

*The Jurisprudence of Lord Hoffmann: A Festschrift in Honour of Lord Leonard Hoffmann* BY PAUL S DAVIES AND JUSTINE PILA, EDS [Oxford and Portland: Hart Publishing, 2015. xxxviii + 384 pp. Hardcover: £50.00]

In April 2014, a conference was held at St Catherine's College, Oxford, to mark the 80th birthday of Lord Leonard Hoffmann, widely recognised as one of the greatest jurists of our time. This volume brings together as a festschrift edited versions of the papers delivered at that conference. All are written by academics with current or former ties to the University of Oxford, the institution with which Lord Hoffmann's legal career is inextricably linked. For it was to The Queen's College, Oxford that Lord Hoffmann travelled as a Rhodes scholar from his native South Africa in 1954 to study for the BA in Jurisprudence and Bachelor of Civil Law—subsequently winning the Vinerian Scholarship for his performance in the final examinations and being appointed Stowell Civil Law Fellow at University College—and it was to Oxford that he returned as a Visiting Professor when he retired from the Judicial Committee of the House of Lords in 2009.

In the intervening years, Leonard (or Lennie) Hoffmann had an illustrious career. Having published the first edition of *The South African Law of Evidence* in 1963, he was called to the Bar from Gray's Inn in 1964, and during the next nine years established himself as an extremely successful barrister while also maintaining his position as an Oxford tutorial fellow (finally leaving academe in 1973 in order to concentrate on his practice at the Chancery Bar). Appointed Queen's Counsel in 1977, he served for five years from 1980 as a part-time member of the Courts of Appeal of Jersey and Guernsey, and in 1985 was appointed a judge of the Chancery Division of the High Court. There followed swift elevation to the Court of Appeal in 1992 and, as Baron Hoffmann of Chedworth, to the Judicial Committee of the House of Lords in 1995. Lord Hoffmann, who in 1998 was also appointed a non-permanent judge of the Court of Final Appeal of Hong Kong, remained a member of the Judicial Committee (from 2007, as Second Senior Law Lord) until his retirement in April 2009, just months before the Court's powers were transferred to the newly-formed Supreme Court.

In his foreword to *The Jurisprudence of Lord Hoffmann*, Lord Sumption of the Supreme Court—himself a formidable practitioner and jurist—describes Lord Hoffmann as “probably the most creative legal mind to sit on the Judicial Committee of the House of Lords in the last half-century of its existence,” adding that “[h]is prose style, with its combination of informality, precision and humour. . . has always made his the first speech that one turns to” (at p v). And, as Lord Sumption goes on to observe, Lord Hoffmann's speeches display a prodigious level of expertise across a dazzling array of subject-matter—due no doubt to “the exceptional range of his legal interests” and his “marked ability to surmount the partitions between specialised areas of law” (at pp v, vi).

Many of the areas in which Lord Hoffmann has shown such skill and versatility are represented in the book's 19 chapters. The book begins with a short introductory chapter in which Colin Tapper examines Lord Hoffmann's scholarship in the law of evidence. The next five chapters are devoted to tort law—the largest single area of law to be represented—with a brief general discussion by Tony Honoré

of responsibility for harm to others, followed by longer and more specific analyses of Lord Hoffmann's influence on the development of tort law by Sarah Green, who discusses causation in negligence, James Goudkamp, who writes on illegality, Roderick Bagshaw, who considers the economic torts, and Robert Stevens, whose primary focus is on Lord Hoffmann's role in clarifying the law with respect to the liability of public bodies. Three chapters—those of Paul S Davies on commercial contracts, Andrew Burrows on remoteness in contract, and Francis Reynolds on bills of lading—deal with contract law, and the remaining contributions analyse Lord Hoffmann's influence in a plethora of areas, with chapters by Sandra Fredman on human rights law, Jacob Rowbottom on free speech and the media, Alison L Young on public law, Justine Pila on intellectual property law, Alan Bogg and Hugh Collins on employment law, Judith Freedman on tax law, Frederick Wilmot-Smith on mistakes of law and restitution, Roger Smith on property law, Ben McFarlane on proprietary estoppel and Jennifer Payne on corporate attribution.

The chapters on torts (the area of law with which this reviewer is most familiar) provide an excellent demonstration of the depth and range of Lord Hoffmann's influence. In the chapter entitled "But for Lord Hoffmann, How Would the Causal Inquiry in Negligence Look?", Sarah Green argues not only that the rules relating to causation in negligence would have been quite different without Lord Hoffmann's involvement in key decisions, but also that the law would thereby have been the poorer. Green focuses on his Lordship's participation in the three major causation cases decided by the House of Lords during the first decade of this century: his role in the unanimous but radical decision to vary the rules of causation in the mesothelioma case of *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 [*Fairchild*] and his subsequent emphasis—both in *Barker v Corus* [2006] 2 AC 572 and his extra-judicial writing—on the need to limit the scope of *Fairchild*; his rejection as a majority judge in *Gregg v Scott* [2005] 2 AC 176 of claims for loss of chance in the context of medical negligence; and his minority judgment against a variation of the rules on causation, also in the context of medical negligence, in *Chester v Afshar* [2005] 1 AC 134. She argues that, in each respect, Lord Hoffmann's resistance to a creeping erosion of the fundamental requirements for establishing causation was correct, concluding that "[p]erhaps the most distinctive feature of his approach to the causal inquiry is that it is self-consciously crafted to serve forensic, as opposed to philosophical, concerns" (at p 30). This conclusion in the specific area of causation ties in with the more general observation by Lord Sumption in his foreword that "[p]erhaps the principal hallmark of Lord Hoffmann's judicial work is the avoidance of redundant moralising" (at p vii).

In "A Long, Hard Look at *Gray v Thames Trains Ltd*", James Goudkamp examines Lord Hoffmann's oft-cited and frequently-analysed judgment in *Gray v Thames Trains Ltd* [2009] 1 AC 1339 [*Gray*], in which his Lordship eschewed the many tests which had previously been used to determine whether a claimant's illegal conduct would lead to a rejection of his action against a defendant in negligence, employing instead what he termed as the 'narrow' and 'wide' rules for determining cases involving a plea of illegality (the former preventing recovery for losses flowing from a claimant's punishment for his criminal act, the latter preventing compensation for any consequence of that act). While not agreeing entirely with some of the justifications given by his Lordship for these rules, Goudkamp nevertheless considers that

Lord Hoffmann's speech in *Gray* brought "welcome clarity to the law" by extracting from "the jurisprudential debris created by a series of decisions of the Court of Appeal" two separate (and distinct) rules for determining the applicability of the doctrine of illegality in negligence (at pp 57, 58). Echoing Lord Sumption's sentiments on Lord Hoffmann's exceptional writing style, Goudkamp also observes that the judgment is a "triumph in more ways than one. . . beautifully clear. . . wonderfully rich yet succinct exploration of one of the most challenging corners of the law of torts" (at p 58).

Lord Hoffmann's key judgment in *OBG v Allan* [2008] 1 AC 1 [*OBG*] in which the House of Lords re-organised the general economic torts—forms the basis for Roderick Bagshaw's chapter, "Lord Hoffmann and the Economic Torts". Bagshaw analyses Lord Hoffmann's role in separating the tort of procuring or inducing breach of contract from the tort of intentionally causing loss by unlawful means, and concludes that in so doing his Lordship "exterminated the misbegotten chimera of direct interference with contractual relations" (at p 59). Although in Bagshaw's opinion Lord Hoffmann's approach arguably resulted in an over-simplification of this area of law, he nevertheless shares the "conviction that predictability is important" and therefore concludes that the decision in *OBG* "provides the best foundations on which to build the future of the general economic torts" (at p 84).

Robert Stevens in "Salvaging of the Law of Torts" takes an even more positive view of Lord Hoffmann's judgment in *OBG*, which he suggests managed to achieve "what had seemed. . . to be the impossible task of sorting out the dog's dinner that the Court of Appeal had made of the economic torts" (at p 85). Stevens also notes the many other important contributions made by Lord Hoffmann across a range of torts such as nuisance, the rule in *Rylands v Fletcher*, occupiers' liability, nervous shock and economic loss, concluding that probably his greatest single achievement—through his judgments in *Stovin v Wise* [1996] AC 923 (HL) and *Goringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057 (HL)—was "in correcting the terrible mess that the liability of public bodies in tort, particularly for negligence, had become" (at pp 85, 86).

Other chapters indicate Lord Hoffmann's range and depth of analysis in various areas of law. In "The Meaning of Commercial Contracts", for example, Paul S Davies examines his judgment in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 (HL), which provides "the leading guidance" on the interpretation of written contracts (at p 215). In "Retrospective Mistakes of Law", Frederick Wilmot-Smith, examining his Lordship's influential speech in *Kleinwort Benson v Lincoln County Council* [1999] 2 AC 349 (HL) (the decision which overruled the practice of two centuries by allowing restitution in relation to mistake of law), observes that even though he decided comparatively few cases concerning the law of unjust enrichment, "his contribution to each was striking" (at p 289). In "The Jurisprudence of Lord Hoffmann in Property Law" Roger Smith, discussing *Bruton v London and Quadrant Housing Trust* [2000] 1 AC 406 (which held that a licensee is capable of creating a lease with exclusive possession), observes that Lord Hoffmann's judgment in that case was marked by "persuasive legal analysis" (at p 310). And in "Lord Hoffmann, Tax Law and Principles", Judith Freedman comments on his strong preference for purposive construction, a theme which is echoed in "Lord Hoffmann and Purposive Interpretation in Intellectual Property Law," where

Justine Pila refers to his special interest in—and “enormous”, indeed “unrivalled” contribution to—the law of intellectual property (at p 161).

This brief examination of about half the book’s chapters demonstrates the phenomenal scope of Lord Hoffmann’s jurisprudential contributions. The extent of his influence becomes even more apparent when one considers that (the occasional brush with controversy notwithstanding—as in the employment law case of *Johnson v Unisys Ltd* [2003] 1 AC 518, discussed by Alan Bogg and Hugh Collins in “Lord Hoffmann and the Law of Employment: The Notorious Episode of *Johnson v Unisys Ltd*”, where his Lordship led an “unwise departure from common law principle” (at p 214) in rejecting an employee’s claim for substantial damages resulting from a summary dismissal) his Lordship made equally significant contributions to the laws of, *inter alia*, evidence, free speech, public law and company law. He also sat in a number of human rights cases—and indeed it was in his dissenting judgment in *A v Secretary of State for the Home Department* [2005] 2 AC 68 at para 97, objecting to the indefinite detention without trial of foreign suspects under the *Anti-Terrorism, Crime and Security Act 2001* (UK), c 21, that he famously stated: “[t]he real threat to the life of the nation. . . comes not from terrorism but from laws such as these.”

It is rare for a book to bring together with such charm and erudition so many aspects of the law. This book achieves that rare feat. Like the judgments of the man in whose honour it was written, its chapters are scholarly, accessible and very well-written. It is a book in which we can all find something of interest, whether in offering a different take on areas with which we are already familiar or in stimulating our desire to learn more of areas about which we know little. *The Jurisprudence of Lord Hoffmann* is therefore to be highly recommended, both as a fascinating book and as a testament to the work of a very great lawyer.

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