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Annual Festive Case Law Update

Part 2

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13th December 2022

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Police Law

Amelia Katz

Tindall v Thames Valley Police [2022] EWCA Civ 25

- In 2014, a motorist, ‘Mr. K,’ was driving along the A413 in Buckinghamshire. He skidded on black ice, and lost control of his vehicle. Despite being injured, he called the emergency services, advising them of the danger posed by the black ice. The call was taken by a police control room operator. During this period, Mr. K sought to alert other road users of the danger.
- Thames Valley Police attended the scene. The police officers put up a temporary ‘Police Slow’ sign by the carriageway. They cleared away the debris and placed Mr K in the care of the ambulance service. Having been informed that Mr. K had been removed to hospital, they left the scene with their sign. No action was taken to remove the black ice, and no warning of it remained.

Tindall v Thames Valley Police [2022] EWCA Civ 25

- Twenty minutes later, Mr. B drove on the same stretch of road. Much like Mr. K, he lost control of his vehicle due to the black ice. In doing so, he collided with car driven by Mr. Tindall. Both drivers died in the accident. Mr. Tindall's widow brought a claim in negligence against both the police and the highway authority.
- In sum, the allegations of breach against the police were that they had made the danger worse for two reasons. First, because of their attendance Mr. K had ceased his efforts to warn vehicles. Second, they had failed to take proper steps to protect motorists using the road. They also averred that the police had assumed responsibility for their actions in the circumstances. The Chief Constable applied to strike out the claim.

Tindall v Thames Valley Police [2022] EWCA Civ 25

- Chief constable were unsuccessful at first instance. Master McCloud concluded that the claim had a real prospect of success.
- She set out that police officers removed a warning sign after having put it up and took minimal steps to render the road safe. They had also arranged Mr Ks removal from the scene, thereby causing his efforts to warn traffic to cease. These matters could, in principle, amount to sufficient intervention that the police had made matters worse.
- Chief Constable appealed and the Court of Appeal allowed the appeal.

Tindall v Thames Valley Police [2022] EWCA Civ 25

- CoA set out a useful summary of the principles applying to the liability of public authorities at paragraph 54.
- Two key points arising. First, merely allowing a pre-existing danger to continue cannot amount to a creation of a danger. The focus of the claimant's enquiry should be on factors which indicate that the situation has been made worse by the relevant public authority.
- Second, the Court of Appeal has firmly held that the law on when a public authority will be held to owe a duty of care is 'no longer in flux'. The principles are settled and have been authoritatively summarised. There is therefore little scope for claimants to resist applications to strike out on the basis that the civil liability of public authorities is a developing area of jurisprudence.

AB v Chief Constable of British Transport Police [2022] EWHC 2749 (KB)

- The respondent had Autistic Spectrum Disorder. He suffered from high levels of anxiety and communication and processing difficulties. As a coping mechanism, he stimmed, rubbing fabric between his fingers.
- In 2011, a woman complained to police that AB, who had been sitting next to her on a train, had touched her inappropriately. In 2014, another woman made a similar complaint.
- The appellant Chief Constable of British Transport Police's officers investigated the reports. AB was not charged with any offence, but the police retained information about the complaints.

AB v Chief Constable of British Transport Police [2022] EWHC 2749 (KB)

- AB brought a claim, contending that the retention of the information was unlawful because: (i) it was inaccurate; and (ii) it was a disproportionate interference with his right to respect for private life under Art 8 ECHR.
- The judge found that the details of the incidents recorded in police pocketbooks accurately reflected what the police had been told, but that they were not an accurate account of what had, in fact, happened. He also found that AB had not posed any real risk to the complainants, and that his disability diminished the risk that he posed, generally. The judge concluded that the retention of the records amounted to a breach of art 8 of the Convention. He ordered that the police delete the records and he awarded: (i) damages of £15,000 in respect of loss of earnings; (ii) a further award of £15,000 for distress; and (iii) a further £6,000 for aggravated damages.

AB v Chief Constable of British Transport Police [2022] EWHC 2749 (KB)

- The police appealed against the order. They contended the judge had erred in finding the records were inaccurate and in finding there had been a disproportionate interference with AB's Art 8 rights.
- The High Court concluded the judge had been entitled to assess the underlying merits of the records and the risk that AB posed.
- In relation to the second point, the Court concluded that while in most cases the balance may be different as generally, the interference with the subject's art 8 rights was likely to be modest, whereas there was likely to be a compelling public interest in retention. It was only because of the very particular facts of the present case, both in terms of the exceptional impact on AB, and the lack of any real risk to the public, that the judge had concluded that it had not been proportionate to retain the records.

Other notable cases

***YZ v Chief Constable of South Wales* [2022] EWCA Civ 683**

Considered and distinguished in *AB.* Claimant had sought deletion of data relating to his acquittal for 3 counts of rape. IN this case CoA found there was ample justification for retaining the data for safeguarding purposes of the Claimant's wife and child.

***Leigh v Metropolitan Police Commissioner* [2022] EWHC 527 (Admin)**

Claim for JR following the policing of vigil for Sarah Everard. Claim allowed and the decisions of the MPC were criticised

***ST v Chief Constable of Nottinghamshire Police* [2022] EWHC 1280 (QB)**

Arrest of a 14 year old at 5:30AM following an accusation he had stolen a phone from another student at school. Arrest found to unnecessary and claim for false imprisonment made out on appeal.

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Court of Protection

Ed Lamb

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Cases that touch on COP jurisdiction and PI/Clinical Negligence from the year that has flown by (as usual)

Seeing an increasing need for PI/CN practitioners to be aware of the COP jurisdiction

X, Re (Catastrophic Injury: Collection and Storage of Sperm) [2022] EWCOP 48

Urgent application by parents to extract and store the sperm of their son who was dying following a catastrophic stroke.

At the time of the judgment X was unconscious following a stroke that occurred while playing sport. His parents were seeking a declaration that it would be lawful for a doctor to retrieve X's gametes and lawful for those gametes to be stored. There was no dispute as to capacity nor that X would not recover. Mr Justice Poole had statements from the parents but nothing from X's girlfriend other than the mother's report that the girlfriend had expressed a desire to carry X's child. The HFEA and the OS opposed the application, the HFEA partly because consent is central to effective regulation in this area.

Martin v Salford Royal NHS Foundation Trust (Payment of Damages) [2022] EWHC 532 (QB)

In the case of *Martin*, an application for a variable periodical payment order pursuant to the Damages (Variation of Periodical Payments), Order 2005 was made by the Defendant.

In this instance, the court was satisfied there was a chance the Claimant might further deteriorate to the point of requiring institutionalisation, reducing her care needs. The court also sought to determine whether a claimant who has capacity but is vulnerable to potential exploitation is entitled to an award in respect of the cost of a personal injury trust (PIT).

Collins v. Buyers [2022] EWHC 3103

The claimant brings an action for damages for personal injury. At a directions hearing he applied for permission to call an expert on the cost of deputyship issues. The claimant has capacity to litigate but not in relation to property and affairs, he is to be treated as a protected beneficiary. The claimant's schedule for future costs of deputyship and Court of Protection costs amounted to £2.25 million. The defendant's counter-schedule put these at £362,000 and argued there should be a nil award for deputyship costs.

Interesting decision on equality of arms.

Hinduja v. Hinduja [2022] EWCA Civ 1492

Long running saga

See also previous decision in Chancery Division [2020] EWHC 1533

A very important point, often overlooked by civil practitioners, is that there is no requirement to provide medical evidence to support the contention that C lacks capacity for the appointment for a litigation friend.

Paragraph 2.2 PD 21: ‘That requires the grounds of belief of lack of capacity to be stated and, “if” that belief is based on medical opinion, for “any relevant document” to be attached. So the Practice Direction provides that medical evidence of lack of capacity must be attached only if (a) it is the basis of the belief, and (b) exists in documentary form. It does not require a document to be created for the purpose’.

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Clinical Negligence

Esther Pounder

Secondary Victims: *Paul v. Royal Wolverhampton NHS Trust [2022] EWCA Civ 12*

Mental Health:

- *Traylor v. Kent & Medway NHS Social Care Partnership Trust* [2022] EWHC 260 (QB)
- *Williams v Betsi Cadwaladr University Local Health Board* [2022] EWHC 455 (QB)
- *Lewis-Ranwell v G4S Health Services (UK) Ltd* [2022] EWHC 1213 (QB)

Vicarious Liability: *Hughes v. Rattan* [2022] EWCA Civ 107

Causation*:*

- *Pickering v. Cambridge University Hospital NHS Foundation Trust [2022] EWHC 1171 (QB)*
- *Richins v Birmingham Women's and Children's NHS Foundation Trust* [2022] EWHC 847 (QB)

Secondary Victims

Paul v Royal Wolverhampton NHS Trust

[2022] EWCA Civ 12

- Court of Appeal held that it was bound by its decision in *Taylor v A Novo (UK) Ltd [2013] EWCA Civ 194* in relation to secondary victim psychiatric injury claims in clinical negligence.
- Permission to appeal to the Supreme Court has been given. Due to be heard in May 2023.

Mental Health

- ***Traylor v. Kent and Medway NHS SCP [2022] EWHC 260 (QB);***

- ***Williams v Betsi Cadwaladr University Local Health Board* [2022] EWHC 455 (QB)**

- ***Lewis-Ranwell v G4S Health Services (UK) Ltd* [2022] EWHC 1213 (QB)**

Non-delegable duty of care and vicarious liability

***Hughes v. Rattan* [2022] EWCA Civ 107**

D owed C a non-delegable duty of care in respect of treatment they received from associate dentists at the practice.

Not vicariously liable. The test in *Barclays Bank Plc v Various Claimants [2020] UKSC 13, [2020] A.C. 973, [2020] 3 WLUK 464* was not met.

Causation & Experts

Pickering v. Cambridge University Hospital NHS Foundation Trust [2022] EWHC 1171 (QB)

- But for the defendant NHS Trust's negligence C would have avoided suffering a stroke two days after she was discharged from its A&E department. If C had been treated with Heparin whilst she was in A&E, on the balance of probability, she would not have suffered a stroke.
- A reminder of the importance of good experts.

Causation- again…

***Richins v Birmingham Women's and Children's NHS Foundation Trust* [2022] EWHC 847 (QB)**

Stillbirth case. When determining causation, the judge considered the extent to which the concept of 'Claimant Benevolence', could be applied.

The judge accepted that the concept had a role to play but was not persuaded that the concept could provide "*a bridge to causation*" in the face of expert evidence to the contrary.

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Travel Law

Andrew Spencer

Spanish penalty interest

Woodward and *Sedgwick v Mapfre Espana Compania de Seguros y Reaseguros.*

Montreal Convention

JR v Austrian Airlines, *BT v Laudamotion*

Credit cards – Section 75

Cooper v Freedom Travel Group Ltd

Standard of proof: procedural or substantive?

Bristow v Vaudoise Generale

Spanish penalty interest

- *Sedgwick v Mapfre Espana Compania de Seguros y Reaseguros SA*
- Lambert J follows *Troke* – Spanish penalty interest is procedural not substantive. But appropriate to award it as a matter of discretion under S 35A SCA.
- Same result in *Woodward*.

Montreal Convention: CJEU redefines «accident» and «bodily injury»

- *BT v Laudamotion*: CJEU re-interpets Montreal to allow a claim for a pure psychological injury.
- CJEU seeks to prevent «floodgates» with limitations (requirement for certain «gravity and intensity» and of need for treatment).
- *JR v Austrian Airlines*: CJEU fails to follow *Air France v Saks*, and holds that a fall, *without* identifiable external cause, is an ‘accident’ and compensatable under the Montreal regime.

Credit Cards: S 75 CCA 1974

- S 75 provides «the debtor» with a «like claim» against the against the credit card company, as well as the supplier (holiday company), where the holiday was purchased with a credit card.
- But who is «the debtor»? The cardholder only? Or everyone who goes on the holiday (all of whom as «consumers» under the Package Travel Regulations).
- The Court of Appeal have answered: only the cardholder (*Cooper v Freedom Travel*).

Standard of proof: procedural or substantive?

- Standards of proof vary significantly in different jurisdictions.
- Eg «strict proof» (Switzerland) vs. «balance of probabilities».
- *Marshall v MIB*: court holds that standard of proof is procedural and a matter for the forum.
- But in *Bristow v Vaudoise Generale* judge considered that if substantive law required a defence to be proved to a particular standard, this may be a matter of substantive law and not procedural.

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Personal Injury

John Schmitt

- **Duty of Care / Failure to Remove:** *HXA v Surrey CC; YXA v Wolverhampton CC [2022] EWCA Civ 1196*
- **Vicarious Liability:** *Chell v Tarmac Cement and Lime Limited [2022] EWCA Civ 7*
- **Occupiers' Liability Act 1984:** *Brown & Ors v South West Lakes Trust & Ors [2022] EWCA Civ 18*
- **Secondary Victims:** *Paul v Royal Wolverhampton NHS Foundation Trust [2022] EWCA Civ 12*
- **Local Authority Liability for Trees Adjacent to Highway:** *Hoyle v Hampshire County Council [2022] EWHC 934 (QB)*

HXA v Surrey CC; YXA v Wolverhampton CC [2022] EWCA Civ 1196

Underlying facts: each claimant as a child was subjected to severe abuse and neglect by families.

Both claimants were involved with social services for a number of years whilst they remained at home with their families and continued to suffer abuse.

The issue is whether, at any stage in its contact with the children, the local authorities can be said to have assumed responsibility for their welfare so that they owed the children a duty of care at common law.

HXA v Surrey CC; YXA v Wolverhampton CC [2022] EWCA Civ 1196

Stacey J had previously upheld the striking out of negligence claims against the defendant local authorities by Deputy Master Bagot QC in the HXA case and Master Dagnall in the YXA case.

Court of Appeal have allowed the appeal.

The court analysed the statutory scheme in the YXA case as giving rise to a particular statutory duty to safeguard a “looked after” child: it was arguable that the provision of accommodation under s.20 of the Children Act involved an assumption of responsibility not just to take reasonable steps to ensure that the accommodation was safe, but also more widely to ensure the welfare of the child by not returning it to an unsafe environment at home.

HXA v Surrey CC; YXA v Wolverhampton CC [2022] EWCA Civ 1196

At [92], Baker LJ:

"In what other circumstances does a local authority assume responsibility for a specific child so as to give rise to a duty of care? That is a question which can be only answered definitively on a case by case basis by reference to the specific facts of each case. It is not appropriate to seek to lay down guidance in a judgment such as this where the court is considering appeals against orders striking out claims."

HXA v Surrey CC; YXA v Wolverhampton CC [2022] EWCA Civ 1196

The judgment predicated on the principle that claims should not be struck out in an area of law that is “developing”.

Practitioners now left with a lack of clarity in the circumstances in which a duty of care could be owed.

In turn this means strike out applications may likely to fail in any reasonably analogous scenarios through reliance on this authority.

The defendants have sought permission to appeal to the Supreme Court.

Chell v Tarmac Cement and Lime Limited [2022] EWCA Civ 7

The Claimant employed as site fitters by Roltech Engineering Limited.

They were contracted out to the Defendant, Tarmac Cement and Lime Limited working alongside Tarmac's own fitters on site which Tarmac controlled and operated.

Tension between Roltech and Tarmac workers on site.

Claimant injured by "practical joke" actions of Tarmac employee.

Issue, so far as vicarious liability was concerned, was whether the Tarmac fitter's wrongful act was done in the course of his employment.

Chell v Tarmac Cement and Lime Limited [2022] EWCA Civ 7

To succeed, Claimant needed to show –

- This was a wrongful act authorised by his employer, or
- A wrongful and unauthorised mode of doing some act authorised by Tarmac.

Court of Appeal dismiss the appeal:

“The careful and detailed findings of fact made by the judge, unchallenged by the appellant, are fatal to his appeal. What they demonstrate is that there was not a sufficiently close connection between the act which caused the injury and the work of [the Tarmac fitter] so as to make it fair, just and reasonable to impose vicarious liability on Tarmac” [26].

Chell v Tarmac Cement and Lime Limited [2022] EWCA Civ 7

- C of A focus on the cause of the Claimant's injury (an explosive target pellet) which was not the employer's equipment.
- It was no part of the Tarmac fitter's work to use target pellets.
- The Tarmac fitter did not have a supervisory role: there was no abuse of power.
- The risk created by the Tarmac fitter was not inherent in the business. It provided only the background or context to injury.

There was no reasonably foreseeable risk of injury from horseplay, ill-discipline or malice to render Tarmac directly liable to the Claimant.

In the absence of express or implied threats of violence and complaints about named individuals, even if a duty of care existed, it had not been breached by Tarmac.

Brown & Ors v South West Lakes Trust & Ors [2022] EWCA Civ 18

- Mrs Brown was driving her car on the road running along the south of Stithians Reservoir in Cornwall. Shortly after rounding a sweeping left hand bend, she lost control of the car which left the road and crashed through a chain link fence into the water of the reservoir.
- A claim was commenced against the two occupiers of the reservoir and Cornwall Council, the highway authority.
- Claimant argued that the danger was the existence of the water, which posed a real risk of injury to anyone who came upon it.
- Claimant argued this was not a voluntary trespasser but an involuntary or inadvertent trespasser coming across the danger.
- Claimant accordingly seeking to distinguish OLA 1984 authority of *Tomlinson v Congleton BC* [2004] 1 AC 46 (the trespasser who dived into a lake).

Brown & Ors v South West Lakes Trust & Ors [2022] EWCA Civ 18

Claimant argued the risk of driving into the water was one against which, in all circumstances of the case, the occupiers of the reservoir might reasonably be expected to have offered protection from as required under section 1(3)(c) of the Occupiers' Liability Act 1984 Act i.e. warning sign / stronger fence.

Court of Appeal upholds strike out: "no sustainable basis for showing a duty under the 1984 Act owed to Mrs Brown by the occupiers of the reservoir".

Brown & Ors v South West Lakes Trust & Ors [2022] EWCA Civ 18

Dingemans LJ: “it is necessary (for the Claimant) to show that there was a ‘risk of … suffering injury on the premises by reason of any danger due to the state of the premises’. In this case the danger arose because Mrs Brown's car came off the highway, travelled across the verge, went through the fence and down the bank, and into the reservoir. This danger was not due to the *state* of the reservoir.”

- Nothing in the state of the reservoir posed a danger to C.
- Nothing in the duties of those occupying properties bordering the highway which extends to preventing drivers on the highway from driving off the highway on to their land.

Paul v Royal Wolverhampton NHS Foundation Trust [2022] EWCA Civ 12

Close relatives witness the death or immediate aftermath of death of family member some time after the index negligent consultation / failure to diagnose or treat.

Such relatives are caused psychiatric illness.

Question of whether there was sufficient proximity in time and space between C and the relevant “event” to satisfy that limb of the *Alcock* criteria & give rise to a duty of care.

C of A strike out all three claims on basis of authority of *Taylor v A Novo (UK) Ltd* [2013] EWCA Civ 194.

Panel of 7 Supreme Court justices convened to hear appeal in May 2023 (because looking at *Alcock*).

Hoyle v Hampshire County Council [2022] EWHC 934 (QB)

The deceased had been driving along an “A” road when a mature tree growing by the roadside on land owned by the highway authority fell onto his car, causing him fatal injuries.

Pre-accident tree fell subject to monthly “drive-by” inspections by highways inspectors, and periodic “on-foot” inspections by arboriculturists.

C argued that any competent tree inspector would have noticed a problem with the roots and raised the alarm.

C argued negligence and breach of section 41 HA 1980.

Hoyle v Hampshire County Council [2022] EWHC 934 (QB)

C fails to prove evidentially the tree was at risk of falling and/or that such a risk would have been visible to an ordinarily skilled tree inspector.

LA's inspection found to be more than adequate.

For the LA to adopt a risk-averse approach would result in the unnecessary removal of trees and the accompanying destruction of habitats.

Section 1 of the Compensation Act 2006 and 'Deterrent effect of potential liability'.

Section 41(1) was held not applicable: the tree was not part of the fabric of the highway and in any event its failure was not due to a lack of maintenance.

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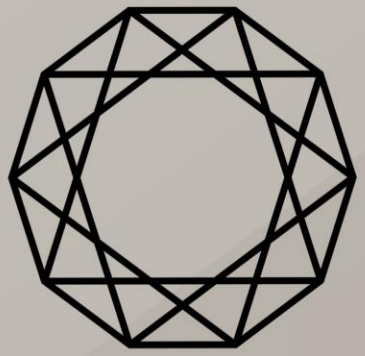
Thank you for your attention

Questions?



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