convicted of stealing his own property even though nobody else had a protected interest of any sort. It adds interest to the story that the repairer in *Turner* had in fact discovered the car parked in the street by Turner, driven it back to his workshop, removed the engine and then towed it back to the street where he had found it. On the Court's reasoning, he could probably have been convicted of theft too (at least of the engine), since at the time he took the car, it was again in Turner's possession.

The Theft Act 1968 marked a significant shift in the criminal law protecting property interests. The old crime, larceny, was essentially crafted through the common law to protect possession rather than ownership. By recognising that there are different levels of interest that might exist in property (ownership, "any proprietary right or interest", possession and control are the ones identified in the Act itself), the law was brought more into accord with the civil law around which it must operate. This change in the law was a welcome development, but it does give rise to the possibility that there might be conflicting interests in a particular article or thing that becomes at issue in a theft or robbery. That may generate the further complication that the civil law and the criminal law are sometimes at risk of speaking with different voices, giving different answers to essentially the same question.

But that is not the situation that confronted the court in *Smith*, and it is a pity that the Court has breathed some life into a precedent that, taken at face value, makes very little sense. In *Smith*, unlike *Turner*, the appellant had violently helped himself to property over which he had not the slightest entitlement and in which he had no prior legal interest. Even if the victim in that case did not have a right that could be vindicated in legal proceedings, he had a better right to the drugs than did Smith, who was rightly convicted of robbery for that reason.

A.T.H. SMITH

BUILDING CONTRACTS – IS THERE CONCURRENT LIABILITY IN TORT?

IN *D. & F. Estates Ltd* v. *Church Commissioners for England* [1989] A.C. 177, the House of Lords rejected a claim in negligence by the current owners of a flat against the original builders, for the cost of rectifying defective plasterwork. As is well known, this denial of a duty of care for pure economic loss in the context of defective building work was later endorsed in *Murphy* v. *Brentwood District Council* [1991] 1 A.C. 398, where the House of Lords held that a local authority surveyor owed the purchaser of residential property no duty of care

https://doi.org/10.1017/S0008197311000407 Published online by Cambridge University Press

when checking the plans of the foundations. The authority could be under no greater liability than the builder, the primary wrongdoer while, as Lord Bridge said, to recognise "a duty of care to any person acquiring an interest in the product of the builder's work would be to impose on him the obligations of an indefinitely transmissible warranty of quality". Outside the defective building context, however, the law of negligence in respect of pure economic loss has expanded considerably since *Murphy*, in particular with the recognition in *Henderson* v. *Merrett Syndicates Ltd.* [1995] 2 A.C. 145 that a contractual relationship between claimant and defendant can give rise to a tortious "assumption of responsibility", and thus concurrent liability in contract and tort, as long as the terms of the contract are not inconsistent with a duty of care. So where does this leave a claimant who (unlike the claimant in *D&F Estates*) *is* in a concurrent contractual relationship with his builder, but chooses for procedural reasons to sue in tort instead?

In *Robinson* v. *PE Jones (Contractors) Ltd.* [2011] EWCA Civ 9 the claimant contracted to purchase a house, then under construction, from the defendant builder and the purchase was completed in 1992. The contract incorporated the National House-Building Council's (NHBC) standard form of agreement, whereby the builder had extensive liability to the house owner for defects, but only for the first two years after completion. In 2004 the claimant discovered that one of the flues was defective, so a gas fire was disconnected for safety reasons and the flue required expensive rebuilding, although no personal injury or damage to any other property was caused. The claimant sued the defendant for damages for this pure economic loss.

His claim for breach of contract was clearly statute barred, as it was over a decade since any breach by the defendant, but by framing his claim in tort as well, the claimant hoped to be able to take advantage of the more generous tortious limitation regime that allows a claim to be brought within three years of the date previously latent damage becomes reasonably discoverable. The question of whether the defendant owed a concurrent duty of care in tort for pure economic loss was heard as a preliminary issue. The judge at first instance struck out the claim and the Court of Appeal agreed, dismissing the claimant's appeal.

The court dealt with the specific issue of the terms of the contract between claimant and defendant, as well as the more general question of whether the relationship between a builder and immediate purchaser could ever give rise to a duty of care in respect of pure economic loss. On the particular facts, the term in the contract limiting the defendant's liability to reflect the NHBC Scheme was straightforwardly inconsistent with the alleged duty of care. The contract was a sensible allocation

https://doi.org/10.1017/S0008197311000407 Published online by Cambridge University Press

of risk, both parties were represented by solicitors when it was negotiated and so (unlike the disclaimer in *Smith* v. *Bush* [1990] 1 A.C. 831) the NHBC term was reasonable under the Unfair Contract Terms Act 1977. As Jackson L.J. said, "It is not possible for the claimant to invoke the law of tort in order to impose liabilities upon the defendant which are inconsistent with the contract"

The more controversial question was whether, in the absence of an obviously inconsistent term, there will generally be a concurrent duty of care in tort between a builder and his client, as is the case in contracts for professional services between, for example, solicitors or surveyors and their clients. The basis of concurrent liability in professional contracts is the slippery concept of "assumption of responsibility", developed from *Hedley Byrne & Co Ltd* v. *Heller & Partners* [1964] A.C. 465 and *Henderson* v. *Merrett Syndicates Ltd*. Jackson L.J. tentatively accepted this in *Robinson*: "It is perhaps understandable that professional persons are taken to assume responsibility for economic loss to their clients. Typically, they give advice, prepare reports, draw up accounts, produce plans and so forth. They expect their clients and possibly others to act in reliance upon their work product, often with financial or economic consequences."

Outside professional retainers, however, it "by no means follows that every contracting party assumes responsibilities (in the *Hedley Byrne* sense)" – this would be "nonsensical" and inapplicable to the standard building contract, such as this, where the parties were not, "in a professional relationship whereby, for example, the claimant was paying the defendant to give advice or to prepare reports or plans upon which the claimant would act." So overall, a builder owes no concurrent duty of care in tort to his client by reason of the contract between them.

It is difficult to fault the conclusion that a claimant should not be permitted to sue his builder for pure financial loss coming to light many years after the expiration of the contractual limitation period, merely by dressing the claim up in tortious clothes. But it is much more difficult to explain precisely what it is about giving professional advice or reports that justifies the opposite conclusion. To say that there is an (objective) assumption of responsibility in professional contracts, but that this would be nonsensical in building contracts, is not really principled reasoning or justification, merely another way of asserting the conclusion. Of course, the impetus to plead contractual cases in tort comes entirely from the oddity that there are secondary latent damage provisions for tortious but not contractual negligence claims, a practical consideration openly acknowledged by Lord Goff when recognising an "assumption of responsibility" and thus concurrent liability in *Henderson* v. *Merrett Syndicates Ltd*. Overall the refusal of the Court

https://doi.org/10.1017/S0008197311000407 Published online by Cambridge University Press

of Appeal in *Robinson* to follow *Henderson* and allow the limitation tail to wag the substantive dog is to be welcomed.

JANET O'SULLIVAN

NEGLIGENCE LIABILITY OF PUBLIC BODIES: LOCATING THE INTERFACE BETWEEN PUBLIC AND PRIVATE LAW

THE law on the negligence liability of public bodies is complex and in a state of evolution. Underlying it is a tension between public and private law. Public bodies exercise discretionary powers granted by Parliament and their decisions often involve policy-making of a political nature. They are challengeable in public law, which is concerned with the validity of the action taken, rather than compensation. In contrast, the tort of negligence seeks to compensate the victims of careless actions. The difficulty, arising at the interface of the two legal spheres, is how to deal with claims in negligence against public bodies exercising their statutory powers. English courts apply the ordinary rules of negligence, but public law considerations play a role within them. The nature and scope of these considerations has recently been examined in *Connor* v. *Surrey County Council* [2010] EWCA Civ 286, [2010] 3 W.L.R. 1302.

Connor was employed as a head teacher at a mainly Muslim school. Problems began to arise after February 2003, when Martin and his associates joined the governing body. They frequently criticised and verbally abused Connor for allegedly failing to promote closer links with the Muslim community, creating tension in the governing body. Connor informed the local council but it was slow to act. In May 2005 the governing body removed Martin. Subsequently, he made a complaint of Islamophobia against Connor and in July 2005 the council commissioned an independent inquiry into Martin's complaint. It was only in October that it intervened in a manner supportive of its teacher by replacing the governing body with an Interim Executive Board ("IEB") pursuant to the School Standards and Framework Act 1998, ss. 14 and 16A. In September 2005 Connor was signed off work with depression and later retired. She sued the council in negligence.

At first instance, the judge found that the council failed to take reasonable steps to protect the claimant against work-related psychiatric injury and was therefore in breach of its duty of care as employer. The breach consisted in failing to exercise its power to replace the governing body earlier and by establishing the inquiry into Martin's complaint. Both decisions were guided by the council's exaggerated fears over accusations of prejudice against Islam. The council appealed,

https://doi.org/10.1017/S0008197311000407 Published online by Cambridge University Press