FOREWORD (PRIVATE LAW)

Professor Donal Nolan
Francis Reynolds and Clarendon Fellow and Tutor in Law, Worcester College
Professor of Private Law, University of Oxford

In its purest form, the Oxford tutorial is a discussion of an essay written by the student on reading assigned by the tutor. This is no accident. The writing of the essay forces the student to marshal his or her thoughts on the topic and the process of reducing them to writing transforms them from ideas and inclinations into fully formed propositions and positions. In the tutorial itself those propositions and positions are probed, tested and challenged by the tutor, but because it is the student's essay that serves as the stepping off point for the discussion, the Oxford tutorial is "student-centred" teaching in the true sense of that phrase.

Student writing is generally limited to formative essays written during the degree—such as the Oxford tutorial essay—— as well as longer dissertations which afford students the opportunity to explore one particular topic in greater depth. However, the *Oxford University Undergraduate Law Journal* enables students to reach a wider audience for their ideas. The value and significance of that endeavour is readily apparent from the essays on a private law theme in this volume of the journal. All four papers forced me to think hard about the issues under discussion, and where the issue was one on which I had a fully formed opinion I was made to question it.

In her essay on termination for breach of contract, Bertilla Chow questions the threefold classification of contractual terms into conditions, warranties and innominate terms, which she argues fails to uphold the intentions of the parties, unduly favours the party in breach and provides insufficient certainty.

She proposes that the approach of *ex ante* classification of terms be replaced with an *ex post* enquiry of great sophistication. This is a thought-provoking discussion of a topic of considerable practical and theoretical significance. I found the author's observations concerning the role of party intention in the application of the *Hongkong Fir* test and the inappropriateness of applying the same test for discharge in cases of frustration and breach particularly helpful for my own thinking on this question.

Stephanie Bruce-Smith writes on the omissions liability of public authorities in negligence. This issue has been the subject of much academic and judicial attention over the course of the last decades, and so it might be thought that there is nothing new to be said. However, the author dispels any such idea. Thus far, the debates in the case law and literature have centred on whether public authorities should be liable in negligence only when a private party would be, or whether more extensive liability should be imposed. The former view now represents the law, but nagging doubts remain as to the suitability of private law concepts such as assumption of responsibility where a public authority is being sued for alleged failures in its performance of its public functions. The author's solution is novel: to apply what would in effect be a *more limited* negligence liability regime to public bodies, rejecting automatic application of private law principles across the board, and in particular excluding liability on the basis of assumption of responsibility where the claim rests on an alleged failure in the performance of a peculiarly public function. The slack this would leave should then be taken up by public law mechanisms. A shift of focus from private to public law in this context may be hard for common lawyers to swallow, but if private law mechanisms do indeed prove inadequate to the task then the fresh thinking in this paper shows a possible way forward.

Charles Redmond's contribution concerns another topical private law question, the defence of illegality in the

aftermath of the decision of the Supreme Court in *Patel v Mirza*. However, rather than focusing on the substantive law in this area, his paper considers the implications of that decision for appellate interference with trial court determinations on the illegality issue. Drawing on recent discussion of this question in the Court of Appeal and Supreme Court in *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd*, the author argues persuasively that the approach set out in *Patel* amounts to the exercise of a discretion, and that an appellate court should therefore exercise restraint in such a case, and interfere only if the trial judge has made an error of principle or reached a result that is plainly wrong. Amidst the flood of case law and commentary on illegality in recent years, little attention has thus far been given to the issue of appellate intervention, and this valuable essay forces us to confront that question squarely, as well as providing us with a persuasive and well-reasoned response to it.

The fourth essay, by Cassandra Somers-Joce, is an impressively argued plea for radical revisions to the wrongful death liability regime in the Fatal Accidents Act 1976. The lynchpin of the reforms she proposes is to move the law on wrongful death away from the current "dependency loss" model towards a "loss to the estate" model, whereby the damages would be paid to the estate and thereby distributed through the estate channels in the usual way. Although this is not a novel proposal, the author's critique of the current model is comprehensive and damning, and even for those (including myself) with a sentimental attachment to the existing wrongful death legislation, the force of this clarion call for reform is hard to resist.

It has been a pleasure to read these essays and I have learned a great deal from them. The authors are to be congratulated for the quality and significance of these contributions to private law literature.