Liability Update: EL, PL, RTA

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The ‘Bar Snack’ Menu

- Fundamental Dishonesty, Exaggeration and Credibility
- Public Liability generally
  - Breach of duty
  - Contribution proceedings
- Employer’s Liability & Vicarious Liability
- Multi-Party claims
- Occupiers’ Liability
- Highways Claims

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Fundamental Dishonesty

- **Continuing trend towards a more robust approach**

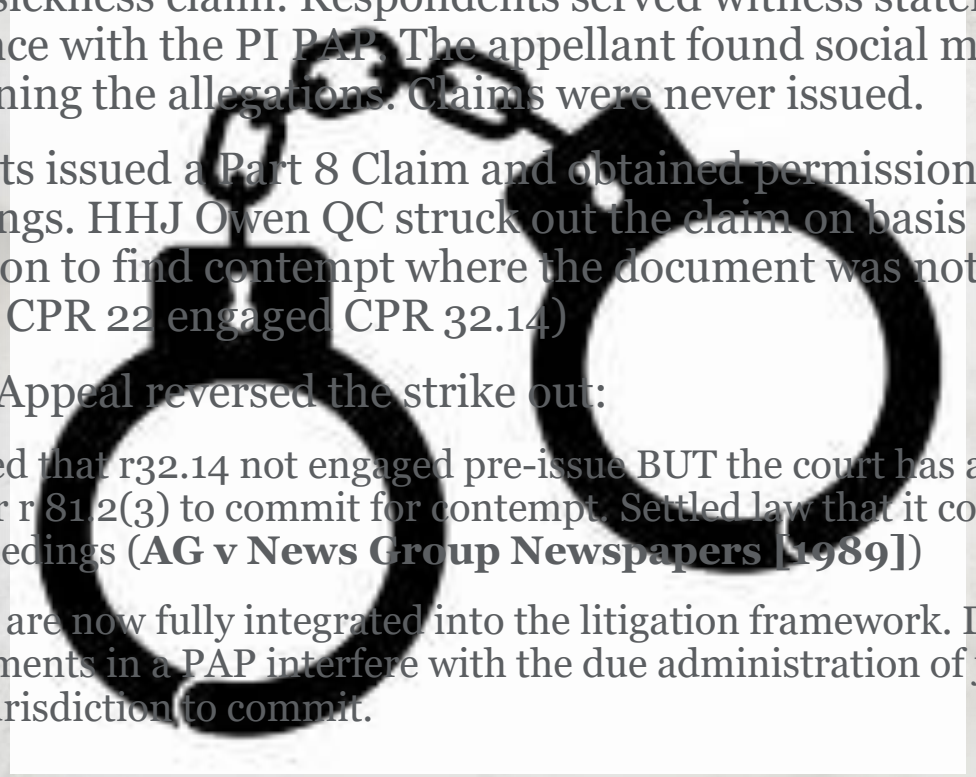
- **Mansur Haider v DSM Demolition[2019] EWHC 2712 (QB)**
  - RTA for with claim for £30,000 credit hire
  - Alleged dishonesty arose out of incomplete disclosure. C failed to disclose any credit cards, and signed Part 18 responses falsely stating '*I did not have any credit cards accounts*'. In fact he had 2 cards. Also alleged his bank had accidentally opened a second (undisclosed) account into which he had paid the PAV
  - On appeal Knowles J found:
    - A failure or disclose 2 credit cards and another bank account was 'plainly dishonest'. C 'deliberately failed to disclose highly relevant material.' The Part 18 response was unambiguous and untrue.
    - It was fundamental since it went to the recoverability of the main head of claim

Fundamental Dishonesty

- **Roberts v Alan Kesson (1) Tesco Underwriting (2) [2020] EWHC 521 (QB)**
  - RTA leading to a claim for a taxi allegedly damaged beyond economic repair. C claimed £10,400 PAV. C said he had authorised the sale of his taxi and used the salvage money to hire a car. D2 found the taxi for sale on C's Facebook account for £7,000. C gave a second witness statement correcting 'one small detail' (he had in fact repaired taxi and put it up for sale!) At trial he admitted the first account was untrue
  - The Judge at first instance dismissed D's application under s57 CJCA 2015 because C had 'not persisted' with the dishonesty
  - Reversed on appeal by Jay J:
    - C **had been** dishonest; back-peddling later does not alter the dishonesty
    - The court should take a holistic view of the dishonesty (i.e. both a focussed view on the matter in issue and a wide view in the context of the claim)
    - Where the dishonesty is '*significant and substantial, the court should not be slow to find that the stringent criterion of 57 has been fulfilled*'

Contempt of Court (false statement of truth)

- **Can you be committed for contempt for a false statement of truth on a document in a claim you never issued?**
- **Jet 2 Holidays Ltd v Hughes (1) Hughes (2) [2019] EWCA Civ 1858**
  - Holiday sickness claim. Respondents served witness statements in purported compliance with the PI PAP. The appellant found social media material undermining the allegations. Claims were never issued.
  - Appellants issued a Part 8 Claim and obtained permission to start Committal Proceedings. HHJ Owen QC struck out the claim on basis that the court lacked jurisdiction to find contempt where the document was not used in proceedings (because CPR 22 engaged CPR 32.14)
  - Court of Appeal reversed the strike out:
    - Agreed that r32.14 not engaged pre-issue BUT the court has an inherent jurisdiction under r 81.2(3) to commit for contempt. Settled law that it could be pre-date proceedings (**AG v News Group Newspapers [1989]**)
    - PAPs are now fully integrated into the litigation framework. Dishonest witness statements in a PAP interfere with the due administration of justice and hence engage the jurisdiction to commit.

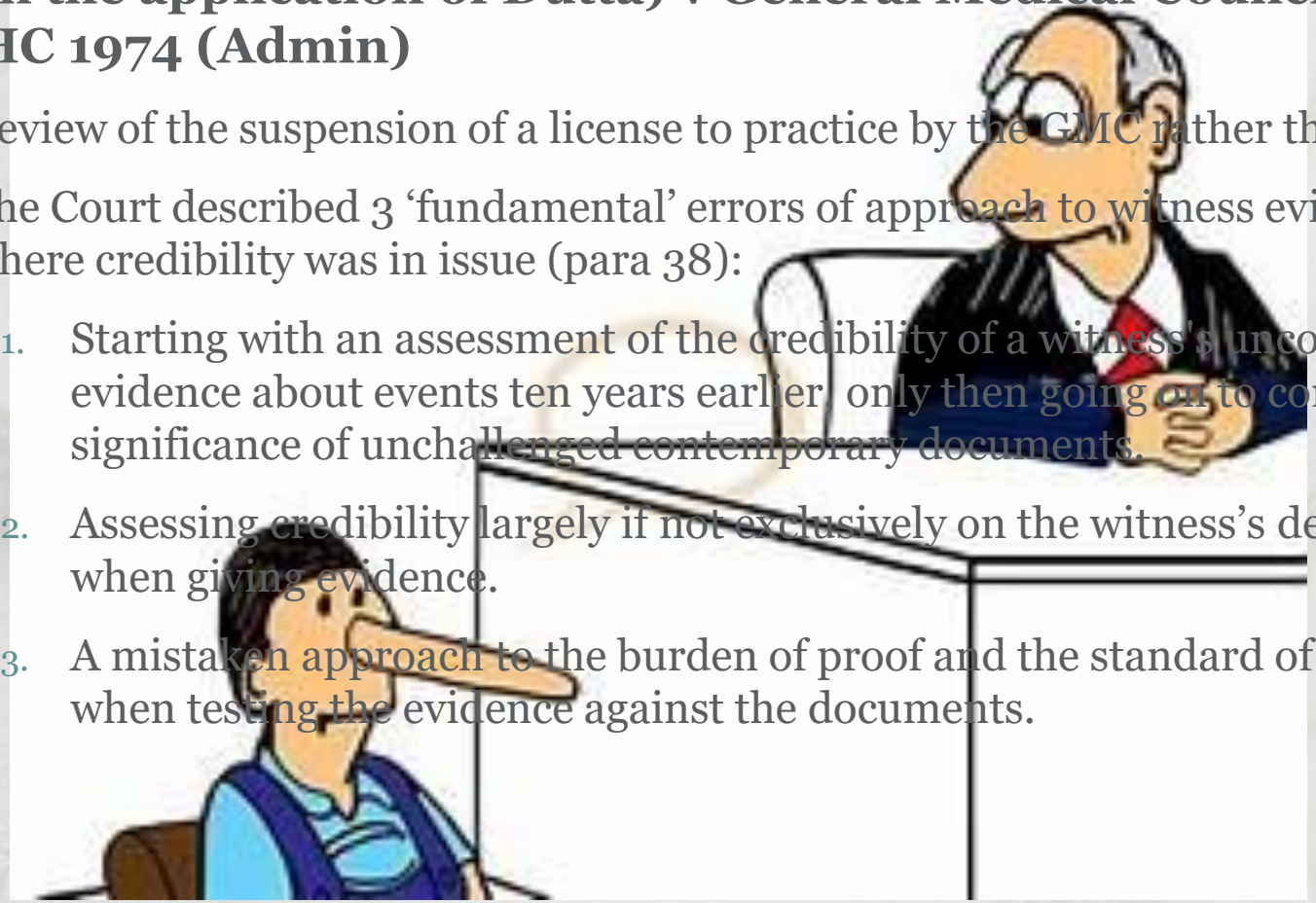


Exaggerated Claims

- **CPR44.2(6)(a) a tool to penalise exaggerated (but not fundamentally dishonest) claims.**
- **Morrow v Shrewsbury RUFC [2020] EWHC 999 QB**
  - C suffered a head injury when a post fell on his head at a rugby match. Claimed £1.4million, of which £1m was for complete future LOE as an IFA.
  - D alleged that the injury was largely irrelevant and any loss was due to documented pre-existing psychological problems
  - Farbey J awarded C £285,000 (cf d's Part 36 Offer of £110,000 and D's belated Part 36 of £800,000). C was not dishonest but he had misled experts about his pre-accident condition, and grossly exaggerated his future LOE. Costs were reduced under CPR 44.2(6)(a) by 15% on the basis that
    - Exaggeration was '*built into the structure of the claim*'. Much of the trial and evidence devoted to the exaggerated claim for future LOE.
    - D's Part 36 Offer was a better attempt at settlement than C's
    - BUT the conduct was not egregious and D did not help itself by admitting next to nothing in the Counter Schedule. Hence a 15% deduction was fair.

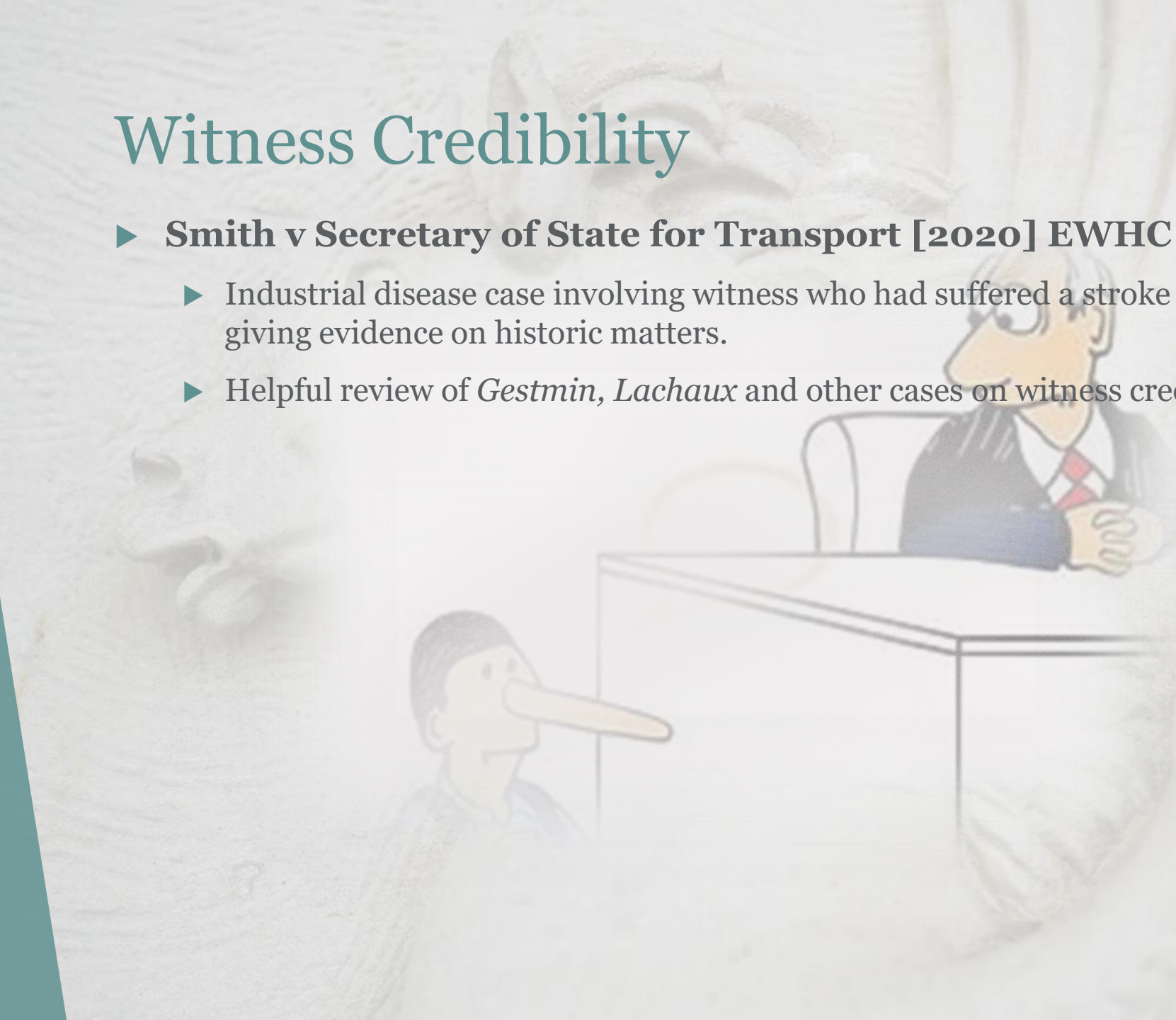
Witness Credibility

- **R (On the application of Dutta) v General Medical Council [2020] EWHC 1974 (Admin)**
  - Review of the suspension of a license to practice by the GMC rather than PI
  - The Court described 3 'fundamental' errors of approach to witness evidence where credibility was in issue (para 38):
    1. Starting with an assessment of the credibility of a witness's uncorroborated evidence about events ten years earlier, only then going on to consider the significance of unchallenged contemporary documents.
    2. Assessing credibility largely if not exclusively on the witness's demeanour when giving evidence.
    3. A mistaken approach to the burden of proof and the standard of proof when testing the evidence against the documents.



Witness Credibility

- **Smith v Secretary of State for Transport [2020] EWHC 1954 (QB)**
  - Industrial disease case involving witness who had suffered a stroke and was giving evidence on historic matters.
  - Helpful review of *Gestmin*, *Lachaux* and other cases on witness credibility.



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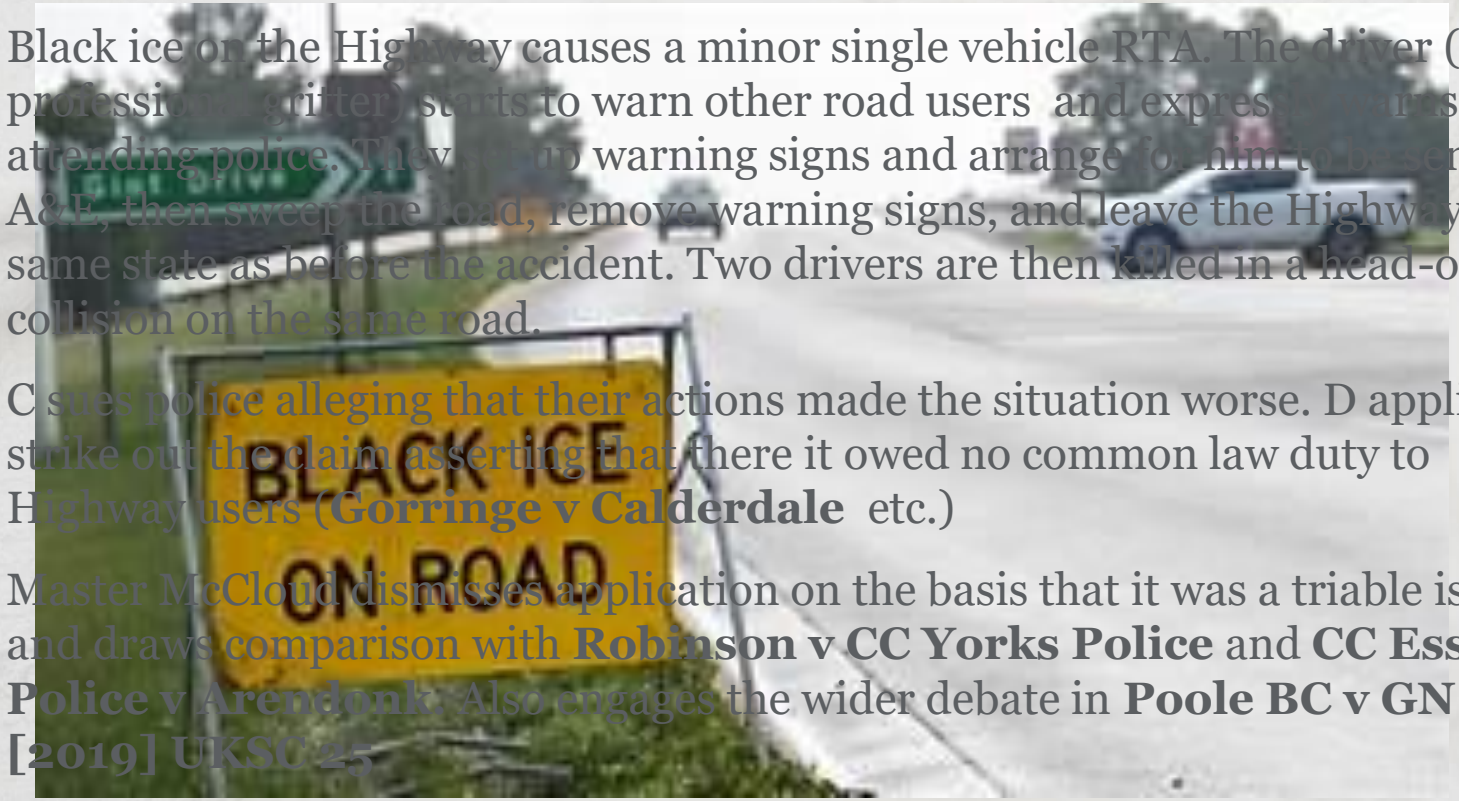
Duty of Care in Negligence

- **What duty is owed in respect of risks that should be reasonably obvious? Not much….**
- **Wells v Full Moon Events [2020] EWHC 1265 QB**
  - C suffered a life changing spinal injury when he fell from a motorbike during an off-ride motorbike course. Claimed he struck a rock concealed in a puddle and that he was not warned of the possibility of submerged hazards
  - Michael Bowes QC (sitting as a Deputy) dismissed the claim
    - In an unwitnessed accident he was not satisfied that C struck a submerged rock.
    - Even if he had, the absence of a warning was irrelevant. C was an expert rider doing the expert level course and knew that such a risk existed (and had attested to the same when he signed the registration form)
    - Moreover it was an obvious risk that muddy puddles may conceal objects (especially on Cross Country motorbike courses.)

Breach of Duty

- **Can the police be liable for failing to deal with a known risk on a Highway? Watch this space…**
- **Tindall v Chief Constable of Thames Valley Police [2020] EWHC 837**
  - Black ice on the Highway causes a minor single vehicle RTA. The driver (a professional gritter) starts to warn other road users and expresses fears to the attending police. They set up warning signs and arrange for him to be sent to A&E, then sweep the road, remove warning signs, and leave the Highway in the same state as before the accident. Two drivers are then killed in a head-on collision on the same road.
  - C sues police alleging that their actions made the situation worse. D applies to strike out the claim asserting that there it owed no common law duty to Highway users (**Gorringe v Calderdale** etc.)
  - Master McCloud dismisses application on the basis that it was a triable issue and draws comparison with **Robinson v CC Yorks Police** and **CC Essex Police v Arendonk**. Also engages the wider debate in **Poole BC v GN [2019] UKSC 25**

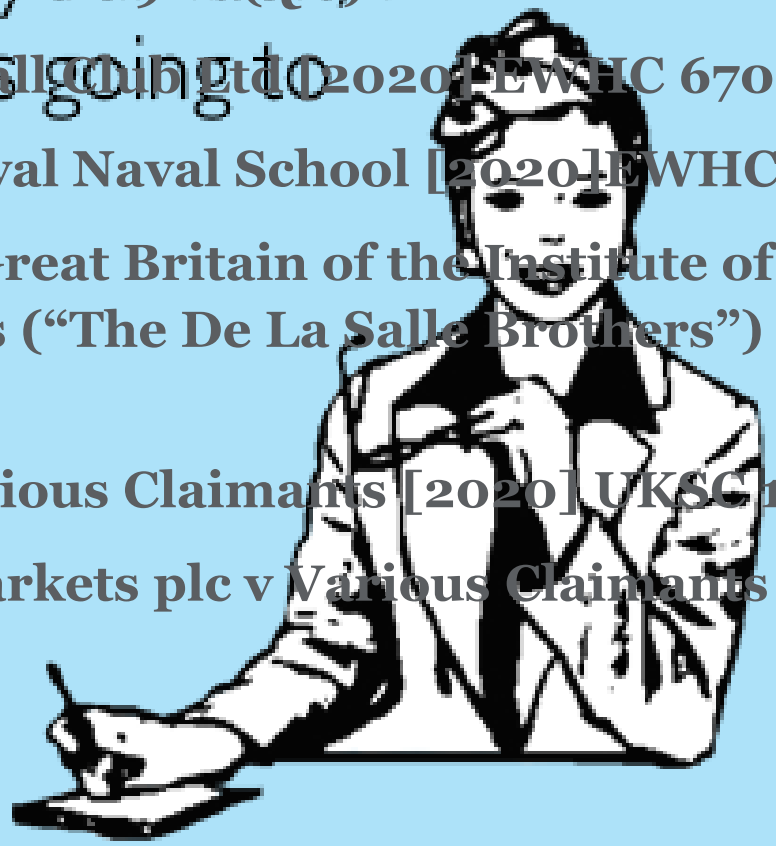


Breach of Duty

- **Injury during restraint. When is it negligent?**
- **Thompson v Chief Constable of Greater Manchester [2020] EWCA Civ 739**
  - 2 Police Officers restrain C during a dispute with a steward at a football game. They take him to the ground using the '*arm entanglement*' method. In the melee, C straightens his arm and it is fractured when he hits the ground.
  - C loses claim at first instance and appeals on 2 bases (but not that it was negligent to attempt the restraint in the first place)
    - the officer admitted the technique had gone wrong but did not desist, hence the judge failed to apply the right test when not finding him negligent (and failing to address this specific point in his reasoning)
    - It was irrational to find the officer not negligent we he had admitted that the technique could not be done properly once C had straightened his arm
  - CA dismisses the appeal. This all happened in a second, and the decision to continue with the technique rather than abandon it (or try an alternative) in circumstances where C was resisting, did not fall below the standard of reasonable care. It was also not irrational to view the events holistically and find reasonable care was taken.

Vicarious Liability

- **Leyitt v Euro Building & Maintenance Contractors Ltd (1) Dual Glaze Ltd (2) [2019] EWHC 2926 (QB)**
- **DSN v Blackpool Football Club Ltd [2020] EWHC 670 (QB)**
- **EXE v Governors of Royal Naval School [2020] EWHC 595 (QB)**
- **JXJ v The Province of Great Britain of the Institute of Brothers of the Christian Schools ("The De La Salle Brothers") [2020] EWHC 1914 (QB)**
- **Barclays Bank plc v Various Claimants [2020] UKSC 13**
- **WM Morrison Supermarkets plc v Various Claimants [2020] UKSC 12**



Vicarious Liability

- **Levitt v Euro Building & Maintenance Contractors Ltd (1) Dual Oliva Ltd (2) [2019] EWHC 2926 (QB)**
  - Claimant struck over head with a scaffolding pole by a colleague following a dispute over work equipment.
  - HHJ Freedman held that there was a relationship akin to employment with the Defendants and that there was a close connection to the work and the assault.
  - Defendant's appeal due to be heard in December 2020.
- **DSN v Blackpool Football Club Ltd [2020] EWHC 670 (QB)**
  - C was assaulted by a football scout whilst on a youth football trip to New Zealand.
  - Held that although the scout was an unpaid volunteer, almost all non-playing staff of the Defendant were and the relationship was akin to employment. This was almost an official trip and the abuse was sufficiently closely connected to the employment for D to be liable.

Vicarious Liability

- **EXE v Governors of Royal Naval School [2020]EWHC 595 (QB)**
  - C was sexually abused by a kitchen porter at her school.
  - No dispute about stage I. Held that this job was behind the scenes and the two met in an area of the school which was out of bounds to C. Although some of the sexual activity took place in the employee's room at the school, there was not a sufficiently close connection with the school for stage II to be satisfied.
- **JXJ v The Province of Great Britain of the Institute of Brothers of the Christian Schools ("The De La Salle Brothers") [2020] EWHC 1914 (QB)**
  - C was sexually abused by a lay member of staff whilst at a school at which several Brothers worked (including as headmaster and deputy head).
  - The member of staff was not employed by D, but D did exercise considerable control over the running of the school, giving instructions to the headmaster covering all aspects of the school's organization.
  - Held that the Brothers who worked at the school had a relationship akin to employment with D, but just because the school could not function without also employing lay members, this and the control exercised over the school by D did not tip the balance towards vicarious liability.

Vicarious Liability

- **Barclays Bank plc v Various Claimants [2020] UKSC 13**
  - Barclays Bank arranged for a doctor to carry out pre-employment medical examinations on the Claimants. During the course of these examinations, the Claimants alleged that the doctor sexually assaulted them.
  - The doctor was not on a retainer, but was paid a fee for each report which was completed on D's pro forma report form.
  - At first instance and in the Court of Appeal, the Claimants succeeded.
  - The Supreme Court held that Stage I of the test was not met as he was free to refuse an offered examination should he wish to; probably carried his own medical liability insurance; and was in business on his own account with a portfolio of patients and clients, one of which was the bank.
  - Per Baroness Hale:

"24. There is nothing, therefore, in the trilogy of Supreme Court cases discussed above to suggest that the classic distinction between employment and relationships akin or analogous to employment, on the one hand, and the relationship with an independent contractor, on the other hand, has been eroded…

"27. The question therefore is, as it has always been, whether the tortfeasor is carrying on business on his own account or whether he is in a relationship akin to employment with the defendant. In doubtful cases, the five "incidents" identified by Lord Phillips may be helpful in identifying a relationship which is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability."

Vicarious Liability

- **WM Morrison Supermarkets plc v Various Claimants [2020] UKSC 12**
  - The Claimants were employees of the supermarket who had had their personal data leaked online and to various newspapers by an internal auditor with a grievance.
  - The Claimants succeeded at first instance and in the Court of Appeal, which found that there was a sufficiently close connection between the tort and the breach of the DPA to impose vicarious liability.
  - The Supreme Court found for the Appellant, noting that this case provided it with "an opportunity to address the misunderstandings which have arisen since its decision in ***Mohamud v Wm Morrison Supermarkets plc [2016] AC 677***"
  - Per Lord Reed:

"28. Read in context, Lord Toulson JSC's comments that there was "an unbroken sequence of events", and that it was "a seamless episode", were not directed towards the temporal or causal connection between the various events, but towards the capacity in which Mr Khan was acting when those events took place. Lord Toulson JSC was explaining why, in his view, Mr Khan was acting throughout the entire episode in the course of his employment. When he followed the motorist out of the kiosk and on to the forecourt, he was following up on what he had said to the motorist in the kiosk. He ordered the motorist to keep away from his employer's premises, and reinforced that order by committing the tort. In doing so, he was "purporting to act about his employer's business". As Lord Toulson JSC said, "this was not something personal".

Vicarious Liability

- **WM Morrison Supermarkets plc v Various Claimants [2020] UKSC 12**
  - The Court held that:
    1. The disclosure of the data on the internet did not form part of the auditor's functions or field of activities
    2. The fact that the five factors listed by Lord Phillips in **Catholic Child Welfare Society [2013] 2 AC 1 , para 35** were all present was irrelevant to the second stage
    3. Although there was a close temporal link and an unbroken chain of causation linking the provision of the data to the auditor for the purpose of transmitting it to external auditors and his disclosing it on the internet, a temporal or causal connection does not in itself satisfy the close connection test.
    4. The reason why the auditor acted wrongfully was not irrelevant: on the contrary, whether he was acting on his employer's business or for purely personal reasons was highly material. It was abundantly clear here that he was not engaged in furthering his employer's business, but pursuing personal vengeance.
  - The Court did find as a matter of law that a Defendant could be vicariously liable for an employee's breach of the DPA.

Employer's Liability

- **Walsh v CP Hart & Sons Ltd [2020] EWHC 37 (QB)**
  - Claimant injured when he fell off the back of a lorry whilst preparing to operate the tail lift.
  - Accident in early summer 2013 so one of the last pre-Enterprise Act cases.
  - The Court of Appeal overturned the trial judge's finding for the Defendant. Held on the correct approach to risk assessments that:
    - The starting point is whether the measure in question is practicable at all. If it is not, that is the end of the matter.
    - If the measure is practicable then the court goes on to consider whether it is, "reasonably" practicable.
    - "Reasonably" connotes whether the employer can show that the cost and difficulty of the steps so substantially outweigh the quantum of risk involved as not to be reasonably practicable. A mere balancing act, between cost and difficulty and the risks is insufficient. Otherwise this would be an easy escape avenue but rather a "long stop" defence in very limited circumstances.

Employer's Liability

- **David Harris v (1) Bartrums Haulage and Storage Ltd (2) Paul Andre Rombough (t/a) Par European [2020] EWHC 900 (QB)**
  - Claimant was injured when his lorry and trailer rolled over him.
  - Court found Defendant in breach of duty in respect of training and risk assessment.
  - However, the Claimant was an experienced driver and the Court found the breaches did not cause the accident.

Multi-party PL claims

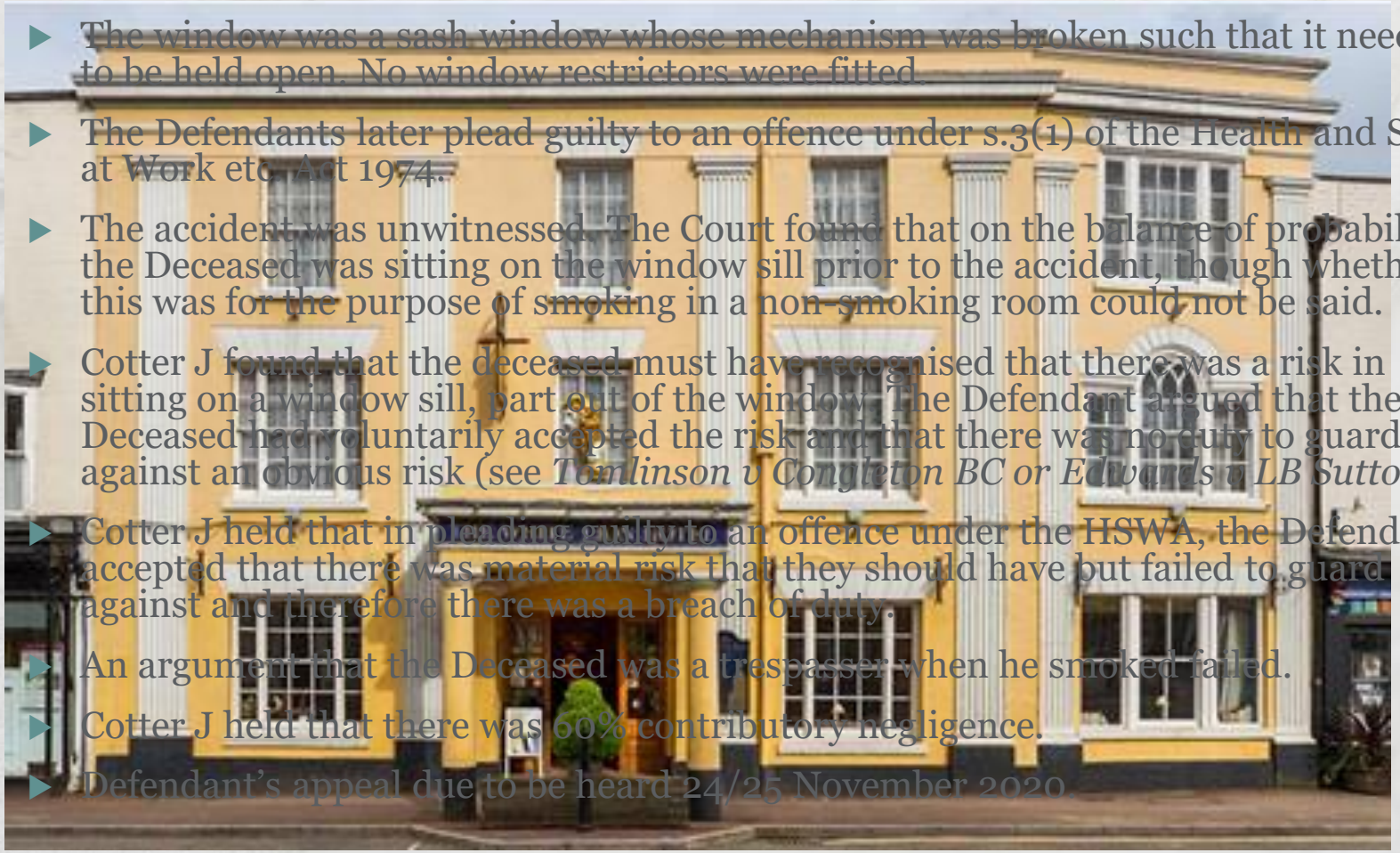
- **Who pays the bill when (almost) everyone sues everyone else?**
- **Jagger v Holland (1) Cambridge Live (2) Stanley Thurston (3) [2020] EWHC 1197 (QB)**
  - D is organising a fireworks event on a common in Cambridge, involving (inter alia) fairground rides at D3's fairground. D1 is delivering dodgems to the event when reverses his HGV into C. C sues D1 who denies liability.
  - C then sues D2, who denies liability and issues an additional claim for indemnity/contribution against D3 (who denies liability). C then amends and sues D3, and D1 issues a contribution notice against D3, adopting C's allegations.
  - D3 makes a time-bomb offer to discontinue and it will bear its own costs. The offer is ignored. D1 and D2 admit liability shortly before trial (with modest contrib from C), hence the trial deals with: i) apportionment between D1 and D2, and ii) the claims against D3.
  - The claim against D3 is dismissed. The main claim is apportioned D1-65%, D2-35%

Multi-party PL claims

- **Jagger v Holland (1) (cont.)**
  - D3 is entitled to costs. Issues were:
    - Standard or indemnity basis
    - Apportionment of D3's costs between D1 and D2
  - Costs awarded on a standard basis, because D3 refused to attend a JSM or serve the standard 'not doing ADR' witness statement ordered at the CMC.
  - Apportionment more interesting:
    - D2 says 65/35 in line with the liability judgment. D1 had jumped on the band wagon of suing D3 and should not escape the costs penalties when the clam failed.
    - But the judge ordered D2 to pay 60%, and D1 40% on the grounds that D2 started the contribution proceedings running (even though everyone else joined in) and at trial the major issue was '*between D2 and D3*'
  - Interesting logic. Can you be more liable on costs for setting in motion a course that other parties then follow?

Occupiers' Liability & *ex turpi causa*

- **James v White Lion Hotel [2020] 1 WLUK 39; [2020] PIQR P10**
  - The Deceased fell from a second floor window to his death on the street below in the early hours of the morning.
  - The window was a sash window whose mechanism was broken such that it needed to be held open. No window restrictors were fitted.
  - The Defendants later plead guilty to an offence under s.3(1) of the Health and Safety at Work etc. Act 1974.
  - The accident was unwitnessed. The Court found that on the balance of probabilities the Deceased was sitting on the window sill prior to the accident, though whether this was for the purpose of smoking in a non-smoking room could not be said.
  - Cotter J found that the deceased must have recognised that there was a risk in sitting on a window sill, part out of the window. The Defendant argued that the Deceased had voluntarily accepted the risk and that there was no duty to guard against an obvious risk (see *Tomlinson v Congleton BC or Edwards v LB Sutton*).
  - Cotter J held that in pleading guilty to an offence under the HSWA, the Defendant accepted that there was material risk that they should have but failed to guard against and therefore there was a breach of duty.
  - An argument that the Deceased was a trespasser when he smoked failed.
  - Cotter J held that there was 60% contributory negligence.
  - Defendant's appeal due to be heard 24/25 November 2020.



Highways claims

- **Barlow v Wigan Metropolitan Borough Council [2020] EWCA 696**
- C injured when she trips on a path through a park that was in poor repair.
- D said it was a highway (because of a right of way to the public at large) but not maintainable at public expense. It was built by D's predecessor in the 1930s.
- C had two arguments
  - S36(2) – it was a highway constructed by a Highway Authority. Per Sedley LJ in **Gulliksen**, it doesn't matter whether they built it in their capacity as Highway Authority, just that they built it.
  - S36(1) It was maintainable at public expense immediately before the 1980 Act by operation of s38(2) of the Highways Act 1959 (because it was dedicated prior to the 1949)
- C won in the High Court on limb 36(2) but the Court of Appeal overturned this decision (disapproving **Gulliksen.)**
- C won on limb 2 (the 36(1) argument) on the facts of the case, but the significance of the case more generally is that it will probably reduce the number of paths classed a Highway under s36(2).

Questions?

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