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Professional Negligence in 2022: The Year in Review

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Professional Negligence

Introduction

It is the view of this author, and perhaps also some readers of the journal, that 2022 was a year that held hope of brighter times and, in many ways, failed to deliver. While restrictive rules introduced during the Covid-19 crisis were gradually lifted for much of the world, allowing increased freedom and long-awaited reunions for many, the consequences of the devastating global event that was the pandemic are still being felt and uncovered. In addition, this year was rocked by war, economic and political upheaval, and natural disasters linked to the climate crisis. Any sense of certainty, or predictability even in the short term, has taken knock after knock. Wariness and weariness abound.

This article concerns some interesting cases and issues arising in 2022 from the field of torts, and therefore relevant to professional liability. It is the privilege of the writer of such a review to cherry-pick material for consideration; the following discussion is selective rather than comprehensive. This review considers developments in vicarious liability, the duty to confer a benefit, pure psychiatric injury and the defence of illegality. Acknowledging the selective lens applied, it appears also to have been a year marked by wariness and caution in the courts. This is no doubt in part because the cases considered here are principally Court of Appeal or lower court cases; unlike the preceding four years, the Supreme Court has been quiet on the tort front in 2022. Decisions on important appeals have not yet been handed down.[1] Nevertheless, some significant judgments were delivered in which the courts have proceeded with notable caution, with a firm eye to precedent, and shown great concern for recent warnings by the Supreme Court against excessive expansion.

No vicarious liability?

Following several years of expansion in the scope of the doctrine of vicarious liability, including the extension of the doctrine to relationships *akin* to employment, the Supreme Court in recent years has sought to correct (and restrain) the direction of travel and narrow its scope. *Barclays Bank v Various Claimants*[2] was concerned with the first limb of the vicarious liability enquiry: whether the relationship between the defendant and the wrongdoer gives rise to vicarious liability. A doctor, despite providing a crucial service to the bank's recruitment process, was found to be in 'business on his own account'.[3] *WM Morrison Supermarkets Plc v Various Claimants*[4] ('*Morrison No 2*') focused on the second limb: whether there was a sufficient connection between that relationship and the tort. The

Supreme Court in *Barclays* upheld, in strong terms, the difference under the law between employees and independent contractors. It confirmed that the fact that vicarious liability now extends to relationships 'akin to employment' did not erode that distinction. If the tortfeasor was an independent contractor, it was incorrect to consider the five 'incidents' identified by Lord Phillips in *Various Claimants v Catholic Child Welfare Society*[5] (*CCWS*) which suggest that it is fair to impose vicarious liability. Only in 'doubtful cases' was this exercise to be done.[6] In *Morrison No* 2, Lord Reed corrected what he said were 'misunderstandings' of a different *Morrison* case, *Mohamud v WM Morrison Supermarkets* plc,[7] which could be (and had been) understood as widening the scope of the doctrine in finding vicarious liability where a petrol station attendant inflicted upon a customer racial abuse and assaulted him at his car. The Supreme Court in *Morrison No 2* rejected the applicability of vicarious liability when an employee misused confidential data and maliciously published it online. It emphasised that *Mohamud* had not effected a change in the law, and that the approach remained that taken in *Lister v Hesley Hall*[8] and *Dubai Aluminium v Salaam*.[9] The question remained 'whether the wrongful conduct was so closely connected with acts the employee was authorised to do that, for the purposes of the liability of his employer, it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment'.[10] The Supreme Court confirmed the insufficiency of providing the employee with the opportunity to commit the tort, and that no liability would arise where the employee was on an 'independent personal venture' or 'frolic of his own'.[11] Although the case was not one concerning sexual abuse, the Supreme Court said in *Morrison No 2* that the 'close connection' test was applied differently in such cases and certain factors, such as the employer's 'conferral of authority' on the employee over the victims, would be important.[12]

Looking back on vicarious liability in 2022, we turn first to a decision that was not, in fact, decided in 2022 but in the later months of 2021: *Blackpool Football Club Limited v DSN*.[13] It provoked comment in 2022 for the approach taken by the Court of Appeal to the question of the vicarious liability of Blackpool Football Club (Blackpool FC) when a child was abused by Mr Roper, a youth football coach and unpaid scout for the club. This decision has been noted in this journal[14] and elsewhere, but it is worth revisiting in some detail given its importance this year.

In *Blackpool*, the claimant had been 13 years old at the time of the abuse. Mr Roper was not an employee of Blackpool FC; he was connected informally with the club, running youth football teams that were generally seen as 'feeder' teams for Blackpool FC.[15] He was not paid for this and did not operate exclusively for the benefit of Blackpool FC; the only person employed by the club regarding youth football was the Head of Youth

Development, Mr Jack Chapman. Blackpool FC was, at the time, in a difficult financial position and employed only the minimum staff required.[16] The recruitment of players through such means as Mr Roper's youth teams was said to be important to the club, given its financial position. In the 1980s, it had sold players from its first team, who had been scouted by Mr Roper, to other clubs for significant sums.[17] Blackpool FC could not create an official relationship with young players under 14 years old – Mr Roper's youth teams provided a way by which players younger than 14 might be spotted, coached and encouraged to form a relationship with Blackpool FC.[18] Mr Roper was given access to private areas of Blackpool FC and other privileges, and it seems he was able to offer places at Blackpool FC's School of Excellence.

The claimant had attended Blackpool FC's School of Excellence for training and coaching. A short time later, he went on a trip to New Zealand and Thailand organised by Mr Roper. It was on this tour that he, the sole adult in charge of about 20 children, abused the claimant. Was Blackpool FC vicariously liable for the acts of abuse committed on this tour?

As was noted in this journal, Stuart-Smith LJ, with whom Macur LJ and Sir Stephen Richards agreed, emphasised the relevance of 'control' in both stages of the vicarious liability enquiry.[19] He noted that the fact that a tortfeasor has done something for the benefit of the 'employer' or their enterprise will seldom be determinative – the question of vicarious liability generally will not arise without that basic starting position.[20] More is required than mere

opportunity, both in the first and second stages.[21] The authorities suggested, he said, that it was the combination of the creation of 'enterprise risk', together with 'the measure of control (if only in assigning the tortfeasor to roles that significantly enhance that risk)', that provide the 'touchstone for the synthesis of stage 1 and stage 2'.[22]

Stuart-Smith LJ rejected the submission that Blackpool FC's relationship with Mr Roper was 'akin to employment'. Although he could be described as 'embedded' in the business of Blackpool FC, and would not have been able to commit the abuse if Blackpool FC had severed the relationship, this was not determinative.[23] Fatally, for the 'akin to employment' argument, there was no control over *how* he should do the scouting, or *what* he should do.[24] Using Lord Reed's wording from *Cox v Ministry of Justice*,[25] Stuart-Smith LJ said there 'was a complete absence even of a vestigial degree of control'.[26] The power to terminate the relationship was not sufficient 'control'. As with the doctor in *Barclays*, what Mr Roper did was said to be integral to the business of Blackpool FC. However, this was not enough.[27]

-- ***(2023) 1 PN 5–23 at 8***

As to the second limb of vicarious liability, Stuart-Smith LJ said that the decided cases:

> show that this second question is highly fact-sensitive and requiring of detailed scrutiny. Where it is proposed to extend the imposition of vicarious liability beyond its traditional bounds, the rigour to be attached to the second question (as well as to the first) must, in my judgment be even greater because notions of entrusting functions, assigning work, and the extent of the “employer's” control are likely to be more fluid than in a conventional employer/employee relationship.[28]

On this interpretation, the threshold for satisfying the second limb of the vicarious liability will be higher where the relationship is not one of traditional employment. The Court's consideration of the relationship between the two limbs is a noteworthy feature of this decision.

The abuse occurred on the international trip organised by Mr Roper. Other than a small contribution of £500, Blackpool FC did not fund the tour; Mr Roper paid the approximately £25,000 bill.[29] Stuart-Smith LJ rejected the trial judge's description that it was 'as close to an official trip as makes no difference'.[30] He found it to be 'Mr Roper's trip in every sense'.[31] The Thailand leg seems to have been the chance for Mr Roper to conduct transactions associated with his clothing business. It was not, therefore, something forming part of Mr Roper's ordinary scouting activities. The Court of Appeal placed emphasis on Lord Phillips' formulation in *CCWS* that the employer, in cases of sexual abuse, must have *significantly* increased the risk of harm by putting the employee in their position and requiring them to perform certain tasks.[32] While Blackpool FC put Mr Roper in the position of scout, Stuart LJ said it would 'stretch[ ] meaning beyond breaking point to suggest that the club required him to organise and lead the trip'.[33] There was, crucially, no conferral of authority in relation to the trip.

This case signals a return to prominence of 'control' as a factor for consideration in approaching vicarious liability. After *CCWS* and *Cox*, it was understood that 'control' over employees, certainly control of *how* work was carried out, was less important than it had been in the past. However, the Court of Appeal here placed great emphasis on the club's lack of control over Mr Roper's activities at both stages of the vicarious liability enquiry, repeatedly referring to Lord Reed's note in *Cox* that the absence of some degree of control in determining what tasks are undertaken would suggest against a relationship attracting the doctrine. The case is significant in exploring the role of control at both stages of the enquiry.

One might query, though, if the power to control existed even if it was not exercised by Blackpool FC. The club probably could have dictated the nature of Mr Roper's scouting activities, had it chosen to do so. If satisfied with Mr Roper's approach, which it might have been given his successes in bringing in talent, it may not have been necessary. Stuart-Smith LJ downplayed the significance of the ability to withdraw perks and terminate the

-- ***(2023) 1 PN 5–23 at 9***

relationship, but this would have given the club some power over Mr Roper. Is control indicative of a relationship attracting vicarious liability only if actually exercised?

Blackpool FC set up Mr Roper in a position of power over the young players and their families. They would not have travelled with Mr Roper if not for the club association. One cannot help but think that perhaps Blackpool FC is getting off lightly, in circumstances where it allowed Mr Roper to act as gatekeeper for young hopefuls, facilitated the players' perception of Mr Roper as acting for the club and benefited from his activities.

Before *Barclays* and *Morrison No* 2, there was a time when denial of vicarious liability would seem unusual. In this case it was noted by Stuart-Smith LJ that the high-watermark 'for an expansionist approach' had already been reached and that the Supreme Court had since attempted to apply the brakes.[34] The outcome here is in keeping with that attempt. This decision was followed in *TVZ v Manchester City Football Club*,[35] involving broadly similar facts.

The insufficiency of 'mere opportunity' was again emphasised before the HHJ Carmell Wall in the High Court in *MXX v A Secondary School*.[36] The tortfeasor was an 18-year-old former pupil of the defendant school, and had undertaken a work experience placement at the school. The claimant was, at the time, a 13-year-old student of the school. After the end of the work experience placement, the defendant had groomed and sexually assaulted the claimant. HHJ Carmell Wall found that there was no relationship 'akin to employment' because there was no real benefit derived by the school by the tortfeasor's presence – instead, he was a burden and needed supervision and close direction.[37] He had never been given any responsibility for teaching or care, and was not in any meaningful way part of the defendant's business activity.[38] The school had not created the risk of the tort being committed; the judge said that the most that could be said was that he had been given the opportunity to meet pupils.[39] The defendant controlled the wrongdoer in directing every task, but there were no consequences to refusal and no obligation to do anything.[40] As to the second limb of vicarious liability, while it was acknowledged that wrongdoing after the employment had ended did not necessarily break the 'close connection', it was held that no aspect of the defendant's function was delegated to the tortfeasor.[41] He had no caring responsibilities. He had simply been presented with an opportunity.[42]

The first appeal decision in *Chell v Tarmac, Cement and Lime Limited*[43] was noted in this journal in a review of 2020.[44] There was a further appeal to the Court of Appeal and a decision handed down in 2022.[45] This was a case concerning a workplace prank following

tension between two groups of fitters. Two pellet targets were placed on a surface near the appellant's ear and struck with a hammer, causing a loud explosion and consequent injury.[46] It was ultimately decided that this was a frolic by the wrongdoer, for which the employer was not vicariously liable. Such an activity 'in no way advanced the purposes of [the employer] and that activity was in no sense within the field of activities authorised'.[47] The outcome is convincing. More curious is the reasoning of the Court of Appeal, which seems largely based on the old *Salmond* formulation (though *Lister* and *Morrison No 2* were also discussed and applied). The original *Salmond* formulation was set out in the Court's review of authorities and the Court, in discussion, posed the central question in the following terms:

> Was it a wrongful act authorised by his employer … or a wrongful and unauthorised mode of doing some act authorised by [the employer]? It is only if the unauthorised act is so connected with what [the wrongdoer] had been authorised to do that it may rightly be regarded as the mode of doing what was authorised.[48]

The failure of these four cases, and the grounds upon which they fail, all suggest that the Court of Appeal and lower courts are heeding the Supreme Court's call for a return to orthodoxy and a more restrictive approach to situations that will attract the doctrine of vicarious liability.

Non-delegable duty of care

Conversely, the claimant in *Hughes v Rattan*[49] was successful, though in asserting the existence of a non-delegable duty of care rather than vicarious liability. This case was also noted in this journal earlier in the year.[50] When the law

of vicarious liability narrows in scope and hardens its boundaries it is unsurprising to see attempts to expand the scope of the non-delegable duty of care. It is perhaps more surprising that this attempt succeeded.

The claimant, Ms Hughes, received NHS dental treatment over a period of six years at Manor Park Dental Practice (MPDP), which was owned by Dr Rajendra Rattan. Dr Rattan was the sole principal dentist at MPDP, but it was other practitioners who provided treatment to Ms Hughes. Three were 'self-employed Associate Dentists'.[51] A trial had been ordered of the preliminary issue, which was also the subject of the appeal: whether or not Dr Rattan was liable for any negligence on the part of the three Associate Dentists (AD), through the principles of vicarious liability or a non-delegable duty of care.

A General Dental Services Contract (GDS Contract) existed between Dr Rattan and the relevant healthcare trust for the provision of NHS dental work. Dr Rattan was obliged, under the GDS Contract, to provide a certain amount of dental work each year, but could meet these requirements by sub-contracting or engaging associates.[52] The agreement between the ADs and Dr Rattan included clauses describing the ADs as

'self-employed' and that the agreement was not intended to create an employer-employee relationship.[53] Dr Rattan was required to provide equipment needed, but this excluded clothing.[54] Patients paid MPDP for the services provided by ADs, rather than paying the ADs directly. The ADs received 50 per cent of the fees Dr Rattan received from the healthcare trust for NHS work carried out.[55] The ADs were not permitted to take more than 21 working days in holiday without prior agreement and the agreement also provided for maternity and paternity leave.[56] They each held professional indemnity cover, were responsible for their own tax and national insurance contributions and did not receive sick pay or a pension from Dr Rattan.[57] They were each in full control of clinical decisions and could work for other practices.[58] Two of the three ADs did so at some point.[59]

The judge at first instance found in favour of the claimant with regard to both vicarious liability and the non-delegable duty of care.

On appeal, Bean LJ (with whom Nicola Davies LJ and Simler LJ agreed) upheld the judge's finding that a non-delegable duty was owed by Dr Rattan. Though it was not strictly necessary to do so, he went on to consider vicarious liability and set out reasons for disagreement with the first instance judge. Bean LJ said he would have found vicarious liability due to the relationship being one 'akin to employment', if *Cox* had been the 'last word' of the Supreme Court on the issue, rather than *Barclays*. *Cox* treated the critical question as whether the tortfeasor carried on activities that were an integral part of the defendant's business.[60] In *Barclays*, he said, the key enquiry had 'reverted' to focusing on the contractual arrangements between tortfeasor and defendant.[61] This is unsurprising, as there was no contractual relationship in *Cox* between prisoner and prison authority. Nevertheless, it is true that there was a change of direction signalled in *Barclays*. The inapplicability of vicarious liability to independent contractors was confirmed, and the independent contractor/employee distinction re-emphasised as a primary question. Ultimately, Bean LJ reached a different conclusion to the judge at first instance after balancing the features of this contractual arrangement. Significant in reaching this conclusion were the defendant's lack of control over clinical judgments, and that the ADs were free to work when and how much they wanted, and for other practices.[62]

As was noted by Beuermann in this journal, it is difficult to identify the 'independent business' supposedly conducted by the ADs.[63] As part of the finding of a non-delegable duty of care, it was decided that the patients were patients of the *practice* – Dr Rattan's practice was more than simply an administrative funnel for the ADs. Bean LJ noted that there were factors pointing both ways, and indeed that in a 'multi-factorial evaluation by a trial judge … this court should be slow to interfere'.[64] The Court of Appeal did so without enormously convincing reasons. It is difficult not to suspect that the Court of

Appeal's reasoning on this point is motivated less by it having been convinced that the ADs were really pursuing recognisably-independent businesses, and more by the wind-change signalled in *Barclays.* Vicarious liability is to be treated with caution.

As to the non-delegable duty, it was argued for Dr Rattan on appeal that the judge had been incorrect in finding the first three factors in the test set out in *Woodland v Swimming Teachers Association*[65] to be satisfied. As was noted by the Court of Appeal,[66] *Woodland* is currently the leading case concerning non-delegable duties of care. Lord Sumption there suggested five factors indicative of a non-delegable duty (in circumstances outside of duties concerning highways or hazards).[67] In summary form, these are:

(1) That the claimant is a patient or a child, or for some other reason is 'especially vulnerable or dependent on the protection of the defendant against the risk of injury'.

(2) There is a relationship between claimant and defendant, (i) which places the claimant in the custody, charge or care of the defendant, and (ii) by which the defendant assumes a positive duty to protect the claimant.

(3) The claimant has no control over how the defendant performs those obligations, ie whether personally or through a third party.

(4) The defendant has delegated to a third party some function integral to that positive duty and the third party is exercising the defendant's custody or care of the claimant and the element of control that goes with it.

(5) The third party has been negligent in performing of the very function delegated.

Only the first three factors were in issue. The judge at first instance found these to be satisfied. As to the first factor, she said that someone 'who is a patient for the purposes of receiving dental treatment falls within the rationale identified by the Supreme Court in *Woodland …* namely they have placed themselves in the care of the Practice in circumstances where they are vulnerable to the risk of injury'.[68] The second factor was found to be satisfied due to the nature of the contractual arrangements in place; for example, the ADs assisted Dr Rattan in performing his obligations under the GDS Contract and if the ADs terminated their agreements, Dr Rattan took over responsibility for continuing treatment of their patients.[69] The third factor was said to be satisfied as Ms Hughes could do no more than request a particular dentist (which might not be granted), or seek another practice.

Apart from two county court cases, before this case a non-delegable duty in a medical context had been found only in the case of patients admitted to hospital for treatment.[70] It was argued, on appeal, that dental treatment was very different to cases concerning admission to hospital. The focus of submissions was on the second factor. It was said that unlike a hospital 'accepting a patient … [the practice] did not assume a duty … to provide

dental treatment but merely a duty to make arrangements for the dental treatment to be provided by an associate'.[71]

Bean LJ agreed that the *Woodland* factors were satisfied. He said that Lord Sumption's sentence, which referred expressly to 'patient[s]', was not confined to emergency-care patients or hospital in-patients, and 'cannot be rewritten as though the Claimant had to be within a subset of especially vulnerable patients in order to qualify'.[72] With Ms Hughes signing the Personal Dental Treatment Plan, which listed Dr Rattan as provider, the relevant antecedent relationship was formed which satisfied the second factor.[73] This had the effect, it was said, of placing her in the actual care of Dr Rattan. The third factor was said to be satisfied because she could do no more than express a preference as to the dentist treating her. The ability to refuse treatment at all was said not to be significant; 'that a prisoner or immigration detainee cannot decide to seek treatment elsewhere does not mean that any patient who can do so is not owed the non-delegable duty of care'.[74]

The five factors were identified by Lord Sumption as characteristics of cases in which a non-delegable duty of care

was enlivened. The language used by Lord Sumption in *Woodland* suggested that non-delegable duties were exceptional duties owed to especially vulnerable parties. Being a patient is listed as a reason for creation of the requisite vulnerability. However, this does not necessarily suggest that all patients will fit the bill. Regard must still be had to the bigger picture. The type of patient considered by Lord Sumption, from the context of the cases discussed in *Woodland*, was the hospital in-patient. This type of patient is, to a significant degree, under the control the hospital for the time they are in its care and their own agency is curtailed in many aspects of living. The same is true of children at school. Lord Sumption's formulation focuses attention on *especial vulnerability.* A few paragraphs later he refers to the policy of protecting those who are 'inherently vulnerable and highly dependent on the observance of proper standards of care by those with a significant degree of control over their lives'.[75]

Bean LJ's reasoning on the first factor focuses on Lord Sumption's choice of words. Standing back, though, and looking at Ms Hughes' claim, it is perhaps surprising that an adult with full capacity, who could choose a different dental practice if unsatisfied, might be treated as being 'especially vulnerable'. The child or in-patient (usually) does not have the same choice. There was not the same degree of control over Ms Hughes' life as is exercised by a school over a powerless child, or a hospital over an in-patient or someone requiring emergency care. This decision has the potential to expand the scope of non-delegable duties to a significant degree. Without the need for the type of control (and corresponding vulnerability) present in residential or school-based care as a significant hurdle, there is the possibility that a non-delegable duty might be owed wherever a professional service is provided and there is a lack of client choice in the practitioner performing the service.

As was noted in this journal earlier in 2022, the relationship between vicarious liability and liability for breach of a non-delegable duty of care remains murky and requires clarification by the Supreme Court.[76] The confused state of affairs is evident in Bean LJ's comment that, if not for Lady Hale's reasoning in *Barclays*, he would be prepared to find vicarious liability for 'essentially … very similar' reasons he found a non-delegable duty of care.[77]

It may, in fact, be desirable that the law does hold 'masters' liable for the acts of independent contractors. It has been suggested that the traditional distinction between employees and independent contractors, in terms of the lack of vicarious liability for the latter, is out-of-sync with modern employment practices.[78] However, this should be a change that is made expressly and clearly by the Supreme Court or by Parliament; it should not be the result of stretching criteria to fill a perceived gap, in an area of law that already exists, as Morgan has argued, to fill a gap and without much independent justification.[79]

Duty to confer a benefit

Over the past year, several cases were decided in the Court of Appeal concerning the duty of care in negligence where there has been an alleged failure to confer a benefit rather than a positive act causing harm. 'Failure to confer a benefit' is the language now preferred by the Supreme Court, as explained by Lord Reed in *N v Poole Borough Council*,[80] over the traditional distinction drawn between acts and omissions. It is now clear that neither private individuals nor public bodies generally owe a duty to confer benefits upon others, perhaps by protecting them from harm, unless certain exceptional circumstances are present.[81] Lord Reed, for the majority, in *Robinson v Chief Constable of West Yorkshire*[82] cited with approval the summary provided by Tofaris and Steel.[83] It was also emphasised in *Robinson* that public authorities were to be treated no differently to private individuals, and that it was inappropriate to ask whether or not the existence of a duty is 'fair, just and reasonable', a key step in an approach based on the *Caparo* factors,[84] where the existence or non-existence of the duty had already been decided.

> In the tort of negligence, a person A is not under a duty to take care to prevent harm occurring to person B through a source of danger not created by A unless (i) A has assumed a responsibility to protect B from that danger, (ii) A has done

> something which prevents another from protecting B from that danger, (iii) A has a special level of control over that source of danger, or (iv) A's status creates an obligation to protect B from that danger.[85]

Rushbond Plc v JS Design Partnership LLP[86] was decided in December 2021. It was an appeal of a decision to strike out a claim in negligence. The central question for the Court of Appeal was whether or not the case was of the type historically known as a 'pure omissions' case, or if it fell within one of the categories in which a claim might succeed.

The appellant owned an empty 1920s-built cinema, the Majestic, in Leeds. The doors were usually kept locked, and there was an alarm system and other security measures in place. The respondent was the firm advising a third party which was interested in acquiring or leasing the building. The respondent sent Mr Jeffrey, an architect, to visit the property on several occasions.

The appellant suggested that Mr Jeffrey should have been aware of the security practices adopted in respect of the building, including entering by one specific door and locking it immediately after passing through. The door, it seems, was prone to swinging open.[87] Mr Jeffrey was given the keys and the alarm code. However, after entering the building through the mandated door, he did not secure it. During the hour-long inspection (which involved Mr Jeffrey and several colleagues making their way through the six storeys of the building), it was alleged that an intruder entered the building. Although Mr Jeffrey reset the alarm and locked the door when they left, a fire was started from inside the property later that day. The roof and the interior were destroyed. The appellant suggested that the fire was started by the intruder. The appellant argued that the respondent owed a duty of care to take precautions as to security, which was breached.[88] It claimed damages around £6.5 million.[89] The judge at first instance found that this was a 'pure omissions' case, that none of the relevant exceptions applied, and therefore struck out the claim.

There are some similarities between this case and *Smith v Littlewoods Organisation*,[90] which was also concerned with an empty cinema which burned down. However, there the argument was that the *owners* owed a duty to their neighbours to guard against the foreseeable risk of damage caused by intruders. The House of Lords held that they did not, Lord Goff setting out the general rule that there is no duty to prevent a third party from causing damage except in special circumstances, including where the relationship between the parties gives rise to an assumption of responsibility by the defendants, where the defendant exercises special control of a third party, or where the defendant causes, or permits to be created, a source of danger.[91] *Stansbie v Troman*[92] was cited as an example of the first of these, which also bears a similarity to the present case. In *Stansbie*, an assumption of responsibility was held to arise when a decorator left premises without locking the door, and a thief entered and stole property.

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Returning to *Rushbond*, Coulson LJ, with whom Stuart-Smith LJ and Asplin LJ agreed, found that there was an arguable case either that the claim was *not* a 'pure omissions' case.[93] As such, the appeal was allowed. The Court of Appeal considered that this was not, in fact, a case of a 'pure omission'. Coulson LJ noted that 'pure omissions' cases were those in which 'the defendant did nothing, or certainly nothing of any legal relevance to the claim'.[94] For example, in *Mitchell v Glasgow City Council*,[95] the defendant council had no 'particular' involvement with the person killed; it was merely the landlord.[96] Similarly, it was said, in *Smith*, the defendant had done nothing except own adjacent property.[97] In this case, by contrast, Coulson LJ thought that 'the respondent was involved directly in the activity which allowed the intruder to enter the property'.[98] He had unlocked the door, turned off the alarm and left the door unlocked (and possibly open). Coulson LJ categorised the case as one of the defendant having 'positively made things worse' – it was not a 'pure' omission, but part of a series of acts and omissions during the visit in which Mr Jeffrey 'rendered a secure building insecure'.[99] It was also, he said, indistinguishable from *Stansbie*.[100]

Coulson LJ also considered it arguable that, if it was a pure omissions case after all, the respondent had assumed responsibility to take reasonable care with respect to security and therefore owed a duty of care. He rejected the suggestion by the judge at first instance that the respondent needed to hold itself out as having special skills in

safeguarding to owe a duty on the basis of assumption of responsibility – all that was required was locking the door.[101]

It is noteworthy that Coulson LJ reverted, in this case, to the traditional language of 'acts/omissions', despite noting Lord Reed's warning in *Poole Borough Council* that it may be unhelpful. While the acts/omissions boundary can be difficult to navigate, justifications for there being no general duty with respect to negligent omissions, set out by Lord Hoffman in *Stovin v Wise*,[102] only apply to *pure* omissions. Perhaps the traditional language still serves as a useful guide in certain cases.

As Coulson LJ acknowledged in *Rushbond*, the threshold for success was low: being an appeal from a strike out, the appellant simply had to demonstrate that the claim was *arguable*. However, it is still interesting to contrast this case with a case decided shortly afterwards but concerning a public body – the police. In *Tindall v Chief Constable of Thames Valley Police*,[103] the Court of Appeal confidently overturned the decision that the case should go to trial and declared the law to be settled. One cannot help but feel that this is, in large part, due to the status of the alleged wrongdoer and (unspoken) policy concerns. In *Tindall*, the defendant Chief Constable was successful in appealing the Master's refusal of his application to strike out the claim against him, or for summary judgment. Police officers had attended the scene of an accident when a driver had lost control of his vehicle on black ice. While the injured driver was waiting for emergency services, he began to warn other vehicles to slow down – he had worked as a road gritter and was concerned

to prevent further accidents.[104] When the police arrived, he impressed upon the police the danger and was taken to hospital. The police officers erected a 'Police Slow' sign while clearing the debris but removed it on leaving the scene. Around 20 minutes later, the claimant's husband drove along that stretch of road and was killed in a collision with another vehicle which had skidded on the ice. Stuart-Smith LJ, with whom Nicola Davies LJ and Thirlwall LJ agreed, found that it was not arguable that the police owed a duty of care in this situation.

The central argument advanced by the claimant was that this was a case of 'making things worse', and therefore one of the exceptional situations in which there was a duty to protect. It was said that the police attendance led to the injured driver (and anyone else who would have come to his aid) ceasing his attempts to warn other motorists of the danger.[105] The injured driver had, for the time he was able, been successfully slowing down traffic.[106] It was suggested that, if the police had not attended, the fire service would have taken control and remained at the scene until the ice was cleared. It was also said that, either in addition or in the alternative, the police had '[a]ssumed responsibility/control and then relinquished it'.[107]

The Master had decided that what amounted to an intervention which 'makes things worse' was a fact-dependant exercise, and she could not say that this case was bound to fail on current authority. She noted that it 'may lie on the spectrum of cases between 'no duty and duty' and where the line is to be drawn cannot fairly be an exercise based on assumed facts and argument at a strike out application given the evident flux which the law is experiencing in the light of the recent run of Supreme Court authority …'.[108] By contrast, the Court of Appeal decided that the case was clearly unarguable, and struck out the claim.

Stuart-Smith LJ emphasised that there was a difference, in the authorities, between actions of the police that are ineffectual (for which no duty arises) and actions which make matters worse.[109] He noted that *Ancell v McDermott*[110] was particularly relevant, as it had been held that police officers did not owe a duty of care after noticing a diesel spill on the road when a motorist was killed after skidding. Pointing to case law including *East Suffolk Rivers Catchment Board v Kent*,[111] in which a local authority undertook the repair of a sea wall so inefficiently that flooding continued for 178 days, Stuart-Smith LJ noted that a public authority will generally not be liable where it has intervened only ineffectually rather than harmfully, even if the intervention involves taking control of the situation.[112] Alternatively, a duty might be found where it has assumed responsibility to an individual member of the public.[113] However, the police intervention here was not sufficient. Stuart-Smith LJ rejected the claimant' s reliance on *Gibson*

v Orr,[114] a Scottish case in which the Lord Ordinary applied the *Caparo* factors to find a duty existed where police attending

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a bridge collapse withdrew from the scene (and therefore withdrew their blue warning lights) without receiving confirmation that any warning was in place on the other side of the river. Two people lost their lives when a car plunged into the river. In taking control of the hazard, there was said to be sufficient proximity between police and road users likely to be immediately affected by the hazard.[115] Stuart-Smith LJ noted that, given the Supreme Court's 'corrective re-emphasis' in recent decisions, *Gibson* was inconsistent with the more restrictive approach currently taken in England and Wales.[116] Any suggestion that the officers made matters worse in *Gibson*, or that there was an assumption of responsibility, was said to be inconsistent with authorities including *East Suffolk* and *Stovin*.[117]

That the arrival of the police in *Tindall* caused the injured driver to give up his warning activity and seek medical attention was not, it was said, a basis for finding a duty of care to prevent road users from suffering harm. They could not be said to have 'made matters worse' by reference to the driver's departure.[118] This was a paradigm example of 'ineffectual intervention':[119] by taking away the sign again, they simply left the road as they found it.

The case was not permitted to go to trial because the Court of Appeal decided the facts were clear and the law settled. The Supreme Court in recent cases like *Robinson* has, indeed, been keen to discourage courts from 're-opening' settled categories of 'duty' or 'no duty'. One might query, however, how clear and settled is the law on this difficult topic. The possibility of an alternative, more effective 'rescue', a similar argument to that advanced in *Tindall* with respect to the fire service, was held to be important in *Kent v Griffiths*,[120] where an ambulance accepted a call and then failed to arrive in a timely manner. When a case is 'novel' and when it is 'not novel' is not always easy to determine. This is the new frontier, post *Robinson.*

That is not to say that the outcome is undesirable. The power to prevent harm does not necessitate its use. This case appears to be a good example of one based on what might be termed 'policy considerations', but which, following the Supreme Court's recent guidance in cases like *Robinson*, is hidden from view behind the assertion that the case is not 'novel'. The decision in *Ancell*, on which Stuart-Smith LJ placed emphasis, was reached by consideration of the extensive and undesirable burden that would be placed on the police if there were a duty to protect road users from hazards, which would divert attention and resources from core functions. The same point likely applies here and renders the outcome sensible.

Nevertheless, Stuart-Smith LJ's suggestion that *Gibson* would also fail, if decided now, highlights aspects of the current state of the law that should make us uneasy. It is easy enough to accept that police cannot be made responsible for protection against everyday hazards that exist on roads – debris, oil, ice and the like. This would be a burdensome duty owed to a huge class of people on a daily basis. However, it is difficult to suggest that they ought not to guard against the grave and obvious risk that a car full of people might meet their deaths if sufficient care is not taken to draw attention to a collapsed bridge. This was an exceptional and unlikely situation, not encountered as an ordinary incident of using

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the roads, and the class of people to whom the duty would be owed was limited in time and space.

The ability to draw a line between two cases that might be said to belong to the same 'settled category' is what is missing from an approach that seeks to restrict recourse to policy-based reasoning in the way the Supreme Court has sought to do in *Robinson* and the like. With heavy emphasis on the importance of precedent and proceeding by analogy, courts may be discouraged from according weight to factual differences in cases that might, in fact, call for a different approach to do justice.

HXA v Surrey County Council[121] was also decided by the Court of Appeal in 2022. The first instance decisions were

noted in this journal.[122] This was, again, an appeal from decisions to strike out two separate claims in negligence against a public authority. The issue for consideration by the Court of Appeal was whether or not a local authority could be said to have assumed responsibility for the welfare of children subjected to abuse by their family, and therefore owe a duty of care to those children.[123] Baker LJ, Lewis LJ and Elisabeth Laing LJ agreeing, found that it was arguable that there was such a duty owed.

HXA, the first claimant, and her siblings were the subject of multiple referrals to the local authority and investigations into welfare and were placed on the child protection register. The local authority decided to undertake a full assessment with a view to initiating care proceedings. However, no such assessment was done and monitoring continued instead. HXA's stepfather was later convicted of raping her and her mother of indecently assaulting her.[124] YXA, the second claimant, had epilepsy, learning disabilities and autism spectrum disorder, and alleged that his parents inflicted upon him physical and other abuse. Respite care was agreed, whereby he spent one night per fortnight and one weekend every two months in foster care.[125] Both claimants argued that a care order should have been made by the local authority.

Both claims were found to be arguable. *Poole Borough Council* was central to this conclusion. Baker LJ's treatment of the recent Supreme Court decisions stands in contrast to the way they were treated in *Tindall.* Baker LJ said, after acknowledging Lord Reed's warning that it was inappropriate to reconsider existing decisions on the existence or non-existence of a duty of care:

> In my judgment … this is still an evolving area of the law. The ramifications of the change of direction heralded by the decisions of the Supreme Court in *Robinson* and *Poole* are still being worked through.[126]

Baker LJ noted that cases such as these involved an intense focus on the facts and particular statutory background.

As has been noted elsewhere,[127] there are important differences between this case and *Tindall* or *Stovin.* The latter cases involved simple facts with minimal interaction between the parties, whereas in cases like *Poole Borough Council* and *HXA* there is often a long and

complex history of interaction.[128] A greater willingness to entertain the possibility of liability (and certainly to permit presentation and exploration of all facts) is understandable.

Psychiatric injury

Predictably, an attempt to extend the scope of liability for pure psychiatric injury failed before the Court of Appeal in *Paul v The Royal Wolverhampton NHS Trust.*[129] Commentators have, over the years, expressed dissatisfaction with the law concerning pure psychiatric harm so consistently that it comes as no surprise that the latest case also fails to do justice for the parties. The general shortcomings of this area of the law have been well-covered elsewhere.[130] Consideration of this case will therefore be brief.

The appeal in *Paul* concerned three cases of alleged failure to diagnose a life-threatening condition, causing the victim to suffer a traumatic death some time afterwards. The question for the Court of Appeal was whether or not a claim was available to those who had sustained psychiatric injury after witnessing the death of a loved one as a result of earlier clinical negligence.

Sir Geoffrey Vos MR, with whom Nicola Davies LJ agreed, held that the requirements for a duty to avoid causing psychiatric harm, set out in *Alcock v Chief Constable of the South Yorkshire Police*,[131] applied to cases of clinical negligence as well as cases concerning accidents.[132] The difficulty for the Court (and for sufficient 'proximity') was the lapse of time between the negligence and the horrifying event causing psychiatric harm. The *Alcock* factors include a requirement that the plaintiff be personally present at the scene of the accident, in the immediate vicinity or the close aftermath. How could this be satisfied in a clinical negligence context?

Sir Geoffrey Vos felt 'prevented' by the authorities from deciding the case in the way he thought would do justice in

the situation. *Taylor v A. Novo*[133] was said to be 'binding authority for the proposition that no claim can be brought in respect of psychiatric injury caused by a separate horrific event removed in time from the original negligence, accident or a first horrific event'.[134] Underhill LJ, with whom Nicola Davies LJ also agreed, would also have found for all claimants 'if the point were free from authority'.[135]

Unusually, but not unsurprisingly, the Court of Appeal encouraged the claimants to appeal to the Supreme Court.[136] It remains to be seen if this marks the end of such an unsatisfactory chapter in the common law.

Illegality

Our final area of focus is the defence of illegality – the doctrine by which a claimant's action in tort may be barred because of their own serious wrongdoing or unlawful

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behaviour. There were two cases in 2022 dealing with the important question of the effect of the wrongdoer's acquittal because of insanity on the availability of the defence. Before these decisions, the matter had not been decided in English law.[137] The important cases of *Gray v Thames Trains Limited*[138] and *Henderson v Dorset Healthcare University NHS Foundation Trust*[139] said that the defence of illegality did apply to cases of diminished responsibility; a person guilty of manslaughter on the basis of diminished responsibility will be barred from recovering for losses flowing from that wrongful act and its consequences. However, as a defence, insanity is different to diminished responsibility. The former leads to acquittal.[140] Does it merit different treatment?

The High Court considered this issue in *Traylor v Kent and Medway NHS Social Care Partnership Trust*.[141] Mr Traylor suffered a psychotic episode and, despite police attendance, stabbed his daughter several times. He was prosecuted for attempted murder but was found not guilty by reason of insanity. Mr Traylor then brought a claim against the defendant trust alleging negligent treatment of his mental illness. While the trust acknowledged a breach of duty concerning the decision to discharge Mr Traylor from secondary psychiatric care, it denied other allegations of negligence and pointed to Mr Traylor's decision to stop taking his medication as causative of the tragic events.

Johnson J found that no breach of duty had been established. As to illegality, the defendant trust accepted that, at the time of committing the crime, Mr Traylor was insane within the meaning of the rules in *R v M'Naghten*.[142] It was common ground that if this had not been the case, his claim would be barred by illegality.[143] It was submitted that, although he was rightly found not guilty by reason of insanity, he was nevertheless guilty of a criminal act and only acquitted because he did not have capacity to form the requisite intent.[144] Johnson J did not accept this submission, and said that those who satisfy the *M'Naghten* rules are not regarded in law as having committed the act or having responsibility for the act. He also noted that there were multiple authorities indicating that the illegality defence was only available where the claimant *knew* that they were acting unlawfully.[145] Johnson J noted that in *Henderson*, it was significant to the Supreme Court's finding that the defence was available that the claimant 'knew what she was doing and that it was legally and morally wrong'.[146] Conversely, Mr Traylor 'did not know what he was doing or, if he did, he did not know that it was wrong'.[147]

In *Lewis-Ranwell v G4S Health Services (UK) Ltd and others*,[148] *Traylor* was followed by Garnham J in the High Court in deciding not to strike out a claim in negligence against various healthcare providers and public bodies. The claimant, Mr Lewis-Ranwell, alleged negligence after he had been arrested and released several times without, it was said, adequate assessment and treatment. He was acquitted of the murder of several people by reason of insanity.

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It was submitted for the defendants that, *inter alia*, there was no 'sustainable distinction' between the 'quality of intention in a defendant found guilty of manslaughter by way of diminished responsibility … and a defendant found not guilty by reason of insanity'.[149] Drawing a distinction between this case and *Henderson* would be incoherent.[150]

His acts were not rendered lawful or moral by the application of the insanity defence.[151] As such, the illegality defence ought to apply in this case to bar the claim as in *Henderson* and *Gray.*

Garnham J held that the authorities established the need, for the defence of illegality to apply, for the claimant to have known that what he was doing was wrong. The defendants had not established that was the case. He noted that he perceived a great difference in the 'nature and quality' of intention in one guilty of manslaughter by way of diminished responsibility, and one not guilty by reason of insanity:

> In the former case responsibility is diminished but not eliminated; in the latter case it is eliminated because insanity means the defendant does not know that what he was doing was wrong and that knowledge is essential to affix responsibility.[152]

He acknowledged that it was possible for the illegality defence to apply where there was no criminal responsibility. However, this would require 'quasi-criminality, conduct that raises similar public interest objections to those prompted by criminality'.[153] Garnham J emphasised the centrality and necessity of a turpitudinous act, 'an act of knowing wrongfulness'.[154] By allowing this claim, the law would not condone wrongdoing or offend public notions of fairness because according to the jury's verdict, there was no criminal conduct.[155]

At the time of writing, an appeal from this decision is on foot. Time will tell if the illegality defence will be narrowed in scope in this way. If an 'act of knowing wrongfulness' is required, there remains the possibility that criminal or quasi-criminal conduct that is done without subjective knowledge of transgression – perhaps some types of assault, battery or gross negligence – are also excluded from the ambit of the defence.

Conclusion

The past year has been one in which, in these areas of tort law at least, the courts have generally appeared to be engaging in careful and cautious decision-making. Great attention has been paid to existing 'categories', precise wording in authoritative statements, and the boundaries apparently set by existing case law. Policy-based reasoning has not been prominent – or perhaps has not been overt. One suspects, if cases like *Robinson* remain

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indicative, this cautious, precedent-focused approach is one of which the Supreme Court would generally approve. However, it is important that this not be taken too far. Respect for precedent promotes stability and predictability. However, courts should not feel shackled by existing case law, nor should they avoid making difficult decisions by retreating behind it. Excessive caution will cause the law to stagnate.

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