of autonomy) is a trump card, which overrides the patient's best interests. Even sanctity of life does not outweigh the patient's right to self-determination. At least, that is the principle.

The role of autonomy as a trump card has been stated many times by English courts. In *Re T*, it was held that the refusal of treatment was not effective because of undue influence from the patient's mother. In *St George's*
p. 57 *Healthcare NHS Trust v S* [1999] Fam 26, it was ↵ determined that it *had been* a trespass to impose treatment (in this case, a caesarean section) not only in order to save the life of a competent mother who refuses treatment, but also to save her unborn child. The interests of the foetus do not weigh against the competent mother's autonomy. In this case, the caesarean had already been carried out, and the mother sought an order that this was unlawful. There was no longer an emergency.

No Possibility of Consent or Refusal: 'Best Interests' vs Sanctity of Life?

In 'refusal' cases, sanctity of life *and* best interests of the patient are in principle trumped by autonomy or self-determination. What of the case where there is *neither consent nor refusal*, because the patient is permanently unable to give or withhold consent? Here, the trump card of 'autonomy' cannot come into play.[30] In the next case extracted the House of Lords held that in such a case, given that the best interests of the patient prevail, even life-saving or life-sustaining treatment need not be offered or maintained if it is judged not to be in the best interests of the patient to receive it. It is important to note that this is an application of *Re F*.

Airedale NHS Trust v Bland [1993] AC 789

The patient had been in a 'persistent vegetative state' for three years. He was judged to have no prospect of recovery. A declaration was sought that it would be lawful to withdraw the artificial feeding which was maintaining his life. Without such a declaration, the medical team which withdrew treatment might be open to civil proceedings for trespass and criminal prosecution for murder.[31]

The House of Lords held that the 'best interests of the patient' required that treatment to prolong his life should be discontinued. The patient had not expressed any advance wishes as to what should happen if he should be in such a state, so that there was ***no consent to the treatment***. (Equally, of course, there was no *refusal* of treatment.) Applying the reasoning in *Re F*, the lack of consent to treatment could make the treatment a trespass, if it was not judged to be *in the patient's best interests*. This is the only sense in which *Bland* is a case about trespass. The medical team sought a declaration that they could *cease* to treat, and Lord Goff explained that non-treatment (even if it involves some physical steps) is essentially an omission; and an omission cannot amount to a battery. Larger concerns in respect of withdrawal of treatment were raised concerning the criminal law, but these are beyond the scope of this book. The following passage is particularly germane to the role of consent.

Lord Goff, at 864

> First, it is established that the principle of self-determination requires that respect must be given to the wishes of the patient, so that if an adult patient of sound mind refuses, however unreasonably, to consent to treatment or care by which his life would or might be prolonged, the doctors responsible
> p. 58 for his care must give effect to his wishes, even though they do ↵ not consider it to be in his best interests to do so ...: Moreover the same principle applies where the patient's refusal to give his consent has been expressed at an earlier date, before he became unconscious or otherwise incapable of communicating it; though in such circumstances especial care may be necessary to ensure that the prior refusal of consent is still properly to be regarded as applicable in the circumstances which have subsequently occurred: see, e.g., *In re T. (Adult: Refusal of Treatment)* [1993] Fam. 95. I wish to add that, in cases of this kind, there is no question of the patient having committed suicide, nor therefore of the doctor having aided or abetted him in doing so. It is simply that the patient has, as he is entitled to do, declined to consent to treatment which might or would have the effect of prolonging his life, and the doctor has, in accordance with his duty, complied with his patient's wishes.
>
> But in many cases not only may the patient be in no condition to be able to say whether or not he consents to the relevant treatment or care, but also he may have given no prior indication of his wishes with regard to it. In the case of a child who is a ward of court, the court itself will decide whether medical treatment should be provided in the child's best interests, taking into account medical opinion. But the court cannot give its consent on behalf of an adult patient who is incapable of himself deciding whether or not to consent to treatment. I am of the opinion that there is nevertheless no absolute obligation upon the doctor who has the patient in his care to prolong his life, regardless of the circumstances. Indeed, it would be most startling, and could lead to the most adverse and cruel effects upon the patient, if any such absolute rule were held to exist. It is scarcely consistent with the primacy given to the principle of self-determination in those cases in which the patient of sound mind has declined to give his consent, that the law should provide no means of enabling treatment to be withheld in appropriate circumstances where the patient is in no condition to indicate, if that was his wish, that he did not consent to it.

Several members of the House of Lords appeared to say in *Bland* that the best interests of the patient outweigh the sanctity of life itself. It is important to note that this has been doubted. John Keown, 'Restoring Moral and Intellectual Shape to the Law After *Bland*' (1997) 113 LQR 482–503, argued that the sanctity of life should *not* be regarded as 'giving way' to best interests in such a case. On the other hand, sanctity of life does not on his view require the continuation of life at all costs (this would be a doctrine which Keown calls 'vitalism'). On this account, life-saving treatment can indeed be withheld *while respecting the sanctity of life*, provided that attention focuses on *whether the treatment is of any therapeutic benefit*, rather than on the question of *whether the patient's life is no longer of value*. In other words, treatment may be judged futile, but no person's *life* should ever be judged futile.

Keown's analysis has prompted a large literature.[32] It was adopted by Ward LJ in the next case considered.

p. 59

Re A (Children) (Conjoined Twins: Surgical Separation) [2001] Fam 147

In deciding whether to approve treatment of an incompetent minor, a court must be guided by 'the best interests of the child': section 1(1) of the Children Act 1989. Therefore, the wishes of *parents* may clearly be overridden. Indeed, there is no question of starting with the parents' wishes and determining whether they are 'reasonable': the welfare of the child is paramount.

Re A was a case of conjoined twins. It posed an acute problem for a 'best interests' approach because surgery to separate the twins would result inevitably in the death of one of them, Mary. On the other hand, not to proceed with surgery would inevitably lead to the death of both twins. Jodie, the twin who would be expected to survive surgery, was sustaining Mary's life and could not do so for very long. The parents withheld their consent, but their refusal was overridden by the court.

Much of the crucial argumentation in *Re A* concerned criminal law. The Court of Appeal held that the separation would not amount to murder because it could be said to be 'necessary'.[33] But on what basis could the court validly approve the operation on the basis of *civil* law, given the ruling principle that they must give effect to the best interests of the child?

Ward LJ and Brooke LJ conceded that they could not apply the thinking in *Bland* directly to this case. The operation could not be considered as being *in the best interests of Mary*:[34]

Ward LJ, at 190

> The question is whether this proposed operation is in Mary's best interests. It cannot be. It will bring her life to an end before it has run its natural span. It denies her inherent right to life. There is no countervailing advantage to her at all. It is contrary to her best interests. Looking at her position in isolation and ignoring, therefore, the benefit to Jodie, the court should not sanction the operation on her.

On the other hand, the court could not, consistently with its duty to act in the best interests of the child, simply refuse consent for the operation. This would lead to the death of Jodie, as well as Mary. Instead, Ward LJ explained that the court must act *in the best interests of both twins*. This meant engaging in a balancing act but, applying Keown's analysis of 'sanctity of life', this would not mean weighing the *value* of the two lives against one another, as all lives are of equal value; rather it would depend on the *worthwhileness of the treatment* (or withholding the treatment) to each of the twins. Since in Jodie's case the treatment was expected to lead to a reasonably fulfilling life in future, and in Mary's case withholding treatment could only delay death for a short time, this approach led to the conclusion that *in the best interests of the twins* (taken together and balanced in this way), consent to the operation should be granted.

Type 2: 'Uninformed Consent'

p. 60

The doctrine of 'informed consent' originated in the United States. This doctrine holds that consent to medical treatment is real and valid only if it is based on sufficient information ↵ about the risks involved. Generally speaking, sufficiency of information would be judged, for the purposes of this doctrine, according

to the requirements of a 'prudent patient'.

The doctrine of informed consent in the context of the tort of battery was rejected by the House of Lords in *Sidaway v Bethlem Royal Hospital* [1985] AC 871, holding that questions of *information* and *advice as to risks* should be addressed solely through the tort of negligence, not through trespass to the person. In *Sidaway*, the relevant question was held to be what information *the reasonable doctor would have given.* This test appeared inconsistent with informed consent, although in the negligence case of *Chester v Afshar*, the House of Lords treated informed consent as part of English law. Scholars proposed that *Chester* was part of a more general trend to appreciate the need to respect the decision-making autonomy of patients in the context of the tort of negligence, and this was very clearly confirmed by the Supreme Court in *Montgomery v Lanarkshire Health Board* [2015] UKSC 11.[35] However, *Montgomery* too was argued in negligence, and it appears the doors have not been reopened to actions in trespass. The issue of 'which tort' (battery or negligence) was more or less settled in *Chatterton v Gerson* [1981] QB 432: so long as consent was 'real'—which required that the patient knew the general 'nature of the operation'—it would operate as a defence to an action in trespass.

Bristow J, *Chatterton v Gerson*
[1981] QB 432 (emphasis added)

> In my judgment what the court has to do in each case is to look at all the circumstances and say 'Was there a real consent?' I think justice requires that in order to vitiate the reality of consent there must be a greater failure of communication between doctor and patient than that involved in a breach of duty if the claim is based on negligence. *When the claim is based on negligence the plaintiff must prove not only the breach of duty to inform, but that had the duty not been broken she would not have chosen to have the operation. Where the claim is based on trespass to the person, once it is shown that the consent is unreal, then what the plaintiff would have decided if she had been given the information which would have prevented vitiation of the reality of her consent is irrelevant.*
>
> In my judgment once the patient is informed in broad terms of the nature of the procedure which is intended, and gives her consent, that consent is real, and the cause of the action on which to base a claim for failure to go into risks and implications is negligence, not trespass. Of course if information is withheld in bad faith, the consent will be vitiated by fraud. Of course if by some accident, as in a case in the 1940's in the Salford Hundred Court where a boy was admitted to hospital for tonsilectomy and due to administrative error was circumcised instead, trespass would be the appropriate cause of action against the doctor, though he was as much the victim of the error as the boy. But in my judgment it would be very much against the interests of justice if actions which are really based on a failure by the doctor to perform his duty adequately to inform were pleaded in trespass.

p. 61

3.2 Necessity

It is a defence to battery that the defendant applied only such force as a reasonable person would consider 'necessary' in the circumstances. Similar defences apply in assault (threatening a battery in order to achieve an appropriate goal, such as the safety of others) and false imprisonment (imprisoning someone to protect them, or others).

Evidently, for a defence of necessity to apply, the relevant circumstances must create a genuine *need* for the trespass. Through the standard of the 'reasonable person', the defence of 'necessity' introduces a 'reasonableness' element into the trespass torts.[36]

We have seen that in a medical case where the patient is suffering a transient inability to consent, the defence of necessity will be vitally important. It is an important defence in cases of emergency and in cases, such as *Re A*, where a choice must be made between the interests of two or more people. But as *Re F* made clear, necessity is not a sufficient guiding principle in cases of long-term incompetence to consent. It will also be noted that section 4 of the Mental Capacity Act 2005 (extracted in Section 2.4) provides that the 'best interests' principle will apply even where the incapacity is temporary; however, the likely length of incapacity and likely views of the patient, so far as these can be ascertained, will be relevant. Necessity is also overridden by a *refusal* of consent to be treated (or, presumably, rescued) more generally.

3.3 Self-Defence

Earlier in this chapter, we outlined the facts of *Ashley v Chief Constable of Sussex*, and explored its implications for the nature of trespass torts. Another crucial question to arise in this case was the boundary between trespass torts, and criminal trespass, given that a criminal prosecution of the officer who had shot the deceased had failed. In particular, could it be said that the tort claim stood a chance of success if the officer had successfully argued self-defence in connection with the *criminal* charge?

The House of Lords concluded that there was still room for the claim in tort. Self-defence is a recognized defence to civil trespass, just as it is to criminal trespass, but the content of these two defences differs. In criminal law, the defendant needs to show an honest belief in the necessity of his actions. There is no need to show that this belief is reasonable. Not so in civil law: the actor's belief must be both honestly held, and reasonable. This difference is not arbitrary, but reflects the different purposes of the criminal and civil law.

3.4 No Reduction for Contributory Negligence

Under the Law Reform (Contributory Negligence) Act 1945, damages are reduced by the court to reflect the relative 'responsibility' of claimant and defendant. This replaces the previous defence of contributory negligence, where causative fault on the part of the claimant operated as a complete bar. The defence is explored in relation to negligence in Chapter 7. It was determined by the Court of Appeal in *Pritchard v Co-operative Group Ltd* [2011] EWCA Civ 329, [2012] QB 320, that contributory negligence does not operate in cases of trespass to the person. Here we consider the reasons behind this position.

p. 62 ↵ First, we should reject any simple idea that the defence does not apply because the tort of battery is 'intentional'. It had previously been *suggested* by one member of the House of Lords that the defence of contributory negligence would not apply to any case where *harm* is intentionally caused (Lord Rodger, *Standard Chartered Bank v Pakistan Shipping* [2003] 1 AC 959).[37] And indeed, in a case where harm was *intended*, there is an argument that the defendant's liability for the harm should not be affected by contributory fault on the part of the claimant. But this thinking cannot be coherently applied to trespass to the person as a whole,

since intent to cause harm is not an element of these torts. The judgment of Aikens LJ in *Pritchard* made reference to battery as an 'intentional wrong'. But there is no requirement that the *wrongful* element of trespass should be intended.

A different aspect of the reasoning in *Standard Chartered Bank* holds the key to the decision in *Pritchard*. Both Lord Hoffmann and Lord Rodger took the view that the 1945 Act introduced apportionment *only* in those torts to which the old defence of contributory negligence applied. This was the case both because of the precise wording of the Act, and because of the broader intention indicated by that wording.

As to the wording, damages are to be reduced where the claimant suffers injury 'as the result partly of his own fault and partly of the fault of any other person …' (section 1(1)). 'Fault' is defined in section 4:

Law Reform (Contributory Negligence) Act 1945

> **4 *Interpretation***
>
> … 'fault' means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.

In *Standard Chartered Bank*, it was concluded that this definition of fault should be read as having two separate limbs. The first (acts or omissions etc which give rise to liability in tort) applies to defendants; and the second ('would, apart from this Act, give rise to the defence of contributory negligence') to claimants. On this basis, the reduction in damages required by section 1(1) applies only in those torts where the claimant's conduct would have given rise to a defence of contributory negligence before 1945; and this was not the case with the tort of deceit. Lord Hoffmann thought this was also in line with the intentions of the legislature, which were not to reduce lower damages than would otherwise have been recovered.

In *Pritchard*, the Court of Appeal applied this reasoning to trespass to the person. Aikens LJ concluded that contributory negligence had not operated to bar claims in trespass to the person before the reform; and that the statute could not be read as extending to such claims. It is important to note that the reasoning in *Standard Chartered Bank* is not restricted to intentional torts; and should in principle apply to *any* tort to which the defence of contributory negligence did not apply before 1945.

The decision in *Pritchard* means that suggestions in a number of earlier cases, to the effect that contributory
p. 63 negligence is available in relation to battery, are now to be regarded as ↵ incorrect. In one of these, the claimant had been participating in a riot, and had been hit by a plastic baton round: *Wasson v Chief Constable of Northern Ireland* [1987] NI 420. In another, Lord Denning MR suggested that damages might be reduced where the deceased had been involved in a violent affray.[38] These authorities will not now be followed.

4 False Imprisonment

4.1 Defining False Imprisonment

False imprisonment consists of unlawful and total physical confinement of the claimant, brought about by the defendant. The restraint may be very fleeting, and in *Walker v Commissioner of Police for the Metropolis* [2014] EWCA Civ 897, being confined to a doorway for a few seconds was a false imprisonment. Damages, however, will reflect the seriousness of the restraint: in *Walker*, they were assessed at £5. Like the other trespass torts, false imprisonment is actionable per se; and the claimant need not even have been aware of the detention (*Murray v Ministry of Defence* [1988] 2 All ER 521 (a decision of the House of Lords)). However, in the absence of any harm to the claimant, only nominal damages will be available.

R (Jalloh) v Secretary of State for the Home Department [2020] UKSC 4; [2020] 3 WLR 418

The claimant had been subject to a curfew for two and a half years, purportedly imposed pursuant to paragraph 2(5) of Schedule 3 to the Immigration Act 1971. In a separate case, it was established that the provision did not empower the Secretary of State to impose a curfew. The claimant received a notice of restriction included warning of criminal liability in the event of breach; and the curfew was monitored by electronic tag. The Secretary of State argued that the curfew did not amount to an 'imprisonment' for the purposes of the tort. It was also argued for the Secretary of State that the common law should be brought into line with the ECHR, so that there could be no liability for false imprisonment where the restriction did not amount to a 'deprivation of liberty' for the purposes of Article 5 of the Convention—we deal with this second aspect of the case in section 4.1 below.

Older case law had dealt with some aspects of the meaning of 'imprisonment'. For example, in *Bird v Jones* (1845) 7 QB 742, a plaintiff who was prevented by an obstruction from crossing Hammersmith Bridge was *not* 'falsely imprisoned', because he was free to turn back. Equally, it seems that a 'reasonable condition' may be placed on exit from a place which the claimant has voluntarily entered—at least if they have done so in pursuance of a contract and the 'contractual route out' is still open. In *Robinson v Balmain New Ferry* [1910] AC 295, the plaintiff had paid to gain entry to a wharf in order to catch a boat but had changed his mind and sought to make his way out through the turnstile through which he had come in. It was considered reasonable for the defendant to charge a penny for him to leave the wharf. None of the authorities, however, fitted the present case particularly well. In the extract below, the Supreme Court defines the 'essence' of false imprisonment, and finds that a claimant who had, in fact, breached the curfew on a number of occasions was nevertheless imprisoned, because he was obliged to be where the defendant told him to be. The essence, therefore, was 'being made to stay in a place defined by another person'.

p. 64 **Baroness Hale, giving the judgment of the Court**

24. As it is put in *Street on Torts*, 15th ed (2018), by Christian Witting, p 259, 'False imprisonment involves an act of the defendant which directly and intentionally (or possibly negligently) causes the confinement of the claimant within an area delimited by the defendant.' The essence of imprisonment is being made to stay in a particular place by another person. The methods which might be used to keep a person there are many and various. They could be physical barriers, such as locks and bars. They could be physical people, such as guards who would physically prevent the person leaving if he tried to do so. They could also be threats, whether of force or of legal process. A good example is *R v Rumble* [2003] EWCA Crim 770; (2003) 167 JP 205. The defendant in a magistrates' court who had surrendered to his bail was in custody even though there was no dock, no usher, nor security staff and thus nothing to prevent his escaping (as indeed he did). The point is that the person is obliged to stay where he is ordered to stay whether he wants to do so or not.

25. In this case there is no doubt that the defendant defined the place where the claimant was to stay between the hours of 11.00 pm and 7.00 am. There was no suggestion that he could go somewhere else during those hours without the defendant's permission. This is not a case like *Bird v Jones* where the claimant could cross the bridge by another route or *Robinson v Balmain New Ferry Co Ltd* where he had agreed to go onto the wharf on terms that he could only get out if he paid a penny.

26. The fact that the claimant did from time to time ignore his curfew for reasons that seemed good to him makes no difference to his situation while he was obeying it. Like the prisoner who goes absent from his open prison, or the tunneller who gets out of the prison camp, he is not imprisoned while he is away. But he is imprisoned while he is where the defendant wants him to be.

27. There is, of course, a crucial difference between voluntary compliance with an instruction and enforced compliance with that instruction. The Court of Appeal held that this was a case of enforced not voluntary compliance and I agree. It is not to be compared with those cases in which the claimant went voluntarily with the sheriff's officer. There can be no doubt that the claimant's compliance was enforced. He was wearing an electronic tag which meant that leaving his address would be detected. The monitoring company would then telephone him to find out where he was. He was warned in the clearest possible terms that breaking the curfew could lead to a £5,000 fine or imprisonment for up to six months or both. He was well aware that it could also lead to his being detained again under the 1971 Act. All of this was backed up by the full authority of the State, which was claiming to have the power to do this. The idea that the claimant was a free agent, able to come and go as he pleased, is completely unreal.

Confinement Caused Directly

Iqbal v Prison Officers Association [2009] EWCA Civ 1312; [2010] QB 732 concerns a claim in false imprisonment against a trade union whose members had undertaken an unlawful one-day strike failed. The claimant had been confined to his cell as a consequence of the strike. Members of the Court of Appeal concluded that there was no positive act on the part of the trade union members, Lord Neuberger MR and Smith LJ arguing that this was an essential component of the tort unless there was some particular affirmative duty, in particular
p. 65 where ↵ there was a right to be released at the end of a lawful sentence.[39] Equally, the union and its members were not directly responsible for the additional imprisonment of the claimant, despite the fact that it was plainly foreseeable as a result of the strike, and directness too was required; nor did the union or its members wish or intend that the additional confinement would follow. Therefore, the reasoning illustrates the criteria of positive act; direct causation of result; and intention, in relation to this tort.

Smith LJ, *Iqbal v Prison Officers Association*

> 80 In summary, it appears to me that, although the act required for false imprisonment does not have to be that of physically depriving the claimant of his freedom, it must be an intentional or at least reckless (see above) positive act or, in limited circumstances, omission (see above) and it must be the direct and immediate cause of the loss of liberty.

Lord Neuberger MR suggested that claims involving additional periods of confinement due to the inaction of prison officers would be better confined to the tort of misfeasance in a public office, which we consider at the end of this chapter, and therefore to cases where the inaction was 'deliberate or dishonest'.

In contemporary law, the tort of false imprisonment is most used in cases against public authorities, for example, where police officers are said to have exceeded their powers or where detention in prison exceeds lawful limits.[40] The relationship between trespass to the person and 'unlawfulness' is particularly clear in such cases, and this tort has a strong 'constitutional' element. Two elements to the constitutional role of false imprisonment should be noted:

1. The definition of 'lawfulness' of detention will frequently depend upon analysis of powers of arrest and/or detention;
2. Where the defendant is a 'public authority' within the terms of the Human Rights Act 1998 (as it often is), the tort of false imprisonment may coexist with an action for damages in respect of a violation of the Convention right to liberty (set out in Article 5 ECHR): HRA, sections 7 and 8. The scope of Article 5 is broader than the scope of false imprisonment in certain respects, applying for example to failures to *review* imprisonment; but on the other hand, the definition of 'imprisonment' (outlined above) may itself be broader than the meaning of 'deprivation of liberty' under Article 5. The common law action, and the HRA action, have continued to be independent of one another.

4.2 Further Elements of the Tort

We have already seen the definition of imprisonment, and the need for direct causation of it. In addition, it is generally accepted that, since *Letang v Cooper*, this form of trespass to the person—like the others—must be
p. 66 confined to intentional conduct on the part of the ↵ defendant, though it is sometimes argued that a negligent imprisonment should suffice.[41] *Iqbal*, extracted earlier, suggests that the *target* of intention is 'imprisonment', and this would well reflect the position in battery, where the target of intention is the physical contact which is complained of. At the same time, there need be no intention, nor even knowledge, in relation to the unlawfulness of the detention. The next case powerfully illustrates this.

In *R v Governor of Brockhill Prison, ex p Evans* [2001] 2 AC 19, Ms Evans had been sentenced to two years' imprisonment. The governor of Brockhill Prison calculated her release date in a manner which was clearly consistent with judicial decisions interpreting relevant statutory provisions. Doubt was then cast on the judicial rulings, and Ms Evans applied for an order for her release. A subsequent judicial ruling confirmed that the doubts were correct, and an order was made. By this time, the claimant had spent 59 days too long in captivity. The House of Lords held that the prison governor was liable in damages for false imprisonment. The gist of the tort is unlawfulness, *not* inappropriate conduct. Detention for those additional days was now known to have been unlawful, even if the governor could not have been aware of that at the time.

Ex p Evans was distinguished by the Court of Appeal in the case of *Quinland v Governor of Swaleside Prison and Others* [2003] QB 306, applying the (pre-*Evans*) case of *Olutu v Home Office* [1997] 1 WLR 103. In each of these cases, a prison governor detained a prisoner pursuant to a court order requiring detention. By these orders, the governor was not permitted to release the prisoner until the stated date. In *ex p Evans* by contrast, the governor himself had calculated the release date. In *Quinland* and *Olutu*, the existence of the court order was found to 'justify' the continued detention of the prisoner, by the governor. He did not commit a tort.

R (Lumba) v Secretary of State for the Home Department [2011] UKSC 12; [2012] 1 AC 245 provides a contrast with *ex p Evans*. Its background is the adoption by the Secretary of State of an unlawful, blanket policy of detention for all foreign nationals at the end of their prison terms. No change in the published policy was made to reflect this, from its adoption in 2006 until 2008, and it remained not only undisclosed, but also concealed, as officers were instructed to give false reasons (consistent with the published policy) for their decisions.[42] Its existence was revealed only as the consequence of judicial review proceedings brought by two of the tort claimants. Applying a policy inconsistent with the published policy was unlawful. Two further questions of law arose in relation to claims in false imprisonment.

First, is there a false imprisonment where a claimant is unlawfully detained, but where (on the balance of evidence) they *would have remained in prison even if the lawful policy had been applied?* This goes to the requirements of the tort of false imprisonment and can be called the 'liability question'.

Second, if there is a false imprisonment here, what damages are available to the claimant? This may be called the 'damages question'.

It is only when these questions are looked at together that we can really answer the question of whether the tort of false imprisonment protects against arbitrary and unlawful decisions and actions (consistent with its alleged character as a 'constitutional tort'); or whether it simply protects against deprivations of liberty. As a

p. 67 preliminary point, it should be pointed out that ↵ it is well settled that detention *itself* is sufficient 'harm' to form the subject of a claim for damages.[43] The fact that there is no simple way of calculating how much money to award for deprivation of liberty per se is not to the point. The question was, rather, whether detention pursuant to an unlawful process could be the subject of damages where *lawful* detention would otherwise have followed, so that the unlawful action had not 'caused' a loss of liberty at all.

It is for this reason that the court considered the possibility of 'vindicatory' damages. These are not necessarily needed as a separate head of damages in a case of loss of liberty, because the compensatory award will also vindicate the claimant's right. The question is whether damages, whether they are called 'compensatory' or 'vindicatory', are available to protect against *arbitrary* detention in its own right. Quite simply, does common law compensate violations of rights, or does it only compensate for consequent harm, including deprivation of liberty?

Understanding the decision in *Lumba* is made more difficult by the way that the nine-judge panel split in relation to the key questions. On the liability question, six of the nine judges decided that a false imprisonment may be committed even where, as here, the unlawful action is not causative of imprisonment: false imprisonment is actionable *per se*. On the damages question, a different six judges might appear to have agreed that in these circumstances, only nominal damages were recoverable for the false imprisonment. But this is not the case. Three of these six judges thought there was no false imprisonment at all, and two of them (Lord Brown, and Lord Rodger) expressly rejected the idea of nominal damages for a false imprisonment. In fact they argued that such damages would 'devalue the tort'. They joined the majority in refusing the damages claimed, but for reasons which are actually inconsistent with the supposed ratio.[44] Since they also rejected the idea of nominal damages, it seems *there was no majority* on the damages question. Only three of the nine judges supported both aspects of the result.

Lord Kerr, *Lumba. Lord Kerr was in the majority both on the liability question, and on the damages question*

—there was a false imprisonment, but only nominal damages would be awarded.

> 239 False imprisonment is established if there has been a detention and an absence of lawful authority justifying it. The question whether lawful authority exists is to be determined according to an objective standard. It either exists or it does not. It is for this elementary—but also fundamental—reason that a causation test can have no place in the decision whether imprisonment is false or lawful. By a 'causation test' in this context I mean a test which involves an examination of whether the persons held in custody could have been lawfully detained. The fact that a person *could have been* lawfully detained says nothing on the question whether he *was* lawfully detained.
>
> p. 68 240 The Court of Appeal in the present case decided that, since the claimants could have been detained lawfully had the published policy been applied to them, the fact that an unpublished and unlawful policy was in fact applied was immaterial. With great respect, this cannot be right. The unpublished policy was employed in the decision to detain the appellants. It was clearly material to the decision to detain. Indeed, it was the foundation for that decision. An ex post facto conclusion that, had the proper policy been applied, the appellants would have been lawfully detained cannot alter that essential fact.
>
> ...
>
> 242 It is, I believe, important to recognise that lawful detention has two aspects. First the decision to detain must be lawful in the sense that it has a sound legal basis and, secondly, it must *justify* the detention. This second aspect has found expression in a large number of judgments, perhaps most succinctly in the speech of Lord Hope in *R v Governor of Brockhill Prison Ex p Evans (No 2) [2001] 2 AC 19*, 32 d where he said 'it is of the essence of the tort of false imprisonment that the imprisonment is without lawful justification'. It seems to me to be self evident that the justification must relate to the basis on which the detainer has purported to act, and not depend on some abstract grounds wholly different from the actual reasons for detaining. As Mr Husain put it, the emphasis here must be on the right of the detained person not to be detained other than on a lawful basis which justifies the detention. Detention cannot be justified on some putative basis, unrelated to the actual reasons for it, on which the detention might retrospectively be said to be warranted. Simply because some ground for lawfully detaining may exist but has not been resorted to by the detaining authority, the detention cannot be said, on that account, to be lawful.
>
> ... it is nothing to the point in this case that if the decision had been taken on the basis of the published policy, it would have been immune from challenge. As Professor Cane put it in 'The Temporal Element in Law' (2001) 117 LQR 5, 7 'imprisonment can never be justified unless *actually* [as opposed to hypothetically] authorised by law'. (The emphasis and the words enclosed in square brackets are mine.)
>
> ...
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> 256 ... The defendant's failures have been thoroughly examined and exposed. A finding that those failures have led to the false imprisonment of the appellants constitutes a fully adequate acknowledgement of the defendant's default. Since the appellants would have

> been lawfully detained if the published policy had been applied to them, I agree that no more than a nominal award of damages is appropriate in their cases.

Baroness Hale, ***Lumba. Baroness Hale was in the majority on the liability question, but in the minority on the damages question: she would have awarded more than nominal damages.***

> 217 … no one can deny that the right to be free from arbitrary imprisonment by the state is of fundamental constitutional importance in this country. It is not the less important because we do not have a written constitution. It is a right which the law should be able to vindicate in some way, irrespective of whether compensatable harm has been suffered or the conduct
p. 69 of the authorities has been so egregious as to merit exemplary damages. Left to myself, therefore, I would mark the false imprisonment in these cases with a modest conventional sum, perhaps £500 rather than the £1,000 suggested by Lord Walker JSC, designed to recognise that the claimant's fundamental constitutional rights have been breached by the State and to encourage all concerned to avoid anything like it happening again. In reality, this may well be what was happening in the older cases of false imprisonment, before the assessment of damages became such a refined science.

The final point made by Baroness Hale is instructive. Any idea of 'vindicatory' damages here may well be a distraction, suggesting some form of *additional* head of damages to reflect constitutional impropriety. Instead, damages for torts actionable per se may inherently vindicate rights, a fact which is less evident because generally the tort *does* lead to a loss of liberty.

Lord Brown (with whom Lord Rodger agreed), ***Lumba. Lords Brown and Rodger dissented on the liability***

question, and would have awarded no damages.

> 341 'Freedom from executive detention is arguably the most fundamental right of all'. Thus Lord Bingham of Cornhill in his 2002 Romanes lecture. The tort of false imprisonment is, of course, the remedy provided by law for the violation of this freedom, for the unlawful deprivation of a person's liberty. The outcome of the appeals proposed by the majority of the court is to hold the appellants—and, indeed, a large number of others similarly placed—to have been unlawfully detained, in many instances for a period of years, and yet to compensate them by no more than a nominal award of damages. They are to be held unlawfully detained because, in his (or her) exercise of the undoubted power to detain them, the Secretary of State breached certain public law duties. But they are to be awarded only nominal damages because, whatever approach had been taken to the exercise of the detaining power, the appellants must inevitably have been detained in any event.
>
> 342 Whilst I share to the full the majority's conclusion that it would be quite wrong in the circumstances of these cases to award the appellants any substantial compensation in respect of their detention, for my part I would reach that conclusion by a very different route. I would hold that a public law breach of duty in the course of exercising an executive power of detention does not invariably, and did not here, result in the subsequent detention itself being unlawful—in short, that these appellants were not the victims of false imprisonment.
>
> 343 ... Why should someone imprisoned without lawful justification be paid nominal damages only? If the answer is that they would have been imprisoned anyway, under the same power and in just the same way, then in reality the court is saying that the tort may be committed merely in a technical way. I have to say that such an approach would to my mind seriously devalue the whole concept of false imprisonment.

Lord Brown refers to a merely 'technical' false imprisonment, where no additional detention results. But it is arguable that to be subject to an arbitrary exercise of power is not merely a technical 'wrong'. If comparing torts actionable per se with liability under the HRA, it is arguable that the decision is a missed opportunity to reassert the traditional capacity of common law torts to remedy invasions of fundamental rights. We return to this comparison at the end of the section. First, however, we should note some objections to the decision in *Lumba*.

p. 70 **A Ruck Keene and C Dobson, 'At What Price Liberty? The Supreme Court Decision in *Lumba* and**

Compensation for False Imprisonment' (2012) PL 628

> … Understanding that the right to freedom from executive detention is a right to procedural protections against arbitrary detention rather than a right to liberty itself is key to determining what relief ought to be available in order to vindicate that right.
>
> If that approach is taken, then at the very least relief must be such as to acknowledge that harm is caused where there has been a failure strictly to adhere to the procedural requirements for detention, regardless of whether the decision to detain would have been the same if taken in accordance with the law. To suggest that an individual suffers no harm where the decision to detain would have been the same if taken in accordance with the law might be said to erode a fundamental distinction between arbitrary and lawful detention.
>
> Access to the courts to challenge the legality of executive detention is also critical to the vindication of the right to liberty. The cause of action in false imprisonment is the principal means for an individual to challenge the legality of historic detention once released. The ability to bring an action in false imprisonment often depends on the availability of public funding. Our experience already is that claims that would previously had been brought in the mental health field are no longer being advanced because of the likelihood that only nominal damages could be recovered, such that they cannot now satisfy the cost-benefit criteria established by the Legal Services Commission. (The Administrative Court has already indicated that individuals should not pursue claims in false imprisonment unless they are likely to achieve substantive damages: see *R. (on the application of Betteridge) v The Parole Board* [2009] EWHC 1638 (Admin); *R. (on the application of Degainis) v The Secretary of State for Justice* [2010] EWHC 137 (Admin) at [15] and [22].)
>
> Furthermore, it is not fanciful, we suggest, that devaluing the cost of non-compliance in monetary terms carries with it the risk that procedural rules will not be respected. (In this regard, see *Law Commission Consultation Paper No.187, Administrative Redress: Public Bodies and the Citizen, Appendix B,* particularly at para.B.10.) The potential chilling effect on litigation combined with the fact that public bodies may now be able to avoid an award of substantial damages risks creating a culture in which arbitrary detention can occur with impunity …

Further Limits to False Imprisonment, and Comparison with HRA Remedies

As we have seen, *Sidaway* confirmed the view that consent based on broad understanding of the nature of medical treatment was sufficient to exclude a claim in battery. In *Hague v Deputy Governor of Parkhurst Prison and Others* [1992] 1 AC 58, the House of Lords held that a lawful detention did not become unlawful when the *conditions* of detention were in breach of applicable Prison Rules.[45] False imprisonment is not the proper route to take in order to gain compensation where conditions of detention are unacceptable. That does not mean that there is no source of compensation in such a case. There may be an action for breach of statutory duty; in negligence; for misfeasance in a public office; or under the HRA. For example, in *Karagozlu v Commissioner of Police for the Metropolis* [2006] EWCA Civ 1691, loss of 'residual' liberty was held to be actionable damage for the tort of misfeasance ↵ in a public office (Section 8.2 of this chapter: here the claimant was transferred from open to closed prison).

p. 71

The right to 'liberty' is also protected by Article 5 ECHR. Article 5 is a complex provision with more than one aspect. We extract Article 5(1), which is the most general of the provisions, when we discuss *Austin v Saxby* later in this section. Further provisions relate to the conduct of arrest and detention, while Article 5(5) appears to set out a general right to compensation for violation of the Article. Of immediate interest is Article 5(4):

Article 5(4), European Convention on Human Rights

> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Article 5 therefore includes certain *procedural* rights in relation to liberty. In *Lumba*, as we have seen, application of an unlawful procedure did not justify an award of more than nominal damages at common law, unless it led to a loss of liberty. But in a series of decisions relating to claims by prisoners, not only have *damages* been awarded under the HRA in circumstances where there would clearly be no action for false imprisonment at common law, but this has included cases of delay in relation to parole hearings, irrespective of any loss of residual liberty. These claims have given rise to awards of relatively modest, but not purely 'nominal' damages, both in cases involving a change in the conditions of detention ('residual liberty' cases), and in cases where it is not established that any difference to the period or nature of detention resulted. The remedy is not for the unlawful delay itself, but for the impact of that delay on the claimant.[46] This impact may include feelings of stress and frustration, which would not ground a compensation claim at common law. Taking into account both the limits on false imprisonment set out in cases such as *Hague*, and the application of a causation test to compensatory damages in *Lumba*, it has become much harder to maintain that false imprisonment operates satisfactorily as a constitutional tort, protecting against abuse of power—despite Lord Walker's reference to 'the pride that English law has taken for centuries in protecting the liberty of the subject against arbitrary executive action'.[47] Being subject to such action is not itself a harm to be remedied by damages. It is certainly not that the common law is unable to accommodate 'conventional' awards.[48] But *Lumba* suggests that tort compensates only for a certain range of consequences, and not for breaches of rights per se. For many, this will be a disappointing conclusion.

On the other hand, the more recent decision in *Jalloh* (extracted above) indicates that false imprisonment is also capable of application in certain circumstances which would not amount to a sufficient 'deprivation of liberty' for the purposes of Article 5. In the following extract, the Supreme Court gives its reasons for rejecting the argument of the Secretary of State, that false imprisonment should be more narrowly interpreted, to fall into line with Article 5 in this respect.

p. 72 **Baroness Hale, *R (Jalloh) v Secretary of State for the Home Department***

29. Mr Tam makes an alternative argument in this court which was not open to him in the courts below. This is that the concept of imprisonment for the purpose of the tort of false imprisonment should now be aligned with the concept of deprivation of liberty within the meaning of article 5 of the ECHR <http://uk.westlaw.com/Document/I8241ED61EE3C4D77BE2C280D3AC956DC/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>. The classic definition of this concept is taken from *Guzzardi v Italy* (1980) 3 EHRR 333 <http://uk.westlaw.com/Document/IB5EB86E0E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>, para 92:

> "In order to determine whether someone has been 'deprived of his liberty' within the meaning of Article 5 <http://uk.westlaw.com/Document/I8241ED61EE3C4D77BE2C280D3AC956DC/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question."

The ECHR <http://uk.westlaw.com/Document/I38C9C0AD773A4385868CB431E132B1A7/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)> distinguishes between the deprivation and restriction of liberty and the court emphasised that this was a matter of degree rather than nature or substance (para 93). This multi-factorial approach is very different from the approach of the common law to imprisonment.

30. In *Austin v Comr of Police of the Metropolis* [2008] QB 660 <http://uk.westlaw.com/Document/IC2C072307BA311DC82E6F187EFDEDCFF/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)> the Court of Appeal held that 'kettling' the claimants for several hours at Oxford Circus was indeed imprisonment at common law, but that it was justified by the common law principle of necessity; however, it was not a deprivation of liberty within the meaning of Article 5 <http://uk.westlaw.com/Document/I8241ED61EE3C4D77BE2C280D3AC956DC/View/FullText.ht

ml?
originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>, a conclusion with which both the House of Lords and the European Court of Human Rights agreed: [2009] AC 564 and *Austin v United Kingdom* (2012) 55 EHRR 14 <http://uk.westlaw.com/Document/ID820B3B077C511E1AF3AF22153EA877B/View/FullText.html?
originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>. The trial judge's observation that there could be imprisonment at common law without there being a deprivation of liberty under Article 5 <http://uk.westlaw.com/Document/I8241ED61EE3C4D77BE2C280D3AC956DC/View/FullText.html?
originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)> and vice versa was cited by the Court of Appeal with apparent approval (para 87). That observation was repeated by the Court of Appeal in *Walker v Comr of Police of the Metropolis* [2015] 1 WLR 312 <http://uk.westlaw.com/Document/I7634EB60011811E4A73182A230546520/View/FullText.html?
originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>, where it was held to be false imprisonment for a police officer to stand in the front doorway of a house so as to prevent the claimant from leaving, even for a very short time, but it was not a deprivation of liberty within the meaning of Article 5 <http://uk.westlaw.com/Document/I8241ED61EE3C4D77BE2C280D3AC956DC/View/FullText.html?
originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>.

31. By contrast, when the *Bournewood* case reached the European Court of Human Rights, that court held that the patient had been deprived of his liberty within the meaning of article 5: *HL v United Kingdom 40 EHRR 32*. This is thought to be the only case going the other way. Imprisonment for the purpose of the tort of false imprisonment can take place for a very short period of time, whereas a number of factors are relevant to whether there has been a deprivation of liberty. On the other hand, imprisonment may be justified at common law in circumstances which are not covered by the list of possibly permissible deprivations of liberty in Article 5.1 of the ECHR <http://uk.westlaw.com/Document/I38C9C0AD773A4385868CB431E132B1A7/View/FullText.html?
originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>.

32. Mr Tam argues that the time has now come to align the two concepts: specifically to align the concept of imprisonment with the concept of deprivation of liberty. He says this because, in *Secretary of State for the Home Department v JJ [2008] AC 385*, while the House of Lords held,

by a majority, that a 16-hour curfew was a deprivation of liberty, Lord Brown of Eaton-under-Heywood expressed the view that an eight-hour curfew, such as this, would not be such a deprivation.

33. It is, of course, the case that the common law is capable of being developed to meet the changing needs of society. In Lord Toulson JSC's famous words in *Kennedy v Information Comr (Secretary of State for Justice intervening)* [2015] AC 455 <http://uk.westlaw.com/Document/I15B03E80B4E111E3AB12840362EEA953/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>, para 133, 'it was not the purpose of the Human Rights Act that the common law should become an ossuary'. Sometimes those developments will bring it closer to the ECHR <http://uk.westlaw.com/Document/I38C9C0AD773A4385868CB431E132B1A7/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)> and sometimes they will not. But what Mr Tam is asking this court to do is not to develop the law but to make it take a retrograde step: to restrict the classic understanding of imprisonment at common law to the very different and much more nuanced concept of deprivation of liberty under the ECHR <http://uk.westlaw.com/Document/I38C9C0AD773A4385868CB431E132B1A7/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>. The Strasbourg court has adopted this approach because of the need to draw a distinction between the deprivation and the restriction of physical liberty. There is no need for the common law to draw such a distinction and every reason for the common law to continue to protect those whom it has protected for centuries against unlawful imprisonment, whether by the state or private persons.

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34. The Court of Appeal in *Austin* [2008] QB 660 <http://uk.westlaw.com/Document/IC2C072307BA311DC82E6F187EFDEDCFF/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)> and in *Walker* [2015] 1 WLR 312 <http://uk.westlaw.com/Document/I7634EB60011811E4A73182A230546520/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)> were right to say that there could be imprisonment at common law without there being a deprivation of liberty under Article 5 <http://uk.westlaw.com/Document/I8241ED61EE3C4D77BE2C280D3AC956DC/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>. Whether they were also right to add 'and vice versa' may be open to doubt in the light of the *Bournewood* saga, but it is not necessary for us to express an opinion on the matter.

The Supreme Court here explains that under the ECHR, there is a contrast between 'deprivation of liberty', and 'restriction of liberty'. The tort of false imprisonment does not need to incorporate such a distinction; and it is less 'nuanced' in the factors it takes into account in determining whether there is an imprisonment.

We should look more closely at the decision of the Court of Appeal in *Austin*, which is discussed by Baroness Hale above.

Lawfulness and Justification

In *ex p Evans*, Lord Hope said (at 32):

> The tort of false imprisonment is a tort of strict liability. But the strict theory of civil liability is not inconsistent with the idea that in certain circumstances the harm complained of may have been inflicted justifiably. This is because it is of the essence of the tort of false imprisonment that the imprisonment is without lawful justification.

Lord Hope describes lack of 'lawful justification' as being 'of the essence of the tort'. This recalls our discussion of consent in respect of the tort of battery, where we noted that in *Freeman v Home Office (No 2)*, it was held that lack of consent, being central to the definition of the tort of battery, was for the claimant to establish.[49] Is the same true of lack of 'lawful justification' in false imprisonment? Must the *claimant* show that the imprisonment was unjustified?

In *Austin and Saxby v Commissioner of Police of the Metropolis* [2005] EWHC 480, a case where police officers had detained a number of protestors for seven hours in Oxford Circus in an attempt to preserve order and prevent violence, Tugendhat J suggested otherwise:

> 157 In a claim for false imprisonment the burden of proof clearly rests upon the claimant to prove the imprisonment, and (subject to one point) upon the defendant to prove the justification for it …

p. 74 ↵ This seems to suggest that justification is to be treated as a defence.

The 'one point' which qualifies this was important, however. Here the officers 'detained' the claimants without arresting them, on the basis of a reasonable suspicion of a threat which might justify that detention. The burden of proof was then regarded as falling on the claimant to show that this *exercise of discretion* was *unreasonable*.[50] The Court of Appeal agreed with Tugendhat J on these points: *Austin & Saxby v Commissioner of Police of the Metropolis* [2007] EWCA Civ 989, at [70]. The relevant defence was referred to in terms of 'necessity'. In this case, necessity was established.

There was a further appeal to the House of Lords ([2009] UKHL 5; [2009] 1 AC 564). The appeal was occupied solely with Article 5 ECHR, though this was treated as relevant to the tort claim because of a concession on the part of the claimant, mentioned at para [11] of the House of Lords' judgment: 'the appellant accepts that, if her detention did not amount to an unlawful deprivation of liberty contrary to Article 5(1), she was contained within the cordon in the lawful exercise of police powers'. This does not seem to be at all consistent with the

analysis of the Court of Appeal, and it may be that it was made for tactical reasons.[51] The Article 5 claim, like the false imprisonment claim, failed. We will extract the judgments of the Court of Appeal, and then the House of Lords. The relevance of the House of Lords' decision for tort law depends on the validity of the concession, and this is doubtful. Therefore, the Court of Appeal's judgment continues to be of relevance.

Austin & Saxby in the Court of Appeal: False Imprisonment

Austin & Saxby v Commissioner of Police of the Metropolis [2007] EWCA Civ 989 (CA)

The Court of Appeal considered that for the purposes of the tort of false imprisonment, the claimants clearly had been 'imprisoned' in a relevant sense: they were kept behind a cordon for seven hours with no opportunity to leave. The court also took the view that necessity could provide a defence to a claim for false imprisonment. In this case, the limits of necessity would be equated with the limits to the power to act to prevent a breach of the peace. This power had been strictly defined by the House of Lords shortly before in *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2006] UKHL 55; [2007] 2 AC 105, and required that the anticipated breach must be 'imminent'.[52]

Sir Anthony Clarke MR, *Austin v Commissioner of Police of the Metropolis*

> 62 … If the claimants did not appear to be about to commit a breach of the peace, was their containment lawful?
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> 63 The judge held that the answer to this question was 'No'. He did so on the basis to which we have already referred, namely that, unless the question whether a particular claimant was about to commit a breach of the peace was answered in the affirmative, the case against that claimant based on powers to prevent a breach of the peace must fail: para 520.
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> p. 75 64 Mr Pannick nevertheless invites an affirmative answer to this question. He does so on the basis of the obiter reasoning in *Laporte's* case [2007] 2 AC 105 discussed above, which was not of course available to the judge. He submits that on the judge's findings of fact a breach of the peace was reasonably thought by the police to be imminent, that the police had taken all the steps which they possibly could to avoid a breach of the peace by those likely to cause it by arrest or other action directed at them and that, in all the circumstances, if a breach of the peace was to be avoided, there was no alternative but to contain everyone within a police cordon. As to release, no alternative strategy was possible, or indeed suggested, other than that adopted by the police and, in these circumstances, the containment of some innocent people such as the claimants was inevitable and lawful in accordance with the principles discussed earlier and summarised, at para 35 above. In short, Mr Pannick submits that, on the findings of fact made by the judge, the situation was wholly exceptional and that the police had no alternative but to do what they did in order to avoid the imminent risk of serious violence, with its consequent risk of serious injury and perhaps death, quite apart from damage to property.
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> . …
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> 67 While we see the force of the points made by Mr Starmer, especially his point that the containment of the crowd for hours without any or any sufficient toilet facilities and in many cases without food or drink was intolerable, with consequent risk to the health and safety of innocent members of the public, and we can well understand that being in Oxford Circus for so long without any idea when one would be released would have been very unpleasant, we see no realistic alternative but to accept Mr Pannick's submission in response. It is that the judge properly held that the police could not reasonably have foreseen what happened or that it would have been necessary to have contained people for so long. The judge held that the police took action to avoid or minimise the risk of crushing: paras 371 and 376.
>
> 68 For these reasons, we conclude that in this very exceptional case, on the basis of the judge's finding that what the police did in containing the crowd was necessary in order to avoid an imminent breach of the peace, the actions of the police were lawful at common law in accordance with the principles discussed above. On that basis, we answer the question whether the containment was lawful in the affirmative, even though the police did not reasonably suspect that the individual claimants were about to commit a breach of the peace. In our judgment that was the case, both when the cordon was imposed at about 2.20 p m and

> throughout the time the cordon was maintained. On the judge's findings of fact, the conditions of necessity remained throughout because no one had or has suggested an alternative release policy.

In effect, dicta in *Laporte* which were intended to define very narrowly the circumstances in which 'bystanders' (people not themselves threatening a breach of the peace) could have their freedom of movement curtailed, were used to create and define a defence of necessity, equated with lawful exercise of police powers, to an action in tort on the part of such individuals. The claimants then faced an insuperable hurdle: they could only succeed by showing that in their own individual cases, the failure to release them was '*Wednesbury* unreasonable'. This is a public law concept and is much more demanding than the idea of reasonableness ordinarily applied in the law of tort.

The following extract sets out the circumstances in which the Court of Appeal took it that people could be detained:

p. 76 **Sir Anthony Clarke MR, *Austin v Commissioner of Police of the Metropolis* (CA)**

> 35 As we read the speeches of Lord Rodger and Lord Brown [in *Laporte*] they give some support for the following propositions: (i) where a breach of the peace is taking place, or is reasonably thought to be imminent, before the police can take any steps which interfere with or curtail in any way the lawful exercise of rights by innocent third parties they must ensure that they have taken all other possible steps to ensure that the breach, or imminent breach, is obviated and that the rights of innocent third parties are protected; (ii) the taking of all other possible steps includes (where practicable), but is not limited to, ensuring that proper and advance preparations have been made to deal with such a breach, since failure to take such steps will render interference with the rights of innocent third parties unjustified or unjustifiable; but (iii) where (and only where) there is a reasonable belief that there are no other means whatsoever whereby a breach or imminent breach of the peace can be obviated, the lawful exercise by third parties of their rights may be curtailed by the police; (iv) this is a test of necessity which it is to be expected can only be justified in truly extreme and exceptional circumstances; and (v) the action taken must be both reasonably necessary and proportionate.

The reference to necessary and proportionate action is familiar from the ECHR, though the Court of Appeal preferred to separate discussion of tort and Convention rights. The approach to the issues relating to Article 5 was itself controversial. As we have seen, it was thought that 'imprisonment' for the purposes of tort was established, but justified by necessity. Yet where Article 5 ECHR was concerned, the court found that there was no 'deprivation of liberty' at all. This finding was challenged before the House of Lords; but was upheld.

Austin and Article 5: The House of Lords and European Court of Human Rights

Austin v Metropolitan Police Commissioner [2009] 1 AC 564 (HL)

The conclusion of both Court of Appeal and House of Lords that for the purposes of Article 5(1) there was no 'deprivation of liberty' in this case (rather than a deprivation of liberty that required justifying) may seem very strange. The key to understanding it lies in the lack of any general exception to the Article 5 right.

> **Article 5 ECHR**
>
> (1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the
> p. 77 detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Article 5(1) lists exhaustively the reasons why an individual may be deprived of their liberty. None of these would cover the case in hand. Therefore, a police action which had been found to be 'necessary' at common law within the terms of *Laporte* would violate Article 5 unless the House of Lords held—as it did—that the Article was simply not engaged in circumstances where the action was justified. The Article was said to be aimed only at 'arbitrary' deprivations of liberty. Otherwise, Lord Hope argued, there would be a conflict with competing rights, such as those in Article 2 (right to life);[53] and a need to ensure 'fair balance' between individual and collective interests was read into the Article on the basis that this is inherent to the Convention as a whole. Pragmatism and fair balance were seen as relevant factors even here, where there is no indication to this effect in the wording of the Article.

Lord Hope, *Austin v Metropolitan Police Commissioner* (HL)

> 34 I would hold therefore that there is room, even in the case of fundamental rights as to whose application no restriction or limitation is permitted by the Convention, for a pragmatic approach to be taken which takes full account of all the circumstances. No reference is made in article 5 to the interests of public safety or the protection of public order as one of the cases in which a person may be deprived of his liberty. This is in sharp contrast to article 10(2), which expressly qualifies the right to freedom of expression in these respects. But the importance that must be attached in the context of article 5 to measures taken in the interests of public safety is indicated by article 2 of the Convention, as the lives of persons affected by mob violence may be at risk if measures of crowd control cannot be adopted by the police. This is a situation where a search for a fair balance is necessary if these competing fundamental rights are to be reconciled with each other. The ambit that is given to article 5 as to measures of crowd control must, of course, take account of the rights of the individual as well as the interests of the community. So any steps that are taken must be resorted to in good faith and must be proportionate to the situation which has made the measures necessary. This is essential to preserve the fundamental principle that anything that is done which affects a person's right to liberty must not be arbitrary. If these requirements are met, however, it will be proper to conclude that measures of crowd control that are undertaken in the interests of the community will not infringe the article 5 rights of individual members of the crowd whose freedom of movement is restricted by them.

p. 78 ↵ Despite criticisms,[54] in *Austin and Others v UK* (39692/09), 15 March 2012, the Grand Chamber of the European Court of Human Rights reached a decision that was largely consistent with the approach taken by the House of Lords. The Chamber agreed that outside the paradigm case of confinement in a cell, Article 5 must be applied within the context of the Convention as a whole. Especially pertinent are the positive obligations imposed upon states to protect safety within Articles 2 and 3. On this basis, where action was taken in order to protect other Convention rights, there had been no violation of Article 5(1). The decision was a majority one; the minority judges thought they detected illegitimate recourse to 'public interest' arguments in the approach of the majority. The truth is, weighing rights of other members of the public, and restricting rights pursuant to a public interest, are not easily distinguished.[55]

People Lacking Capacity

The Mental Health Act 2007 introduced a number of amendments and additions to the Mental Capacity Act 2005 (MCA), dealing with the deprivation of liberty of people who lack capacity. Once again, Convention rights were an influencing factor: the amendments were provoked by the decision of the European Court of Human Rights in *HL v UK* (2005) 40 EHRR 32, finding the UK in violation of Article 5 where an adult lacking capacity and who was notionally free to leave a psychiatric facility had nevertheless been unlawfully deprived of his liberty. His movements were closely tracked; those outside with whom he had had contact were discouraged from visiting him in case he attempted to leave; and he would be 'sectioned' if he tried to do so. The House of Lords had previously held in *R(L) v Bournewood Community and NHS Trust* [1999] 1 AC 458 that this did not amount to a false imprisonment under domestic law, so that there was clearly a shortfall in protection: these

decisions are referred to in the extract from Baroness Hale's judgment in *Jalloh*, above, and the conclusion in the *Bournewood* case is described as 'open to doubt'. The provisions are lengthy and complex (indeed they have been described as 'hideously and needlessly complicated').[56] In essence, they apply to people lacking capacity and deprived of their liberty in hospitals or care homes.[57] They provide that a supervisory body or local authority will need to be informed of the deprivation of liberty so that it can ensure that the provisions of the MCA are followed, and that individuals will be appointed to be consulted on the best interests of the individual concerned, and to maintain contact with and represent that person, respectively. Since these provisions are essentially designed to ensure compatibility with the state's obligations under Article 5 ECHR, their detailed operation lies beyond the reach of this text. However, it is worth noting that courts have found it particularly challenging to set the boundary between deprivation of liberty (which would engage Article 5), and mere 'restriction' of liberty.[58]

p. 79

5 Intentional Infliction of Physical or Mental Harm

Wright J, *Wilkinson v Downton*
[1897] 2 QB 57

> In this case the defendant, in the execution of what he seems to have regarded as a practical joke, represented to the plaintiff that he was charged by her husband with a message to her to the effect that her husband was smashed up in an accident, and was lying at The Elms at Leytonstone with both legs broken, and that she was to go at once in a cab with two pillows to fetch him home. All this was false. The effect of the statement on the plaintiff was a violent shock to her nervous system, producing vomiting and other more serious and permanent physical consequences at one time threatening her reason, and entailing weeks of suffering and incapacity to her as well as expense to her husband for medical attendance. These consequences were not in any way the result of previous ill-health or weakness of constitution; nor was there any evidence of predisposition to nervous shock or any other idiosyncrasy.
>
> … The defendant has, as I assume for the moment, 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 has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act. This wilful injuria is in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant.
>
> It remains to consider whether the assumptions involved in the proposition are made out. One question is whether the defendant's act was so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the defendant, regard being had to the fact that the effect was produced on a person proved to be in an ordinary state of health and mind. I think that it was. It is difficult to imagine that such a statement, made suddenly and with apparent seriousness, could fail to produce grave effects under the circumstances upon any but an exceptionally indifferent person, and therefore an intention to produce such an effect must be imputed, and it is no answer in law to say that more harm was done than was anticipated, for that is commonly the case with all wrongs. The other question is whether the effect was, to use the ordinary phrase, too remote to be in law regarded as a consequence for which the defendant is answerable. Apart from authority, I should give the same answer and on the same ground as the last question, and say that it was not too remote …

Wilkinson v Downton is our first example of an action which depends on showing *intentionally caused harm*. The target of intention in *Wilkinson v Downton* is harm (including distress) to the claimant. In fact, it is a tort both of *intention*, and of *damage*. The damage caused must be more than mere distress: physical injury or recognized psychiatric illness is required, so that the required damage and the target of intention do not match precisely. While the tort has for most of its career been named purely by reference to *Wilkinson v Downton*, the Supreme Court in *OPO v Rhodes* has referred to it as **the tort of wilful infringement of the claimant's right to personal safety**, emphasizing both of these requirements (Baroness Hale and Lord

p. 80 Toulson at [81]). Most of the 'economic torts' (Section 7) also require both ↵ intention and damage. That comparison was clearly in the mind of Wright J, since the claimant attempted to argue the case in 'deceit' (one of the economic torts). Deceit requires that the defendant made *a false statement, with the intention that the claimant should rely upon that statement to her detriment*. There was a false statement in this case, and the plaintiff was able to claim in deceit for her bus fare to the scene of the supposed accident. But the basis of liability in deceit is that *a person who makes a false statement intended to be acted on must make good the damage naturally resulting from its being acted on*. The plaintiff's physical injury flowed from *believing* the statement, but *not* from acting upon it.

If the claim did not fall within the action for deceit, then the main obstacle to its success was the restrictive decision in *Victorian Railways Commissioners v Coultas* (1888) 13 App Cas 222. This decision had treated psychiatric harm suffered as a result of a railway accident as unrecoverable for being 'too remote'. That case, Wright J reasoned, could be distinguished because it did not concern a '*wilful*' act. In fact, change soon followed.[59] Arguably, it was the need to distinguish *Coultas* at the time of *Wilkinson v Downton* which explains Wright J's emphasis on the damage as 'wilful'.

In *OPO v Rhodes* [2015] UKSC 32, the Supreme Court considered the action in *Wilkinson v Downton*. The claimant's success before the Court of Appeal was considered problematic, partly because the claimant's goal was to prevent publication of the defendant's autobiography. Her argument was that its stark and hard-hitting style and its revelations about the author's early life would cause harm to their psychologically vulnerable son. The Supreme Court responded by emphasizing the value of freedom of speech and constraining the range of application of the tort in certain respects.

The elements of the tort were broken down by the Supreme Court into three: the conduct element; the required mental element (what form of 'intention' will suffice?); and the consequence element (what type of harm is required). The last of these was not in issue in *OPO*, but members of the Supreme Court commented on it nonetheless. The three elements are used here to explore the ambit of the tort.

5.1 The Conduct Element

As we have seen, in *Wilkinson v Downton*, a false statement was made, without justification, and directly to the claimant. However, Wright J seems to have categorized the conduct involved, in the extract above, as merely 'wilfully doing an act', though without justification. There is no sense that this should be confined to speech. *OPO* too involved words, but was a very different case, where a book was to be published to the world at large, whose contents were truthful and whose publication was clearly justified both in the sense that it concerned the author's own life; and in the sense that there were public interest reasons why it should be published. The book starkly detailed the abuse suffered by the author from the age of six, the impact this had on his life, and the way he had found salvation in music, forming a successful career as a concert pianist. The majority of the Supreme Court thought that 'words or conduct' could suffice; but the words in this instance did not fit the
p. 81 conduct element of ↵ the tort for two reasons. First, the words were not 'directed to' the child (though the book was dedicated to him and contained one passage addressing him); second, publication was far from unjustified.

Baroness Hale and Lord Toulson, *OPO v Rhodes*

> 74 The conduct element requires words or conduct directed towards the claimant for which there is no justification or reasonable excuse, and the burden of proof is on the claimant. We are concerned in this case with the curtailment of freedom of speech, which gives rise to its own particular considerations. We agree with the approach of the Court of Appeal in regarding the tort as confined to those towards whom the relevant words or conduct were directed, but they may be a group. A person who shouts 'fire' in a cinema, when there is no fire, is addressing himself to the audience. In the present case the Court of Appeal treated the publication of the book as conduct directed towards the claimant and considered that the question of justification had therefore to be judged vis-à-vis him. In this respect we consider that they erred.
>
> 75 The book is for a wide audience and the question of justification has to be considered accordingly, not in relation to the claimant in isolation. In point of fact, the father's case is that although the book is dedicated to the claimant, he would not expect him to see it until he is much older. Arden LJ said that the father could not be heard to say that he did not intend the book to reach the child, since it was dedicated to him and some parts of it are addressed to him. We have only found one passage addressed to him, which is in the acknowledgments, but more fundamentally we do not understand why the father may not be heard to say that the book is not intended for his eyes at this stage of his life. Arden LJ also held that there could be no justification for the publication if it was likely to cause psychiatric harm to him. That approach excluded consideration of the wider question of justification based on the legitimate interest of the defendant in telling his story to the world at large in the way in which he wishes to tell it, and the corresponding interest of the public in hearing his story.
>
> 76 When those factors are taken into account, as they must be, the only proper conclusion is that there is every justification for the publication. A person who has suffered in the way that the father has suffered, and has struggled to cope with the consequences of his suffering in the way that he has struggled, has the right to tell the world about it. And there is a corresponding public interest in others being able to listen to his life story in all its searing detail. Of course vulnerable children need to be protected as far as reasonably practicable from exposure to material which would harm them, but the right way of doing so is not to expand *Wilkinson v Downton* [1897] 2 QB 57 to ban the publication of a work of general interest. But in pointing out the general interest attaching to this publication, we do not mean to suggest that there needs to be some identifiable general interest in the subject matter of a publication for it to be justified within the meaning of *Wilkinson v Downton*.
>
> 77 Freedom to report the truth is a basic right to which the law gives a very high level of protection (see, for example, *Napier v Pressdram Ltd* [2010] 1 WLR 934, para 42.) It is difficult to envisage any circumstances in which speech which is not deceptive, threatening or possibly abusive, could give rise to liability in tort for wilful infringement of another's right to personal safety. The right to report the truth is justification in itself. That is not to say that the right of disclosure is absolute, for a person may owe a duty to treat information as private or confidential. But there is no general law prohibiting the publication of facts which will

p. 82

> cause distress to another, even if that is the person's intention. The question whether (and, if so, in what circumstances) liability under *Wilkinson v Downton* [1897] 2 QB 57 might arise from words which are not deceptive or threatening, but are abusive, has not so far arisen and does not arise for consideration in this case.
>
> 78 The Court of Appeal recognised that the father had a right to tell his story, but they held for the purposes of an interlocutory injunction that it was arguably unjustifiable for him to do so in graphic language. The injunction permits publication of the book only in a bowdlerised version. This presents problems both as a matter of principle and in the form of the injunction. As to the former, the book's revelation of what it meant to the father to undergo his experience of abuse as a child, and how it has continued to affect him throughout his life, is communicated through the brutal language which he uses. His writing contains dark descriptions of emotional hell, self-hatred and rage, as can be seen in the extracts which we have set out. The reader gains an insight into his pain but also his resilience and achievements. To lighten the darkness would reduce its effect. The court has taken editorial control over the manner in which the father's story is expressed. A right to convey information to the public carries with it a right to choose the language in which it is expressed in order to convey the information most effectively: see *Campbell v MGN Ltd* [2004] 2 AC 457, para 59, and *In re Guardian News and Media Ltd* [2010] 2 AC 697, para 63.

Although the passage above is concerned with speech, the majority of the Supreme Court did not confine the relevant conduct in *Wilkinson* to speech: the 'words or conduct' must be directed at the claimant, and be unjustified. Lord Neuberger by contrast referred to the action as 'the tort of making distressing statements'. It is suggested that the majority approach better captures the essence of the action.

5.2 The Mental Element

What form of intention is required for the action in *Wilkinson v Downton*? As we saw in our first extract, Wright J did not claim that the defendant actually *desired* the plaintiff to suffer harm. Rather, he said that the law here *imputes* intention to the defendant. Arguably, *Wilkinson v Downton* fitted the *second* form of intention mentioned in the US Restatement on Torts (extracted in Section 1), by which a party is held to intend consequences which are substantially 'certain' to follow from his or her actions. It makes no claim that this is *the same thing as* desiring the result. Indeed, Wright J may even be read as saying that in the absence of any other motive, the virtual certainty of the result is *evidence* that the outcome was desired.

The Supreme Court did not, however, see Wright J's discussion in this way. Rather, they looked at *Wilkinson* in its historical context, and argued that 'imputed intention' was by no means a creation of Wright J, but a familiar aspect of the law at the time of the decision. In criminal law, it has been removed by section 8 of the Criminal Justice Act 1967; and it was best for it to be removed from civil law also.

Baroness Hale and Lord Toulson, *OPO v Rhodes*

> 81 There is a critical difference, not always recognised in the authorities, between imputing the existence of an intention as a matter of law and inferring the existence of an intention as a
> p. 83 matter of fact. Imputation of an intention by operation of a rule of law is a vestige of a previous age and has no proper role in the modern law of tort. It is unsound in principle. It was abolished in the criminal law nearly 50 years ago and its continued survival in the tort of wilful infringement of the right to personal safety is unjustifiable. It required the intervention of Parliament to expunge it from the criminal law, but that was only because of the retrograde decision in *Director of Public Prosecutions v Smith* [1961] AC 290. The doctrine was created by the courts and it is high time now for this court to declare its demise.
>
> 82 The abolition of imputed intent clears the way to proper consideration of two important questions about the mental element of this particular tort.
>
> 83 First, where a recognised psychiatric illness is the product of severe mental or emotional distress, (a) is it necessary that the defendant should have intended to cause illness or (b) is it sufficient that he intended to cause severe distress which in fact results in recognisable illness? ...
>
> 84 Secondly, is recklessness sufficient and, if so, how is recklessness to be defined for this purpose? Recklessness is a word capable of different shades of meaning. In everyday usage it may include thoughtlessness about the likely consequences in circumstances where there is an obvious high risk, or in other words gross negligence...
>
> ...
>
> 87 Our answer to the first question is that of option (b): para 83 above. Our answer to the second question is not to include recklessness in the definition of the mental element. To hold that the necessary mental element is intention to cause physical harm or severe mental or emotional distress strikes a just balance. It would lead to liability in the examples in para 85 but not in the example in para 86. It means that a person who actually intends to cause another to suffer severe mental or emotional distress (which should not be understated) bears the risk of legal liability if the deliberately inflicted severe distress causes the other to suffer a recognised psychiatric illness. A loose analogy may be drawn with the 'egg shell skull' doctrine, which has an established place in the law of tort. This formulation of the mental element is preferable to including recklessness as an alternative to intention. Recklessness was not a term used in *Wilkinson v Downton* [1897] 2 QB 57 or *Janvier v Sweeney* [1919] 2 KB 316 and it presents problems of definition.

Clearly, the mental element has been defined here to exclude both 'imputed' intention, and recklessness. Lord Neuberger agreed that recklessness should not suffice; but maintained (with reference to *Wilkinson v Downton* itself) that:

Lord Neuberger, *OPO v Rhodes*

> 112 … There are statements (and indeed actions) whose consequences and potential consequences are so obvious that the perpetrator cannot realistically say that those consequences are unintended…

It is suggested that this is correct, and it is compatible with the approach taken by the US Restatement and extracted in Section 1 of this chapter. Indeed, it may be compatible with the judgment of the majority, who
p. 84 made a distinction between imputing at law and 'inferring' ↵ as a matter of fact. The door may therefore remain open to acceptance of Lord Neuberger's comments above; and indeed Lord Neuberger's statement was applied in the case of *C v WH* [2015] EWHC 2687 (QB). This was a case in which a senior member of staff at a special school was found to have groomed a pupil and actively encouraged him to send indecent photographs to him. A claim under *Wilkinson v Downton* was successful: the emotional harm suffered was considered such an obvious consequence that it was 'intended', even though the trigger for this was the fact that it was discovered.

So far as the 'target' of intention is concerned, the Supreme Court in *OPO* held that it should suffice to intend to cause severe distress. But did the Court consider that distress could suffice for the 'consequence' element?

5.3 The Consequence Element

There has been considerable academic support for a development of *Wilkinson v Downton* to cover less tangible injuries, such as distress or anxiety.[60] In the United States, *Wilkinson* has indeed developed into an action in respect of the consequences of 'harassing and outrageous acts', provided the product of such acts amounts to 'severe emotional distress'. In *Wong v Parkside Health NHS Trust* [2003] 3 All ER 932, the Court of Appeal rejected an argument that *Wilkinson v Downton* had been similarly extended in English law. This was a case of bullying at work which would, if the events occurred now, give rise to claims under the Protection from Harassment Act 1997.[61] Hale LJ concluded that English common law had not developed an action for harassment before the Protection from Harassment Act 1997.

In *Wainwright v Home Office*, a decision of the House of Lords, Lord Hoffmann did not entirely rule out a remedy for intentionally caused anxiety and distress in its own right under *Wilkinson v Downton*. In his view, if such a claim were to be recognized, it would depend on much stronger 'intention' than the sort of intention which he thought was referred to by Wright J. No such strong intention was present in that case. In *OPO*, the Supreme Court has of course rejected 'imputed intention' as the basis of liability under *Wilkinson* generally, and was critical of the analysis in the extract below, which it considered a 'reconstruction' ([62]); but it did not choose to expand the forms of damage that would thereby become recoverable.

Lord Hoffmann, *Wainwright v Home Office*
[2004] 2 AC 406

> 44 I do not resile from the proposition that the policy considerations which limit the heads of recoverable damage in negligence do not apply equally to torts of intention. If someone actually intends to cause harm by a wrongful act and does so, there is ordinarily no reason why he should not have to pay compensation.[62] But I think that if you adopt such a principle, you have to be very careful about what you mean by intend. In *Wilkinson v Downton* Wright J
> p. 85 wanted to water down the concept of intention as much as possible. He clearly thought, as the Court of Appeal did afterwards in *Janvier v Sweeney*, that the plaintiff should succeed whether the conduct of the defendant was intentional or negligent. But the *Victorian Railway Comrs* case prevented him from saying so. So he devised a concept of imputed intention which sailed as close to negligence as he felt he could go.
>
> 45 If, on the other hand, one is going to draw a principled distinction which justifies abandoning the rule that damages for mere distress are not recoverable, imputed intention will not do.

In *OPO*, the question of which damage would suffice did not arise for determination, and discussion on the point was brief. Nevertheless, the Court stated its conclusions on all three elements, and on the ambit of the tort, as follows:

Baroness Hale and Lord Toulson, *OPO v Rhodes*

> 88 It would be possible to limit liability for the tort to cases in which the defendant's conduct was 'extreme, flagrant, or outrageous', as in Canada. But this argument has not so far been advanced in this country, and, although Arden LJ adverted to it as a possibility, the father has not sought to pursue it. We are inclined to the view, which is necessarily obiter, that the tort is sufficiently contained by the combination of (a) the conduct element requiring words or conduct directed at the claimant for which there is no justification or excuse, (b) the mental element requiring an intention to cause at least severe mental or emotional distress, and (c) the consequence element requiring physical harm or recognised psychiatric illness.

For the time being, this is the authoritative statement of the boundaries of the tort of 'wilful infringement of another's right to personal safety'.

6 Statutory Action for Harassment

6.1 Defining Statutory Action

Protection from Harassment Act 1997

The Act is summarized below.[63]

1 Prohibition of harassment

(1) A person must not pursue a course of conduct—

(a) which amounts to harassment of another, and

(b) which he knows or ought to know amounts to harassment of the other.

...

p. 86 (3) Subsection (1) does not apply to a course of conduct if the person who pursued it shows—

(a) that it was pursued for the purpose of preventing or detecting crime,

(b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or

(c) that in the particular circumstances the pursuit of the course of conduct was reasonable.

...

3 Civil Remedy

(1) An actual or apprehended breach of [section 1(1)] may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question.

(2) On such a claim, damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment.

...

7 Interpretation of this group of sections

(1) This section applies for the interpretation of sections 1 to 5.

(2) References to harassing a person include alarming the person or causing the person distress.

[(3) A 'course of conduct' must involve—

(a) in the case of conduct in relation to a single person (see section 1(1)), conduct on at least two occasions in relation to that person ...]

...

(4) 'Conduct' includes speech.

[(5) References to a person, in the context of the harassment of a person, are references to a person who is an individual.]

6.2 Protected Interests

Clearly, by section 3(1) and (2), the available remedies include compensation for harm suffered, and this harm may include 'anxiety and distress'. That is already more flexible than the common law. However, this form of harm is not a *requirement* of the civil action under the Act which, quite simply, protects *against harassment*. Where physical or mental injuries flow from the harassment, these too may be recoverable (see *Jones v Ruth*, below).

In *Levi v Bates* [2015] EWCA Civ 206, the Court of Appeal considered the important question of *whose* interests were protected by the civil liabilities created by the Act, and found that it was not only the 'target' of the conduct who was protected. Here, a wife was also the victim of harassment directed at her husband:

p. 87 **Briggs LJ, *Levi v Bates***
[2015] EWCA Civ 206

> 33 I agree that alarm or distress suffered out of nothing more than sympathy for the targeted victim of harassment is insufficient to found a claim under the Act. The claimant must be harassed by it, in the sense that the conduct complained of must have some direct effect on the claimant (in terms of causing foreseeable harm, usually, but not limited to, alarm and distress). This is because section 3(1) of the Act confers a right to bring a civil claim on persons who are or may be the victim of the course of conduct in question, and because section 1(1) requires that course of conduct to amount to harassment of another. My view that the harm to the claimant must be foreseeable arises from section 1(1)(b) because of the requirement that the perpetrator knows or ought to know that the relevant course of conduct amounts to harassment.
>
> 34 The result of that analysis is that the ability to bring a harassment claim extends beyond the targeted individual only to those other persons who are foreseeably, and directly, harmed by the course of targeted conduct of which complaint is made, to the extent that they can properly be described as victims of it.

6.3 States of Mind

Liability under the 1997 Act is based on actual or constructive knowledge that conduct is likely to amount to harassment. This requirement may be fulfilled without any actual realization on the part of the defendant that he or she is 'harassing' the claimant. There is certainly no need for the defendant to *wish* to have the effect of making the claimant feel 'harassed', or to suffer anxiety. The following case goes further: a claimant was entitled to damages for personal injury brought about as a result of the defendants' conduct during building works on neighbouring property, irrespective of whether personal injury was a *foreseeable consequence* of the conduct:

Patten LJ, *Jones v Ruth*
[2011] EWCA Civ 804

> 32 … Conduct of the kind described in section 1(1) is actionable under section 3 in respect of anxiety or injury caused by the harassment and any financial loss resulting from the harassment. There is nothing in the statutory language to import an additional requirement of foreseeability. Nor is the foreseeability of damage the gist of the tort. Section 1(1) is concerned with deliberate conduct of a kind which the defendant knows or ought to know will amount to harassment of the claimant. Once that is proved the defendant is responsible in damages for the injury and loss which flow from that conduct. There is nothing in the nature of the cause of action which calls for further qualification in order to give effect to the obvious policy objectives of the statute.

There must, however, be a 'course of conduct', and a single incident will therefore not suffice, no matter how serious. The primary remedy is an injunction, but damages are also available. The Act also creates criminal offences of harassment.

p. 88 ↵ Section 1(3)(a) creates a defence for conduct pursued for the purpose of combating crime. Plainly, the provision is not subject to a 'reasonableness' criterion, and is generally 'subjective' in nature. However, the Supreme Court has concluded that it contains implicit limits. In particular, it does not protect a party whose pursuit of justice is 'irrational'.

Lord Sumption JSC, *Hayes v Willoughby*
[2013] UKSC 17 (*Lord Neuberger and Lord Wilson agreeing*)

> [14] … Rationality is not the same as reasonableness. Reasonableness is an external, objective standard applied to the outcome of a person's thoughts or intentions. The question is whether a notional hypothetically reasonable person in his position would have engaged in the relevant conduct for the purpose of preventing or detecting crime. A test of rationality, by comparison, applies a minimum objective standard to the relevant person's mental processes. It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse. For the avoidance of doubt, I should make it clear that, since we are concerned with the alleged harasser's state of mind, I am not talking about the broader categories of *Wednesbury* unreasonableness (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223), a legal construct referring to a decision lying beyond the furthest reaches of objective reasonableness.

Lord Mance agreed in the result, but clearly wished to leave open the content of the applicable criterion:

> [23] … On the judge's finding, Mr Willoughby's state of mind took his course of conduct outside paragraph (a), whether one describes it as irrational, perverse or abusive or as so grossly unreasonable that it cannot have been intended to be covered by that head of justification.

Lord Reed, who dissented, was more sceptical about the irrationality criterion, and concerned about the introduction of such a criterion where both criminal liabilities, and civil liberties, were potentially involved. He could not bring to mind 'any example, in any context, of a statutory requirement not of reasonableness but of rationality, the latter being understood as conceptually distinct from the former' (at [26]), and plainly did not think that the comparison with public law notions of 'irrationality' was clear. Moreover, he was concerned about the potential use of the statute against those involved in the prevention or detection of crime, including investigative journalists, and on this basis wary of limiting the protection that Parliament had included in the relevant provision ([29]).

6.4 Vicarious Liability

The House of Lords has accepted that an employer may be *vicariously liable* for harassment under the Act: *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34. On the other hand, in *Daniels v Commissioner of*
p. 89 *Metropolitan Police* [2006] EWHC 1622, it was made ↵ clear that an employer will not be vicariously liable under the Act for a series of individual acts of bullying where the employees concerned are acting independently. For the employer to be vicariously liable for the statutory torts of their employees under this Act, the acts of the employees must amount to a *course of conduct*, with a common purpose. Equally, courts have emphasized that the conduct in question must not be merely unpleasant or unreasonable.

Lord Nicholls, *Majrowski*

> … Courts are well able to recognize the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the boundary from the regrettable to the unacceptable the gravity of the misconduct must be of an order which would sustain criminal liability under Section 2.

6.5 Corporate Defendants

A corporate defendant sued in its own right (rather than vicariously) may have the necessary mental element. In *Ferguson v British Gas Trading* [2009] EWCA Civ 46, the Court of Appeal declined to strike out an action against British Gas for alleged harassing conduct taking the form of a host of computer-generated bills, reminders, and threats (including threats of disconnection and of reporting to a credit agency) to a previous customer who had terminated her contract with the company. The alleged persistent and unwarranted threats were the kind of course of conduct which Parliament had intended the Act to cover, and the fact that the defendant was a corporation (and there was alleged to be no individual with an intention to make the threats or cause distress, only a computer) did not mean it necessarily lacked the mental element: the statute refers to what the defendant 'ought to know'.

Similar issues arose in *Roberts v Bank of Scotland plc* [2013] EWCA Civ 882, in which an individual account-holder gained damages under the Act against her bank, having made it plain that she did not wish to be telephoned about the modest arrears on her accounts with Halifax. The bank's response to her arrears was to subject her to what Jackson LJ described as a 'monstrous system of 547 automated phone calls followed by a series of futile conversations' ([56]). Again, this is a form of harassment by computer. The bank's own records revealed the monstrous number of calls generated, so that the knowledge requirement (which is based on what the defendant *ought to know*) was plainly satisfied.

7 Intentional Interference with Economic Interests

Most undergraduate law courses omit coverage of the important torts collected here. On the other hand, there has been considerable activity in the highest courts in the last few years, indicating the continued relevance of this area. Two very significant House of Lords decisions altered the shape of the law, followed more recently by a notable decision of the Supreme Court. Between them, -these decisions have by no means simplified the structure of the torts as might have been hoped. This section is designed as an introduction and overview,
p. 90 though no such overview can be entirely straightforward given the lack of shared ↵ principles in this area. Certainly, the role of intention in English tort law cannot be properly understood without some attention to the economic torts.

These torts require intention to cause loss to the claimant, except for the tort of inducing breach of contract, where the target of intention is the breach, rather than the loss which may often follow. The kind of intention they require is stronger than the form of intention we saw in *Wilkinson v Downton*, and they are genuinely based upon intentional harm. At the same time, two points need to be made. First, the test for intention varies between some of these torts, with the Supreme Court recently confirming that the two forms of conspiracy require two different levels of intention, for example: *JSC BTA Bank v Ablyazov* [2018] UKSC 19; [2018] 2 W.L.R, 1125. Second, the strong forms of intention required for these torts *are not enough*. Something more is needed before there is said to be an actionable wrong—though the nature of that 'something more' is, again, not identical between the different torts. The 'abstentionist' approach to liability to be seen in the economic torts is an important element in the general understanding of tort law.

The economic torts continue to defy any simple framework. While the House of Lords in *OBG v Allan* [2007] UKHL 21; [2008] 1 AC 1 appeared to have clarified the area (while emphasizing that the principles of the various torts were not unified), the subsequent decisions of the House of Lords in *Total Network v Revenue and Customs Commissioners* [2008] UKHL 19; [2008] 2 WLR 711, and 10 years later of the Supreme Court in *JSC BTA Bank v Ablyazov and Another*,[64] have reemphasised the previous piecemeal position. It is clear that each of these decisions deals only with part of the field. A helpful and detailed analysis of the whole field after *OBG* and *Total Network* (but before *JSC Bank v Ablyazov*) can be found in H. Carty, 'The Economic Torts in the 21st Century' (2008) LQR 641; and proposals to reorganize the torts in a more rational and coherent way (concentrating in part on the interests that are protected by the torts) are developed by S. Deakin and J. Randall, 'Rethinking the Economic Torts' (2009) 72 MLR 519–53; and (suggesting conspiracy forms no logical part of the economic torts), P.S. Davies and P. Sales, 'Intentional Harm, Accessories and Conspiracies' (2018) LQR 69–93. The suggestions made by these authors have not—so far at least—been taken up.

We will group the economic torts into two categories:

(a) Group A economic torts, involving actions or threats;

(b) Group B economic torts, involving misrepresentation.

With one exception, the economic torts selected here[65] require *intentional causation of economic harm*. The one exception—inducing breach of contract—still requires intention, but the focus is intention to induce breach (rather than cause harm).

Equally, in all or nearly all of these torts, *intention is not enough*. Otherwise, there would simply be a tort of 'intentionally causing economic loss'.[66] Such a tort would be very awkward in a competitive market economy (even more so in a society which still recognizes the legitimacy of trade union activity). This point—the need for more than intention to cause economic harm—is clearly made by the Supreme Court in the following extract: as the Justices put it, 'one man's gain is another man's loss'. As will be apparent, the particular action
p. 91 in the case extracted was a form of conspiracy ('unlawful means conspiracy'). But more generally, ↵ the Justices describe the task of separating legitimate activity aimed at getting ahead, from tortious conduct, as one of 'exceptional delicacy'. This is offered as the fundamental reason for a lack of general guiding principles across the relevant torts.

Lords Sumption and Lloyd-Jones JJSC, *JSC Bank v Ablyazov* [2018] UKSC 19; [2018] 2 W.L.R. 1125

> 6. Conspiracy is one of a group of torts which tend to be loosely lumped together as 'economic torts', the others being intimidation, procuring a breach of contract and unlawful interference with economic and other interests (sometimes called the 'intentional harm' tort). Along with tortious misrepresentation (fraudulent or negligent), passing off, slander of title and infringement of intellectual property rights, the economic torts are a major exception to the general rule that there is no duty in tort to avoid causing a purely economic loss unless it is parasitic upon some injury to person or property. The reason for the general rule is that, contract apart, common law duties to avoid causing pure economic loss tend to cut across the ordinary incidents of competitive business, one of which is that one man's gain may be another man's loss. The successful pursuit of commercial self-interest necessarily entails the risk of damaging the commercial interests of others. Identifying the point at which it transgresses legitimate bounds is therefore a task of exceptional delicacy. The elements of the four established economic torts are carefully defined so as to avoid trespassing on legitimate business activities or imposing any wider liability than can be justified in principle. Some of the elements of the torts, notably intention and unlawful means are common to more than one of them. But it is dangerous to assume that they have the same content in each context. In *OBG Ltd v Allan [2008] AC 1*, Lord Hoffmann drew attention to some of the confusions and category errors which have resulted from attempts by judges and scholars to formulate a unified theory on which these causes of action can be explained. Lord Hoffmann was not directly concerned with the tort of conspiracy, but of all the economic torts it is the one whose boundaries are perhaps the hardest to define in principled terms.

Generally speaking (and with exceptions), the torts in Group A also require some 'unlawful means', while the torts in Group B require false representations. Unfortunately, relevant 'unlawful means' vary between the Group A torts.

7.1 The Starting Point: Intentionally Causing Loss Is Not a Sufficient Basis for Liability

All of our economic torts require intention. But our starting point is that intentionally causing economic harm is not in itself sufficient to justify liability. This is very important when comparing these torts with the tort of negligence. In negligence, there has been some temptation to say that *carelessly causing foreseeable harm* is sufficient to justify liability, unless there is some sufficient reason why not.[67] This broad approach (in terms of general principles of foreseeability, carelessness, and causation) is now not generally adopted, and has been resisted particularly strongly in the case of *economic* losses.[68]

p. 92 ↵ The economic torts help to illustrate why the search for such reasons is important. Most of the cases we will consider in this section involve damage inflicted *between competitors* or (if this is genuinely different) *between trade unions and their targets*. There is no general duty to avoid harming one another's interests intentionally, and (therefore) certainly no duty to avoid doing so carelessly. No general obligation (moral or legal) to 'keep safe from economic harm' exists between parties who are in a competitive or antagonistic relationship.

Although the history of the 'economic torts' goes back much further, an important point of reference in understanding the present law is the decision of the House of Lords in *Allen v Flood*. Where action was not in itself 'unlawful' but was motivated by a dominant motive to *harm* (called, rather imprecisely, 'malice'),[69] could this motive in itself make the harm actionable? Or was it necessary to show *both* unlawful means, *and* ulterior purpose? A specially constituted panel of nine judges was assembled to decide this question, indicating how important it was perceived to be. The answer, given by a 6–3 majority, was that economic harm was not actionable, no matter what the intention of the defendant, unless some independent unlawfulness was present.

Allen v Flood [1898] AC 1

The plaintiffs (respondents) were shipwrights employed on repairs to the woodwork of a ship. The association of which they were members allowed them to work on both wood and iron. The boilermakers association (whose members worked with iron alone) took exception to this arrangement. They felt that shipwrights should be confined to working with wood. Ironworkers on the ship discovered that the respondent shipwrights had previously worked on the ironwork of another ship.

The ironworkers called for their delegate (Allen, the defendant), and told him they planned to walk out. He spoke to the employers and secured the dismissal of the shipwrights. The shipwrights sued Allen for maliciously causing them economic loss. Crucially, the employers were within their rights to dismiss the shipwrights and did so with no breach of any contractual term; equally, the ironworkers were not contractually obliged to continue their work. As a result, no breach of contract was either threatened, or

procured. Had Allen *procured* a breach of the employer's contract, then the shipwrights would have been able to sue the employer for breach; and would also have had an action against Allen on the authority of *Lumley v Gye* (1853) 2 E & B 216 (discussed below).

Allen v Flood has been criticized *both* for an unduly restrictive approach to recovery of intentional harm,[70] *and* for a lack of clarity in the idea of 'malice'.[71] Whether the first criticism is well placed is a matter for debate. The second criticism, however, is not unfair. It is not at all clear that Allen's motive really *ought* to be described as malicious, or as really different from the motive of a competitor out to win the entire market (and thereby to put his rivals out of business). He was trying to protect the interests of his trade association at the expense of another; and the reason for doing this was not predominantly to cause harm to shipwrights, even if this was a necessary corollary. It was to benefit boilermakers. Indeed this point was (briefly) made explicit by Lord
p. 93 Herschell at 132: the object which the defendant, ↵ and those he represented, had in view throughout was what they believed to be the interest of the class to which they belonged; the step taken was a means to that end.

This may be compatible with the approach to intention accepted by the Court of Appeal in *Douglas v Hello (No 3)* [2006] QB 125, but that approach appears to have been disapproved by the House of Lords: *OBG v Allan* [2007] UKHL 21. We explore these developments later.

Perhaps, though, it is unwise to scour the judgments in *Allen v Flood* too closely for analysis of the motives involved. The essence of the majority decision was that Allen's motive did not matter. No form of malice or ill-will (if present) would have sufficed to make his actions into an actionable wrong. The headnote to *Allen v Flood* clearly states:

> An act lawful in itself is not converted by a bad motive into an unlawful act so as to make the doer of the act liable to a civil action…
>
> … the appellant had violated no legal right of the respondents, done no unlawful act, and used no unlawful means, in procuring the respondents' dismissal; … his conduct was therefore not actionable however malicious or bad his motive might be …

The main question for those who take a philosophical approach to intention is not so much whether *Allen v Flood* was clear enough about the nature of 'malice' (it would almost certainly fail that test), but whether it took intention seriously enough as a 'wrong-making factor'.

J. Finnis, 'Intention in Tort Law', in D. Owen (ed.), Philosophical Foundations of Tort Law, at 238

> … One's conduct will be right only if *both* one's means *and* one's ends are right; therefore, *one* wrong-making factor will make one's choice and action wrong, and *all* the aspects of one's act must be rightful for the act to be right. The acting person's intentions must be right all the way down (or up).

But the question to be addressed was not whether Allen's actions were *right*. It was whether they were wrong in such a way as to attract legal liability. Finnis concedes that intentional harm will not *always* justify legal liability; but, following J. B. Ames ('How Far an Act May be a Tort Because of the Wrongful Motive of the Actor'

(1905) 18 Harv L Rev 411), he contends that a defendant may *escape* liability for intentional harm only for particular reasons such as legal privilege, or because the defendant only compels the claimant to do what he has a duty to do, or because the defendant's malevolence only extended to an omission or non-feasance (where there was no positive duty to act). This implies that intentionally caused harm *ought always* to attract a remedy. This is at odds with the 'abstentionist' approach (to use the word applied by Hazel Carty)[72] that may
p. 94 be argued to operate in respect of the ↵ economic torts generally.[73] This approach is to be contrasted with the position in the US Restatement (extracted at the start of this chapter).

7.2 Group A: Economic Torts Involving Actions or Threats

One indication of the difficulties in this area is that there is still no uncontroversial way even of listing the 'economic torts' that exist. *OBG v Allan* clarified the nature of two entries on the list; but *Total Network* and *Ablyazov* (discussed below) did not facilitate its easy completion.

Causing Loss by Unlawful Means

This is the largest economic tort and while it has enjoyed a number of different names (even in *OBG v Allan* itself), its nature and essential ingredients are relatively clear (albeit with some areas of uncertainty). It has in the past been called the 'genus' tort, implying that other economic torts are species of it. But it is now clear that the other economic torts are freestanding and do not fall within its principles.

In *OBG v Allan*, Lord Hoffmann made clear that this tort requires intention to cause loss to the claimant through unlawful means. He preferred to define the relevant unlawful means closely, but may have intended to loosen the restrictive approach to intention which had become accepted before this decision. He also clarified that the nature of the tort involved striking at the claimant's interests through another. Thus one uncertainty that remained was whether unlawful means aimed *directly* at the claimant would count for this tort. Some remarks of Lord Hoffmann about 'two-party intimidation' (where the defendant directly intimidates the claimant, rather than intimidating someone else into not trading with the claimant, for example) imply that direct use of unlawful means against the claimant would not fall within the tort.

We address the elements of this tort, and the meaning of unlawful means, in the Section 7.3.

Inducing Breach of Contract

OBG v Allan confirmed the consensus of view that had surrounded the action in *Lumley v Gye*, 'inducing breach of contract'. That is, it confirmed that this is not a species of the 'causing loss by unlawful means' tort, but a separate tort in which the defendant intentionally causes a third party to breach its contract with the claimant. In keeping with the abstentionist approach of the decision as a whole, the House of Lords tightly defined the criteria of this tort in *OBG v Allan*.

Conspiracy

Two forms of actionable conspiracy have long been recognised. Before *OBG v Allan*, 'unlawful means'
p. 95 conspiracy seemed consistent with the broader action of causing loss by unlawful ↵ means. It could be seen to be a species of the genus tort. 'Simple conspiracy' always seemed anomalous because it did not require unlawful means, so that it imposed liability on parties acting together, where an individual acting alone would not incur liability. This was particularly onerous where trade unions were concerned, since their activities could often be said to involve 'combination'. In *Total Network,* however, the House of Lords considered the basis and nature of **unlawful means conspiracy** afresh, and decided that the unlawful means which might suffice to give rise to the action were broader than the unlawful means required for the purpose of the tort of 'causing loss by unlawful means' (above). There was no requirement that the unlawful means used should be capable of giving rise to a civil action in their own right. In this case, the alleged 'unlawfulness' was the common law criminal offence of 'cheating the revenue'—which is not a tort. But it sufficed to provide the 'unlawful means' required. The Supreme Court in *JSC v Ablyazov* reached the same conclusion. Acting in contempt of court, like 'cheating the revenue' is not a tort, but a (common law) criminal offence. This offence was sufficient to amount to 'unlawful means' for the purposes of an action in conspiracy. Thus, 'unlawful means' conspiracy is clearly not an element in a broader tort of causing loss by unlawful means. This means that there is wider liability in conspiracy than where acting alone. No fully convincing justification has yet been presented.

This brief overview demonstrates that the economic torts are neither unified, nor coherently differentiated. The reason that has been offered for this is that delineating tortious conduct, from non-tortious conduct, is an issue requiring particular 'delicacy' in the context of economic activity.

7.3 Intention and Means in the Group A Economic Torts

Against this background, this section will briefly explore each of the torts according to the **nature of the intention** required (what does it mean to cause loss intentionally in this context?), and the **relevant unlawful means** (or other equivalent factor). For a fuller grasp of the area, it is also now necessary to consider the nature of the interests protected by each of the torts.[74]

Causing Loss through Unlawful Means/Unlawful Interference with Trade/the 'Genus' Tort

Causing loss by unlawful means (the expression used by Lord Hoffmann in *OBG v Allan*) requires that the defendant should have used unlawful means with the intention of causing harm to the claimant. Actual harm to the claimant must flow from the defendant's acts. Lord Hoffmann explained that this tort imposes liability where the defendant has used unlawful means towards a third party, which would be actionable on the part of that third party. (An exception to this would arise where there are threats of unlawful action, rather than action as such: this is the case of 'intimidation', below). 'Unlawful means' were defined by Lord Hoffmann
p. 96 (though not by Lord Nicholls in the same case) as being confined to ↵ those actions which are capable of giving rise to a civil action on the part of the third party. Two other members of the House agreed with Lord Hoffmann, therefore his is the majority approach. The ambit of the tort is therefore restricted (though note the less restrictive approach to intention, below).

Unlawful Means

Lord Hoffmann, *OBG v Allan*

> 47 The essence of the tort … appears to be (a) a wrongful interference with a third party in which the claimant has an economic interest and (b) an intention thereby to cause loss to the claimant…
>
> 49 In my opinion, and subject to one qualification, acts against a third party count as unlawful means only if they are actionable by that third party. The qualification is that they will also be unlawful means if the only reason why they are not actionable is because the third party has suffered no loss. In the case of intimidation, for example, the threat will usually give rise to no cause of action by the third party because he will have suffered no loss. If he submits to the threat, then, as the defendant intended, the claimant will have suffered no loss. If he submits to the threat, then, as the defendant intended, the claimant will have suffered loss instead. It is nevertheless unlawful means. But the threat must be to do something which would have been actionable if the third party had suffered loss…
>
> 51 Unlawful means therefore consists of acts intended to cause loss to the claimant by interfering with the freedom of a third party in a way which is unlawful as against that third party and which is intended to cause loss to the claimant. It does not in my opinion include acts which may be unlawful against a third party but which do not affect his freedom to deal with the claimant.

The rationale for this restricted approach to unlawful means was not explored at length, but may be located in the idea that there is existing civil liability (or would be, if the harm was not visited upon the claimant, rather than upon the person against whom the unlawful means is directed). In other words, this approach means that the economic torts (or at least this economic tort) operate to extend liability for existing wrongs to provide an action for the person whom the defendant intended to be the target. As we have already said, Lord Nicholls took a different view, from a different vantage point: if a civil wrong such as a tort or breach of contract is sufficient 'unlawful means', then surely the more serious wrong represented by a criminal offence ought, obviously, to suffice? The abstentionist's answer might be that criminal offences are not intended in themselves to create civil liability or rights of action. To extend the 'unlawful means' tort to criminal wrongs would create new civil liabilities, rather than extending existing ones. But Lord Hoffmann also briefly mentioned a variation of this reason: '… other writers have wondered whether it would be arbitrary and illogical to make liability depend upon whether the defendant has done something which is wrongful for reasons which have nothing to do with the damage inflicted on the claimant: see Roderick Bagshaw's review of Weir in "Can the Economic Torts be Unified?" (1998) 18 OJLS 729–739, at p 732. I agree.'

p. 97

Intention

Where the required intention is concerned, Lord Hoffmann felt able to relax the restrictive view adopted by the Court of Appeal—presumably because of the tightening of the definition of 'unlawful means'. The Court of Appeal in *Douglas v Hello!* had set out a series of possible meanings of intention, in each case avoiding

excessive concentration on the 'state of mind' of the defendant. It is suggested that this had been a valuable exercise in articulating what is meant by the expression 'targeted malice'—frequently considered the required type of intent for at least the majority of economic torts in Group A.

Lord Phillips MR, *Douglas v Hello! (No 3)*
[2006] QB 125 (giving the judgment of the court)[75]

> **159** There are a number of contenders for the test of the state of mind that amounts to an 'intention to injure' in the context of the tort that we have described as 'unlawful interference'. These include the following:
>
> (a) an intention to cause economic harm to the claimant as an end in itself;
>
> (b) an intention to cause economic harm to the claimant because it is a necessary means of achieving some ulterior motive;
>
> (c) knowledge that the course of conduct undertaken will have the inevitable consequence of causing the claimant economic harm;
>
> (d) knowledge that the course of conduct will probably cause the claimant economic harm;
>
> (e) knowledge that the course of conduct undertaken may cause the claimant economic harm coupled with reckless indifference as to whether it does or not.
>
> A course of conduct undertaken with an intention that satisfies test (a) or (b) can be said to be 'aimed', 'directed', or 'targeted' at the claimant. Causing the claimant economic harm will be a specific object of the conduct in question. A course of conduct which only satisfies test (c) cannot of itself be said to be so aimed, directed or targeted, because the economic harm, although inevitable, will be no more than an incidental consequence, at least from the defendant's perspective. None the less, the fact that the economic harm is inevitable (or even probable) may well be evidence to support a contention that test (b), or even test (a), is satisfied.

Nothing less than intention of forms (a) or (b)—both described by Lord Phillips as 'aimed', 'directed', or
p. 98 'targeted' at the claimant—would be sufficient for any of the economic torts ↵ considered by the Court of Appeal in this case. The stronger of these forms of intention—category (a)—was required for the tort of simple conspiracy.

Lord Hoffmann took a different view from the Court of Appeal in respect of the case of *Douglas v Hello!*, in that he thought the defendant did have the required intent (though he thought the other aspects of the tort were not made out because there was no interference with the claimants' freedom to contract with the relevant third party: there was merely an impact on the value of their contract). The difficulty is that it is unclear whether he thought that the above dissection of the meaning of intent was incorrect (perhaps doubting the possibility of drawing a line drawn between (b) and (c)), or whether he simply understood the facts differently. It may be thought that he was doubting the distinction between (b) and (c), because he compared (b) (means to a desired end) directly with something like (d) or (e) (foreseeability). True intention included necessary means to desired ends, and this was stronger than mere foreseeability.

Lord Hoffmann, *OBG v Allan*

> 134 … the position of Senor Sanchez Junco was that he wished to defend his publication against the damage it might suffer on account of having lost the exclusive. But that, it seems to me, is precisely the position of every competitor who steps over the line and uses unlawful means. The injury which he inflicted on 'OK!' in order to achieve the end of keeping up his sales was simply the other side of the coin. His position was no different from Mr Gye saying that he had no wish to injure Mr Lumley and had the greatest respect for Her Majesty's Theatre but his intention was to improve attendance at his own theatre…
>
> The injury to 'OK!' was the means of attaining Senor Sanchez Junco's desired end and not merely a foreseeable consequence of having done so.
>
> 135 The analysis of intention by the Court of Appeal in my opinion illustrates the danger of giving a wide meaning to the concept of unlawful means and then attempting to restrict the ambit of the tort by giving a narrow meaning to the concept of intention. The effect is to enable virtually anyone who really has used unlawful means against a third party in order to injure the plaintiff to say that he intended only to enrich himself, or protect himself from loss. The way to keep the tort within reasonable bounds is to restrict the concept of unlawful means to what was contemplated in *Allen v Flood*; not to give an artificially narrow meaning to the concept of intention.

The comment in para [135] suggests that Lord Hoffmann did intend to adopt a different *approach* to intention, rather than simply judging the case differently on its facts. However, there must be some doubt whether his alternative approach is sufficiently clearly set out to establish a general alternative.

Inducing Breach of Contract

In the tort of **inducing breach of contract,** the defendant must have deliberately and with knowledge of the contract persuaded, procured, or induced a contracting party to breach a contract with the claimant. **Breach of contract** and **harm to the claimant** must both result.

p. 99

Lumley v Gye [1853] 2 E & B 216

Johanna Wagner was an opera star. The plaintiff was manager of Her Majesty's Theatre and the defendant had a rival opera house at Covent Garden. Johanna Wagner had contracted to sing exclusively at the plaintiff's theatre. The defendant persuaded Johanna Wagner to breach her contract, and to sing for him instead. The court agreed that there was a case to be argued at trial—it was not a claim doomed to fail for not disclosing a cause of action.[76]

This tort has inspired a considerable amount of academic comment for two reasons. One is that it has appeared difficult to fit within the general schema of economic torts suggested by *Allen v Flood*. The decision in *OBG v Allan* determined that it does not, thereby resolving this set of problems. The other is that the effect of this tort is to extend the impact of contractual rights and duties *to third parties*. It uses *tort* in order to

protect *contractual* interests against all comers. In *OBG v Allan*, bounds were set on the tort by requiring that there be *knowledge* that a breach of contract is being induced; and *intention* to bring about the breach. While the 'target' of intention is different in this tort from the 'causing loss' tort, the actual nature of intention is the same. What counts as intention is as set out above. It is not enough that the breach should be foreseeable; but it is enough that it is a necessary means to a desired end.

'Unlawful Means' Not Required

The House of Lords, while confirming that breach of contract can be sufficient unlawful means for the 'causing loss' tort, has also said that 'inducing breach of contract' does not require separately unlawful means. This concludes (perhaps?) a long academic debate. The tort does, however, require knowledge and intention.

Knowledge and Intention

In requiring knowledge of the likely breach, and adopting the same standard of intention in this tort as in the 'causing loss' tort, though with a different target of intention (the breach of contract), the House of Lords in *OBG v Allan* has departed from a much-criticized case.

Miller v Bassey [1994] EMLR 44

In *Miller v Bassey*, the defendant (singer Shirley Bassey) was sued for inducing breach of contract when *she* decided not to perform. The plaintiffs were musicians who would have been paid for performing at the recording studio, had she not been in breach; the recording studio seems to have been forced to breach its contract with them when she withdrew her services. Beldam LJ thought it arguable that the singer should be liable for inducing breach of their contracts, despite the fact that she would not have had their contracts at the forefront of her mind (if indeed she was aware of them).

Peter Gibson LJ dissented:

Peter Gibson LJ, *Miller v Bassey* (dissenting)

> The conduct of the defendant [must] be aimed directly at the plaintiff, the contracting party who suffers the damage, in the sense that the defendant intends that the plaintiff's contract should be broken [and it is not] sufficient that the conduct should have the natural and probable consequence that the plaintiff's contract should be broken.

p. 100 ↵ This dissenting approach has now been accepted as correct.

OBG v Allen and 'Abstentionism'

Responding to the ostensibly 'abstentionist' theme of the decision in *OBG v Allan*, the author of the next extract observes that in this area restraint on the part of the common law has been the exception rather than the rule. He is sceptical whether the same restraint would be shown in a case where the inducement to breach

of contract was done on the part of a trade union, at least if the issues were seen to be still of genuine importance. In *OBG v Allan*, the House treated union issues as effectively dealt with through legislation and beyond the reach of common law, but the completeness of this was overstated.[77] This extract deals with the tort of inducing breach of contract, but places the tort within the broad frame of labour law and policy more generally.

Lord Wedderburn, 'Labour Law 2008: 40 Years On'
(2007) 36 ILJ 397–424

> Why did the Law Lords suddenly rein in this tort rather than expand it, differing from the judicial habit of extending tort liability as Lord Denning had so blatantly done, thereby blocking the trade dispute immunities essential for lawful industrial action? Several factors give us a clue to the explanation.
>
> First, the new cases in 2006 all raised economic tort liabilities in relation to commercial activity, so trade union activities were seen merely as background, parallel as judges like to make it to commercial law liabilities. Second, trade unions did not appear in 2007 to be as dangerous an engine of power of social disturbance as they were taken to be in 1901 [when *Quinn v Leatham* was decided] or in 1964. Expanding on these thoughts, Lady Hale of Richmond explained why the court must restrict the economic tort:
>
> > [Lord Hoffmann's reasoning] is also consistent with legal policy to limit rather than to encourage the expansion of liability in this area. In the modern age Parliament has shown itself more than ready to legislate to draw the line between fair and unfair trade competition or between fair and unfair trade union activity. This can involve major economic and social questions which are often politically sensitive and require more complicated answers than the courts can devise. Such things are better left to Parliament.
>
> This kills two birds with one legal formula. Legally it sets another brick in the wall built by the decision in *Johnson v Unisys*, limiting the development of implied contractual terms in territory already occupied by rules enacted by Parliament. Second, it is no accident that this concept that liability in the economic torts should be limited and not expanded was advanced in a case involving not a trade union or labour relations at all but between commercial parties. … The contradiction in what is put forward as new judicial restraint is plain. Lady Hale adds that the courts must develop the common law only 'with the grain of legal policy'. But that policy 'grain' of collective labour law was set by, and still reflects, the restrictive anti-union legislation which satisfied the advocates of the new market capitalism …

p. 101 ↵ For his part, Lord Hoffmann made plain his view that abstentionism in the economic torts should be general, and that he hopes they will now be of little significance: L. Hoffmann, 'The Rise and Fall of the Economic Torts', in S. Degeling, J. Edelman, and J. Goudkamp (eds), *Torts in Commercial Law* (Sweet and Maxwell, 2010). That ambition for insignificance has not been fulfilled, as more recent decisions in relation to conspiracy, and the number of cases relating to the economic torts that continue to be reported, bear out.

Intimidation

In the tort of **third-party intimidation**, the defendant deliberately threatens a third party in order to compel that third party to harm the claimant. The threat itself must be unlawful, so this tort is consistent with the requirement of 'unlawful means' in *Allen v Flood*. Lord Hoffmann seems to have treated it in *OBG v Allan* as part of the 'causing loss through unlawful means' tort, though an exceptional instance given that the unlawful means may not cause harm to the third party, and therefore may not be actionable. Lord Hoffmann also mentioned, in *OBG v Allan*, that there may be an action for 'two-party intimidation', but thought such an action would 'raise different issues'. Presumably then it would not be part of the 'causing loss' tort, which requires some wrong directed at a third party.

Rookes v Barnard [1964] AC 1129

The plaintiff brought an action against members of a union from which he had resigned. The union threatened to withdraw labour unless the plaintiff was removed from his job. The defendants were individuals who spoke in favour of this action at a union meeting. Agreements between BOAC (the employer) and the union provided that there would be 100 per cent union membership, and no strikes. It was conceded by the defendants' counsel (perhaps unwisely) that the threatened strike would therefore be in breach of an implied term of the employment contracts.

The House of Lords decided that a threat to breach contract could amount to a tort, despite the absence of any threat of force or violence. For a critical review of this case in its context, see Wedderburn, 'Intimidation and the Right to Strike' (1964) 27 MLR 257–81 (especially at 257–8).

Conspiracy Torts

OBG v Allan did not deal with conspiracy, since none of the cases on appeal raised the issue. But unlawful means conspiracy was the key issue soon afterwards in *Total Network v Customs & Excise Commissioners* [2008] UKHL; [2008] 2 WLR 711,[78] and again a decade later in *JSC BTA Bank v Ablyazov* [2018] UKSC 19; [2018] 2 WLR 1125.

Unlawful means conspiracy requires that two or more persons combine together to use unlawful means in order to harm the claimant. There must be a common design aimed at the claimant; and *action* in concert (not just agreement). On the other hand, only one of the conspirators needs to have used unlawful means. Actual loss by the claimant must be shown. As we have seen, the courts have defined 'unlawful means' in this tort more broadly than in the tort of 'causing loss by unlawful means'.

p. 102 ↵ **Simple conspiracy** requires two or more persons to act in combination for the predominant purpose of causing injury to the claimant. There is no need for the acts performed to be unlawful in themselves.

Simple conspiracy has long been recognized to be an exception to the clear principle in *Allen v Flood*, that intentional harm, without unlawful means, is not actionable in itself. The only explanation for this tort (though the explanation has been almost universally recognized as rather weak, until it was adopted in respect of unlawful means conspiracy by the House of Lords in *Total Network*) has been that the *fact of*

combination is so wrong or so threatening in itself that it stands in for the use of unlawful means. The Supreme Court in *Ablyazov* has recognised the weakness of the justification but described the tort as well established. This tort was recognized in *Quinn v Leatham* [1901] AC 495.

The idea behind simple conspiracy seems to be that individual self-interest is fine, provided one stops short of unlawful means, but that collective self-interest and combination are bad in themselves. In *Lonrho v Shell Petroleum (No 2)* [1982] AC 173, Lord Diplock identified the flaws in this reasoning:

Lord Diplock, *Lonrho v Shell Petroleum (No 2)*
[1982] AC 173

> … Why should an act which causes economic loss to A but is not actionable at his suit if done by B alone become actionable because B did it pursuant to an agreement between B and C? An explanation given at the close of the 19th century by Bowen L.J. in the *Mogul* case when it was before the Court of Appeal (1889) 23 Q.B.D. 598, 616, was:
>
> > "The distinction is based on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise."
>
> But to suggest today that acts done by one street-corner grocer in concert with a second are more oppressive and dangerous to a competitor than the same acts done by a string of supermarkets under a single ownership or that a multinational conglomerate such as Lonrho or oil company such as Shell or B.P. does not exercise greater economic power than any combination of small businesses, is to shut one's eyes to what has been happening in the business and industrial world since the turn of the century and, in particular, since the end of World War II…

Lord Diplock went on to say that the tort is too well established to ignore. The only solution was to confine its ambit through a particularly demanding intention requirement. In effect, a tort which lacked a real justification should be artificially restricted through one of its components. Does this really fit with the model of 'delicacy' propounded by the Supreme Court in the extract from *Ablyazov* earlier in this Chapter?

Lord Diplock, *Lonrho v Shell Petroleum (No 2)*, at 189

> This House, in my view, has an unfettered choice whether to confine the civil action of conspiracy to the narrow field to which alone it has an established claim or whether to extend this already
> p. 103 anomalous tort beyond those narrow limits that are all that common sense and ↵ the application of the legal logic of the decided cases require. My Lords, my choice is unhesitatingly the same as that of Parker J and all three members of the Court of Appeal. I am against extending the scope of the civil tort of conspiracy beyond acts done in execution of an agreement entered into by two or more persons for the purpose not of protecting their own interests but of injuring the interests of the plaintiff.

Given the strength of these comments, it has been seen as surprising that the House of Lords in *Total Network* was prepared to extend the range of unlawful means that would suffice for 'unlawful means conspiracy' to make it broader than the range of unlawful means that will suffice in respect of other 'unlawful means' torts —a trend which was, moreover, continued by the Supreme Court in *Ablyazov*. The opportunity to distinguish *OBG v Allan* was provided by some comments of Lord Hoffmann, where he said that two-party intimidation raised entirely separate issues from the three-party torts with which he was dealing. This was then generalized to conspiracy. But the underlying rationale seems to be that here, the defendant strikes at the claimant, not through a third party, but directly. It is this directness, together with the fact of combination (itself implying that the defendant is not pursuing his or her own interests), which the House of Lords, and the Supreme Court, has used to distinguish between the two torts.

Lord Hope, whose judgment is extracted below, differed from the majority as to the outcome of the case, on the basis that the applicable statutory scheme barred the Commissioners from claiming damages in the tort of conspiracy. But he agreed with all the other judges on the question of whether unlawful means for the purposes of conspiracy could include criminal acts. That is the point considered in this extract. If the means used had to be actionable by the claimant, then the claimant would by definition have no need of an action in conspiracy: two-party intimidation and conspiracy are in fact outside the range of situations to which the thinking in *OBG v Allan* can be said to apply.

Lord Hope, *Total Network*

43 In OBG Ltd v Allan [2008] 1 AC 1, para 56 Lord Hoffmann said that the courts should be cautious in extending the tort of causing loss by unlawful means beyond the description given by Lord Watson in *Allen v Flood* [1898] AC 1, 96 and Lord Lindley in *Quinn v Leathem* [1901] AC 495, 535, which was designed only to enforce standards of civilised behaviour in economic competition between traders or between employers and labour. I entirely appreciate the point that he makes that caution is needed where the unlawful act is directed against a third party at whose instance it is not actionable because he suffers no loss. There the claimant's cause of action is, as Hazel Carty, *An Analysis of the Economic Torts*, p 274 puts it, parasitic on the unlawful means used by the defendant against another party. As to that situation I would prefer to reserve my opinion. But in this case there was no third party. The means used by the conspirators were directed at the claimants themselves. This is a case where the claimants were persuaded by the unlawful means to act to their own detriment which, in para 61 of *OBG*, Lord Hoffmann said raises altogether different issues. One has to ask why, in this situation, the law should not provide a remedy.

p. 104

44 The situation that is contemplated is that of loss caused by an unlawful act directed at the claimants themselves. The conspirators cannot, on the commissioners' primary contention, be sued as joint tortfeasors because there was no independent tort actionable by the commissioners. This is a gap which needs to be filled. For reasons that I have already explained, I do not accept that the commissioners suffered economic harm in this case. But assuming that they did, they suffered that harm as a result of a conspiracy which was entered into with an intention of injuring them by the means that were deliberately selected by the conspirators. If, as Lord Wright said in *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435, 462, it is in the fact of the conspiracy that the unlawfulness resides, why should that principle not apply here? As a subspecies of the tort of unlawful means conspiracy, the case is virtually indistinguishable from the tort of conspiracy to injure. The fact that the unlawful means were not in themselves actionable does not seem, in this context at least, to be significant. As Professor Joe Thomson put it in 'An island legacy—The delict of conspiracy', *Comparative and Historical Essays in Scots Law*, ed Carey Miller and Meyers (1992), p 148, the rationale of the tort is conspiracy to injure. These factors indicate that a conspiracy is tortious if an intention of the conspirators was to harm the claimant by using unlawful means to persuade him to act to his own detriment, even if those means were not in themselves tortious.

45 I would hold that the decision of the Court of Appeal in *Powell v Boladz* [1998] Lloyd's Rep Med 116 was erroneous and that it should be overruled. I would also hold, in agreement with all your Lordships that criminal conduct at common law or by statute can constitute unlawful means in unlawful means conspiracy. Had it been open to the commissioners to maintain a civil claim of damages the tort of unlawful means would have been available to them, even though the unlawful means relied upon were not in themselves actionable.

JSC Bank v Ablyazov (No 14) [2018] UKSC 19; [2018] 2 WLR 1125

This decision of the Supreme Court is one element in long-running litigation. The claimant bank had been granted a worldwide freezing order against Ablyazov (A) as part of proceedings in which it sought to recover a great deal of allegedly stolen money. A breached the freezing order and fled the UK in 2012. In these particular proceedings, the bank alleged that A had conspired with the second defendant, Khrapunov, to breach the freezing orders, and thus to engage in serial contempts of court. The difficulty in tracing A himself made the conspiracy claim attractive. These contempts of court were the alleged 'unlawful means' through which harm (removal of the assets) was done to the claimant bank. The defendants argued that a contempt of court could not be the relevant 'unlawful means' for the purpose of an action in conspiracy. The question of whether a criminal offence, which is not a tort, could amount to the required unlawful means was therefore once again significant.

Lord Sumption and Lord Lloyd-Jones

9. Conspiracy is both a crime, now of limited ambit, and a tort. The essence of the crime is the agreement or understanding that the parties will act unlawfully, whether or not it is implemented. The overt acts done pursuant to it are relevant, if at all, only as evidence of the agreement or understanding. It is sometimes suggested that the position in tort is different. Lord Diplock, for example, thought that 'the tort, unlike the crime, consists not of agreement but of concerted action taken pursuant to agreement': *Lonrho Ltd v Shell Petroleum Co Ltd* <http://uk.westlaw.com/Document/IE32B1580E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>p. 105 ↵ *(No 2)* [1982] AC 173, 188. This is true in the obvious sense that a tortious conspiracy, like most other tortious acts, must have caused loss to the claimant, or the cause of action will be incomplete. It follows that a conspiracy must necessarily have been acted on. But there is no more to it than that. The critical point is that the tort of conspiracy is not simply a particular form of joint tortfeasance. In the first place, once it is established that a conspiracy has caused loss, it is actionable as a distinct tort. Secondly, it is clear that it is not a form of secondary liability, but a primary liability. This point had been made by Lord Wright in *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435 <http://uk.westlaw.com/Document/I924D5510E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>, 462: 'the plaintiff's right is that he should not be damnified by a conspiracy to injure him, and it is in the fact of the conspiracy that the unlawfulness resides.' It was reaffirmed by the House of Lords in *Revenue and Customs Comrs v Total Network SL* [2008] AC 1174, paras 102 (Lord Walker), 116 (Lord Mance), 225 (Lord Neuberger of Abbotsbury). Third, the fact of combination may alter the legal character and consequences of the overt acts. In particular, it may give rise to liability which would not attach to the overt acts in the absence of combination. This latter feature of the tort was what led Lord Wright in *Crofter*, loc cit, to say that it was 'in the fact of the conspiracy that the unlawfulness resides.' He was speaking of a lawful means conspiracy, but as Lord Hope of Craighead pointed out in *Revenue and Customs Comrs v Total Network SL* at para 44, the same applies to an unlawful means conspiracy, at any rate where the means used, while not predominantly intended to injure the claimant, were directed against him. There is clearly much force in his observation at para 41 that if a lawful means conspiracy is actionable on proof of a predominant intention to injure, 'harm caused by a conspiracy where the means used were unlawful would seem no less in need of a remedy'.

10. What is it that makes the conspiracy actionable as such? To say that a predominant purpose of injuring the claimant in the one case and the use of unlawful means in the other supply the element of unlawfulness required to make a conspiracy tortious simply restates the proposition in other words. A more useful concept is the absence of just cause or excuse, which was invoked by Bowen LJ in *Mogul Steamship Co v McGregor Gow & Co* (1889) 23 QBD 598 <http://uk.westlaw.com/Document/IFC02F281E42711DA8FC2A0F0355337E9/View/FullText.ht

> *ml?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>*, 614, by Viscount Cave LC in *Sorrell v Smith* [1925] AC 700 *<http://uk.westlaw.com/Document/IB6D7C630E42811DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>*, 711–712, and by Viscount Simon LC with the support of his colleagues in *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435 *<http://uk.westlaw.com/Document/I924D5510E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>*, 441–444 (cf Viscount Maugham at pp 448, 449–450, Lord Wright at pp 469–470, and Lord Porter at p 492). A person has a right to advance his own interests by lawful means even if the foreseeable consequence is to damage the interests of others. The existence of that right affords a just cause or excuse. Where, on the other hand, he seeks to advance his interests by unlawful means he has no such right. The position is the same where the means used are lawful but the predominant intention of the defendant was to injure the claimant rather than to further some legitimate interest of his own. This is because in that case it cannot be an answer to say that he was simply exercising a legal right. He had no interest recognised by the law in exercising his legal right for the predominant purpose not of advancing his own interests but of injuring the claimant. In either case, there is no just cause or excuse *for the combination*.
>
> 11. Conspiracy being a tort of primary liability, the question what constitutes unlawful means cannot depend on whether their use would give rise to a different cause of action independent of conspiracy. The real test is whether there is a just cause or excuse for combining to use unlawful means. That depends on (i) the nature of the unlawfulness, and (ii) its relationship with the resultant damage to the claimant. This was the position reached by the House of Lords in *Revenue and Customs Comrs v Total Network SL* [2008] AC 1174. The Appellate Committee held that a criminal offence could be a sufficient unlawful means for the purpose of the law of conspiracy, provided that it was objectively directed against the claimant, even if the predominant purpose was not to injure him. …

p. 106 ↵ What does the Supreme Court here add to the analysis in *Total Network*? Arguably, not a great deal. There is an attempted emphasis on what the defendant does and does not have a ‘right’ to do. They have a ‘right’ to pursue their own interest; but not to use unlawful means to do so; and no right to cause harm where that is the predominant motive. This seems to do no more than restate the accepted rules. In addition, there is an attempt to emphasise the ‘primary’ nature of the liability in conspiracy. This is not, in other words, a case of being liable through joint tort feasance; nor is it liability based on the commission of another legal wrong.

> 16. The unlawful means relied upon in this case are criminal contempt of court albeit that the offence is punishable in civil proceedings. The bank does not of course contend that the defendants' predominant purpose in hiding Mr Ablyazov's assets was to injure it. Their predominant purpose was clearly to further Mr Ablyazov's financial interests as they conceived them to be. At the same time, damage to the bank was not just incidental to what they conspired to do. It was necessarily intended. The freezing order and the receivership order had been made on the application of the bank for the purpose of protecting its right of recovery in the event of the claims succeeding. The object of the conspiracy and the overt acts done pursuant to it was to prevent the bank from enforcing its judgments against Mr Ablyazov, and the benefit to him was exactly concomitant with the detriment to the bank as both defendants must have appreciated. In principle, therefore, we conclude the cause of action in conspiracy to injure the bank by unlawful means is made out. …

7.4 Group B: False Statements

Deceit requires that the defendant should knowingly make a false representation to the claimant, with the intention that the claimant should rely upon it. The claimant must rely upon the representation, to his or her detriment.

Unlike most of the Group A torts, *and* unlike malicious falsehood (below), deceit typically applies in a 'two-party' situation. The person *relying upon the statement* is the claimant.

A clear statement of the 'intention' requirements in the tort of deceit is as follows:

Jackson LJ, *EC03 Capital Ltd and others v Ludson Overseas Ltd* [2013] EWCA Civ 413

> 77 … What the cases show is that the tort of deceit contains four ingredients, namely:
>
> i) The defendant makes a false representation to the claimant.
>
> ii) The defendant knows that the representation is false, alternatively he is reckless as to whether it is true or false.
>
> iii) The defendant intends that the claimant should act in reliance on it.
>
> iv) The claimant does act in reliance on the representation and in consequence suffers loss.
>
> Ingredient (i) describes what the defendant does. Ingredients (ii) and (iii) describe the defendant's state of mind. Ingredient (iv) describes what the claimant does.

p. 107 ↵ In *Derry v Peek* (1889) 14 App Cas 337, the House of Lords strictly limited the ambit of deceit by holding that misrepresentations giving rise to harm were not actionable except in the presence of 'fraud' or contractual breach. 'Fraud' generally means that the defendant *knows* that the statement is false, or is *reckless* as to its truth or falsity, and relates only to (ii) above. 'Recklessness' involves *neither knowing nor caring* whether the statement is true or false.

An exception to the fraud requirement was carved out for cases of 'fiduciary relationship' (or relationships close to this) in *Nocton v Lord Ashburton* [1914] 2 AC 932. Much later, in *Hedley Byrne v Heller* [1964] AC 465, this exception was developed to allow claims *in the tort of negligence* for merely negligent misrepresentation, in defined circumstances. A large body of case law now exists in respect of liability under *Hedley Byrne*, and is reviewed in Chapter 6. Not only does the action in negligence require no fraud, it also requires no *intention* that C should rely. (On the other hand, knowledge of the purpose for which C will use the information or advice given does appear to be essential.) And yet, despite the growth of negligence liability, deceit retains utility because it allows for recovery of a broader range of loss than negligence; and the defence of contributory negligence is not available.

Malicious falsehood requires that the defendant should maliciously publish falsehoods concerning the claimant or his or her property. Except where statutory exceptions apply, there must also be 'special damage'.

'Malice' in Malicious Falsehood

Hazel Carty, *An Analysis of the Economic Torts*
(Oxford University Press, 2nd edn, 2010), 211–12

> The real issue has become to pinpoint the definition of malice applied by the courts. A review of case law reveals that malice can be proved in various ways, summarized by Heydon [*The Economic Torts*, p. 83] as either personal spite, or an intention to injure the plaintiff without just cause or excuse or knowledge of the falsity of the statement. However, it is difficult to separate personal spite from the related concepts of improper motive and intention to injure without lawful excuse. … It is simpler and consistent with leading modern case law to define malice as either 'motive' malice (*mala fides* means that an honest belief will not negative liability) or 'deceit' malice (lies where indifference as to the effect on the claimant will not negate liability). The absence of good faith is, therefore, due to either the knowledge of falsity or the malicious intention. So, 'if you publish a defamatory statement about a man's goods which is injurious to him, honestly believing that it is true, your object being your own advantage and no detriment to him, you obviously are not liable' [Stable J in *Wilts United Dairies v Robinson* 57 RPC 220, p. 237].

Either 'deceit malice' or 'motive malice' will suffice:

- If there is intent to harm (motive malice), honest belief in truth will not assist the defendant.
- If there is no belief in truth (deceit malice), lack of intent to harm will not assist the defendant.

p. 108

7.5 Measure of Damages

The House of Lords has ruled that damages for **deceit** in particular are not confined to damage that is *foreseeable* (which is the case in a claim for negligence). Rather, all those losses that were the *direct consequence* of reliance on the false representation are recoverable. Furthermore, damages in respect of a *negligent* misstatement are limited to those damages which are regarded as 'within the scope' of the particular duty of care that was owed. Thus if the duty is only one to give information, and not to 'advise' in a general way, then

only damage that can be fairly attributed to the incorrectness of the information can be recovered in negligence. In deceit, however, because there is an intention that the claimant should rely *and* fraud in respect of the statement, *all* direct consequences of the statement (subject to a duty to mitigate) can be recovered.

Lord Steyn, *Smith New Court Securities v Citibank NA*
[1997] AC 254, at 283

> The context is the rule that in an action for deceit the plaintiff is entitled to recover all his loss directly flowing from the fraudulently induced *transaction*. In the case of a negligent misrepresentation the rule is narrower: the recoverable loss does not extend beyond the consequences flowing from the negligent *misrepresentation*: see *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191.

'Directness' is clearly intended to be distinct from 'foreseeability'. The impact of the directness test and the contrast with negligence liability can be illustrated by reference to *Nationwide Building Society v Dunlop Haywards (DHL) Ltd* [2009] EWHC 254 (Comm). Here there were two liable parties in respect of a mortgage fraud. The first defendant was liable in deceit for the fraud. The second defendant, the solicitors of the first defendant, had negligently failed to notice the fraud. Quite apart from the fact that the first defendant bore a greater share of the 'responsibility' for the claimant's losses, the court emphasized clearly that damages in deceit cover a range of losses which in negligence would be regarded as 'too remote' a consequence of the breach. So the second defendant had to pay a 20 per cent share of *negligence* damages; *deceit* damages were higher. The amount for which the first defendant was liable in deceit was £15,464,106, including the net amount advanced on the basis of the fraudulent over-valuation; lost interest on other advances that would have been made; cost of staff time exploring the fraud; additional funding costs; and loss of opportunity to make mortgage loans. Staff time, lost opportunities, and additional costs were not included in the calculation of *negligence* damages.

In *Parabola Investments Ltd and another v Browallia Cal Ltd (formerly Union Cal Ltd) and others* [2010] EWCA Civ 486, the Court of Appeal applied the *Smith New Court* approach to hold that a trader whose fund had been significantly depleted by the defendant's fraud was entitled to compensatory damages encompassing not only the initial losses suffered through the defendants' fraud, but also, on the basis of his exceptional and consistently successful record as a trader on the London markets, for lost gains that he was unable to make because of the depletion of his funds. In assessing 'direct' consequences, the date of discovery of the fraud would be an artificial cut-off point, since the impact of the fraud continued to affect the claimant. This result
p. 109 needs to be compared with the approach taken within the tort of ↵ negligence in relation to economic loss, where damages are limited by interpretation of the relevant duty to take care: see Chapter 5.2.

Should the *Smith New Court* approach be applicable to all those torts where harm to the claimant is actually intended? Lord Steyn placed considerable emphasis on the element of 'fraud' in an action for deceit. This particular element is not present in the other economic torts.

7.6 Defences

Justification

The tort of inducing breach of contract is clearly qualified by a defence of 'justification'. It seems that the defence requires some 'compelling reason' for inducing the breach. In those torts which, unlike inducing breach of contract, require some independently unlawful means, it has been wondered whether these unlawful means could ever be 'justified'. In respect of the tort of 'causing loss by unlawful means', Carty argues that any such defence (if it exists) would be 'very residual'.[79] Arguably, because the tort of intimidation has been developed to include a threatened breach of contract (*Rookes v Barnard*), intimidation—like inducing breach of contract—should benefit from a justification defence. It seems less likely that there could be 'justification' for a fraud or malicious falsehood (Group B), but this is not out of the question.

Contributory Negligence

In *Standard Chartered Bank v Pakistan National Shipping Corpn* [2003] 1 AC 959, the House of Lords clearly decided that fault on the part of the claimant did *not* give rise to a defence of contributory negligence in the tort of deceit. This defence requires the court to reduce damages to reflect fault on the part of both parties and is fully explored in relation to negligence in Chapter 5. The essential reason why it was held not to apply in deceit is that no such defence to deceit was recognized before 1945. The Law Reform (Contributory Negligence) Act 1945 did not *introduce* a defence of contributory negligence, it only converted it from a total defence (no damages at all) to a partial one (damages reduced). We visited this reasoning in relation to battery in an earlier section of this chapter (Section 3.4).

8 Intentional Abuse of Power and Process

8.1 Malicious Prosecution and Analogous Torts

The tort of malicious prosecution is committed where the defendant has maliciously and without reasonable or probable cause 'prosecuted' the claimant, and where the prosecution has ultimately ended in the claimant's favour. In *Crawford Adjusters v Sagicor General Insurance (Cayman) Limited and another* [2013] UKPC 17 (an appeal from the Cayman Islands), the Privy Council determined that the tort should be applicable where the prosecution is a civil one. The result was surprising because only a few years earlier, in *Gregory v Portsmouth City Council* [2000] 1 AC 419, the House of Lords had heard full argument on the subject of malicious
p. 110 prosecution of civil proceedings and confirmed quite authoritatively ↵ that the tort did not extend to such proceedings. This also put lower courts in a difficult position: should they treat *Gregory* as binding upon them, or follow a more recent Privy Council decision which was plainly based on an interpretation of English law? In *Willers v Joyce* [2016] UKSC 43; [2016] 3 WLR 477, the Supreme Court reached the same conclusion in an English appeal; and thus the scope of malicious prosecution has been markedly expanded.

Prosecution

The defendant need not be a public 'prosecutor'. So far as criminal prosecution is concerned, the activity of 'prosecuting' for the purposes of this tort is plainly broad enough to incorporate the role of the Crown Prosecution Service *and* of police officers who are responsible for charging the claimant and assembling evidence, but it may also include a private individual who instigates a prosecution and offers to give evidence, if they alone can attest to the truth of the charge: see *Martin v Watson* [1996] AC 74. More recently, however, in *H v AB* [2009] EWCA Civ 1092, the Court of Appeal emphasized that only if the public prosecutor's discretion is 'overborne' in some way will such a complainant be considered as a prosecutor. Plainly, an individual who instigates a *private prosecution* will also be treated as having 'prosecuted' the claimant; and it appears from *Willers v Joyce* that an individual pursuing a civil claim will also be a 'prosecutor'. The range of individuals susceptible to a claim in civil malicious prosecution is much broader than in the case of criminal prosecution, because there is no public body which typically pursues civil claims—the category may potentially include all claimants.

Reasonable and Probable Cause and Malice

'Lack of reasonable and probable cause' and 'malice' are two separate requirements. The tort is committed only when there is a subjective type of 'malice', combined with an *objective* lack of reasonable or probable cause. The subjective form of malice may involve any sort of 'improper motive' in launching the prosecution, not confined to 'spite and ill will' towards the claimant.

Damage

Unlike the trespass torts with which this chapter started, the tort of malicious prosecution is 'damage-based', and not actionable 'per se'. The kinds of damage against which it protects are generally thought to be those captured in the following summary of the damage which may be caused to an individual by a malicious prosecution:

Holt CJ, *Savill v Roberts*
(1698) 12 Mod 208

> First, damage to his fame if the matter whereof he be accused be scandalous. Secondly, to his person, whereby he is imprisoned. Thirdly, to his property, whereby he is put to charges and expenses.

In *Crawford Adjusters v Sagicor*, the Privy Council warned that this dictum is not to be read as restricting the range of damage that can be compensated through the tort. In particular, purely economic losses, which as we
p. 111 will see in Chapter 6 are problematic in the tort of ↵ negligence, are recoverable in broader circumstances than those implied by Holt CJ. Nor should the idea of 'scandalous' matters be read too restrictively. Even a civil prosecution may threaten the claimant's reputation.

It will be evident that malicious prosecution deals with a combination of damage, 'malice', and lack of reasonable and probable cause. In *Crawford Adjusters*, Lord Wilson and Baroness Hale in particular regarded the existence of the relevant forms of damage, together with malicious use of the legal system, not merely as

essential *requirements* of the action, but as between them giving the recipe for a 'wrong' which would require a remedy unless principled reasons could be given to the contrary. Their very presence justified an expansion in liability.

Baroness Hale of Richmond, *Crawford Adjusters v Sagicor*
[2013] UKPC 17

> 81 It is always tempting to pray in aid what Sir Thomas Bingham MR referred to as 'the rule of public policy which has first claim on the loyalty of the law: that wrongs should be remedied': *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 663. But by itself that wise dictum does not tell us what the law should define as a wrong. Some conduct is wrongful whether or not it causes any damage—that is the essence of the tort or torts of trespass; other conduct is only wrongful if it causes particular types of damage—that was the essence of the action on the case; but not all conduct which causes such damage is wrongful. The tort or torts of wrongfully bringing legal proceedings are actions on the case and therefore can only lie if there is damage of the kinds specified in *Savile v Roberts* (1698) 1 Ld Raym 374. But that is not enough. Instigating legal proceedings in good faith and with reasonable cause, even if they fail and even if they do damage in the *Savile v Roberts* sense, is not wrongful. Even maliciously instigating legal proceedings is not always, or even often, wrongful. So how is the wrong done by instituting legal proceedings to be defined?

Baroness Hale later answered the closing question as follows. The passage begins by referring to a negligence case (*Jain*), discussed in Chapter 6, where there was no liability; and also confronts the problem that expansion of malicious prosecution would contrast with the culture of abstentionism already noted in relation to the economic torts, even in the presence of malice. Baroness Hale concludes that the combination of *malice* and *damage*, both present in the economic torts, with *misuse of the legal system*, justified a less restrained approach to malicious prosecution. This was despite the fact that she had already noted that it would 'not be surprising' if there were no such tort at all, given the need to protect the integrity of the legal process by deterring relitigation (at [82]). She was willing to set aside that consideration on the basis that there already is such a tort; and on that basis, its limits ought to be principled.

Baroness Hale, *Crawford Adjusters v Sagicor*
[2013] UKPC 17

> 88 In *Jain v Trent Strategic Health Authority* [2009] AC 853, Mr and Mrs Jain were ruined when their business was closed down in an ex parte procedure brought by the regulator without
p. 112 good cause. The House of Lords held that there was no duty of care, partly because the parties to litigation do not generally owe one another a duty of care and partly because regulators do have a duty of care towards the vulnerable people whom they are protecting, which could conflict with a duty of care to the people they are regulating. All that makes sense, although the Jains undoubtedly suffered a grievous injustice. But had the regulator been malicious, why should they not have had a cause of action in malicious prosecution? It is one thing to say that the regulator should not be liable for carelessness, and quite another to say that they should not be liable for malice.
>
> 89 The Jains, of course, suffered from an ex parte remedy of the sort which has previously given rise to liability for malicious prosecution. They also suffered at the hands of a body performing public functions, which is a distinction favoured by Lord Sumption JSC. But it cannot be accepted that malice only turns right into wrong when public officials are concerned. Intentionally causing physical or psychological harm is a tort which can be committed by anyone. Intentionally causing economic damage is not a tort, because that is the object of most business competition. But intentionally abusing the legal system is a different matter. That is not simply doing deals to damage the competitors' business. It is bringing claims which you know to be bad in order to do so.

Torts Analogous to Malicious Prosecution

Malicious prosecution is an old tort and there exist a number of potential variations on its theme.

Malicious Procurement of an Arrest Warrant

In *Roy v Prior* [1971] AC 470, the defendant was a solicitor acting for a man accused of a criminal offence. The defendant sought to serve the plaintiff with a witness summons. When the plaintiff did not appear at trial, the defendant secured a warrant for his arrest, and he was kept in custody for several hours. The House of Lords held that these facts might disclose a cause of action, provided the plaintiff could show *both* malice, *and* lack of reasonable and probable cause.

Malicious Procurement of a Search Warrant

Malicious procurement of a search warrant may be actionable on the same principles: *Gibbs v Rea* [1998] AC 786. The harm against which this tort protects appears slightly different from the harm in the last two torts, in that the procurement of the warrant will lead primarily to disruption, anxiety, and invasion of privacy (and consequential harm) rather than loss of liberty or the threat of it.

Abuse of Civil Process

An action may be an 'abuse of civil process' if it is brought for some improper, collateral purpose, outside the legal claim itself. For example, it may be brought with the intention of forcing the other party's hand on a different matter, or in other words in order to coerce. In *Grainger v Hill* (1838) 4 Bing NC 212, the defendant's purpose in arresting the claimant was essentially extortion. In *Crawford Adjusters*, the defendant's employee pursued civil actions against the claimant because he wanted to ruin him. This was malicious, and in the absence of reasonable and probable cause it formed the foundation for the malicious prosecution action. But the way in which the employee wished to ruin the claimant was to succeed in the civil actions against him. The Privy Council considered that this purpose could not be called 'collateral'; and declined to expand this tort as it had expanded malicious prosecution itself.

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8.2 Misfeasance in a Public Office

The tort of misfeasance in a public office is distinctive because unlike any other tort, it can be committed only by a public officer exercising a power. The tort is committed when a public officer exercising his or her power *either*:

(a) does so with the intention of injuring the claimant; *or*

(b) acts (or decides not to act)[80] in the knowledge of, or with reckless indifference to, the illegality of his or her act or failure to act and in the knowledge of, or with reckless indifference to, the probability of causing injury to the claimant or to persons of a class of which the claimant was a member.

The claimant must suffer damage as a consequence.

The existence of two very different forms of this tort captured as (a) and (b) above was accepted by the House of Lords (except Lord Millett, who argued that they really come down to the same thing) in *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1. This litigation arose from the collapse of BCCI (a bank). The claimants were depositors who lost money when the bank collapsed; they claimed that the Bank of England either wrongly (with the requisite mental element) granted a licence to the bank; or wrongly (with the requisite mental element) failed to revoke the licence when it was clear that BCCI was likely to collapse.[81]

The tort encompasses acts *and* failures to act, but not *all* failures to act will suffice. According to Lord Hobhouse (at [230]), in the case of an omission (such as the failure to *revoke* licences in *Three Rivers* itself), there must be an actual *decision* not to act, rather than a mere failure to consider whether or not to do so. If there is a mere failure to think about it, then the only cause of action is negligence. Lord Hope would go one step further, to include 'wilful or deliberate failure' to take a decision whether to act. In what follows, we will refer to 'acts' to include the relevant sort of 'intended' omission.

The Mental Element

Variation (a)—Targeted Malice

In variation (a), there is no need to show that, apart from the intention to harm the claimant, the act of the official was 'unlawful'. Exercise of public power with intent to harm *is in itself unlawful*. The intent to harm provides the abuse of power.

In *Three Rivers* itself, it was accepted that the acts and omissions of the Bank of England could not be said to have been performed with 'targeted malice'. The only possibility was that variation (b) might be established.

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Variation (b)—Intentional or Reckless Abuse of Power

The second variation requires knowledge or 'reckless indifference' in respect of two different things.

First, the official must either know that, or be reckless whether, his or her act is illegal (in excess of the power conferred). Second, the official must *also* know that, or be reckless whether, injury would be caused to the claimant as a result of the illegal act. Since the concept of 'recklessness' has caused significant difficulties in *criminal* law, there was some discussion of what 'recklessness' might mean in this context. In particular, is it a *subjective* state of mind, by which is meant that the official considered the matter and genuinely did not care whether the action was in excess of power, and would cause the claimant harm (the *Cunningham* test)?[82] Or, is it sufficient that there was an obvious risk, which the official failed to consider in terms of the likely impact on the claimant (the *Caldwell* test)?[83] According to Lord Steyn, whatever the position in criminal law, in this tort recklessness is to be judged subjectively, in terms of what the official actually *thought*.

Lord Steyn, at 193

> Counsel argued for the adoption of the *Caldwell* test in the context of the tort of misfeasance in public office. The difficulty with this argument was that it could not be squared with a meaningful requirement of bad faith in the exercise of public powers which is the raison d'être of the tort. But, understandably, the argument became more refined during the oral hearing and counsel for the plaintiffs accepted that only reckless indifference in a subjective sense will be sufficient. This concession was rightly made. The plaintiff must prove that the public officer acted with a state of mind of reckless indifference to the illegality of his act: *Rawlinson v Rice* [1997] 2 NZLR 651.

As we have seen, reckless indifference does not suffice for the economic torts, which clearly require *intent*. The difference in mental element between the torts is explained by their different focus. The 'gist' of misfeasance is abuse of power.[84]

The Damage Requirement

When we mapped torts in Chapter 1, we specified that misfeasance in a public office is actionable only where there is damage to the claimant. Unlike the trespass torts, but like malicious prosecution, it is not a tort 'actionable per se'. This was confirmed by the House of Lords in *Watkins v Secretary of State for the Home Department and Others* [2006] UKHL 17; [2006] 2 AC 395, a case where prison officers had unlawfully interfered with a prisoner's mail. Importantly, the House of Lords rejected an argument that the action in misfeasance should also be available, in the absence of actual damage, where a 'fundamental right' or 'constitutional right' was interfered with. We have seen how the Supreme Court in *Lumba* continued to limit common law's protection of such rights, on that occasion in the context of a tort actionable *per se*. Lord Bingham argued that
p. 115 if the right in question is not protected ↵ in relevant circumstances by the law of tort, then the claimant should have recourse to an action under section 7 of the Human Rights Act 1998, and should not seek to rewrite the fundamental principles of an action in tort to accommodate their claim. Established torts themselves express a balance between claimants, defendants, and other interests, and core features of this balance should not be cast aside in response to arguments based on Convention rights. These rights may be appropriately protected in other ways.[85]

Subsequently, in *Karagozlu v Commissioner of Police of the Metropolis* [2006] EWCA Civ 1691, the Court of Appeal held that loss of liberty is itself capable of amounting to 'material or special damage' in the sense required by the House of Lords' decision in *Watkins*. The category of material damage is therefore broader than 'financial loss or physical or mental injury' (the terminology used by Lord Bingham in *Watkins* at para [1])—or, perhaps, loss of liberty is closely analogous to physical injury. The Court of Appeal reasoned to this conclusion partly by reference to the tort of malicious prosecution. Lord Steyn clearly said in *Gregory v Portsmouth City Council* [2000] 1 AC 419, at 426 (a case argued in malicious prosecution) that '[d]amage is a necessary ingredient of the tort'; and it is plain that loss of liberty is considered sufficient 'damage' for the purposes of that tort. The Court of Appeal also argued that there was nothing in the House of Lords' judgment in *Watkins* to contradict the idea that loss of liberty was damage.

The Court of Appeal also argued that the decision in *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1992] 1 AC 58 was no impediment to their conclusion. In *ex p Hague* the House of Lords ruled that change in the conditions in which a prisoner is kept did not render the imprisonment—which was generally lawful—unlawful for the purposes of an action in false imprisonment. We have already said that false imprisonment is primarily concerned with unlawfulness not with wrongful damage, and we have contemplated the significance of *Lumba* in relation to the integrity of the tort of false imprisonment. Since the claimant in *Karagozlu* argued that he had been wrongly transferred from open prison to more confined conditions in a closed prison, it appears that loss of 'residual liberty' constitutes damage for the purposes of an action in misfeasance, but will not suffice to render imprisonment unlawful for an action in false imprisonment.

Recoverable Damage/Remoteness

In *Three Rivers* Lord Steyn also considered the **extent of recoverable damage** in the tort of misfeasance in a public office. We have already noted that in the case of deceit, all *directly* caused damage can be recovered. The defendant does not gain 'the benefit' of the foreseeability test which, in the tort of negligence and in private nuisance, limits the recoverable damages to those of a type which the defendant could have foreseen. Lord

Steyn concluded that even the foreseeability test was too generous to the claimant in this particular tort, even though it is an intentional tort. Only the damage *actually foreseen* by the defendant as likely or probable should be recoverable (Lord Steyn at 195–6).

In support of this view, it can be argued that misfeasance in a public office is different from the intentional economic torts discussed earlier, as they in turn are different from the torts of trespass to the person and the action in *Wilkinson v Downton*. There is no reason to say that all torts of intention, given their considerable and
p. 116 often justified variations, should ↵ be subject to the same remoteness rule; and the solution reached was deliberately aimed at achieving balance in protection of different interests and policy goals. On the other hand, against Lord Steyn's solution is the practical difficulty that proving what damage a *recklessly indifferent* official *actually had in mind* may prove to be far from straightforward.

Although misfeasance in a public office is in a sense a resurgent tort, it is hedged in by significant restrictions relating to state of mind; damage; and remoteness. The Law Commission, in its Consultation Paper, *Administrative Redress: Public Bodies and the Citizen* (LCCP 187, 2008) invited views on the abolition of the tort, as part of a package including introduction of a new form of liability where there is serious fault in a 'truly public' activity—although its consultation is now closed and the proposals withdrawn. It is fair to say that the resurgence of the tort raises the possibility of expensive and unfounded litigation against public bodies, on the part of those with a grievance. The boundaries of the tort are not policed by a 'duty' concept in the same way as the tort of negligence. On the other hand, successful claims are not unheard of, even if rare, and it is the seriousness of the abuse of power established in these successful claims which may be thought to justify the risks and expense of unfounded claims.

9 Conclusions

i. The diverse array of intentional torts in English law should serve as a contrast to the wide, sprawling tort of negligence addressed in Part III. Negligence is certainly the dominant tort; but it has by no means driven out other torts nor deprived all of them of their significance.

ii. There is, however, no unifying principle which underlies torts of intention in English law. Some, such as malicious prosecution, require damage or harm in the same way as negligence, though the range of harms covered may be different. As we saw in Chapter 1, torts have different 'ingredients', and there is no specific recipe for a tort of intention in English law. Even the 'economic torts' are hard to unify; certainly, no attempt to unify all the torts in this chapter is likely to succeed. Rather, the possibilities can be 'mapped' and compared.

iii. Most undergraduate law courses pay minimal attention to intentional torts, yet many of them continue to develop in significant ways. Intentional torts may have uses which are very different from the core of negligence, for example, by restraining *unlawful* (rather than solely damaging) acts, and in this sense protecting certain core fundamental rights. In such instances, intention may vary from weak (false imprisonment) to strong (misfeasance in a public office) as an element of the cause of action. This function of the common law is far older than the Human Rights Act 1998, but coexistence with the action for damages under that statute undoubtedly poses challenges.

iv. At the same time, it is clear that intention alone is not enough to justify liability. The economic torts illustrate this clearly, since strong intention must be accompanied by unlawfulness of action. Perhaps the closest the law has come to a general principle of liability for intentionally caused harm is through the tort in *Wilkinson v Downton,* now renamed as the tort of wilfully endangering another's personal safety. This too has been confined, however, and the trend towards containment was continued by the Supreme Court in *OPO v Rhodes*.

p. 117 v. An obvious instance of an expanding intentional tort is malicious prosecution. This tort requires both a malicious motive, and actual harm to the claimant. By recognizing the possibility of liability for malicious *civil* prosecution, the Supreme Court has expanded the potential ambit of this tort. Many of the limiting factors which have confined the operation of malicious criminal prosecution—for example, the existence of a public prosecutor and police force—will simply not operate to limit the civil version of the tort.

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Notes

[1] Note the discussion of contributory negligence as a defence to the torts of battery, and of deceit, in Sections 3.4 and 7.6.

[2] The previous Restatement, Section 8, also contained a dual definition. The present version makes this more apparent.

[3] The term ‘wrong-making factor’ is used by John Finnis, ‘Intention in Tort Law’, in D. Owen (ed.), *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995), 229–47, supporting generalization of liability for truly ‘intended’ harms. The general picture in this chapter by contrast is one of ‘wrong-making recipes’: there are many ways to make a wrong.

[4] Discussed in Section 7 of the present chapter.

[5] As to the former see Aikens LJ in *Pritchard v Co-operative Group* [2011] EWCA Civ 329; as to the latter see Lord Hope in *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1992] 1 AC 58 (both extracted later in the present chapter).

[6] F. A. Trindade, ‘Intentional Torts: Some Thoughts on Assault and Battery’ (1982) 2 OJLS 211–37, finds evidence that this used to be the case but also emphasizes that, these days, battery is confined to cases of intentional contact.

[7] (1725) 1 Stra 634, 636.

[8] *Hillier v Leitch* [1936] SASR 490.

[9] In relation to false imprisonment, see *Iqbal v Prison Officers Association* in Section 4.

[10] This conclusion has been criticized by A. Beever, 'Transferred Malice in Tort Law?' (2009) 29 LS 400.

[11] Chapter 8.

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

[13] Declarations of lawfulness have often been used in medical cases although the basis for this is not straightforward: see *Re F* [1990] 2 AC 1 (Section 2.4 of the present chapter).

[14] Some of these claims relate to wrongdoing on the part of the police authorities; others propose that the commissioner is liable 'vicariously' for a tort on the part of the police constable (see Chapter 10). The specific claims against S in assault and battery are claims for *vicarious* liability.

[15] D. Ibbetson, *A Historical Introduction to the Common Law* (Oxford University Press, 2001), at 44, gives the example of *Rattlesdene v Grunestone* (1317). Here it was claimed that the defendant, having sold the plaintiff a barrel of wine but before delivery, removed the cap 'by force of arms, with swords bows and arrows etc', and replaced some of the wine with salt water. As Ibbetson says, 'It is hard not to suspect that the true basis of the claim was a shipping accident'.

[16] See also S. Douglas, *Liability for Wrongful Interferences with Chattels* (Hart Publishing, 2011), Chapter 6.

[17] This is not because the only 'wrongs' understood in medieval times were 'forcible'. Ibbetson points out that defamation (harm to reputation) was recognized at an early stage but was hived off to the ecclesiastical courts. Likewise, an action in 'covenant' was developed which broadly concerned contractual wrongs, leaving 'trespass' to deal (primarily at least) with forcible interventions.

[18] *Res ipsa loquitur* places on the defendant the task of showing *some* evidence weighing against an inference of negligence.

[19] This point may be debated in those relatively rare cases where there is an intention to disarm, for example.

[20] The rules of 'limitation' and their rationale are explained in Chapter 8.

[21] Law Reform (Limitation of Actions, etc) Act 1954, s 2(1). As we will see, the limitation period for personal injury is no longer so inflexible.

[22] This aspect of the judgment in *Wilson v Pringle* is not called into doubt by the developments in cases such as *Re F* [1990] 2 AC 1, also extracted later.

[23] He did so on the basis that courts were now free, following the decision in *Pepper v Hart* [1993] AC 593, to consult the record of parliamentary debates through *Hansard*, in order to construe the intentions of the proposer of a statute. This is a supplement to interpretation of the words of the statute themselves, and was not an accepted technique at the time of *Letang*.

[24] Report of the Committee on the Limitation of Actions 1949 (Cmd. 7740).

[25] In fact there is no definitive reason to think that the tort of negligence *only* applies to unintended harms. For example, a person who deliberately drives into another vehicle would surely be in breach of the duty of care owed to other road users.

[26] For the position with children (minors) who are incompetent to consent, see the discussion of *Re A (Conjoined Twin)*, below. Powers under the Mental Capacity Act 2005 do not apply where the person who lacks capacity is under the age of 16 (s 2(5)).

[27] Particularly *Reibl v Hughes* (1980) 114 DLR (3d) 1.

[28] The decision in *Sidaway v Bethlem Royal Hospital* [1984] QB 493 had meanwhile made it clear that only broad knowledge of the treatment is required for consent to be valid and effective; it remains the case after *Montgomery v Lanarkshire Health Board* [2015] UKSC 11; [2015] AC 1430, that questions as to disclosure of risks to a patient will be approached as questions of negligence, rather than consent.

[29] This should now be read subject to the provisions of the Mental Capacity Act 2005 extracted in Section 2.4.

[30] Difficult questions surround the status of *advance* expressions of a patient's wishes (to have treatment at all costs, or to have treatment withdrawn in specified circumstances). These questions were inconclusively discussed by the Court of Appeal in *R v GMC, ex p. Burke* [2004] 3 FCR 579. Sections 24–26 of the Mental Capacity Act 2005 now govern the validity and effect of advance decisions to *refuse* particular treatment. These sections allow (amongst other things) for declarations as to the validity and effect of such refusal.

[31] In fact, a declaration does not in theory preclude a future criminal prosecution: *Airedale NHS Trust v Bland* [1993] AC 789, at 862.

[32] D. Price, 'Fairly Bland: an Alternative View of a Supposed New "Death Ethic" and the BMA Guidelines' (2001) 21 LS 618; A. McGee, 'Finding a Way Through the Legal and Ethical Maze: Withdrawal of Treatment and Euthanasia' (2005) 13 Med LR 357; J. Keown, 'Restoring the Sanctity of Life and Replacing the Caricature: A Reply to David Price' (2006) 26 LS 109. Similarly—and controversially—the Mental Capacity Act 2005, s 4(5) (extracted in Section 2.4) provides that decisions as to life-sustaining treatment *must not* be motivated by a desire to bring about death. For discussion see J. Coggon, 'Ignoring the Moral and Intellectual Shape of the Law After *Bland*' (2007) 27 LS 110–25.

[33] The court therefore distinguished the case of a cabin boy killed to maintain the life of fellow shipwrecked crew members, who were duly convicted of murder: *R v Dudley and Stevens* (1884–85) 14 QBD 273.

[34] Robert Walker LJ disagreed on this point.

[35] R. Heywood, 'Medical Disclosure of Alternative Treatments' (2009) CLJ 30 (noting the decision in *Birch v University College Hospital NHS Foundation Trust* [2008] EWHC 2237 (QB)).

[36] Note, however, that in the special circumstances set out in Criminal Justice Act 2003, s 329 an honest belief suffices.

[37] This was a case in deceit. It was unanimously held by the House of Lords that the defence of contributory negligence is not available in deceit: see Section 7.

[38] *Murphy v Culhane* [1977] QB 94. Alternatively, there may be no damages in such a case, on grounds of illegality: see Chapter 7.

[39] This dealt with the case of *ex p Evans*, extracted in Section 4.1, where there was a false imprisonment consisting of failure to order the claimant's release.

[40] However, a very serious case of false imprisonment in the form of sexual enslavement (forced prostitution) is discussed in Chapter 8 in connection with remedies: *AT v Dulghieru* [2009] EWHC 225 (QB).

[41] F. A. Trindade, 'The Modern Tort of False Imprisonment', in N. J. Mullaney (ed.), *Torts in the Nineties* (LBC, 1997), contrasts English with Australian and New Zealand law in this respect.

[42] This is highlighted as the 'most disturbing' feature of the case by Baroness Hale in her judgment, who nevertheless had some sympathy with the government in light of tabloid complaints about release of foreign nationals at the end of their term of imprisonment.

[43] This can be illustrated by reference to the torts of both malicious prosecution and misfeasance in a public office, discussed later. Both of these are torts which require damage, and in each case imprisonment itself may clearly be the relevant damage.

[44] Readers may find it interesting to refer to A. Burrows, 'Numbers Sitting in the Supreme Court' (2013) 129 LQR 305. The article seeks the thinking behind the growing practice of using panels of more than five judges in the highest court, and is sceptical of its value. One of the reasons reviewed is that where decisions are reached by a bare majority, there may be a feeling that with a different panel, a different result might have followed. The presence of a nine-judge panel in *Lumba* appears to have exacerbated this problem, rather than resolving it.

[45] See also *Cullen v Chief Constable of RUC* [2003] 1 WLR 1763: detention lawful at its inception would not become unlawful through breach of codes of conduct.

[46] *R (Faulkner) v Parole Board* [2013] UKSC 23; [2013] 2 WLR 1157, on the proper approach to damages in such cases, is discussed in Chapter 9.

[47] *Lumba*, [181].

[48] Apart from *ex p Evans* (Section 4.1), and other false imprisonment cases, see the discussion of damages for death (Chapter 9).

[49] We also suggested that the approach in *Freeman* may have been wrong.

[50] On this point, Tugendhat J followed *Al Fayed v Metropolitan Police Commissioner* [2004] EWCA Civ 1579.

[51] Perhaps the claimant wished to narrow the range of issues to be determined, in order to smooth her path to Strasbourg and the European Court of Human Rights; or perhaps this was simply a question of reciprocal concessions.

[52] False imprisonment was not considered by the House of Lords in *Laporte*, in which passengers on a coach were prevented from joining a demonstration (see the discussion of *Bird v Jones*, earlier in Section 4). But the police action in preventing attendance at the demonstration was held to be unlawful.

[53] The state and the police force are under a positive duty to act to protect the life of citizens, including protection from the crimes of others: *Osman v UK* (Chapter 5, Section 3).

[54] See, for example, D. Feldman, 'Containment, Deprivation of Liberty and Breach of the Peace' (2009) 68 CLJ 243–5.

[55] For criticism of the Grand Chamber's decision, see N. Oreb (2013) 76 MLR 735.

[56] P. Bartlett, *Blackstone's Guide to the Mental Capacity Act 2005* (2nd edn, 2008), at 4.05.

[57] For a case of false imprisonment outside this context, where the provisions of the Mental Capacity Act 2005 were applied and damages awarded, see *H v Commissioner of Police of the Metropolis* [2013] EWCA Civ 69.

[58] For analysis see the decision of the Supreme Court in *Cheshire West and Chester Council v P* [2014] UKSC 19.

[59] *Bell v Great Northern Railway Company of Ireland* (1890) 26 LR Ir 428, mentioned by Wright J, had already declined to follow *Coultas* in Ireland; within a few years, a barmaid put in fear for her safety was able to claim for the consequences in English law: *Dulieu v White* [1901] 2 KB 669 (see further Chapter 6, Section 1). In *OPO v Rhodes*, however, Baroness Hale pointed out that *Dulieu* would not have covered the outcome in *Wilkinson v Downton*, as it would have required the trigger to be fear for oneself.

[60] See J. Bridgeman and M. Jones, 'Harassing Conduct and Outrageous Acts: A Cause of Action for Intentionally Inflicted Mental Distress?' (1994) 14 LS 180. Generally, this form of damage is not sufficient to ground an action in negligence per se, but may be recoverable sometimes as a head of consequential loss: P. Giliker, 'A "New" Head of Damages: Damages for Mental Distress in the English Law of Torts' (2000) 20 LS 19–41.

[61] The events predated the Act. Although the claimant had been physically assaulted by one of the defendants, a claim in battery on the basis of this attack was ruled out. By statute, battery cannot be the subject both of a successful private prosecution (as was the case here) *and* of a further civil claim.

[62] It is doubtful whether this comment fits with the economic torts, considered in Section 7.

[63] The statute as a whole has been considerably amended so far as it relates to criminal offences: for example, recently, the Protection of Freedoms Act 2012 has added new offences. Here we focus solely on the provisions relating to civil liabilities and therefore omit these provisions.

[64] This case is also sometimes known as *JSC BTA Bank v Khrapunov*.

[65] We do not include passing off in this chapter. It primarily protects against damage to goodwill, not against economic losses, and is not dependent on intention.

[66] See our discussion of the US case *Tuttle v Buck*, Section 1 in the present chapter.

[67] This was broadly the *Anns v Merton* test for the duty of care, since superseded: Chapter 4, Section 2.2.

[68] We explore some of the reasons for this in Chapter 5, Section 2.

[69] The expression 'malice' is now generally avoided in describing the relevant intention: but a strong form of intention is clearly required. See our discussion of *OBG v Allan*, below.

[70] J. D. Heydon, *The Economic Torts* (2nd edn, Sweet & Maxwell, 1978). Sir John Salmond was also a noted critic of *Allen v Flood*.

[71] Finnis, 'Intention in Tort Law', extracted later.

[72] H. Carty, *An Analysis of the Economic Torts* (see Further Reading to Section 7), at 6.

[73] One of the key tensions between *OBG v Allan* and *Total Network* is that the former clearly expresses an abstentionist approach to the economic torts, while the latter appears to embrace an 'interventionist' approach. The question of course is whether this is merely the superficial appearance given where the court was dealing with different issues—or whether it betrays underlying differences in approach. See Lee and Morgan, Further Reading to Section 7 for a suggestion that it is the latter. *JSC v Ablyazov* follows *Total Network* and could potentially be described in the same terms.

[74] For a proposed way forward after *OBG* and *Total Network* which focuses on the interests protected, see Deakin and Randall (earlier, and Further Reading for Section 7). For a very different exploration of whether analysis of protected rights may provide the basis for a coherent exposition of what is now called 'causing loss by unlawful means', see J. Neyers, 'Rights-based Justifications for the Tort of Unlawful Interference with Economic Relations' (2008) 28 LS 215–33.

[75] In this case, the defendants *Hello!* had failed to acquire the exclusive right to publish photographs of the Douglases' wedding, which had gone to their rival, *OK!* So they appear to have infiltrated the wedding and taken illicit photographs, and published them, fully aware that they did not have permission to do so, and that this would interfere with the contractual rights of their rival, *OK!* Actions were brought against them by both the Douglases (breach of confidence) and *OK!* The latter's claim failed before the Court of Appeal because their contract was made less profitable: this did not fit the definition of any of the economic torts. *OK!* later succeeded before the House of Lords on the basis of confidence: see Chapter 15.

[76] In fact, the claim did ultimately fail at trial.

[77] B. Simpson, 'Trade Disputes Legislation and the Economic Torts', in T. T. Arvind and J. Steele (eds), *Tort Law and the Legislature: Common Law, Statute, and the Dynamics of Legal Change* (Hart Publishing, 2013), traces the role of the courts in resisting defences to liability created by statute for the unions, and argues that the courts' resistance in this respect has shaped the economic torts.

[78] For discussion see J. Lee and P. Morgan, 'The Province of *OBG v Allan* Determined: The Economic Torts Return to the House of Lords' (2008) King's Law Journal 338–46; J. O'Sullivan, 'Unlawful Means Conspiracy in the House of Lords' (2008) 67 CLJ 459–61.

[79] Carty, *An Analysis of the Economic Torts*, 101.

[80] Or perhaps, according to Lord Hope, wilfully fails to decide whether to act.

[81] The expensively litigated claim eventually collapsed in its turn. So also did the claim for misfeasance brought by shareholders in Railtrack, *Weir v Secretary of State for Transport* [2005] EWHC 2192.

[82] *R v Cunningham* [1957] 2 QB 396.

[83] *R v Caldwell* [1982] AC 341.

[84] Lord Phillips MR commented specifically on this point in *Douglas v Hello! (No 3)*, at [222].

[85] The position in *D v East Berkshire*, a case mentioned by Lord Bingham in the passage above, is quite different. The argument there concerned policy considerations affecting the application of the tort of negligence. There was no question of fundamentally altering the nature of the tort.

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