# LIABILITY UPDATES

# PIBA CONFERENCE – MARCH 2019

## (1) The basics

- What is actionable personal injury? Dryden v Johnson Matthey plc [2018] UKSC 18 "*Their bodily capacity for work has been impaired [by the sensitisation] and they are therefore significantly worse off… bodily changes have led to the claimants, who were formerly people who could and did work around platinum salts, no longer being able to do so*."

  Claimants had '*lost their safety net*' – they '*suffered a loss of bodily function by virtue of the physiological change caused by the company's negligence*'.

## (2) Causation

- Khan v MNX [2018] EWCA Civ 2609

  The issue of causation is to be addressed by reference to the scope of the doctor's duty,

  "*The scope of the appellant's duty was not to protect the respondent from all the risks associated with becoming pregnant and continuing with the pregnancy. The appellant had no duty to prevent the birth of FGN… The SAAMCO test requires there to be an adequate link between the breach of duty and the particular type of loss claimed… the development of autism was a coincidental injury and not one within the scope of the appellant's duty*."

## (3) Vicarious liability

- Bellman v Northampton Recruitment Ltd [2018] EWCA Civ 2214

"*The question of whether there is a sufficient connection between the position in which the wrongdoer is employed and his wrongful conduct so as to the make the employer liable under the principle of social justice requires the court to conduct an evaluative judgment. It is a question of law based upon the primary facts as found."*

Reiteration of Mohamud - field of activities and sufficient connection between that and the assault

*"… context and circumstances are important and the mere opportunity of being present at a particular time or place does not mean that the act is within the relevant field of activities… The question is 'what is the nature of the job?' … The court is required to look at the question of the field of activities 'broadly'."* Actual authority is not the test, the court must take account of the position in which the employer has placed the wrongdoer.

- Sophocleous v FCO [2018] EWCA Civ 2167

"[*V]icarious liability is not itself a tort. It is a legal rule which imposes liability for someone else's tort. It is where that tort is committed that must be decisive*…" And so too for joint liability – there is only one tort and if that is committed by the primary actor in Cyprus, the fact that the person jointly liable was elsewhere when he gave the assistance which rendered him jointly liable makes no difference.

- X v Kuoni [2018] EWCA Civ 938 (SC 1/5/19)

Contractual claim so less important as a concept but per Longmore LJ, "*I would be far from certain that the hotel would not be vicariously liable as a matter of English law, for rape by an employee whom the hotel clothed in its uniform and represented to the world in general was a reliable employee*."

**(4) <u>Ex turpi causa</u>**

- Blake v Croasdale [2018] EWHC 1919 (QB) (HHJ McKenna)

"*Where the character of a joint criminal enterprise was such that it was foreseeable that a party or parties might be subject to unusual or increased risks of harm as a consequence of the activities of the parties in pursuance of their criminal objective and the risk materialised, the injury could properly be said to have been caused by the criminal act of the claimant even if it resulted from the negligent or intentional act of another party to the illegal enterprise*." Does the unlawful act have any causative bearing on the accident?

- Clark v Farley [2018] EWHC 1007 (QB) (Yip J)

C was not, on the facts, a party to a CJE – he had not encouraged the driver to ride dangerously and did not intend to do so. (Wallett – '*equally responsible for the dangerous driving'* of the D).

- Wallett v Vickers [2018] EWHC 3088 (QB) (Males J)

  A claimant suing a party to a (criminal) joint enterprise suing might meet a defence of CJE where the C has the necessary mens rea of intention to assist or encourage the commission of a crime.
  "*Because the accessory or secondary party is equally responsible in law for the crime committed by the principal, an accessory who is injured by the principal's criminal conduct cannot sue the principal to recover compensation for his injuries … he can no more sue the principal than he could sue himself*."

  In a racing case – *"[f]ar from wishing the other to drive dangerously, it seems highly probable that each would have preferred that the other should slow down and give way*." Having the effect of encouraging the other to drive dangerously is not the same as intending that the other should do so.

  C might also meet a defence where the claim is founded on D's turpitude.
  "*Dangerous driving by the C will not bar a claim pursuant to the ex turpi causa principle. Rather such a claim is to be determined in accordance with principles of causation (has the conduct of the defendant made a material contribution to the claimant's injuries?) and contributory negligence (should the damages be reduced by reason of the claimant's own fault?). These principles are sufficient to give effect to the requirements of justice and public policy*."

## (5) <u>Primary/secondary victim</u>

- Yah v Medway [2018] EWHC 2964 (QB) (Whipple J)

  Mother is primary victim for PI consequent on negligence before the baby is born – and does not cease to be a primary victim at the moment the child is born.

  No need to satisfy Alcock nervous shock criteria for a primary victim claiming 'just' psychiatric damage.

- Tunisia terrorist litigation – immediacy in the modern world; social media and how things have changed since Hillsborough

## (6) Occupiers

- Robinson v Bourne Leisure [2018] 9 WLUK 398 (HHJ Cooke, Birmingham)

  Ward v Tesco does not apply in a public venue where drinks are being served and carried by members of the public. "[*T]he fact that a spillage is present on the floor at a particular moment when an accident occurs, in my view, is entirely neutral as to whether it is caused by the fault of the defendant or in circumstances where the defendant was not at fault*.

  *… a period of some length has to expire between a spillage and it being cleared up, and it would be necessary to show that if a proper or different system had been in place then some intervention would more likely than not have taken place in that period that would have prevented the accident*."

- Cockerill v CXK [2018] 5 WLUK 355 (Rowena Collins Rice)

  Not part of the duty of care owed by the occupier to this claimant to keep the door shut (query if claimant had been small child in the nursery). C was not exposed to a risk which its closure was designed or intended to prevent.

  "*There is no necessary logic that post-accident improvements must be taken to be suggestive of pre-accident deficiencies, even where, as in the present case, it was accepted that the improvements had been made in the light of the accident*."

- Dodd v Raebarn Estates [2017] EWCA Civ 439

  "*The obligation [on a landlord] to repair does not arise unless the objects in respect of which it is imposed are out of repair… Thus the reach of the duty arising under section 4 [DPA 1972] is no longer than the reach of the covenant to repair owed (or treated as being owed) by the landlord in any particular case… [The duty to repair] cannot be equated with a duty to make safe*."

## (7) Roads and highways

- Hilliard v SCC [2018] EWCA Civ 3156 (QB) (Slade J)

  The fact that 12,400 cyclists had passed by the defect without incident was "*overwhelming evidence*" that the obligation to maintain the highway under s.41 HA 1980 had been complied with.

- Shevlin v European Metal Recycling [2018] EWHC 1699 (QB) (Rowena Collins Rice)

Adverse inferences acceptable from the absence of a witness who might be expected to have material evidence to give, unless the reason for the absence satisfies the court.

"[*T]he right of way obligations of deference and carefulness on traffic proposing to cross a carriageway are more distinctive, extensive and demanding than the (undoubted) obligations of traffic to be vigilant and prepared for hazards emerging in front of them*."

- Cameron v Liverpool Victoria Insurance Co Ltd [2019] UKSC 6

"[*T]he legitimacy of issuing or amending a claim form so as to sue an unnamed defendant can properly be tested by asking whether it is conceptually (not just practically) possible to serve it.*
*…*
*One does not however identify an unknown person simply by referring to something he has done in the past…The impossibility of service in such a case is due not just to the fact that the defendant cannot be found but to the fact that it is not known who the defendant is."*

## (8) Hospitals

- Darnley v Croydon Health Services [2018] UKSC 50

"[*T]he scope of the duty to take reasonable care not to act in such a way as foreseeably to cause such a patient to sustain physical injury clearly extends to a duty to take reasonable care not to provide misleading information which may foreseeably cause physical injury*."

## (9) Contributory negligence

- Ellis v Kelly [2018] EWHC 2031 (QB) (Yip J)

"*Uncommon*" to find CM against an 8yo (or younger).

No liability against mother for letting C out; not ensuring that he had sufficiently clear rules etc – "*real caution should be exercised both by courts considering claims against parents and by insurers in deciding whether it is appropriate to join parents*."

- EMS v ES [2018] NIQB 36 (Hughes v Williams [2013] EWCA Civ 455)

Harness under C's arm rather than over shoulder; and was inappropriate for her age and weight – 25% contribution from mother.

- McPherson v Smith [2018] EWHC 1433 (QB) (HHJ Robinson)

  "*Truly appalling*" driving by C warranted 2/3 deduction where he was there to be seen.

- Clark v Farley [2018] EWHC 1007 (QB)

  Failure to wear a helmet agreed (and approved) at 12.5% but overall, assessing relative blameworthiness and causative potency as a whole, C's carelessness in riding pillion along the path without a helmet was assessed at 40%.

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