I. England and Wales

Ken Oliphant

A. Legislation

1 There were no major legislative developments relating to tort law in England and Wales in 2019.

B. Cases

1. *Lungowe v Vedanta Resources plc* [2020] United Kingdom Supreme Court (UKSC) 20, [2019] 3 All England Law Reports (All ER) 1013 (10 April 2019):[1] Parent company duty of care over foreign subsidiary

a) Brief Summary of the Facts

2 The first defendant, a United Kingdom company domiciled in England, had a subsidiary in Zambia, the second defendant, that owned and operated a large copper mine in that country. The claimants, a group of 1,826 Zambian citizens living in the area, were very poor members of rural farming communities served by watercourses which provided their only source of drinking water for themselves and their livestock, and of irrigation for their crops. They alleged

[1] Judgment available online at https://www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment.pdf. Noted by *W Day* (2019) 135 Law Quarterly Review (LQR) 551; *A Sanger* [2019] Cambridge Law Journal (CLJ) 486.

that both their health and their farming activities have been damaged by repeated discharges of toxic matter from the mine into those watercourses over several years. In the present proceedings, they sought damages for negligence and breach of statutory duty in the English courts, having obtained judicial permission to serve the claim form on the second defendant outside the jurisdiction. Both defendants challenged the jurisdiction of the English courts. Their jurisdictional challenges failed at first instance and in the Court of Appeal. The defendants now appealed to the Supreme Court.

b) Judgment of the Court

3 Rejecting the appeal, the Supreme Court accepted that Zambia was prima facie the proper place in which the case should be tried, but permitted the English proceedings to proceed as there was cogent evidence of a real risk that substantial justice would not be obtainable in that foreign jurisdiction. The Court's conclusion was based both on the practicable impossibility of funding the group claim given that the claimants were all in extreme poverty and the absence within Zambia of sufficiently substantial and suitably experienced legal teams to enable litigation of this size and complexity to be prosecuted effectively against a likely to prove an obdurate opponent.

4 Regarding the first defendant, though it was not the owner or operator of the mine, there was a real issue to be tried as to whether it owed a duty of care to the claimants in respect of the mining activities of its subsidiary. The extent of the former's management control over the latter, and the level of its interventions into the conduct of operations at the mine, made it arguable that the first defendant did in fact owe the alleged duty, it being assumed that the Zambian courts would identify the relevant principles of Zambian common law in accordance with those established in England.

c) Commentary

5 This decision attracted extensive media interest, being seen as paving the way for more environmental claims to be brought in London against large multinationals with global operations – particularly from claimants living in poorer countries where they may not be able to obtain access to justice.[2] For tort lawyers, the greatest interest lies in what Lord Briggs, delivering the sole judgment, with which the other Justices agreed, said about the parent company's duty of care. Though the issue has attracted judicial attention in the past,[3] Lord Briggs appears to have gone further than previous authorities in accepting that the required degree of supervision and control might be demonstrated by way of group-wide policies and guidelines – for example about minimising

[2] UK Supreme Court rules Zambians can sue miner Vedanta, Financial Times, 10 April 2019.

[3] Notably in *Chandler v Cape plc* [2012] 1 Weekly Law Reports (WLR) 3111.

the environmental impact of inherently dangerous activities such as mining – at least if the parent does not merely proclaim them, but takes active steps, by training, supervision and enforcement, to see that they are implemented by relevant subsidiaries.[4] It should be noted, however, that the question for the Supreme Court was merely whether the existence of the duty of care was sufficiently arguable to be a triable issue, and Lord Brigg's words are merely of persuasive weight rather than binding on lower courts. One should also bear in mind the risk of a backlash to the Supreme Court's decision as company legal teams review group-wide guidelines to ensure that, wherever possible, responsibility for their implementation explicitly lies with subsidiaries.[5]

2. *N v Poole Borough Council* [2020] United Kingdom Supreme Court (UKSC) 25, [2019] 4 All ER 581 (6 June 2019):[6] Liability of Public Authority; Duty of Care

a) Brief Summary of the Facts

6 The alleged facts, never tested in court, were that in May 2006 the two child claimants – boys aged seven and nine – were placed with their mother in a council house on an estate in the town of Poole, adjacent to another family who to the council's knowledge had persistently engaged in anti-social behaviour. The elder boy was severely disabled both mentally and physically, and required constant care. The defendant council, responsible for the placement, made extensive adaptations to the house in order to meet his needs and provided him with a care package through its child health and disability team. Following an altercation, the mother reported the neighbouring family to the council, resulting in the police attending and issuing issued a warning to them. They consequently targeted the mother and the two boys for harassment and abuse which persisted over several years, involving physical assaults, threats of violence, verbal abuse and criminal damage. This was reported to the council and various measures were taken against the neighbours, including eviction, the obtaining of injunctions, proceedings for contempt of court, anti-social behaviour orders, and sentences of imprisonment. The harassment nevertheless continued. The case gained public attention, resulting in the Home Office commissioning an independent report, which was critical of (inter alia) of the council's failure to make adequate use of powers available under anti-social behaviour legislation. The claimants and their mother were eventually rehoused away from the estate in December 2011.

4 At [52] f.

5 *Sanger* [2019] CLJ 486, 489.

6 Judgment available online at https://www.supremecourt.uk/cases/docs/uksc-2018-0012-judgment.pdf. Noted by *S Deakin* [2019] CLJ 513; *C Beuermann* (2019) 35 Journal of Professional Negligence (PN) 247.

7 The claimants sought damages on the basis that the abuse and harassment they suffered between May 2006 and December 2011 had caused them physical and psychological harm and was attributable to the defendant council's negligence or the negligence of their social workers or social work managers. The defendant applied unsuccessfully to have the claim struck out at first instance for want of a duty of care but were successful in persuading the Court of Appeal to reverse the first instance decision. The claimants appealed to the Supreme Court.

b) Judgment of the Court

8 The Supreme Court rejected the appeal, ruling that the particulars of claim relied upon did not disclose any recognisable basis for a cause of action.[7] Insofar as the complaint was that the council or its employees failed to fulfil a common law duty to protect the claimants from harm inflicted by their neighbours by exercising certain statutory powers, the relevant provisions did not themselves create a cause of action. Insofar as reliance was placed on an assumption of responsibility arising from the relationship between the claimants and the council or its employees, there was nothing to suggest that those relationships possessed the necessary characteristics for an assumption of responsibility to arise. Insofar as the alleged breach of duty was the failure to remove the claimants from the care of their mother, there was no possible basis for finding that the council or its employees had grounds for such action.[8]

9 The sole judgment was delivered by Lord Reed, with whom the other Justices agreed. Lord Reed acknowledged the 'shifting approaches' in recent decades in the Court's legal thinking – and that of the House of Lords before it – about the liabilities of public authorities in negligence.[9] It was now clear that the Lords' 1995 decision in *X (Minors) v Bedfordshire County Council*[10] could no longer be regarded as good law in ruling out on grounds of public policy any duty of care by a local authority or its staff towards children with whom they came into contact in the performance of their protective statutory functions. Whether a local authority or its employees owed a duty of care to a child in particular circumstances depended on the application of general principles most recently clarified by the Supreme Court in the case of *Robinson v Chief Constable of West Yorkshire Police*.[11]

10 The *Robinson* approach is based on the premise that public authorities are prima facie subject to the same general principles of the common law of negligence as private persons, and may therefore be liable for negligently causing individuals to suffer actionable harm but not, in the absence of some particular

7 At [91] per Lord Reed.
8 Ibid.
9 At [25].
10 [1995] 2 AC 633.
11 At [74].

reason justifying such liability, for negligently failing to protect persons from harm caused by others.[12] Public authorities do not owe a duty of care at common law merely because they have statutory powers or duties, even if, by exercising their statutory functions, they could prevent a person from suffering harm.[13] Conversely, even if a duty of care would ordinarily arise on the application of common law principles, it may nevertheless be excluded or restricted by statute where it would be inconsistent with the scheme of the legislation under which the public authority is operating.[14]

11 Notwithstanding the general absence of liability at common law for negligently failing to protect persons from harm caused by others, a common law duty to protect a person from harm may arise in exceptional circumstances, for example on the basis of the creation of a source of danger or the assumption of responsibility to protect a person from harm. Public authorities can come under such a duty in circumstances where the principles applicable to private persons would impose it, unless the imposition of such a duty would be inconsistent with the relevant legislation.[15]

12 The concept of an assumption of responsibility first came to prominence in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[16] in the context of liability for negligent misstatements causing pure economic loss, but it is a concept of more general significant. It is not confined to the provision of information or advice but can also apply where the claimant entrusts the defendant with the conduct of his affairs, in general or in particular, for example by undertaking the performance of some task or providing some service for the claimant with an undertaking that reasonable care will be taken. Such an undertaking may be express, but is more commonly implied, usually by reason of the foreseeability of reliance by the claimant on the exercise of such care.[17]

13 In the instant judgment, Lord Reed underlined that it should not be thought that an assumption of responsibility can never arise out of the performance of statutory functions.[18] In fact, a public body which offers a service to the public often assumes a responsibility to those using the service. The assumption of responsibility is an undertaking that reasonable care will be taken, either express or more commonly implied, usually from the reasonable foreseeability of reliance on the exercise of such care. Examples would include where a hospital undertakes to exercise reasonable care in the medical treatment of its patients – in such a case, it would be immaterial whether the hospital operated

12 At [75].
13 At [65].
14 At [75].
15 At [65].
16 [1964] AC 465.
17 At [88]
18 At [72].

privately or under statutory powers – or where an education authority accepts pupils into its schools.[19]

14 In the present case, however, the Supreme Court ruled that there was no basis for concluding that the council assumed a responsibility towards the claimants to perform its statutory functions with reasonable care. Lord Reed observed that the council's conduct towards the claimants, including investigating and monitoring their position, did not involve the provision of a service to them on which they or their mother could have been expected to rely. It may have been reasonably foreseeable that their mother would be anxious that the council should act to protect the family from their neighbours, in particular by rehousing them, but anxiety did not amount to reliance. The claimants and their mother had not entrusted their safety to the council; nor had the council accepted that responsibility. It was not a case where the council had taken the claimants into its care and thereby assumed responsibility for their welfare.[20]

15 Lord Reed conceded that, even where no assumption of responsibility can be inferred from the nature of the function itself, it may nevertheless be inferred from the manner in which the public authority has behaved towards the claimant in a particular case. Such an inference would depend on the facts of the individual case and there could well be cases in which the existence or absence of the assumption could not be determined on a strike-out application. Nevertheless, the particulars of claim must provide some basis for the leading of evidence at trial from which an assumption of responsibility can be inferred. That was not the case in the appeal before the Court, however, as the particulars of claim did not provide a basis for leading evidence about any particular behaviour by the council towards the claimants or their mother, besides the performance of its statutory functions, from which an assumption of responsibility might be inferred. An email written to the claimant's mother by a council employee, which spoke of the existence of a duty of care towards her and her family, did not indicate the required evidential basis as a duty of care cannot be brought into being solely by a statement that it exists.[21]

[19] At [80]. At [73], Lord Reed explained in such terms the cases of *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619, where teachers and educational psychologists assumed responsibility through their conduct in the performance of contractual duties which they owed to the education authority, their employer, and *Barrett v Enfield London Borough Council* [2001] 2 AC 550, where the assumption of responsibility arose out of the local authority's performance of its functions under child care legislation

[20] At [81].

[21] At [82], citing *O'Rourke v Camden London Borough Council* [1998] AC 188, 196 per Lord Hoffmann.

c) Commentary

16 This decision underlines once again the highly restrictive approach of English common law to the liability of public authorities, which emerges clearly from numerous cases already reported in previous volumes of this Yearbook.[22] Asserting the identity of position of public authorities and private persons, English common law declines to treat the public functions of the former, their special powers or their receipt of public funds as adequate reason for imposing on them a duty of care of any greater scope than a private person would come under in comparable circumstances (minus the public functions, special powers or public funds). Combined with the general absence of any duty at English common law to take positive steps for the protection of another person, this produces a liability regime that is much narrower and less flexible than that to be found in most other European countries.[23]

17 Three short further comments may be made.

18 First, Lord Reed underlined that the courts should not rule out on grounds of public policy the possibility that a duty of care might be owed by public authorities or their employees towards persons with whom they came into contact in the performance of their protective functions.[24] However, this should not be interpreted as meaning that policy considerations can *never* justify the denial of a public authority's duty of care. On the contrary, Lord Reed expressly acknowledged that, even if a duty of care would ordinarily arise on the application of common law principles, it may nevertheless be excluded or restricted by statute where it would be inconsistent with the scheme of the legislation under which the public authority is operating. He suggested that, in that way, the courts could continue to take into account, for example, the difficult choices which may be involved in the exercise of discretionary powers.[25] It seems, then, that the Supreme Court was ruling out reliance on any *generalised* policy immunity for public authorities, in contrast with the more nuanced policy reasoning that Lord Reed himself instantiated.

19 Second, Lord Reed's judgment contains a short and not wholly satisfactory discussion of whether the council might have owed a duty of care to the boys on the basis that they had created a source of danger by housing them next to antisocial neighbours. Lord Reed rejected this argument, upon which the claimants appear not to have placed much reliance, as contrary to a consistent

[22] See in particular the cases of *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057, *D v East Berkshire Community NHS Trust* [2005] 2 AC 373, *Mitchell v Glasgow City Council* [2009] AC 874, and *Michael v Chief Constable of South Wales* [2015] AC 1732

[23] See generally *K Oliphant* (ed), The Liability of Public Authorities in Comparative Perspective (2016).

[24] At [74].

[25] Ibid.

line of authority holding that landlords (including local authorities) do not owe a duty of care to those affected by their tenants' anti-social behaviour.[26] With respect, it would have been better to address the issue of principle – and in particular what it means to create a source of danger and the circumstances in which doing so may give rise to a duty of care – rather than simply to rely on countervailing precedents from which the Supreme Court is in any case free to depart.

20 Lastly, Lord Reed observed in passing, again departing from the approach in *X (Minors) v Bedfordshire County Council*,[27] that a child taken into local authority care without adequate justification can be regarded as harmed by a positive act in circumstances where they are removed from her home and detained against their will, suffering a psychiatric disorder as a result. There is no need in such a case to establish an assumption of responsibility towards the child by either the authority or its employee.[28] This important dictum may have considerable practical significance inasmuch as it entails the application of the broader principles of negligence liability applicable to acts rather than omissions, and may possibly result in a rise in the number of claims where the negligent exercise of protective powers may plausibly be considered the positive cause of actionable harm, and not merely the failure to prevent the suffering of harm.

3. *Lachaux v Independent Print Ltd* [2019] UKSC 27, [2020] AC 612 (12 June 2019): Defamation[29]

a) Brief Summary of the Facts

21 Following the break-down of his marriage, the claimant sought a divorce from his wife and custody of their son under the law of the UAE, where they were living. He eventually enforced the latter by way of court order. A number of British newspapers published articles making allegations about his conduct towards his wife during the marriage and in the course of the divorce and custody proceedings. It was alleged in particular that the claimant had been violent and abusive towards his wife, had hidden their son's passport to stop her removing him from the UAE, had made use of UAE law and the UAE courts to deprive her of custody and contact with their son, had callously and without justification taken their son out of her possession, and had then falsely accused her of abducting him.

[26] At [77].
[27] [1995] 2 AC 633.
[28] At [38].
[29] Judgment available online at https://www.supremecourt.uk/cases/docs/uksc-2017-0175-judgment.pdf. Noted by *D Erdos* [2019] CLJ 510.

22 The newspapers did not contest these primary facts but argued that the statements in the articles were not defamatory because they did not meet the threshold of seriousness in sec 1(1) of the Defamation Act 2013, which provides: 'A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.' In a hearing on this preliminary issue, the first instance judge found that the statements did indeed satisfy this requirement. The Court of Appeal dismissed the newspapers' appeal, albeit for reasons different from the judge of first instance. The newspapers appealed to the Supreme Court.

b) Judgment of the Court

23 The Supreme Court dismissed the appeal, ruling that the application of the 'serious harm' test in sec 1(1) of the Defamation Act 2013 is be determined by reference to the actual facts about its impact and not just to the meaning of the words.[30] Delivering the sole judgment of the Supreme Court, with the agreement of the other Justices, Lord Sumption observed that it was in this respect too, and not just in its introduction of a new threshold of serious harm, that sec 1(1) changed the prior common law.

24 Lord Sumption's starting point was that the relevant background to the statutory provision was the common law position.[31] For a working common law definition of what makes a statement defamatory, Lord Sumption was content to rely on the well-known formulation of Lord Atkin in *Sim v Stretch*,[32] namely that 'the words tend to lower the plaintiff in the estimation of right-thinking members of society generally'. He noted that the test turns on the supposed impact of the statement on those to whom it is communicated, but that impact is to be ascertained in accordance with a number of more or less artificial rules: first, the meaning is not that which other people may actually have attached to it, but that which is derived from an objective assessment of the defamatory meaning that the notional ordinary reasonable reader would attach to it; second, damage to the claimant's reputation is presumed rather than proved (subject to exceptions not applicable here) and depends on the inherently injurious character or tendency of a statement bearing that meaning; third, the presumption is one of law, and irrebuttable.[33]

25 Lord Sumption then observed that sec 1(1) necessarily means that a statement which would previously have been regarded as defamatory, because of its inherent tendency to cause some harm to reputation, is not to be so regarded unless it 'has caused or is likely to cause' harm which is 'serious'. In his opinion, the statutory reference to a situation where the statement 'has caused' se-

[30] At [12] per Lord Sumption.
[31] At [13].
[32] [1936] 2 All ER 1237, 1240.
[33] At [6]

rious harm is to the consequences of the publication, and not the publication itself. It points to some historic harm, which is shown to have actually occurred – a proposition of fact which can be established only by reference to the impact which the statement is shown actually to have had. The same must, he thought, be true of the reference to harm which is 'likely' to be caused. In this context, the phrase naturally refers to probable future harm. Lord Sumption rejected the submission that 'likely to cause' is a synonym for the inherent tendency which gives rise to the presumption of damage at common law and refers to harm which is liable to be caused given the tendency of the words. He also rejected the alternative submission that the phrase, if it refers to the factual probabilities, must be considered to be directed to applications for pre-publication injunctions quia timet. Both these submissions seemed to him to be rather artificial in a context which indicates that both past and future harm are being treated on the same footing, as functional equivalents. If past harm may be established as a fact, the legislator must have assumed that "likely" harm can be also. As to pre-publication injunctions, the section was designed to import a condition to be satisfied if the statement is to be regarded as defamatory at all. It is not concerned with the remedies available for defamation, whether interlocutory or final.[34]

26 This interpretation of sec 1(1) was buttressed by the similar wording of sec 1(2), which adapted the rules in sec 1(1) for application to statements said to be defamatory of a body trading for profit. Section 1(2) refers to the same concept of 'serious harm' as sec 1(1 , but provides that in the case of such a body the statement must have caused or be likely to cause 'serious financial loss'. That refers not to the harm done to the claimant's reputation, but to the loss which that harm has caused or is likely to cause. The financial loss is the measure of the harm and must exceed the threshold of seriousness. As applied to harm which the defamatory statement 'has caused', this necessarily calls for an investigation of the actual impact of the statement, which cannot be effected by reference only to the inherent tendency of the words. The question what harm the statement was 'likely to cause' is to be decided on the same basis.[35]

27 Further, as sec 1(1) was evidently intended as a significant amendment to the existing law, and in particular to remove the anomaly whereby damage to reputation is presumed from the words alone and might therefore be very different from any damage which could be established in fact. The common law treated the publication of a grave allegation against the claimant to a small number of people, or to people none of whom believe it, or possibly to people among whom the claimant had no reputation to be harmed, as matters that could mitigate damages but did not affect the defamatory character of the

[34] At [14].
[35] At [15].

words. It was plain to Lord Sumption that sec 1 was intended to make such matters part of the test of the defamatory character of the statement.[36]

28 Lastly, and fundamentally, the common law rule that damage to reputation is presumed, not proved, and that the presumption is irrebuttable, left no scope for evidence of the actual impact of the publication. That was plainly contradictory to the statutory intention.[37]

29 Applying these principles to the facts of the present case, the Supreme Court found that the first instance judge had been entitled to reach the conclusion that the harm caused by the publications complained of was serious, based on the scale of the publications (evidenced by agreed figures relating to print runs and the number of readers), the fact that the statements complained of had come to the attention of at least one identifiable person in the United Kingdom who knew the claimant, and that they were likely to have come to the attention of others who either knew him or would come to know him in future, and the gravity of the statements themselves. The want of evidence from those who had read the statements about its impact on them did not mean that his must necessarily fail.[38] There was no principled reason why the assessment of the harm to the claimant's reputation should not take account of the impact of the publications on those who had never heard of him at the time. The claimant's reputation was harmed at the time of publication notwithstanding that readers knew nothing about him other than what the publication told them. It could not make any difference that it was only later, when they came to know the claimant personally, that the latter's diminished reputation was of any personal interest to them.[39]

c) Commentary

30 As Lord Sumption noted at the outset of his judgment, the tort of defamation is an ancient construct of the common law that has accumulated, over the centuries, a number of formal rules with no analogue in other branches of the law of tort. Its coherence has not been improved, said Lord Sumption with a degree of understatement, by attempts at statutory reform in 1888, 1952, 1996 and 2013, each of which sought to modify existing common law rules piecemeal, without always attending to the impact of the changes on the rest of the law. Most of the law of defamation originated well before freedom of expression acquired the prominent place in English law that it enjoys today. The Defamation Act 2013 sought to modify some of the common law rules which were seen unduly to favour the protection of reputation at the expense of freedom of expression. Section 1 was one of the principal provisions intended to

[36] At [16].
[37] At [21].
[38] At [22].
[39] At [25].

have that effect.[40] The decision under comment rejects a legal challenge that would have limited its impact in that regard.

31 In another defamation case before the Supreme Court, *Stocker v Stocker*,[41] the question was what the words 'He tried to strangle me.', posted on Facebook by his former wife, would convey to their ordinary reasonable reader. The claimant argued that the meaning to be given to the words was that he had tried to kill his ex. Mrs Stocker denied that the words bore that meaning. She claimed that, in the context of domestic violence, the words did not impute an intention to kill but would be understood to mean that her husband had violently gripped her neck, inhibiting her breathing so as to put her in fear of being killed. A police report recorded that, on being called to an incident at their then home, there were red marks on Mrs Stocker's neck. Mr Stocker had agreed during a police interview that it was possible that he had put his hand around his wife's neck and, implicitly, that this had caused the red marks that were found there. The Supreme Court followed the established approach whereby, where a statement has more than one plausible meaning, the question of whether defamation has occurred can only be answered by deciding that one particular meaning should be ascribed to the statement. It is then for the court to decide which meaning to plump for.[42] In doing so, the context in which the statement is made is significant. The Supreme Court considered that the fact that this was a Facebook post was critical. The advent of the 21st century had brought with it a new class of reader: the social media user. The judge tasked with deciding how a Facebook post or a tweet on Twitter would be interpreted by a social media user had to keep in mind the way in which such postings and tweets are made and read.[43] It would be unwise to parse a Facebook posting for its theoretically or logically deducible meaning. The imperative was to ascertain how a typical (ie an ordinary reasonable) reader would interpret the message. That search should reflect the circumstance that Facebook is a casual medium; it is in the nature of conversation rather than carefully chosen expression; and that it is pre-eminently one in which the reader reads and passes on.[44] On the facts, the dictionary definition of the verb 'to strangle' did not dictate the meaning of Mrs Stocker's Facebook post; it was merely a check.[45] The ordinary reader of the Facebook post would not splice the post into separate clauses, much less isolate individual words and contemplate their possible significance. In the Supreme Court's view, he or she, knowing that the author was alive, would unquestionably have interpreted the post as meaning that Mr Stocker had grasped his wife by the throat and

[40] At [1].
[41] [2019] UKSC 17, [2020] AC 593 (3 April 2019). Judgment available online at https://www.supremecourt.uk/cases/docs/uksc-2018-0045-judgment.pdf.
[42] At [34] f/
[43] At [41].
[44] At [43].
[45] At [47].

applied force to her neck rather than that he had tried deliberately to kill her.[46] Given the clear evidence that that Mr Stocker was a dangerous and disreputable man, who had grasped his wife by the throat so tightly as to leave red marks on her neck, the Court considered that there was ample evidence to demonstrate the substantial truth of Mrs Stocker's statement.[47]

4. Personal Injury

a) Trends in Personal Injury Claims

32 2019 saw a slight increase in the total number of recorded personal injury claims, the first for several years. This came on the back of a steady decline over the five preceding years, reflecting the concerted efforts of Government to tackle the so-called compensation culture by reducing the profitability of personal injury work and increasing the regulation of the claims market.[48] There were 862,356 recorded personal injury claims in 2018/19, as compared to 853,615 claims in 2017/2018 and 978,816 claims in 2016/2017. The highest recorded annual figures were for 2012/2013, when 1,048,309 claims were registered. Road traffic accident claims continue to dominate the claims that are brought, constituting 77% (660,608) of the total. The data suggest that 2019 represents a pause in the longer term decline in claims numbers, or perhaps a levelling out, rather than a reversal of the decline.

b) Significant decisions

33 *Goldscheider v Royal Opera House Covent Garden Foundation*:[49] The Royal Opera House Covent Garden was liable to a viola player in its orchestra for 'acoustic shock' caused by the noise coming from the brass section, situated immediately behind him, during rehearsals for Wagner's Ring Cycle. The claim was brought under the Control of Noise at Work Regulations 2005, under which, where noise levels are likely to exceed 85 decibels, an employer comes under a duty to reduce noise exposure to as low a level as reasonably practicable by means of a programme of organisational and technical

[46] At [49].

[47] At [61].

[48] For details of the relevant reforms, see *A Morris/K Oliphant*, England and Wales, in: K Oliphant/BC Steininger (eds), European Tort Law (ETL) 2012 (2013) 186, no 1ff. Statistics on the number and type of claims pursued each year are publicly available from the Department for Work and Pensions' Compensation Recovery Unit: <https://www.gov.uk/government/publications/compensation-recovery-unit-performance-data/compensation-recovery-unit-performance-data>.

[49] [2019] EWCA Civ 711, [2020] Industrial Cases Reports 1 (17 April 2019). Judgment available online at https://www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment.pdf.

measures excluding the provision of hearing protectors. On the facts, the defendant employer had failed to show that it had taken all reasonably practicable steps, particularly given that the orchestra pit had been subsequently reconfigured, with the brass instruments being split up, producing a reduction in noise level with no evidence that there had been an unacceptable, or any, reduction in artistic standards. The claimant's acoustic shock resulted in high frequency hearing loss and hyperacusis (noise sensitivity). The reported proceedings dealt only with the liability issues, and not the quantum of damages.

34 *Perry v Raleys Solicitors*:[50] This was a claim of professional negligence against the claimant's former solicitors. The claimant, a retired miner, had while still working become afflicted with a common condition known as Vibration White Finger (VWF), caused by excessive exposure to the effects of using vibratory tools. A typical symptom is a reduction in grip strength and manual dexterity which can mean that sufferers become unable without assistance to carry out routine domestic tasks such as gardening, DIY or car maintenance. Because of the large numbers of former miners suffering from VWF, a very large compensation scheme was established to process their claims. Compensation was paid both for non-pecuniary loss (general damages) and for dependency on the services of others (a so-called services award). The claimant settled his claim for payment of general damages only and alleged in the current proceedings that the defendant solicitors had failed to give him appropriate advice, as a result of which he lost his claim to a services award as that was now time-barred. To establish liability for this loss of chance, it was established law that the claimant had to prove on the balance of probabilities that he would have brought the relevant claim within time, if advised without negligence. In the present case, the Supreme Court added the glass that the lost claim had to be an honest claim. As the evidence was that the claimant remained able to perform all relevant domestic tasks, he would not have been able to bring an honest claim for a services award and therefore his claim for loss of the chance of obtaining a services award was rejected.

C. LITERATURE

1. *Christine Beuermann*, Reconceptualising Strict Liability for the Tort of Another (Oxford: Hart Publishing, 2019

35 The author, who has written extensively and authoritatively in these areas, proposes a new theory on the basis of which to rationalise the various circumstances in which the courts impose strict liability for the tort of another per-

[50] [2019] UKSC 5, [2020] AC 352 (13 Feb 2019). Judgment available online at https://www.supremecourt.uk/cases/docs/uksc-2017-0092-judgment.pdf.

son. She looks beyond the established categories of vicarious liability and liability for breach of a non-delegable duty of care and focuses instead on the relationships in which the courts impose such liability: employer-employee, adjoining landowners with common walls or mutual supports, hospital-patient, school-pupil, occupier-invitee (arguably) and principal-agent. The book advances the thesis that, despite their apparent diversity, there is a unifying feature to these relationships: authority. This provides a new expository framework within which strict liability for the tort of another can be understood, covering both the situation where the defendant is vested with authority over the person who committed the tort and that where the defendant has vested or conferred a form of authority upon that person in respect of the claimant. This is scholarly and imaginative work that deserves to be widely read.

2. *James Goudkamp/Donal Nolan* (eds), Scholars of Tort Law. (Hart Publishing, 2019)

36 Scholars of Tort Law is essential reading for those with a deep interest in the subject matter. The editors have assembled an impressive team of torts scholars currently active in the English-speaking common law world to consider the work of great tort lawyers of the past. We start with Thomas Cooley (1824–1898) and Oliver Wendell Holmes (1841–1935), whose contributions are assessed by John Goldberg and Benjamin Zipursky, and finish with Patrick Atiyah (1931–2018) and Tony Weir (1936-2011), who provide the focus for James Goudkamp and Paula Giliker respectively. In between, we get more wonderful combinations: Pollock by Stevens, Salmond by Lunney, Bohlen by Green (Michael), Green (Leon) by Steele, Winfield by Nolan, Prosser by Robinette, (Fleming) James by Calabresi, and (John) Fleming by Mitchell. There is a perceptive introduction by the editors that nicely draws out general themes, and a highly stimulating conclusion by Peter Cane that seeks to elucidate what is distinctive about common law torts scholarship in contrast with the rival civil law model. It is unfortunate that none of the featured scholars was a woman, though it is undoubtedly a reflection of the belated acceptance of women in the legal academy.

3. *Andrew Robertson/James Goudkamp* (eds), Form and Substance in the Law of Obligations (Bloomsbury, 2019)

37 This edited collection of papers from the Ninth Biennial Conference on the Law of Obligations, held in Melbourne, Australia in July 2018, explores the relationship between form and substance in the law of obligations. The book matches the high standards set by previous volumes in the series. The papers here that are likely to be of most interest to those interested in the law of tort

include: *J Lee*, Trends in Tort Law: Bad Form and Addictive Substance?, *JW Neyers*, Form and Substance in the Tort of Deceit, and *J Goudkamp/E Katsampouka*, Form and Substance in the Law of Punitive Damages.

4. Selected Journal Articles

38 **Tort law in general:** John Murphy, The Heterogeneity of Tort Law (2019) 39 Oxford Journal of Legal Studies (OJLS) 455; John Murphy, Malice as an Ingredient of Tort Liability [2019 CLJ 355; Donal Nolan, Tort and Public Law: Overlapping Categories? (2019) 135 LQR 272

39 **Negligence:** *T Cornford*, The Negligence Liability of Public Authorities for Omissions [2019] CLJ 545; *R Heywood*, 'If the Problem Persists, Come Back To See Me … .'—An Empirical Study of Clinical Negligence Cases Against General Practitioners (2019) 27 Medical Law Review (Med L Rev) 406; *J Morgan*, Nonfeasance and the end of policy? Reflections on the revolution in public authority liability (2019) 35 PN 32; *D Nolan*, Assumption of Responsibility: Four Questions (2019) 72 Current Legal Problems (CLP) 123; *K Patten*, Public benefit, private burden? The role of social utility in breach of duty decisions in negligence (2019) 35 PN 230; *S Peyer/R Heywood*, Walking on thin ice: the perception of tortious liability rules and the effect on altruistic behaviour (2019) 39 Legal Studies (LS) 266; *S Steel*, Rationalising omissions liability in negligence (2019) 135 LQR 484; *S Todd*, Common law protection for injury to a person's reproductive autonomy (2019) 135 LQR 635; *S Todd*, Professional negligence in 2018: the year in review (2019) 35 PN 6; *G Turton*, Informed Consent to Medical Treatment Post-*Montgomery*: Causation and Coincidence (2019) 27 Med L Rev 108

40 **Privacy:** *K Hughes*, The Public Figure Doctrine and the Right to Privacy [2019] CLJ 70; *MJ Taylor/J Wilson*, Reasonable Expectations of Privacy and Disclosure of Health Data (2019) 27 Med L Rev 432; *P Wragg*, Recognising a Privacy-Invasion Tort: The Conceptual Unity of Informational and Intrusion Claims [2019] CLJ 409

41 **Vicarious liability:** *W Swain*, A Historical Analysis of Vicarious Liability: A 'Veritable Upas Tree'? [2019] CLJ 640; *C Witting*, Modelling organisational vicarious liability (2019) 39 LS 694