

THE NATURE AND SCOPE OF LIABILITY FOR PROCURING THE COMMISSION OF A TORT

JOHN MURPHY*

ABSTRACT. *It has long since been accepted that where a defendant induces a primary wrongdoer to commit a tort against a claimant, the procurer may be held liable for the losses and harm thereby caused. Typically, the existence of such liability has been asserted rather than rigorously demonstrated both by judges and jurists. And while some detailed scholarly engagement with this form of liability has been proffered, the explanations on offer have tended to rely less on established principles of law, than on certain theoretical pre-commitments held by the authors in question. The Supreme Court's decision in Lifestyle Equities v Ahmed has injected some much-needed clarity into this conspicuously underexplored area of law. Yet even now, as this article seeks to show, there is much that remains uncertain concerning the nature and scope of such liability. It therefore seeks to shed light on those matters.*

KEYWORDS: *procurement liability, joint tortfeasance, accessory liability.*

I. INTRODUCTION

Tort law contains an almost dizzying number of rules whereby harm caused by acts done or words spoken by a primary wrongdoer (hereafter “the wrongdoer”) allows a claimant (hereafter “the victim”) to seek compensatory damages from a defendant (hereafter “the procurer”). So long as one includes tort doctrines alongside specific torts, it is possible to discern support for at least 13 ways in which this can occur. Eight of these are very solidly embedded in the law and almost trite to state.¹

*Professor of Law, Faculty of Law, University of Hong Kong. Email: jrmurphy2@hku.hk. Thanks to Roderick Bagshaw, Lionel Bently, Paul Davies, Joachim Dietrich, Craig Purshouse and Sandy Steel for comments on drafts this paper. I am also grateful to participants at a seminar at the National University of Singapore for their feedback on an earlier version. Address for correspondence: Faculty of Law, University of Hong Kong, Pok Fu Lam Road, Hong Kong.

¹ By far the most commonly used is (1) the vicarious liability principle. Almost as well-known is (2) the doctrine of joint tortfeasance. Not so well-known, but just as firmly established, is the prospect of D's liability for (3) authorising the commission of a tort by the wrongdoer or (4) ratifying its commission. And, D can assuredly also be held liable, within the realm of the economic torts, for (5) inducing the wrongdoer's breach of a contract with C, (6) committing an actionable wrong against the wrongdoer such that the wrongdoer then acts in a way that causes loss to C and (7) conspiring with the wrongdoer to harm the victim via the use of unlawful means. Finally, in this category of uncontroversial mechanisms, is the facility for (8) the wrongdoer's commission of a harmful act to place D in breach of a non-delegable duty.

Three further means by which the procurer may be held liable when the relevant primary wrong is committed by the wrongdoer are widely seen as controversial; yet each one stands on appellate court authority.²

Then, to complete the list, there are two further mechanisms for holding the procurer liable when the primary wrong has been committed by the wrongdoer which have only recently received formal recognition in the courts. The first of these – and thus the twelfth overall – is said to arise by way of analogy with the tort of inducing breach of contract first recognised in *Lumley v Gye*.³ It is a very narrow action according to which the procurer is held liable for inducing the wrongdoer not to pay a judgment debt owed by the wrongdoer to the victim.⁴ The thirteenth – also avowedly based on an analogy with *Lumley v Gye* – is an action that renders the procurer liable for inducing the wrongdoer to commit a tort against the victim.⁵

Distinguishing between the various mechanisms can be a challenging task, not least because there is sometimes overlap between them.⁶ This makes it hard to say where action X stops and action Y begins,⁷ and raises the possibility that some of these devices are redundant (because what they offer is already covered by an alternative mechanism).⁸ A second problem that arises from the uncertainty concerning the terrain covered by a particular tort (or tort doctrine) is that its normative foundations can be elusive. For example, numerous writers think that the economic torts exist purely to protect “trade, business or

² These are D’s liability for causing the victim loss via (9) lawful means conspiracy (see e.g. *Crofter Hand Woven Harris Tweed Co. Ltd. v Veitch* [1942] A.C. 435 (H.L.)), (10) a negligent failure to control the wrongdoer in accordance with a duty to do so (see e.g. *Home Office v Dorset Yacht Co.* [1970] A.C. 1004 (H.L.)) or (11) negligently creating a situation in which it became highly likely that the wrongdoer would harm the victim (see e.g. *Topp v London Country Bus (South West) Ltd.* [1993] 1 W.L.R. 976 (C.A.)).

³ (1853) 118 E.R. 749.

⁴ See e.g. *Lakatamia Shipping Co. Ltd. v Su* [2021] EWHC 1907 (Comm).

⁵ See e.g. *Allen v Flood* [1898] A.C. 1, 106–07 (H.L.) (Lord Watson); *Credit Lyonnais Nederland N.V. v Export Credit Guarantee Department* [2000] 1 A.C. 486, 497–98 (H.L.) (Lord Woolf M.R.); *Lifestyle Equities C.V. v Ahmed* [2024] UKSC 17, [2024] 2 W.L.R. 1297, at [135] (Lord Leggatt).

⁶ E.g. there is considerable overlap between unlawful means conspiracy and joint tortfeasance (though the two doctrines are certainly not coterminous in the wake of *Revenue and Customs Commissioners v Total Network S.L.* [2008] UKHL 19, [2008] 1 A.C. 1174 where it was recognised that a crime (with no tort law counterpart) may constitute unlawful means for the purposes of the former). There is also considerable overlap between vicarious liability and the authorisation principle.

⁷ See e.g. P.S. Davies, *Accessory Liability* (Oxford 2015), ch. 6; H. Carty, “Joint Tortfeasance and Assistance Liability” [1999] Legal Studies 489; P. Sales, “The Tort of Conspiracy and Civil Secondary Liability” [1990] C.L.J. 491; C. Beuermann, *Reconceptualising Strict Liability for the Tort of Another* (Oxford 2021), ch. 7; R. Stevens, *Torts and Rights* (Oxford 2007), ch. 11.

⁸ E.g. Sales and Davies have suggested the redundancy of both lawful and unlawful means conspiracy (see P.S. Davies and P. Sales, “Intentional Harm, Accessories and Conspiracies” (2018) 134 L.Q.R. 69, 92: “there is no remaining space for the separate existence of the tort of conspiracy in either of its forms”; others have confined such allegations to only the latter (see e.g. L. Hoffmann, “The Rise and Fall of the Economic Torts” in J. Edelman et al. (eds.), *Torts in Commercial Law* (NSW 2011), 114). I have also raised the question of redundancy in relation to the so-called *Marex* tort: see J. Murphy, “The *Marex* Tort: A Nascent but Needless Action” (2025) 141 L.Q.R. 225.

livelihood” interests.⁹ But if these torts – which include four of our 13 devices¹⁰ – can be shown to protect a much wider range of interests, then their rationale, cannot be captured in this way. It is even misleading to label them economic torts. Likewise, when the vicarious liability principle is used to impose liability on charitable institutions – such as the religious orders that have featured in a good deal of the case law – justifications for the doctrine based on notions of enterprise liability or deep pockets become difficult to maintain.¹¹

Among the 13 devices that exist, it is by some distance the last two – inducing the wrongdoer’s failure to comply with a judgment debt and procuring the commission of a tort (“PCT”) – that have received the least academic attention. As regards the former, the paucity of juristic engagement is in large part attributable to the fact that this action was only formerly recognised a few years ago and then only at first instance.¹² By contrast, the relative lack of *in-depth* academic engagement with PCT is harder to understand,¹³ especially given the very different conceptions of this action that have been proffered by the courts. And whilst it is true that a few jurists have considered this action at length, with broad agreement among them that PCT liability exists, there is a conspicuous lack of consensus on precisely why we have it and what juridical form it takes.

Three broad views are discernible. One is that PCT is best seen as a free-standing tort.¹⁴ A second is that PCT is best understood as involving the attribution of the wrongdoer’s acts to the procurer (so that the latter may be sued as a primary wrongdoer in his or her own right). A third, held by others still, is that PCT is a form of accessory liability.¹⁵ Against this backdrop it seems odd that there should not have been more widespread engagement with PCT among the academic community. Certainly, the need for such engagement persists; for although Lord Leggatt indicated his preference for the third of these conceptions in *Lifestyle Equities v Ahmed*,¹⁶ his treatment of the issue was, as we shall see, far from comprehensive.

⁹ See e.g. S. Deakin and J. Randall, “Rethinking the Economic Torts” (2009) 72 M.L.R. 519, 534; H. Carty, *An Analysis of the Economic Torts*, 2nd ed. (Oxford 2010), 1.

¹⁰ These are the two conspiracy torts and inducing breach of contract and the unlawful means tort.

¹¹ For discussion of this and other explanatory hurdles regarding vicarious liability, see J. Neyers, “A Theory of Vicarious Liability” (2005) 43 Alberta Law Review 287; P. Giliker, *Vicarious Liability in the Common Law World* (Oxford 2022).

¹² The action now referred to as the *Marex* tort takes its name from *Marex Financial Ltd. v Sevilleja Garcia* [2017] EWHC 918 (Comm), [2017] 4 W.L.R. 105.

¹³ For suggestions as to why there has been little analysis, see J. Dietrich and P. Ridge, *Accessories in Private Law* (Cambridge 2016), 93.

¹⁴ Writing before *Lifestyle Equities v Ahmed*, Stevens took exactly this approach. He wrote: “[i]f X [...] procures [...] the commission of acts by Y, those actions are attributed to X [...] [such that] X and Y are jointly liable as principals for the same tort”: Stevens, *Torts and Rights*, 246; see also *Wah Tat Bank Ltd. v Chan Cheng Kum* [1975] A.C. 507, 514–15 (P.C.) (Lord Salmon).

¹⁵ See e.g. Davies, *Accessory Liability*; Dietrich and Ridge, *Accessories*.

¹⁶ *Lifestyle Equities v Ahmed* [2024] UKSC 17.

The case involved a claim brought by Lifestyle Equities against the defendants in relation to certain infringements of registered a trade mark. The infringements were committed by companies of which the defendants were directors and it was alleged that the defendants could be held responsible on the basis of their having procured the infringements. The defendants denied liability. They argued that they could not be held liable for procuring infringements as they were not aware of the essential facts which made the use of the relevant logo wrongful. When the case reached the Supreme Court, the central issue was the juridical significance of what the defendants knew (for the purposes of procurement liability). It was *not* the question of how best to characterise this form of liability.

Undoubtedly, the decision in *Lifestyle Equities v Ahmed* removed some of the confusion that had long since surrounded PCT liability; but there is much that is still uncertain. For one thing, there remains room to doubt the notion that PCT should be seen as being no more than a particular instantiation of the broad principle that underpins the tort of inducing breach of contract (as was asserted, but by no means conclusively shown, by Lord Leggatt). Equally, we still require clarification regarding the precise relationship that exists between PCT and the doctrine of joint tortfeasance. And finally, even though the Supreme Court insisted that PCT is best seen as a form of “accessory liability”,¹⁷ there was a failure in *Lifestyle Equities v Ahmed* to make clear exactly what this term connotes. Does it mean that the procurer’s liability is a form of secondary liability in the sense that it is parasitic upon, *and has its contours entirely conditioned by*, an actionable primary wrong committed by the wrongdoer? Or does it mean, in line with the view sometimes expressed, that it is an independent form of liability that is only secondary in the sense that it is triggered by the commission of a primary wrong by the wrongdoer. Is it, in other words, a form of liability that is somewhat akin to a free-standing tort insofar as the procurer can be held liable (1) to an extent that differs from the wrongdoer and (2) even in circumstances where the wrongdoer’s wrong is not itself actionable? It is with these unresolved questions and the issues to which they give rise, that this article is concerned. It unfolds as follows.

Section II gives substance to the claim made earlier about PCT having uncertain foundations and considers the merits of the three different conceptions of PCT that have emerged therefrom. Then, having analysed the competing conceptions of PCT, Section III examines critically what was laid down in *Lifestyle Equities v Ahmed*. It suggests that, despite their Lordships’ careful consideration of PCT in that case, the decision has two major shortcomings. The first is that it posits the existence of a

¹⁷ *Ibid.*, at [120].

much closer relationship between PCT and inducing breach of contract than can actually be borne by the law as we find it. The second is that, although *Lifestyle Equities v Ahmed* resolved some uncertainties in this area, those that it left intact are of great potential significance. Thus, in summary, this section argues that the decision failed to provide a coherent conception of “accessory liability”; that it failed to clarify the relationship between accessory liability and “common design joint tortfeasance”; and that it left untouched the remedial implications associated with the two competing conceptions of accessory liability that are still available in its wake. Section IV concludes.

II. UNCERTAIN FOUNDATIONS OF PCT LIABILITY

Although a generally accepted theory of why inducing breach of contract is a source of tort liability remains elusive,¹⁸ it is nonetheless clear that judges and jurists acknowledge the vitality of this action. Much the same can be said of PCT. For, although commentators of all stripes readily accept that inducing someone to commit a tort is itself a cause of action, there is considerable disagreement among them about exactly what undergirds it (with the result that the precise *nature* and *scope* of this form of liability is highly contentious). In fact, the only point on which there seems to be general agreement is that the source of PCT liability is a well-known passage in the judgment of Erle J. in *Lumley v Gye*: “the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong [...] [and] he who procures the wrong is a joint wrongdoer, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of.”¹⁹

Ostensibly, it may seem odd that most commentators should agree that this passage comprises the *fons et origo* of PCT liability and yet, at the same time, disagree profoundly about how best we should understand it. But the apparent oddity – namely widespread agreement about the source of the rule and equally widespread disagreement about its juridical qualities and scope – becomes explicable once the Delphic nature of Erle J.’s words are appreciated. For when a legal rule stands on foundations, the breadth and depth of which are uncertain, it is understandable that there should be disagreement about what exactly those foundations can be said to support. So wherein lies the problem with what Erle J. said?

Superficially, his assertion that the procurer is “a joint wrongdoer” who “may be sued [...] jointly with the agent [i.e. the wrongdoer]” might be thought to suggest that, in all such cases, the procurer (whose liability lies in tort) is being sued as a joint tortfeasor with the wrongdoer. But

¹⁸ For a conspectus of the leading theoretical endeavours to explain this action, as well as the objections they have prompted, see J. Murphy, *The Province and Politics of the Economic Torts* (Oxford 2022), 50–55.

¹⁹ *Lumley v Gye* (1853) 118 E.R. 749, 755.

such thinking cannot explain the liability at stake in *Lumley v Gye* (where he said this), since Lumley's allegation was that Joanna Wagner, a famous opera singer, had been induced by Gye to commit a breach of contract. In other words, because Wagner's wrongdoing was a breach of contract (not a tort), she and Gye could never be "joint tortfeasors". If Lumley had sued them both, one of his actions would have lain in contract, the other in tort.

Of course, if Erle J. meant something other than "he who procures the wrong" is a *joint tortfeasor*, then we are forced to look again at exactly what he said to determine what he had in mind when he described the procurer as a "joint wrongdoer". Put another way, is there another sense in which he considered the procurer to be a "joint wrongdoer"? Upon returning to that passage, our attention is naturally drawn to his second main claim: namely, that the procurer's liability arises "in the appropriate action for the wrong complained of". But saying this hardly clarifies matters. In fact, it really only begs the question, for there is nothing in these words that illuminates exactly what constitutes "the appropriate action" or what we should take to be "the wrong complained of". There was no direct precedent for *Lumley v Gye*. Indeed, Lumley had filed a demurrer precisely because there was no established "action", no previously recognised "wrong".

When roughly half a century later, in *Allen v Flood*, Lord Watson indicated his approval of Erle J.'s dictum, he conspicuously failed to clarify matters. He said simply: "[h]e who wilfully induces another to do an unlawful act which, but for his persuasion, would or might never have been committed, is rightly held to be responsible for the wrong which he procured."²⁰ This, of course, takes us no closer to understanding how, in juridical terms, the procurer's liability should be conceived. Indeed, if anything, Lord Watson confused matters. For, his talk of the procurer's being tortiously responsible for *the wrong procured* makes little sense when, as noted already, the wrong procured in *Lumley* was a breach of a contract.

That Erle J.'s words have never been understood with complete clarity was confirmed by Lord Nicholls in *OBG Ltd. v Allan* when he said: "I leave open the question of how far the *Lumley v Gye* principle applies equally to inducing a breach of other actionable obligations such as statutory duties or equitable or fiduciary obligations."²¹ The fact that he should have recorded such doubt (perhaps with a trace of scepticism) is entirely understandable. For, although a number of courts had on several previous occasions stated that the procurer could be liable for inducing the actionable breach of a statutory duty, it would be a stretch to say that any of the relevant cases had embedded this principle with real rigour.

²⁰ *Allen v Flood* [1898] A.C. 1, 106–07.

²¹ [2007] UKHL 21, [2008] 1 A.C. 1, at [172].

*Meade v Haringey L.B.C.*²² is often cited as a Court of Appeal case in which the procurer's potential liability for procuring the breach of an actionable statutory duty was recognised.²³ And whilst this is a fair characterisation of what was said in that case, it is also true that it is seldom noted just how fleetingly the court dealt with PCT.

One question that arose in *Meade v Haringey* concerned protections under the Trade Union and Labour Relations Act 1974 for those who take industrial action. In considering them, Eveleigh L.J. remarked: "[trade unions] may, in proper circumstances, induce others to break a contract in the furtherance of a trade dispute but they are not entitled with impunity to order or solicit a breach of statutory duty."²⁴ And that was it. Yet, his statement, insofar as it touched upon the procurer's liability for instigating the wrongdoer's breach of a statutory duty, says as much about *ordering* the commission of a breach as it does about *soliciting* one. It should therefore be seen for what it is: a very brief remark, made in the absence of authority, that seems to say as much about liability for intimidation as liability for inducing the commission of a tort.

In the very same case, Lord Denning M.R.'s handling of the issue was equally brief. He observed bluntly that, although the 1974 Act "gives ... [the defendants] immunity if they induce a person to break a contract [...] it gives them no immunity if they induce a local authority to break its statutory duty".²⁵ No explication of the rationale for such liability was supplied. This is not to say, however, that no one has attempted to explain PCT liability. Indeed, three tolerably clear conceptions of this form of liability have been offered over the years. Their contents and merits are discussed in turn.

A. The Free-Standing Tort View

Faced with the uncertainty inherent in Erle J.'s dictum (as well as in numerous subsequent cases that failed to elucidate it), Buckley L.J. attempted to clarify matters in *Belegging-en Exploitatiemaatschappij Lavender B.V. v Witten Industrial Diamonds Ltd.*²⁶ His suggestion was that the principle concerning procurement liability set out in *Lumley* could be understood as grounding a free-standing tort. Speaking specifically about the procurer's liability where a tort had been procured, he said: "I am inclined to think that it is a claim in respect of a *distinct, suggested tort of procuring infringement by others*."²⁷ Despite its

²² [1979] 1 W.L.R. 637 (C.A.).

²³ See e.g. Davies, *Accessory Liability*, 184; Sales, "Tort of Conspiracy", 504; Carty, "Joint Tortfeasance", 494.

²⁴ [1979] 1 W.L.R. 637, 651.

²⁵ *Ibid.*, at 648.

²⁶ [1979] F.S.R. 59 (C.A.).

²⁷ *Ibid.*, at 66 (emphasis added).

novelty, this interpretation was by no means groundless. After all, Erle J. had certainly begun the key passage in his judgment with talk of the victim's "cause of action" against the procurer and a tort is certainly a cause of action.

The free-standing tort approach also received support – though its foundations were no more expansively explained – in two subsequent cases, both (once again) centring on the particular tort of inducing a breach of statutory duty. In *Law Debenture Trust Corp. v Ural Caspian Oil Corp. Ltd.*,²⁸ Sir Thomas Bingham M.R. accepted as plausible the first instance judge's suggestion to this effect,²⁹ whereas, in *Associated British Ports v Transport and General Workers Union*,³⁰ Neill L.J. was unequivocal on the point. He said that "inducement of a breach of statutory duty is, of course, akin to the inducement of a breach of contract"³¹ and then added that "both [actions] can be *classed as torts* which involve the interference with a person's legal rights".³²

The free-standing tort approach, however, has not met with universal judicial approval. Significantly, it did not find favour with Lord Woolf M.R. in *Credit Lyonnais Bank Nederland N.V. v E.C.G.D.*³³ He said forthrightly: "[t]he tort upon which he [the claimant] seeks to rely is unsupported by authority [...] [and] [t]he authority which does exist strongly suggests that there is no such tort."³⁴ Further weight was added to this view via an implied rejection of PCT's status as a free-standing tort in *Lifestyle Equities v Ahmed*.³⁵

B. The Common Design Joint Tortfeasance View

Undoubtedly, PCT liability has been analysed most closely by the courts in cases involving induced breaches of intellectual property rights. But even those cases – *Lifestyle Equities v Ahmed* included – fail to furnish an entirely clear image of the nature and scope of the action. In *CBS Songs v Amstrad Consumer Electronics plc.*³⁶ it was alleged that the manufacturers of hi-fi equipment which included a twin-tape recorder could be held liable in tort for advertising and marketing this equipment. It was never doubted that some purchasers would use the tape-to-tape

²⁸ [1995] Ch. 152 (C.A.).

²⁹ On the other hand, the fact that he gave the matter such a light touch was understandable given that it was not a live issue that case.

³⁰ [1989] 1 W.L.R. 939 (H.L.).

³¹ *Ibid.*, at 952. There was further recognition of the possibility of the victim's suing the procurer for inducing a breach of a statutory duty that would, itself, invest the victim with an action against the wrongdoer in *Wilson v Housing Corporation* [1998] I.C.R. 151. However, this was only a first instance decision and one that, according to one notable commentator, is susceptible to be interpreted as a routine case of joint tortfeasance: see Carty, "Joint Tortfeasance", 507.

³² *Associated British Ports v T.G.W.U.* [1989] 1 W.L.R. 939, 952 (emphasis added).

³³ [2000] 1 A.C. 486.

³⁴ *Ibid.*, at 500.

³⁵ *Lifestyle Equities v Ahmed* [2024] UKSC 17, at [120].

³⁶ [1988] A.C. 1013 (H.L.).

facility to make their own, unlicensed copies of works that were copyright protected. But the House of Lords refused to hold the defendants liable for procuring such wrongdoing. They accepted that the defendants had facilitated the commission of these torts. But, quoting Buckley L.J. in an earlier case, Lord Templeman insisted that “[f]acilitating the doing of an act is obviously different from procuring the doing of the act”.³⁷ Thus, although His Lordship was happy to acknowledge *in principle* the possibility of an aggrieved claimant suing for PCT, there was no need for him, on the facts of that case, to provide an elaborate account of the nature and scope of this action. Indeed, he said no more on the subject than that “a defendant who procures a breach of copyright is liable jointly and severally with the infringer”, his joint liability turning on the fact that “he intends and procures and shares a common design that infringement shall take place”.³⁸

Despite his discussion of PCT being brief, it is nonetheless clear that he considered the need for a “common design” to be important. It was something he stressed at two separate points in his speech.³⁹ Yet, in so doing, it might fairly be said that His Lordship really only confused matters. His insistence on the need for a common design in a case of PCT simply blurred the juridical distinction between that action and the doctrine of joint tortfeasance as it was classically described in *The Koursk*.⁴⁰ Worse still, this mixing-up of PCT and common design joint tortfeasance was carried over into a series of subsequent cases that also centred on induced infringements of intellectual property rights.⁴¹

In *Lifestyle Equities v Ahmed*, the question of whether the procurer can be held liable for procuring the infringement of an intellectual property right was finally settled. Lord Leggatt, who delivered the leading speech, pointed out that “[i]nfringements of trade marks (and other intellectual property rights) are regarded as torts”,⁴² making it clear that PCT liability was directly in issue. He then specifically anchored this form of liability to what Erle J. had said. He said there was an “unbroken line of authority recognising that the principle for which *Lumley v Gye* is authority reaches beyond inducing a breach of contract”.⁴³ And he

³⁷ *Ibid.*, at 1058. The case being quoted was *Belegging-en Exploitiatiemaatschappij Lavender v Witten Industrial Diamonds* [1979] F.S.R. 59, 65.

³⁸ *Ibid.*

³⁹ *Ibid.*, at 1056–57.

⁴⁰ [1924] P. 140, 155 (C.A.) (Sargant L.J.): “[p]ersons are [...] joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design [...] there must be concerted action to a common end.”

⁴¹ See e.g. *P.L.G. Research Ltd. v Ardon International Ltd.* [1993] F.S.R. 197, 238–39; *L’Oréal S.A. v eBay International A.G.* [2009] EWHC 1094 (Ch), [2009] E.T.M.R. 53, at [346] (Arnold J.); *Twentieth Century Fox Film Corp. v Newzbin Ltd.* [2010] EWHC 608 (Ch), [2010] E.C.D.R. 8, at [110] (Kitchin J.); *Dramatico Entertainment Ltd. v British Sky Broadcasting Ltd.* [2012] EWHC 268 (Ch), [2012] 3 C.M.L.R. 14, at [82]–[83] (Arnold J.).

⁴² *Lifestyle Equities v Ahmed* [2024] UKSC 17, at [22].

⁴³ *Ibid.*, at [105].

sought to back this up by reference to numerous cases he understood to be supportive of the PCT principle, before focusing the bulk of his attention on the knowledge component in this action (i.e. whether the procurer must know that what he is inducing the wrongdoer to do amounts to a tort or whether the procurer need only know the essential facts which make that act tortious⁴⁴).

Most importantly, for present purposes, Lord Leggatt dealt head on with the question of whether there must be a common design between the procurer and the wrongdoer in a case of PCT. He was unequivocal in laying that notion to rest. He showed convincingly that, in *CBS Songs v Amstrad*, PCT liability had been confused with common design joint tortfeasance. In that case, he explained: “Lord Templeman elides procuring an infringement with participating in a common design.”⁴⁵ And he then went on to show that this interpretation of the PCT principle was one that “does not find support either in the judgments in [*Lumley v Gye*] [...] or in authorities which have considered the decision, including *OBG Ltd. v Allan*”.⁴⁶ This much was undoubtedly true. Lord Templeman had indeed confused two different doctrines. Hence, in the wake of *Lifestyle Equities v Ahmed*, it seems safe to say that there is no further mileage in the common design joint tortfeasance understanding of PCT liability.

C. The Accessory Liability View

When PCT liability was considered by the House of Lords in *OBG v Allan*, Lord Hoffmann – speaking obiter – described it as a form of accessory liability.⁴⁷ He began by indicating his approval of what Lord Watson had said in *Allen v Flood*; and that judgment, it will be recalled, contained an endorsement of Erle J.’s broad principle in *Lumley v Gye*.⁴⁸ Then – with no mention of either a free-standing tort or of joint tortfeasance – he proceeded to recast Erle J.’s formulation in terms a “general principle that a person who procures another to commit a wrong incurs liability as an accessory”.⁴⁹ However, like numerous judges before him and several yet to come, he signally failed to spell out exactly what he meant by this. He provided no clue as to the exact juridical nature or reach of accessory liability in tort, even though the answers to those questions are far from obvious given the existence of several competing (including fluid) conceptions of such liability.⁵⁰

⁴⁴ *Ibid.*, at [126]–[134].

⁴⁵ *Ibid.*, at [109].

⁴⁶ *Ibid.*, at [120].

⁴⁷ So, too, did Lord Nicholls: *OBG v Allan* [2007] UKHL 21, at [172].

⁴⁸ *Ibid.*, at [3].

⁴⁹ *Ibid.*

⁵⁰ P. Ridge and J. Dietrich, “Challenging Conceptions of Accessory Liability in Private Law” [2019] C.L.J. 383.

The notion that accessory liability is in play was also adopted in *Lifestyle Equities v Ahmed*.⁵¹ However, Lord Leggatt's endorsement of the accessorial understanding can hardly be described as entirely convincing. For he failed to observe that the various cases he cited with approval contained very different conceptions of what PCT liability entails. For example, although he took Lord Watson's speech in *Allen v Flood* to be an important reiteration of the principle enunciated by Erle J., he clearly missed the fact that Lord Watson had introduced an important qualifier: the requirement that the person procuring the violation of a right must also have done so "for his own ends".⁵² Equally, even though Lord Leggatt was quick to criticise Lord Macnaghten's interpretation of Erle J.'s words (on the basis that that interpretation failed to include the procurement component⁵³), he voiced no criticism of Dixon J.'s formulation of the principle in *James v The Commonwealth* which he also readily invoked. And yet Dixon J.'s interpretation had led him to conclude that "the procurement of a tort was itself a tort".⁵⁴ In other words, Lord Leggatt was citing with approval a case supportive of the free-standing tort conception whilst purporting to fortify his preferred understanding of PCT as a form of accessorial liability. Finally, His Lordship adverted without discrimination to some of the cases discussed earlier which, while they all recognised PCT as an extant principle of tort law, nonetheless come apart in relation to whether PCT instantiates primary or secondary liability.⁵⁵ Ultimately then Lord Leggatt's talk of an "unbroken line of authority" recognising a broad principle of accessory liability that was traceable to what Erle J. had said in *Lumley* was plainly without foundation.

III. PCT AFTER *LIFESTYLE EQUITIES V AHMED*

The legal landscape that confronted the Supreme Court when it came to decide *Lifestyle Equities v Ahmed* was a veritable quagmire. As noted already, among the various previous cases in which PCT had been discussed, there was discernible judicial support for no fewer than three broad understandings of this form of liability. Furthermore, judicial depictions varied to such an extent that the most striking common feature among them was a conspicuous lack of rigour when it came describing the contents and contours of PCT.⁵⁶ Happily, the Supreme Court dealt

⁵¹ [2024] UKSC 17, at [28].

⁵² *Allen v Flood* [1898] A.C. 1, 107.

⁵³ *Quinn v Leatham* [1901] A.C. 495, 510 (H.L.).

⁵⁴ *James v The Commonwealth* [1939] HCA 9, (1939) 62 C.L.R. 339, 370 (emphasis added).

⁵⁵ *Lifestyle Equities v Ahmed* [2024] UKSC 17, at [105]–[106]. The distinction had also been recognised some weeks earlier in *Northamber plc v Genec World Ltd.* [2024] EWCA Civ 428, [2024] 1 W.L.R. 4826, at [57] (Arnold L.J.).

⁵⁶ In fairness, this lack of rigour in explaining PCT was understandable since the cases in which a view was proffered were all, ultimately, decided on other grounds. For example, in *CBS Songs v Amstrad* [1988]

with some of this confusion in *Lifestyle Equities v Ahmed*. Yet it still failed – like so many courts before it – to provide an entirely clear exposition of the nature and limits of this form of liability. Indeed, although Lord Leggatt advanced an accessorial understanding of PCT in *Lifestyle Equities v Ahmed*, he did so (as we have seen) on highly questionable grounds.

At the same time, the relatively few academic commentators who had discussed PCT were no less divided on how best to understand it in juridical terms. Moreover, while some of these commentators had considered various matters that were left untouched in *Lifestyle Equities v Ahmed*, it is difficult to think of these analyses as anything other than dated. For, most if not all the leading juristic accounts were to some extent undermined by what was said in that case. For example, the Supreme Court’s adoption of an accessorial understanding of PCT clearly contradicts Stevens’s contention that it is best understood as a form of primary liability that derives from the attribution of the wrongdoer’s acts to the procurer.⁵⁷ And there is nowhere in Lord Leggatt’s leading speech any support for the dynamic conception of PCT proffered by Ridge and Dietrich, including their claim that there is no fixed mental element in this action.⁵⁸ In fact, to the contrary, Lord Leggatt specifically stipulated the need to show “intention to procure the doing of the act [which comprises the tort]”.⁵⁹

The conclusion to which all of this impels us is that *Lifestyle Equities v Ahmed* leaves unresolved a number of important questions associated with the yet-to-be clarified juridical nature of PCT. The remainder of this section considers them.

A. PCT as a Stand-Alone Type of Accessory Liability?

Lifestyle Equities v Ahmed marked the end of the erroneous notion that in a case of PCT there must be a common design between the procurer and the

A.C. 1013, the victim could not identify a primary wrong; in *Credit Lyonnais v E.C.G.D.* [2000] 1 A.C. 486, Lord Woolf made clear (at [190]) that the only material question was one about vicarious liability whereas, in *Associated British Ports v T.G.W.U.* [1989] 1 W.L.R. 939, the crucial issue had been whether there had been an induced breach of contract.

⁵⁷ In Stevens’s view “the actions of one party are attributed to another, thereby making them both liable for the same tort”: Stevens, *Torts and Rights*, 245. But this was never true in all cases. As just one example, if the procurer, independently, induced X and Y to do things to the victim that were not per se tortious but which if done multiple times constitute harassment, this would render the procurer liable under the Protection from Harassment Act 1997, s. 7(3A)(a), as this states that, where the procurer induces another person to act, that other person’s conduct will be attributed to inducer. However, as the Act states that actionable harassment requires “a course of conduct”, neither X nor Y could be held liable. But the procurer would stand differently. The attribution of the conduct of both X and Y to the procurer would mean that the procurer crossed the threshold for a “course of conduct”, namely, on at least two occasions (s. 7(3)(a)). So, Stevens’s claim that the attribution of acts such as to expose the procurer to tortious liability would necessarily make the inducer and the person induced joint tortfeasors was wrong.

⁵⁸ Ridge and Dietrich, “Challenging Conceptions”, 387: “[in PCT cases] the legal content of the conduct and mental elements is not fixed” (emphasis added). Cf. *Lifestyle Equities v Ahmed* [2024] UKSC 17, at [107]: “[w]hat is required is that the defendant acted in a way that was intended to cause another party (the primary wrongdoer) to do an act which the defendant knew was a wrongful act” (emphasis added).

⁵⁹ *Lifestyle Equities v Ahmed* [2024] UKSC 17, at [133].

wrongdoer. Yet, in almost the same breath that Lord Leggatt laid this misconception to rest, he introduced a new mistake. In relation to the way the prior case law had been handled in *CBS Songs v Amstrad*, he said:

None of those cases employs the concept of a common design. Lord Templeman may have invoked the concept because he was not attracted by the alternative view suggested by Buckley LJ [...] that procuring infringement by others is a distinct tort. [Yet] [p]resenting a choice [...] between regarding procurement of an infringement as a distinct tort or as a form of participation in a common design is a false dichotomy. The better view is that procuring an infringement and participating in a common design are *two separate principles* of accessory liability on which a person may be held jointly liable with the infringer.⁶⁰

Lord Leggatt's error was to insist that there exists a clear division between "two separate principles of accessory" liability: one based on procurement, the other based on common design joint tortfeasance. Just a moment's reflection should reveal that there is no a priori reason why those who procure the commission of a tort cannot also share a common design with the wrongdoer (as His Lordship suggested when he described them as "two separate principles"). The frailty of the distinction that he drew and to which he afforded salience – hence his criticising PCT's being elided with common design joint tortfeasance in *CBS Songs v Amstrad* – can be illustrated by reference to *Njord Partners SMA-Seal L.P. v Astir Maritime Ltd.*⁶¹

In that case, a father and son (named respectively, Tahir and Ali), were held liable for unlawful means conspiracy when they deceived the claimants into granting a very sizeable loan to a company that they, the defendants, owned. They did so by means of a false statement of its net worth that they had co-written. Satisfied that unlawful means existed – because all the requirements of deceit were in place – the court then worked methodically through the remaining ingredients of unlawful means conspiracy. These included the requirement that there be "a sufficient 'combination, arrangement or understanding' between Tahir and Ali".⁶² Finding that this requirement was satisfied (along with the other requirements of the conspiracy tort), the court concluded that Tahir and Ali could be held *jointly liable* on the basis of their joint commission of this tort.⁶³ Another way of expressing the point would be to say that Tahir and Ali could be regarded as primary wrongdoers who had, in combination, committed a single tort: that of unlawful means conspiracy. They had – to use the words of Scrutton L.J. in *The Koursk* – engaged in "concerted action to a common end".⁶⁴

⁶⁰ *Ibid.*, at [120] (emphasis added).

⁶¹ [2024] EWHC 1682 (Comm).

⁶² *Ibid.*, at [241] (Mr. R. Salter K.C.).

⁶³ *Ibid.*, at [244].

⁶⁴ [1924] P. 140, 156. Note: there was no imputation of the conduct of the father to the son (or vice versa), so they did not fall within the alternative conception of joint tortfeasance provided by Sargant L.J. in that

But the court did not stop there. It held that there was an alternative basis upon which liability could be imposed, namely Tahir being an accessory to the deceit committed by Ali. This alternative basis of liability was considered because (although ultimately the court did not believe him) Tahir had sought to argue that he had played no part in the authorship of the false statement.⁶⁵ Had this been true, it would have been arguable that he and Ali had not engaged in “concerted action to a common end”. Nonetheless, the court was content to affix accessorial liability by reference to the very same fact that grounded its conclusion they were joint tortfeasors: the fact of their “combination, arrangement or understanding”. In other words, it was held that even if Tahir had not specifically helped to co-author the deceitful statement, it was nonetheless clear that “Ali would not have worked [...] to produce a dishonestly exaggerated Statement of Net Worth without (at the very least) the encouragement of Tahir [...] [Thus] the conditions for accessory liability, as restated by the Supreme Court in the recent *Lifestyle Equities* case, are satisfied”.⁶⁶

However, the fact that Tahir had in fact co-authored the relevant statement meant that liability could be imposed on either basis. Accordingly, there is nothing like the degree of division between the “two separate principles” of accessory liability that Lord Leggatt perceived there to be:⁶⁷ one comprising common design joint tortfeasance; the other comprising PCT. The significance of this point is examined next.

B. In What Sense Is Liability Secondary?

Even though the panel in *Lifestyle Equities v Ahmed* were insistent that PCT is a form of “secondary liability”, they nonetheless failed to clarify the exact way in which this phrase should be understood. Lord Leggatt said of the procurer merely that “[t]heir liability is secondary [...] in the sense that it arises from an act which is connected in some relevant way with the commission of a tort by someone else”.⁶⁸ But saying this leaves unanswered the question of whether liability is secondary in the sense that it is conditional upon, but *also has its outer margins and its availability set by reference to*, the wrongdoer’s liability. Or is it merely

case: i.e. joint liability arising from one person’s committing a tort and “the imputation by the law of the same wrongful act to [another]”, at 159.

⁶⁵ *Njord Partners SMA-Seal v Astir Maritime* [2024] EWHC 1682 (Comm), at [83].

⁶⁶ *Ibid.*, at [208].

⁶⁷ At another point in his speech, he emphasised their separateness in two ways. First, he approved a speech by Lord Toulson in an earlier case in which it had been stressed that procurement liability belonged in “a different category” from common design joint tortfeasance (*Fish & Fish Ltd. v Sea Shepherd UK* [2015] UKSC 10, [2015] A.C. 1229, at [19]–[20]); and second, he stressed the fact that “[a]s well as being insufficient, procuring the commission of a tort is also unnecessary to found liability based on a common design”, see *Lifestyle Equities v Ahmed* [2024] UKSC 17, at [122].

⁶⁸ *Lifestyle Equities v Ahmed* [2024] UKSC 17, at [92].

secondary in the sense that it is *triggered by*, but not necessarily coextensive with, the wrongdoer's liability? In other words, is PCT liability contingent on the wrongdoer's wrongdoing, but unaffected by the fact that the wrongdoer may have a valid defence (or other legally recognised basis on which the amount of damages payable may be limited)?

In addressing this question, it is crucial to examine the extent to which, as Lord Leggatt suggested, there is a very close link between PCT and inducing breach of contract. This is because, if the link between them is a very close one, that would constitute a good reason to think the two actions deal similarly with the question of whether the procurer's liability is coextensive with that of the wrongdoer. And it is certainly the case that previous jurisprudence on inducing breach of contract has addressed the specific issue of what effect the wrongdoer's having a defence will have on the procurer's liability.

When comparing PCT and inducing breach of contract, Stevens has identified a "lack of any necessary link between these different doctrines [...] [and thus] no necessary reason why they should have the same features".⁶⁹ By contrast, Lord Leggatt considered them to be no more than two instantiations of the very same principle. He put it this way: "[l]iability for procuring a breach of contract does more than provide an analogy with liability for procuring another person to commit a tort [...] [as] both forms of liability rest on the same principle [...] [the one] stated in *Lumley v Gye* by Erle J."⁷⁰ Depending on which is the more defensible view, *Lifestyle Equities v Ahmed* may or may not be treated as evidence of what Davies – in the face of weighty academic opposition⁷¹ – contends: namely, that there is a single, general principle of accessory liability that operates throughout the entire law of obligations.⁷² So, which of the two views is preferable and why does it matter?

We may conveniently begin by recalling that, although in *Lumley* Erle J. depicted the procurer of a breach of a contract as a "joint wrongdoer", it is almost always impossible to consider such a person a joint tortfeasor because the wrongdoer commits no tort, only a breach of contract.⁷³ Where, however, the wrong induced by the procurer is a tort, there is no good reason why the procurer and the wrongdoer cannot be joint tortfeasors. Lord Leggatt realised as much when he said:

⁶⁹ Stevens, *Torts and Rights*, 278.

⁷⁰ *Lifestyle Equities v Ahmed* [2024] UKSC 17, at [102].

⁷¹ See e.g. N.J. McBride and R. Bagshaw, *Tort Law*, 7th ed. (London 2024), 646–47; Stevens, *Torts and Rights*, 257.

⁷² For a forceful and sustained argument in favour of such a principle in England and Wales, see Davies, *Accessory Liability*, ch. 6. And, for a jurisdictionally more expansive (and conceptually more fluid) account, see Dietrich and Ridge, *Accessories*, 93.

⁷³ The only exception would be where the wrongdoer induces the breach of a contract giving rise to concurrent liability.

[w]here the primary wrong is a breach of contract [...] [D's] *accessory liability takes the form of a distinct tort*. Where the primary wrong is a tort, however, there is no need to posit a separate tort of procuring another person to commit a tort [...] the procurer is made *jointly liable for the tort committed by the primary wrongdoer*.⁷⁴

If we leave to one side His Lordship's highly questionable suggestion that, in the contract setting, "accessory liability takes the form of a *distinct tort*" and if we assume he was correct in saying that accessory liability is a form of joint liability, then a material difference between the *Lumley* action and PCT comes immediately into view. It is that the procurer's liability need not be coterminous with that of the wrongdoer where inducing breach of contract is in play, but it always will be where (1) PCT is invoked *and* (2) the procurer and the wrongdoer are treated in law as joint tortfeasors. In any such case – absent the need to apply the rules of remoteness, contributory negligence or mitigation – the procurer and the wrongdoer may be sued together or alone *for the whole of the loss suffered by the victim*.⁷⁵ But where the procurer induces the wrongdoer to commit a breach of contract and the wrongdoer's breach is covered by a valid limitation clause, the procurer's liability can easily exceed that of the wrongdoer (because the privity of contract doctrine will prevent the procurer from taking advantage of that limitation clause). In cases of induced breach of contract, one can only say that the procurer and the wrongdoer bear *joint responsibility* in a causal sense: that is, that the acts of both were instrumental in bringing about the victim's loss. However, describing their liability as *joint liability* involves a departure from the orthodox understanding of that phrase, namely, one according to which – in the absence of any remoteness, contributory negligence or mitigation issues – the victim may sue either the procurer or the wrongdoer (or both of them together) *for all of the loss suffered*.⁷⁶

In short, the first difference between inducing breach of contract and PCT is that, only a case of PCT can give rise to *joint liability* as that term is conventionally understood. As we shall see presently, this difference may have important remedial consequences.

A second important difference between the two doctrines is that a well-known justification for the liability of the former variety, which has received endorsement at the highest judicial level, cannot be carried over to justify liability for PCT. It is therefore a difference that causes PCT to stand in need of its own rationale. The point requires unpacking.

⁷⁴ *Lifestyle Equities v Ahmed* [2024] UKSC 17, at [135] (emphasis added).

⁷⁵ *Clark v Newsam* (1847) 154 E.R. 55, 59 (Rolfé B.): "[w]hen two persons have so conducted themselves as to be liable to be jointly sued, each is responsible for the injury sustained by their common act."

⁷⁶ Of course, subsequent contribution proceedings might serve to differentiate the liabilities of the procurer and the wrongdoer.

There is nothing inherently wrong with persuading others to act. Friends and family, for instance, quite often persuade us to do all sorts of things. The question, then, is why it becomes tortious for us to persuade others to do certain things (such as break a contract or commit a tort). On the question of why inducing a breach of contract is tortious, numerous different theories have been advanced over the years.⁷⁷ But one which is especially worthy of note, simply because of who said it, is the one proffered by Lord Hoffmann in *OBG v Allan*. In his view, inducing breach of contract is explicable by reference to the fact that the law “treats contractual rights as a species of property which deserve special protection, not only by giving a right of action against the party who breaks his contract but by imposing secondary liability on a person who procures him to do so”.⁷⁸

But, even if this were true, and even if Lord Hoffmann was not wrong to regard contractual rights as a form of property,⁷⁹ it should nonetheless be apparent that this explanation cannot provide a compelling basis for PCT liability. For, the induced commission of many torts will never result in the violation of a property right. But what if His Lordship’s claim is softened? What if we were to say, instead, that inducing a breach of contract is actionable because, as Bagshaw once suggested, contractual expectancies are “sufficiently important that defendants should have to justify deliberate behaviour intended to bring about their disappointment”?⁸⁰

Placing the emphasis on the importance of the rights or interests to be protected might be said to serve a double function: it would meet the complaint that contract rights are not a form of property as well as the observation that not all torts are concerned with the protection of such rights. Put another way, our adopting this “sufficiently important interests” approach would potentially provide a common rationale for both the *Lumley* tort and PCT. And in doing so, it would remove the objection that, unlike inducing breach of contract, PCT is an action without a defensible rationale. It might even be argued, in defence of this position, that *any interest* protected by a *general tortious duty* warrants

⁷⁷ For a sketch of these various accounts, see Murphy, *Province and Politics*, ch. 3.

⁷⁸ *OBG v Allan* [2007] UKHL 21, at [32].

⁷⁹ Lord Hoffmann’s property right explanation is highly questionable because it contains a self-contradiction. If inducing breach of contract were understood as involving the procurer’s violation of the victim’s property right (which would exist *in rem*), then the procurer’s liability would be primary rather than secondary as His Lordship suggested. Furthermore, his analysis is impossible to square with the knowledge requirement in inducing breach of contract. Insisting on knowledge necessarily makes the victim’s entitlement to sue contingent on what the procurer knows. But the actionability of property rights are contingent in this way. I trespass on your land when I set foot upon without your permission *quite regardless* of whether I know the land is yours: *Basely v Clarkson* (1680) 83 E.R. 565.

⁸⁰ R. Bagshaw, “Can the Economic Torts Be Unified?” (1998) 18 O.J.L.S. 729, 736. See also his claim that “contract creates an interest which tort law [...] [has a] justification in protecting against third parties”: R. Bagshaw, “Inducing Breach of Contract” in J. Horder (ed.), *Oxford Essays in Jurisprudence – Fourth Series* (Oxford 1999), 137.

the description a “sufficiently important interest”. But this contention may run out of road in certain circumstances. Suppose a statute singles out as bearers of a tortious duty a particular class of potential defendants to which the wrongdoer belongs. The very fact that the statute does not impose a *general tortious duty* – namely one borne by all of us – renders it arguable that the procurer should not be in the frame for PCT liability if the procurer induces a breach of the relevant duty.⁸¹ To explain more fully we may conveniently invoke the duty incumbent on highways authorities to keep the roads free from such potholes, since breach of this duty does give rise to an action in tort.⁸² However, it is hard to see how inducing a breach of this duty could expose the procurer to liability on the sufficiently important interest theory. The fact that the relevant duty is not one borne by everyone is arguably enough to show that the interest (which is not backed by a general duty) is not a sufficiently important one.

But, even if this analysis is wrong, it remains true to say that the courts have never adopted Bagshaw’s (softened) version of the property interest theory that has been cited in support of the tort of inducing breach of contract, but which cannot be applied to all cases of PCT.

When taken together, the two differences between inducing breach of contract and PCT just sketched tend to support Stevens’s contention that there is no necessary reason why the two actions should possess the same juridical features.⁸³ The two differences also lend weight to his further contention that “it is a mistake to try to build a *general principle of accessory liability* based upon the tort of procuring a breach of contract recognized in *Lumley v Gye*”.⁸⁴ In other words, they render questionable, not just Davies’s monograph-length defence of this idea,⁸⁵ but also, more importantly, Lord Leggatt’s apparent willingness to countenance such a conception of accessory liability in *Lifestyle Equities v Ahmed*.⁸⁶

In short, the two differences confirm the need to reflect more deeply on the particular juridical components of PCT. For Arnold L.J. was assuredly right to issue the caution (when analysing two cases, in one of which it was alleged that the procurer had induced a breach of copyright) that “[these cases] have to be treated with a little care [...] [since] neither is a case about inducing breach of contract”.⁸⁷

⁸¹ I am indebted to Roderick Bagshaw for his help with this point.

⁸² Highways Act 1980, s. 41; *Mills v Barnsley M.B.C.* [1992] P.I.Q.R. P291, P293 (C.A.).

⁸³ Pointing out the differences would not, of course, do this if the reasons that underpin these differences turn out to be spurious. But that is a separate matter for another day.

⁸⁴ Stevens, *Torts and Rights*, 257 (emphasis added).

⁸⁵ Davies, *Accessory Liability*.

⁸⁶ That His Lordship was attracted to the notion of common principles of accessory liability in the civil law is borne out by the fact that he expressed sympathy for the view that, although equity alone currently recognises accessorial liability for the procurer’s assisting the wrongdoer, “the dividing line between procuring or inducing a person to commit a wrong and assisting that person in its commission can be a vanishingly fine”: *Lifestyle Equities v Ahmed* [2024] UKSC 17, at [133].

⁸⁷ *Northamber v Genec World* [2024] EWCA Civ 428, at [56].

C. The Need for an Actionable Wrong by the Wrongdoer?

A third matter left unresolved by *Lifestyle Equities v Ahmed* is whether the wrongdoer must have committed a wrong that was actionable. Certainly, in *Lumley v Gye*, Erle J. averred that “the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong”.⁸⁸ And, in a subsequent case, Lord Woolf also opined that liability was anchored to the commission of an *actionable wrong*. He said – repeating the key phrase three times in all – “if you procure the commission of an *actionable wrong* by another then you are liable for that *actionable wrong*. The responsibility for the *actionable wrong* is a form of secondary liability”.⁸⁹ These words, however, were uttered obiter. Thus, bearing in mind the fact that inducing breach of contract and PCT cannot simply be seen as two instantiations of the very same principle, it follows that there is nothing in these dicta instantiating a rule whereby an actionable wrong must have been committed before the victim can sue the procurer for PCT.⁹⁰

*Wilson v Housing Corporation*⁹¹ comes arguably closer to laying down such a rule as, there, Dyson J. was required to consider a claim based on the defendant’s having induced the commission of a tort: a breach of statutory duty to be precise. He refused to hold the defendant liable, however, on the footing that “[i]t is one thing to recognise as a cause of action inducing the breach of a statutory duty *which is actionable in the courts* [...] [but] quite a different matter to recognise as a cause of action inducing the breach of a statutory duty *which is not actionable*”.⁹² But even this is not determinative of the issue since the decision was one at first instance; and, although what Dyson J. said was not merely obiter, it too cannot be treated as a binding authority.

Doubtless mindful of the non-binding nature of the various judicial utterances on this subject, several scholars have argued that the procurer’s liability need not be regarded as contingent on the victim’s ability to sue the wrongdoer. In their view, the fact that the wrongdoer has acted in a way that satisfies all the elements of a tort will suffice to secure the procurer’s liability even if, as it turns out, the wrongdoer is

⁸⁸ (1853) 118 E.R. 749, 755.

⁸⁹ *Credit Lyonnais v E.C.G.D.* [2000] 1 A.C. 486, 496 (emphasis added).

⁹⁰ In *Law Debenture Trust Corp. v Ural Caspian Oil Corp. Ltd.* [1993] 1 W.L.R. 138, 151, Hoffmann L.J. doubted whether there could be such liability where the wrongdoer’s non-performance was covered by a *force majeure* clause saying that “it is not easy to classify non-performance which involves no breach of contract as an ‘actionable wrong’”. Years later, he reiterated the point – but again only obiter – saying that “[i]f there is no primary liability, there can be no accessory liability”: *OBG v Allan* [2007] UKHL 21, at [8].

⁹¹ [1998] I.C.R. 151.

⁹² *Ibid.*, at 155 (emphasis added). The reason there was held to be no actionable wrong was because, as a matter of statutory interpretation, breach did not create a tortious right of action. (Breach was only capable of redress by a specialist tribunal.) As breach did not constitute a tort, any procured breach could not be seen as PCT.

able to invoke a defence that will negate the wrongdoer's own liability. Ridge and Dietrich, for example, argue that "in private law an accessory can be liable even if PW [the wrongdoer] is not because, for example, PW can establish an excuse".⁹³ In similar vein, Davies contends that, where the wrongdoer has a valid defence, it "could be personal only to the primary tortfeasor, and not extend to the accessory" such that "in a defamation case, the primary tortfeasor may have a defence of qualified privilege, but a defendant could still be liable as an accessory".⁹⁴

The question of who is right here (on whether the wrongdoer's defence will also negate the procurer potential liability for PCT) is not merely an academic matter. This is because a number of the key cases concern the infringement of intellectual property rights; and in this sphere there exist numerous statutory defences that could be available to the wrongdoer. It is a pity, then, that *Lifestyle Equities v Ahmed* did not resolve the disagreement between what the courts and academic commentators have said in this regard.

The truth is that neither position is defensible by reference to *firm authority*. The relevant judicial pronouncements were all made obiter or at first instance while the views expressed by jurists are equally without secure foundations. Ridge and Dietrich, for example, fail to cite any case at all in support of their claim, whereas the one case invoked by Davies, *Egger v Viscount Chelmsford*,⁹⁵ was not one concerning PCT. It was a defamation case in which the procurer *authorised* (but did not induce), the wrongdoer's publication of the offending material that happened to be covered by a defence.

Arguably relevant to breaking the deadlock is the fact that some of the most pertinent intellectual property legislation suggests that the wrongdoer's having a defence will not exonerate the procurer. For example, under section 60(6) of the Patents Act 1977, the fact that X has a defence in relation to the supply of a patented invention will not be enough to confer upon Y (to whom it is supplied) the status of a person entitled to work the invention.⁹⁶ But caution must again be exercised here since the Act does not specifically deal with cases in which the supply of the invention by X to Y was *induced or procured*.

Since there is nothing to which we can point which *authoritatively* settles the question of whether an actionable wrong by the wrongdoer must be established, we may reasonably ask this question: If we were to start from scratch, what would be the best approach to adopt? And by way of response, it is submitted that, for all that academic commentators have been unable to point to a case that puts their position beyond question, it

⁹³ Ridge and Dietrich, "Challenging Conceptions", 401.

⁹⁴ Davies, *Accessory Liability*, 183.

⁹⁵ [1965] 1 Q.B. 248 (C.A.).

⁹⁶ I am grateful to Lionel Bently for drawing this to my attention.

is nonetheless preferable to think that they have the weightier claim, namely, that the procurer may be liable for PCT even where the wrongdoer has a valid defence. In large part, this is because there is no inconsistency between saying (1) the wrongdoer has committed a wrong and (2) the wrongdoer is not liable for the primary wrong they have committed because they have a valid defence. As a matter of logic, the wrongdoer will never need a defence without there being a primary wrong to which it can be applied. It therefore follows that a defence should be regarded as something that negates liability, rather than the wrong itself. And once this is recognised, the way is *largely clear* to regard the procurer as having induced the commission of a wrong by the wrongdoer, even if the wrongdoer cannot be sued in respect of that wrong. This is certainly the view taken in the highly pertinent work of both Ridge and Dietrich,⁹⁷ and Davies⁹⁸ (as well as in the more general scholarship of certain other heavyweights⁹⁹).

But there are two plausible objections that might be raised here. First, it could be said that reaching this conclusion relies on a particular claim – that defences negate liability but not wrongdoing – for which *judicial* support is absent, so one might just as plausibly assert that defences do indeed negate wrongs. This, of course, is true. But this assertion still runs up against the logic of saying that one only needs a defence if one has done something that is *prima facie* wrongful.

Second, the idea that the procurer may be liable even where the wrongdoer has a defence may be resisted on the basis it would generate unjust results in certain circumstances. For example, let us suppose that the procurer, a university professor, creates a link to online material and thereby induces her students to both visit a particular website and make reproductions. If the procurer induced the students to do this *but knew* that they would have a defence based on conducting research, could we justly hold the procurer liable for inducing their breaches of copyright? On the approach favoured here, it would seem as if the procurer should be held liable. But on closer analysis this need not necessarily be the case. For, it was acknowledged in *Lifestyle Equities v Ahmed* that, beyond knowledge of “the essential facts which make the act unlawful” (as opposed to precise knowledge of the law),¹⁰⁰ the procurer must also

⁹⁷ Ridge and Dietrich, “Challenging Conceptions”, 401: “if a defence takes away the inherent wrongfulness of PW’s [the wrongdoer’s] conduct altogether such that no wrong at all has been committed [...] then accessory liability rightly cannot arise.”

⁹⁸ Davies, *Accessory Liability*, 183.

⁹⁹ See J. Goudkamp, *Tort Law Defences* (Oxford 2016), 79. An ultimately identical view is expressed in A. Drassinower, “Exceptions Properly So-Called” in Y. Gendreau and A. Drassinower (eds.), *Langues et Droit D'Auteur – Language and Copyright* (Cowansville, Quebec 2009). See also J. Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford 2007). All of these authors distinguish between absent elements (things that cause us to deny even a *prima facie* claim) and defences proper which come into operation only once a *prima facie* claim has been made out.

¹⁰⁰ *Lifestyle Equities v Ahmed* [2024] UKSC 17, at [108].

have *intended* that the wrongdoer should “do an act which the defendant knew was a wrongful act”.¹⁰¹ It might reasonably be argued, therefore, that, although the procurer knew the students would make a reproduction (“the facts which make the act unlawful”), the procurer could not be said to *have intended that the students should do an act which the procurer knew was a wrongful act*. In fact, in knowing that the students would have a defence, but presumably *not* the intricacies of the law, it seems much more plausible to say that the procurer intended the students to do something she believed to be lawful.

D. Intentionality and Remedies

Acts or words designed to procure the commission of a tort are, by definition, acts or words grounded in deliberation on the procurer’s part. Accordingly, it was held in *Lifestyle Equities v Ahmed* that the mental element applicable to the procurer in this form of wrongdoing contains both a knowledge component and an intentionality component. Specifically, Lord Leggatt insisted: “[w]hat is required is that the defendant acted in a way that was *intended* to cause another party (the primary wrongdoer) to do an act which the defendant *knew was a wrongful act*.”¹⁰²

His stressing that this mental element would apply in *all cases* was important because it contradicted what had been said in some earlier decisions, namely, that whatever mental element (if any) conditioned the wrongdoer’s liability, should also be applied to the procurer.¹⁰³ The matter was of central importance in *Lifestyle Equities v Ahmed* because, as we have seen already, the primary wrong in that case was a trade mark infringement. This is a strict liability tort for which intentional wrongdoing is not required of the tortfeasor. If what was said in the earlier cases had been followed, then the defendants in *Lifestyle Equities v Ahmed* would have faced liability for inducing the infringement of a trademark on a strict liability basis: there would have been no need to show that they intended or knew that the wrongdoer was committing a wrong. But this is not how things played out. Lord Leggatt accepted that the wrongdoer’s liability for a trademark infringement was strict, but he was emphatically of the view that liability for *procuring such an infringement* contained an intentionality component. He stressed the need for the defendants’ intention as well as their knowledge of the “essential facts which make the act unlawful”.¹⁰⁴

To some extent, the high degree of emphasis His Lordship placed on the procurer’s knowledge was apt to mislead in relation to what is crucially

¹⁰¹ *Ibid.*, at [107].

¹⁰² *Ibid.*, at [107] (emphasis added).

¹⁰³ *Ibid.*, at [90]. Cf. *C. Evans & Sons Ltd. v Spritebrand Ltd.* [1985] 1 W.L.R. 317, 329 (C.A.) (Slade L.J.).

¹⁰⁴ *Lifestyle Equities v Ahmed* [2024] UKSC 17, at [108].

important for the purposes of this action. For whilst there can be doubt that the need for knowledge is important,¹⁰⁵ and thus worthy of the extensive discussion it received across 17 paragraphs of Leggatt's judgment,¹⁰⁶ it is nonetheless a legitimate point of criticism that, in *Lifestyle Equities v Ahmed*, the significance of the requirement that there be intention received comparatively little analysis. Indeed, Lord Leggatt did no more than state that "[w]hat is required is that the defendant acted in a way that was intended to cause another party (the primary wrongdoer) to do an act which the defendant knew was a wrongful act".¹⁰⁷ And when he came finally to dismiss Lifestyle Equities' appeal, all mention of the intentionality component disappeared altogether.¹⁰⁸ Yet there are two important ways in which intention, being an ingredient of PCT liability, might affect the extent of the procurer's liability. First, the fact that the wrongdoer acts intentionally could well affect the remoteness rule that should be applied in order to determine the outer margins of the procurer's liability. And, second, it might also affect the kinds of damages available. Some thoughts on both of these matters are in order.

As we have already observed, when Lord Leggatt said that, in a case of PCT, the procurer is "jointly liable for *the* tort,"¹⁰⁹ he did not make clear whether he saw the outer margins of the procurer's liability as being set by reference to "the tort" committed by the wrongdoer or whether he thought the wrongdoer's liability could be more extensive. The question is pertinent because it is possible to envisage a situation in which the procurer intentionally encourages the wrongdoer to act in such a way that the wrongdoer unknowingly commits a strict liability tort against the victim. In such circumstances – say, where the procurer persuades the wrongdoer to help himself to chattels that, unbeknownst to the wrongdoer, belong to the victim rather than the wrongdoer – the wrongdoer's conversion would attract the application of the *Wagon Mound* remoteness rule.¹¹⁰ Established authority makes clear that the more expansive rule of remoteness – the one in *Re Polemis*¹¹¹ – is

¹⁰⁵ A knowledge requirement helps keep accessory liability for PCT within defensible limits. Its existence means that we should generally feel free to encourage others to pursue their personal projects without exposing ourselves to tortious liability of the achievement of those happens, without our knowing this, to be a tort.

¹⁰⁶ *Lifestyle Equities v Ahmed* [2024] UKSC 17, at [126]–[142].

¹⁰⁷ *Ibid.*, at [107].

¹⁰⁸ He said that, in order to hold the defendants (the Ahmeds) liable, "it would have been necessary to show that [they] [...] had knowledge of (or turned a blind eye to) the facts which made the use of the 'Santa Monica Polo Club' signs by Hornby Street infringements of Lifestyle's trade marks. But no such case was advanced [...] [hence] Lifestyle's case on liability was therefore not made out": *ibid.*, at [181].

¹⁰⁹ *Ibid.*, at [136] (emphasis added).

¹¹⁰ *Overseas Tankship (UK) Ltd. v Morts Dock & Engineering Co. (The Wagon Mound)* (No. 1) [1961] A.C. 388 (P.C.) laid down a remoteness rule according to which harm is regarded as too remote if it was not of a reasonably foreseeable kind. It has specifically been held to apply to cases involving the unknowing conversion of another's goods: *Kuwait Airways Corp. v Iraqi Airways Co. (No. 6)* [2002] UKHL 19, [2002] 2 A.C. 883.

¹¹¹ [1921] 3 K.B. 560.

confined to wrongdoers who intentionally convert the victim's property¹¹² since it is only "a rational and defensible strategy to impose wider liability on an intentional wrongdoer".¹¹³ But if intentional wrongdoing is the key to the use of this broader rule – and the courts have repeatedly said this – then the fact that the procurer intentionally induced the wrongdoer's conversion of the victim's chattels might be thought to justify the application of the *Polemis* rule and thus lead to very significant practical consequences.¹¹⁴

At the same time, if Lord Leggatt's reference to "joint liability" did not carry with it the implication that the outer margins of *both* the procurer's and the wrongdoer's liability should be set by reference to the wrongdoer's tort, then the intentionality behind the procurer's conduct might also be considered a sufficient basis on which to make the procurer liable to pay aggravated damages. This is because such damages are also keyed to deliberate wrongdoing.¹¹⁵ Unfortunately, *Lifestyle Equities v Ahmed* was silent on this matter, too. What then, would be the best way to proceed in cases in which the procurer has intentionally procured the morally innocent commission of a strict liability tort?

In *Broome v Cassell & Co. Ltd.*,¹¹⁶ the court's focus was on exemplary damages. But even so, this case arguably provides a helpful starting point in resolving the two questions just raised. Lord Hailsham said there that "awards of punitive damages [...] should reflect only the lowest figure for which any of them can be held liable".¹¹⁷ Reasoning by analogy – namely treating the more expansive remoteness rule and aggravated damages as means by which retributive justice may be effected¹¹⁸ – it might then be argued that the procurer ought not to be exposed to either of these two liability-expanding mechanisms in a case in which the procurer procured the innocent commission of strict liability tort. On the other hand, an important counter argument is available. It is one that lays emphasis on the quasi-independent (albeit contingent) nature of the procurer's liability.

To be more specific, what is envisaged here – and the notion belongs to Davies – is that the procurer's accessory liability should be treated as

¹¹² *Kuwait Airways v Iraqi Airways* [2002] UKHL 19, at [103]–[104].

¹¹³ *Smith New Court Securities Ltd. v Citibank N.A.* [1997] A.C. 254, 279 (H.L.) (Lord Steyn).

¹¹⁴ In *Kuwait Airways v Iraqi Airways* [2002] UKHL 19, the main difference in issue was the value of numerous converted aircraft that were unforeseeably destroyed as a direct consequence of the original conversion.

¹¹⁵ In the leading case, Lord Devlin made clear the need for intentionality, stressing the importance of the procurer's "motives" as well as the procurer's "malevolence or spite or manner of committing the wrong": *Rookes v Barnard (No. 1)* [1964] A.C. 1129, 1221 (H.L.). See also *Thompson v Commissioner of Police of the Metropolis* [1998] Q.B. 498 (C.A.) (false imprisonment); *Khodaparast v Shad* [2000] 1 W.L.R. 618 (C.A.); (malicious falsehood); *Archer v Brown* [1985] Q.B. 401 (deceit).

¹¹⁶ [1972] A.C. 1027 (H.L.).

¹¹⁷ *Ibid.*, at 1063.

¹¹⁸ For such an argument, see J. Goudkamp and E. Katsampouka, "Punitive Damages and the Place of Punishment in Private Law" (2021) 84 M.L.R. 1257, 1271–79.

“a form of ‘primary’ liability, although it is clearly not free-standing liability [...] [but rather] liability [that] is parasitic upon the primary wrong”.¹¹⁹ On this parasitic-but-nonetheless-different wrongdoing approach – made credible by Lord Leggatt’s insistence that the procurer’s liability will invariably require intention even though this need not be true of the wrongdoer – it is defensible to award the victim aggravated damages and apply the broader remoteness rule in a case of PCT.¹²⁰ For, as we have seen, intentional wrongdoing is key to both of these liability-expanding devices.

Further possible support for this approach may be gleaned from the *broad* (though by no means exact) analogy that exists between PCT and inducing breach of contract. Specifically, one may point to the fact that is possible for the procurer to be liable to a greater extent than the wrongdoer in a case of inducing breach of contract where the wrongdoer has a valid limitation clause. Certainly, Erle J. was alive to this possibility when he observed that “he who procures the [breach of contract] ... might justly be made responsible *beyond the liability of the contractor*”.¹²¹ If one accepts the *broad analogy*, one can perfectly well argue that there is no reason in principle why the victim’s potential remedies against the procurer (where the procurer has induced the commission of a tort) should be identical with ones available against the wrongdoer.

Because *Lifestyle Equities v Ahmed* provides no real clues in relation to the procurer’s possible exposure to the more expansive remoteness rule and aggravated damages, the fundamentality of the question with which this article has been concerned comes into even sharper relief. It will be hard to say confidently what the courts should do in relation to these satellite issues until the precise nature of accessorial liability for PCT has been explained. Is it a form of secondary liability that is so intimately bound up with the wrongdoer’s wrongdoing that the procurer’s liability ought never to be more expansive than the wrongdoer’s? Or is it, as Davies suggests (without fully articulating his reasons) “a form of ‘primary’ liability”?

IV. CONCLUSION

Although there is no shortage of judges or jurists who have been prepared to state forthrightly that PCT will generate tortious liability, the precise

¹¹⁹ Davies, *Accessory Liability*, 256. Note that, on this approach, only talk of accessory, but not secondary, liability might be countenanced.

¹²⁰ For others supporting the view that we “may distinguish between the respective culpability of the parties and award different remedies”, see Dietrich and Ridge, *Accessories*, 12.

¹²¹ *Lumley v Gye* (1853) 118 E.R. 749, 756 (emphasis added). In similar vein, Crompton J. averred (at 754) that “the damages occasioned by [the inducer] [...] might be calculated on a very different principle from the amount of the debt [...] recoverable on the contract”. It is also clearly the case that the victim will more readily be granted an injunction against the procurer than against the wrongdoer: see e.g. *Emerald Construction Co. Ltd. v Lowthian* [1966] 1 W.L.R. 691 (C.A.). And, of course, specific performance is only available against the wrongdoer.

juridical nature of that liability has never been made entirely clear. A trawl of the relevant case law as well as of scholarly works throws up a surprising range of obviously irreconcilable views. Perhaps even more surprising, however, is the fact that very little of what has been said on this front could (at least until recently) be dismissed as obviously flawed. No court had ever laid down definitively that PCT comprises a rule of accessory liability rather than a free-standing tort. Nor, until *Lifestyle Equities v Ahmed*, had any court in England and Wales made clear that PCT is a doctrine quite distinct from (1) common design joint tortfeasance or (2) the rules whereby one person's acts may be attributed to another.

Even those scholars who have devoted considerable thought to the contours and mechanics of accessorial liability in the civil law have stopped conspicuously short of spelling out *exactly* what they consider the juridical nature of PCT to be. Davies – the author of the most sustained analysis of accessory liability in England and Wales – writes simply: “[w]hilst such liability is clearly parasitic upon the occurrence of a primary wrong, the nature of the accessory's wrong is distinct from that of the primary wrongdoer.”¹²² Yet his saying that the procurer's wrong is *distinct from* the wrongdoer's merely tells us *what it is not* rather than what precisely it is. Similarly Delphic is the view of Ridge and Dietrich – the leading commentators in Australia – that the procurer's “liability is accessorial even though *in form* [...] [it] is for the same tort”.¹²³ Quite what is meant by saying that, “*in form*”, the procurer's liability is for “the same tort” is not explained. Perhaps, in line with Davies, it is meant to convey a type of primary liability that somehow falls short of free-standing tort status?

Such was the uncertainty that preceded *Lifestyle Equities v Ahmed*. In its wake, we can now be confident that the courts will no longer entertain the notion that PCT constitutes an independent tort or that it involves the attribution of the wrongdoer's conduct to the procurer. It also seems highly unlikely that we shall witness a return to the courts' including among PCT's elements the requirement that there be a common design between the procurer and the wrongdoer. But by no means all the questions that surround PCT have been answered. For one thing, it is unclear that future courts will persevere with Lord Leggatt's suggestion that inducing breach of contract and PCT are just two instantiations of the same genus principle. After all, as was demonstrated at some length, there are several observable differences that exist between the two doctrines, such that the relationship between them be characterised as no more than *broadly analogous*.

¹²² Davies, *Accessory Liability*, 284–85.

¹²³ Ridge and Dietrich, “Challenging Conceptions”, 387 (emphasis added).

Even more unclear are two other matters: (1) whether future courts will continue to insist that the wrongdoer's wrong be actionable before the procurer can be held liable and (2) whether the procurer's wrongdoing will be seen as sufficiently distinct from the wrongdoer's for the procurer to face the more expansive rule of remoteness laid down in *Re Polemis* or be made to pay aggravated damages. On the first question, the balance of argument favours saying that the wrongdoer's tort need not be actionable in order for the procurer to incur accessorial liability. The fact that the wrongdoer has a defence does not negate his or her commission of a tort.¹²⁴ On the second – bearing in mind that the procurer must always have acted intentionally in a case of PCT, there seems to be no good reason why the procurer's liability may not be more expansive than that of the wrongdoer.

All things considered, then, we might usefully build upon Davies's rather cryptic claim that PCT involves “form of ‘primary’ wrongdoing”. Instead, we might express the matter in the following way. In a case of PCT, the procurer's liability need not be coterminous with the wrongdoer's liability and it is only appropriate to consider it a form of “secondary liability” (as per *Lifestyle Equities v Ahmed*), insofar as its existence is contingent upon (but not defined by) a free-standing tort committed by the wrongdoer.

¹²⁴ A loose parallel exists here with a case in which the procurer was held to have committed a tort (albeit one that was not actionable) where he defrauded the victim but only in a way that (fortunately for C) resulted in no loss being suffered: see *National Phonographic Co. Ltd. v Edison-Bell Consolidated Phonograph Co. Ltd.* [1908] 1 Ch. 335 (C.A.).