I. England and Wales

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A. LEGISLATION

1. Fatal Accidents Act 1976 (Remedial) Order 2020, Statutory Instrument (SI) 2020/1023: Entitlement to Bereavement Damages; Cohabiting Partner

1 This Order remedies the incompatibility in the law relating to the damages that may be awarded for bereavement under sec 1A of the Fatal Accidents Act 1967 with the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Rights under the Convention ('Convention rights') were recognised in English law under the Human Rights Act 1998, sec 4 of which gives the courts the power to issue a declaration that a provision of primary legislation is incompatible with a Convention right in circumstances where that provision cannot be read and given effect in a way which is compatible with the Convention rights. Where a court has made a declaration of incompatibility, sec 10 provides for the making of a remedial order to remove the incompatibility.

2 The present Order follows the declaration of incompatibility made by the Court of Appeal in the case of *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* in 2017.[1] In that case, the Court had found that the non-availability of bereavement damages to an unmarried cohabitee of a tortiously killed deceased was incompatible with art 14 ECHR (prohibition of discrimination) read with art 8 ECHR (right to respect for private and family life) and that the relevant legislative provision could not be interpreted as though it extended to unmarried cohabitees.

[1] [2017] EWCA Civ 1916, [2018] QB 804. Noted by *A Morris/K Oliphant*, England and Wales, in: European Tort Law 2017 (2018) 141 no 33.

3 The newly amended 1976 Act now extends the entitlement to bereavement damages previously enjoyed by a wife, husband or civil partner of the deceased to a 'cohabiting partner' (sec 1A(2)(aa)) subject to the definitional requirements that the latter was living with the deceased in the same household immediately before the date of the death, had been living with the deceased in the same household for at least two years before that date, and was living during the whole of that period as the wife or husband or civil partner of the deceased (sec 2A).

2. Damages for Bereavement (Variation of Sum) (England and Wales) Order 2020, SI 2020/316: Sum to be Awarded as Bereavement Damages

4 This Order effects an increase in the value of bereavement damages awards made under sec 1A of the Fatal Accidents Act 1976. As of 1 May 2020 they rise from £12,980 to £15,210. The provision is applicable only to causes of action that accrue on or after that date.

3. Vaccine Damage Payments (Specified Disease) Order 2020, SI 2020/1411: Extension of Vaccine Damages Payments to COVID-19

5 The Vaccine Damage Payments Act 1979 provides for the payment of lump-sum compensation (currently in the amount of £120,000[2]) to persons who are severely disabled by vaccination against certain prescribed diseases. By virtue of the above Order, and with effect from 31 December 2020, these diseases now include COVID-19.

[2] Vaccine Damage Payments Act 1979 Statutory Sum Order 2007, SI 2007/1931.

B. CASES

1. *R (Jalloh) v Secretary of State for the Home Department* [2020] UKSC 4, [2021] AC 262 (12 February 2020): False imprisonment[3]

a) Brief Summary of the Facts

6 The claimant, of Liberian or Guinean nationality, was granted asylum in the UK in 2003 but, following his conviction of criminal offences in 2006, was made subject to a deportation order in 2008. The custodial part of his sentence expired in 2013 but he was then detained by the Secretary of State for the Home Department (Home Secretary) under powers in the Immigration Act 1971. Later that year, he was released on bail but issued with a notice of restrictions that were to be imposed on his liberty, including a curfew, purportedly under the 1971 Act. He was fitted with an electronic tag for monitoring purposes and told that, on pain of conviction to a fine or imprisonment, he was to remain at his residence between the hours of 11 pm and 7 am every day. The curfew was in place for 891 days until lifted by order of the Administrative Court in the course of judicial review proceedings in which the claimant disputed the legality of the curfew. In those proceedings, the claimant alleged that his detention amounted to the tort of false imprisonment and that he was therefore entitled to damages. The claim succeeded before the Administrative Court and the Court of Appeal, with the claimant's damages assessed at £4,000. The Home Secretary appealed to the Supreme Court.

b) Judgment of the Court

7 The Supreme Court unanimously dismissed the Home Secretary's appeal, rejecting her argument that the curfew did not amount to false imprisonment at common law, and (in the alternative) that, if it did, it did not amount to a deprivation of liberty under art 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the common law concept of imprisonment should now be aligned with that concept. On the contrary, the curfew did amount to false imprisonment; the classic understanding of imprisonment at common law was not to be restricted by reference to art 5 of the ECHR.

8 The Court reaffirmed the established propositions that false imprisonment requires the confinement of the claimant within an area defined by the de-

[3] Judgment available online at https://www.supremecourt.uk/cases/docs/uksc-2018-0137-judgment.pdf. Noted by *S Martin* [2020] CLJ 211.

fendant, but that there is no need for any physical barrier.[4] On the facts, there was no doubt that the defendant did in fact define the place where the claimant was to stay between the hours of 11 pm and 7 am. There was no suggestion that he could go somewhere else during those hours without the defendant's permission.[5] It was immaterial that the claimant had from time to time ignored his curfew: he was not imprisoned while he was away, but he was imprisoned while he was where the defendant wanted him to be.[6] There is a difference between voluntary compliance with an instruction and enforced compliance with that instruction, this was a case of the latter not the former. There was no doubt that his compliance was enforced: he was wearing an electronic tag so that leaving his address would be detected, and he had been told in clear terms that breaking the curfew could lead to a fine or imprisonment.[7] As Baroness Hale remarked: 'All of this was backed up by the full authority of the state, which was claiming to have the power to do this. The idea that the claimant was a free agent, able to come and go as he pleased, is completely unreal.'[8]

9 On the question of whether the definition of imprisonment at common law should be brought into line with the ECHR concept of deprivation of liberty, the Court began by noting that the ECHR distinguishes between the deprivation and restriction of liberty, a distinction which is a matter of degree rather than nature or substance; it is addressed through a multi-factorial approach that is very different from the approach of the common law to imprisonment.[9] An imprisonment at common law need not amount to a deprivation of liberty under the ECHR.[10] Whether the converse is also true—ie whether a deprivation of liberty under the ECHR need not amount to an imprisonment at common law—is in the Court's view open to doubt.[11] It was not necessary for the

4 Para 24 per Baroness Hale (handing down the sole judgment of the Court, with which the other Justices agreed).

5 Para 25 per Baroness Hale.

6 Para 26 per Baroness Hale.

7 Para 27 per Baroness Hale.

8 Ibid.

9 Para 29 per Baroness Hale, referring to the classic definition in *Guzzardi v Italy* (1980) 3 European Human Rights Reports (EHRR) 333, para 92.

10 Para 34 per Baroness Hale. See eg *Austin v Commissioner of Police of the Metropolis* [2007] (England and Wales Court of Appeal, Civil Division) EWCA Civ 789, [2008] QB 660 (Court of Appeal), [2009] United Kingdom House of Lords (UKHL) 5, [2009] 1 AC 564 (House of Lords); *Austin v United Kingdom* (2012) 55 EHRR 14 (police crowd control tactic of 'kettling') (European Court of Human Rights, ECtHR). The Court of Appeal ruled that the kittling (confining protestors in an enclosed place, surrounded by a police cordon, for several hours) amounted to imprisonment at common law, but justified by the common law principle of necessity. The House of Lords affirmed the Court of Appeal's view that it was not a deprivation of liberty under art 5 of the ECHR.

11 Para 34 per Baroness Hale. Cf *R v Bournewood Community and Mental Health NHS Trust, ex parte L* [1999] 1 AC 458, finding there was no imprisonment at common law in circumstances where the ECtHR later ruled there to have been a deprivation of liberty

Court to express an opinion on the matter, however.[12] Bringing the common law idea into line with deprivation of liberty under the ECHR would be 'a retrograde step', introducing a restriction that was not called for in the common law.[13] On the contrary, said Baroness Hale, '[t]here is… every reason for the common law to continue to protect those whom is has protected for centuries against unlawful imprisonment, whether by the state or private persons.'[14]

c) Commentary

10 The decision of the Supreme Court reaffirms existing principle rather than breaking new ground. It was entirely predictable that an unlawful curfew was going to be found to be an imprisonment for the purposes of the common law tort of false imprisonment. The Secretary of State's attempted reliance on the ECHR to *reduce* the existing protection provided by the common law was always likely to fail.

2. Various Claimants v Wm Morrison Supermarkets plc [2020] UKSC 12, [2020] AC 989 (1 April 2020): Vicarious liability[15]

a) Brief Summary of the Facts

11 The claim was brought by 9,263 employees or former employees of the defendant supermarket chain, complaining of the unlawful publication of their personal information on the internet in breach of the Data Protection Act 1998 (DPA). The publication was the fault of a disaffected employee (S) in the defendant's internal audit team, who held an irrational grudge against the employer after being subject to disciplinary proceedings for minor misconduct, for which he received a verbal warning. S was tasked with providing payroll data to the defendant's external auditor in preparation for the annual external audit. While doing so, he surreptitiously copied the data from his work computer onto a personal USB stick. Using a false identity, he subsequently uploaded data of 98,998 of the defendant's employees to a publicly accessible file-sharing website. Posing as a concerned member of the public, he then disclosed details of the publication to three national newspapers, who did not publish the information; one of them instead notified the defendant.

under the Convention (*HL v United Kingdom* (2004) 40 EHRR 32). The correctness of the *Bournewood* decision is now open to question.

12 Ibid.

13 Para 33 per Baroness Hale.

14 Ibid.

15 Judgment available online at https://www.supremecourt.uk/cases/docs/uksc-2018-0213-judgment.pdf. Noted by *AJ Bell* (2020) 36 PN 150, *D Brodie* (2020) 24 Edin L Rev 389; *E Gordon* [2020] CLJ 401; *J Lee* (2020) 136 LQR 553; *D Nolan* (2020) 49 ILJ 609; *P Giliker* (2021) 37 PN 55.

12 S was arrested, convicted of a number of offences and sentenced to eight years' imprisonment. The defendant spent more than £2.26m in dealing with the immediate aftermath of the disclosure, a significant element of that sum being on identity protection measures for its employees.

13 The claim succeeded at first instance and before the Court of Appeal on the basis that the defendant was vicariously liable for the wrongdoing of S, its employee. The defendant appealed to the Supreme Court.

b) Judgment of the Court

14 Unanimously allowing the appeal, the Supreme Court ruled that the defendant was not vicariously liable for the statutory tort committed by its employee, S, in breach of the DPA. S's wrongful conduct was not so closely connected with acts which he was authorised to do that, for the purposes of vicarious liability, it could fairly and properly be regarded as done by him while acting in the ordinary course of his employment.

15 Lord Reed, delivering the agreed judgment of the Court, explained that two questions fell to be addressed.[16] First, what functions or field of activities had been entrusted by the employer to the employee? Second, was there sufficient connection between the position in which he was employed and his wrongful conduct to make it right as a matter of social justice for the employer to be held liable? On the facts, the disclosure of the data on the internet did not form part of S's functions or field of activities; it was not an act which he was authorised to do.[17] The task he was given was simply to collate and transmit payroll data to the external auditor.[18] The disclosure was connected with what S was authorised to do inasmuch as he could not have made the disclosure if he had not been given the task of collating and transmitting the data.[19] But the mere fact that S's employment gave him the opportunity to commit the wrongful act was not sufficient to warrant the imposition of vicarious liability.[20] This was not a case where the employee was engaged, however misguidedly, in furthering his employer's business, but one where the employee was solely pursuing his own interests—'on a frolic of his own'.[21] S was pursuing a personal vendetta against his employer, seeking vengeance for the disciplinary proceedings against him, and the disclosure was therefore not so closely connected with acts which he was authorised to do that it could fairly

[16] Para 25, treating as authoritative the approach of Lord Toulson in *Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677, paras 44–46.
[17] Para 31.
[18] Para 33.
[19] Para 34.
[20] Para 35.
[21] Para 47, adopting the distinction drawn by Lord Nicholls in *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366, para 32. The well-known phrase 'frolic of his own' comes originally from *Joel v Morison* (1834) 6 C&P 501, 503 (Baron Parke).

and properly be regarded as done by him while acting in the ordinary course of his employment.[22]

c) Commentary

16 With *Various Claimants v Barclays Bank plc* (noted below), this was one of a pair of decisions on vicarious liability handed down by the Supreme Court on the same day. Together, the judgments have been seen as a reassertion of a more 'conservative'[23] approach to vicarious liability than had been thought to have emerged in recent years—at least in the eyes of some commentators.[24]

17 Vicarious liability requires three things. First, the commission of a tort by the primary tortfeasor. Second, a relationship of or akin to employment between the primary tortfeasor and their employer. Third, the primary tortfeasor's commission of the tort was within the ordinary course of their employment. *Barclays Bank* (below) addressed the second of these requirements, *Morrisons* the third.

18 A decisive moment in the modern analysis of the 'course of employment' requirement came with the decision of the House of Lords in *Lister v Hesley Hall Ltd* in 2001.[25] This recognised the vicarious liability of a school for sexual abuse of pupils by the warden of its boarding house, departing from the classic test of whether the wrongful act constituted a 'mode', albeit an improper mode, of doing an act authorised by the employer; sexual abuse could not remotely be considered a mode of looking after the children. The Law Lords in that case preferred to ask whether the assaults were so closely connected with the warden's employment that it would be fair and just to hold his employer vicariously liable—a question which they answered in the affirmative.

19 The new 'close connection' test was applied in later decisions of the House of Lords[26] and a controversial decision of the Supreme Court in 2016, *Mohamud v Wm Morrison Supermarkets plc*.[27] *Mohamud* seemed to stretch the concept as far as it would go—and, in the view of some commentators, beyond its le-

[22] Para 47.
[23] *Nolan* (2020) 49 ILJ 609, 609.
[24] See also *Bell* (2020) 36 PN 150, 150 ('a sign that the Court is ready to apply the brakes'); *Brodie* (2020) 24 Edin L Rev 389, 389 ('retrenchment'); *Gordon* [2020] CLJ 401, 404 ('a restraining effect'); *Lee* (2020) 136 LQR 553, 558 ('retrenchment'); *Giliker* (2021) 37 PN 55, 56 ('more restrictive').
[25] [2001] UKHL 22, [2002] 1 AC 215. Noted by *K Oliphant*, England and Wales, in: European Tort Law 2001 (2002) 131 no 37 ff.
[26] Notably *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366.
[27] [2016] AC 11, [2016] AC 677. Noted by *A Morris/K Oliphant*, England and Wales, in: European Tort Law 2016 (2017) 000 no 22 ff.

gitimate application[28]—deciding that the defendant supermarket was vicariously liable for a racist assault committed on a customer by its attendant, who, in response to a polite inquiry, had ordered the customer to leave the premises, used racist and threatening language to him, followed him to his car and attacked him there.

20 In its 2020 *Morrisons* decision (coincidentally involving the same supermarket) the Supreme Court stated its intention of addressing 'misunderstandings' that had arisen after its decision in *Mohamud*,[29] underlining that that earlier decision had not been intended to change the law.[30] It was only because certain phrases had been taken out of context that the erroneous impression had arisen that the Court was departing from the precedents that it purported to follow.[31]

21 As Lord Reed explained in his judgment, the course of employment requirement demands a two-stage inquiry: first, what functions or field of activities had been entrusted by the employer to the employee, and, second, was there sufficient connection between these functions or activities and his wrongful conduct to make it right as a matter of social justice for the employer to be held liable? What constitutes a 'sufficient' connection is not just a matter of temporal proximity or causation,[32] and must be considered in the light of previous court decisions.[33] Future courts should look for analogous cases in the past, identify the decisive factual elements in them, and see whether they exist in the case at hand. In the category of cases dealing with an employee's deliberate wrongdoing intended to inflict harm on a third party, there will normally be no vicarious liability if the employee was acting for purely personal reasons ('on a frolic of their own'). Hence there was no vicarious liability where an off-duty police officer injured a bystander when firing his service revolver at his partner in jealous rage at finding her with another man.[34] Nor did vicarious liability arise where a petrol-filling attendant punched a customer who, following an angry confrontation about payment, had brought the police to the scene and was threatening to report the attendant to his employer.[35] Conversely, vicarious liability *was* imposed where the managing director of the defendant company punched a work colleague after an altercation at the staff Christmas party: although the assault occurred after hours and away from the

[28] See eg *Giliker* (2021) 37 PN 55, 63, citing concerns raised by *Mohamud* amongst commentators that the test would be far too readily satisfied.
[29] Para 1 per Lord Reed.
[30] Para 17 per Lord Reed.
[31] Ibid.
[32] Para 31 per Lord Reed.
[33] Para 36 per Lord Reed.
[34] *Attorney General of the British Virgin Islands v Hartwell* [2004] United Kingdom Privy Council (UKPC) 12, [2004] 1 WLR 1273. In *Morrisons*, Lord Reed treated this and the cases cited in the footnotes below as correctly decided.
[35] *Warren v Henlys Ltd* [1948] 2 All ER 935.

workplace, the managing director had been asserting his authority over a subordinate who had challenged his managerial decision-making.[36] In cases involving sexual abuse, the close connection test has been applied differently, the employer's conferral of authority on the employee over the victims being an especially important consideration[37]—justifying liability, for example, for sexual assaults committed on pupils by the warden of a boarding house in a residential school.[38]

22 The Supreme Court's controversial *Mohamud*[39] decision remains one that pushes at the limits to which the scope of employment can be stretched. An unprovoked racist assault on a customer by a retailer worker will normally be viewed as a purely personal matter falling well outside the course of employment. What seems to have led the Court to the contrary conclusion on the facts was the unbroken sequence of events between the customer's inquiry and the assault, such they together formed a single, seamless episode, and the fact that the employee prefaced his attack by telling the claimant to leave the premises and never come back, and was thus purporting to act about his employer's business.[40] The normative significance of these factors may be open to question, but a line has to be drawn somewhere, and by suggesting relevant considerations the Supreme Court may hope at least to encourage greater consistency in the application of the course of employment requirement in future.

3. Various Claimants v Barclays Bank plc [2020] UKSC 13, [2020] AC 973 (1 April 2020): Vicarious liability[41]

a) Brief Summary of the Facts

23 This was a group action brought by 126 female claimants who alleged they had been sexually assaulted in the course of medical examinations conducted by Doctor B in the period 1968 to 1984. The examinations were required by the defendant bank as a condition of an offer of employment. Doctor B was an independent practitioner who was paid a fee for each report he made as part of his 'portfolio practice', in which he also worked as an employee in local hospitals and did miscellaneous work for insurance companies and others. Many of those now claiming had been teenagers at the time, looking for their first jobs after leaving school. The examinations were conducted in Doctor B's

36 *Bellman v Northampton Recruitment Ltd* [2018] EWCA Civ 2214, [2019] ICR 459.
37 Paras 23 and 36 per Lord Reed.
38 *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215
39 [2016] AC 677.
40 Para 28 per Lord Reed.
41 Judgment available online at https://www.supremecourt.uk/cases/docs/uksc-2018-0164-judgment.pdf. Noted by *Bell* (2020) 36 PN 150; *R Buxton* [2020] CLJ 217; *Lee* (2020) 136 LQR 553; *Nolan* (2020) 49 ILJ 609; *C Purshouse* (2020) 28 Med L Rev 794.

own home, in a room converted into a consultancy room. The claimants were all alone in the room with Doctor B when the alleged sexual assaults took place.

24 Doctor B died in 2009 and his assets were redistributed to his heirs. He could not be sued by the claimants; nor could the defendant bank claim contribution from him should the actions against it succeed. In the group litigation that ensued, the High Court and Court of Appeal affirmed the defendant bank's vicarious liability for any proven assaults by Doctor B on the claimants in the course of medical examinations carried out at the bank's request. The bank appealed to the Supreme Court.

b) Judgment of the Court

25 Unanimously allowing the appeal, the Supreme Court rejected the women's claim, ruling that the bank was not vicariously liable for any wrongdoing of Doctor B in the course of the medical examinations he carried out for it. Doctor B was neither a bank employee nor in a relationship 'akin to employment'. Though the latter concept had been recognised in the recent case-law of the Court,[42] nothing in those decisions suggested that the classic distinction between employment and relationships akin or analogous to employment, on the one hand, and the relationship with an independent contractor, on the other hand, had been eroded.[43] The key question was, as it has always been, whether the tortfeasor was carrying on business on his own account or part of the employer's business.[44]

26 On the facts, it was clear that—so far as his relationship with the defendant bank was concerned—Doctor B was at no time an employee, nor even anything close to an employee. Though he discharged the bank's instructions, he was not paid a retainer which might have obliged him to accept a certain number of referrals from the bank; rather he was paid a fee for each report and was free to refuse an offered examination should he wish to. He no doubt carried his own medical liability insurance. He was in business on his own account as a medical practitioner with a portfolio of clients, one of which was the bank.[45]

c) Commentary

27 As noted above (no 16), this was one of a pair of decisions on vicarious liability handed down by the Supreme Court on the same day. Where *Morrisons* (no 11 ff) dealt with the 'course of employment' requirement of the liability,

[42] See *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56, [2013] 2 AC 1 ('*Christian Brothers*').
[43] Para 24 per Baroness Hale.
[44] Paras 22 and 27 per Baroness Hale.
[45] Para 28 per Baroness Hale.

the present case (*Barclays*) addressed the requirement of a relationship of or akin to employment. Notwithstanding the still relatively recent expansion of the relationships in which vicarious liability can be imposed, moving beyond employment relationships strictly so-called to include relationships *akin to* employment,[46] the Supreme Court underlined in *Barclays* that the traditional distinction between employees (extended now to those in akin relationships) and independent contractors remains fundamental. Judicial guidance intended to assist in identifying relationships akin to contract[47] ought not to be used to erode that traditional distinction and is not relevant in drawing the line between the two categories other than in doubtful cases.[48] The present case illustrates very clearly that vicarious liability does not arise in relationships where the person contracted to perform work is in business on their own account.

4. Henderson v Dorset Healthcare University NHS Foundation Trust [2020] UKSC 43, [2021] AC 563 (30 October 2020): Defence of Illegality[49]

a) Brief Summary of the Facts

28 The claimant suffers from paranoid schizophrenia or schizoaffective disorder. Whilst experiencing a serious psychotic episode she stabbed her mother to death. She was subsequently convicted of manslaughter by reason of diminished responsibility and sentenced to detention for an indefinite period. At the time of the killing, the claimant was living in supported accommodation in the community. Acting through the Official Solicitor as her litigation friend, she brought proceedings against the NHS Trust responsible for her health for its admitted negligence in failing to return her to hospital in light of her manifest psychotic state. She sought damages for her depression and post-traumatic stress disorder (PTSD) consequent on her killing of her mother, as well as for her loss of liberty, her loss of inheritance from forfeiting her share of her mother's estate, and the costs of her psychotherapy and care. Notwithstanding its admission of negligence, the Trust resisted the claim on the basis that the

[46] See especially *Christian Brothers* [2013] 2 AC 1 (member of religious community undertaking teaching in associated school); *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660 (prisoner working in prison kitchen); *Armes v Nottinghamshire County Council* [2017] UKSC 60, [2018] AC 355 (paid foster carers).

[47] See especially *Christian Brothers* [2013] 2 AC 1 paras 35 and 47 per Lord Phillips, setting out five 'incidents' of employment relationships which make it fair for the employer to bear vicarious liability for the employee, and stating that, if those incidents are present in a relationship not involving a contract of employment, such relationship may still give rise to vicarious liability on the basis that it is akin to employment.

[48] Para 27 per Baroness Hale.

[49] Judgment available online at https://www.supremecourt.uk/cases/docs/uksc-2018-0200-judgment.pdf.

damages sought were the consequences of the claimant's own criminal act and the sentence she had received for it from the criminal court.

29 The High Court accepted the Trust's contention that the heads of loss claimed were irrecoverable as a matter of law. The Court of Appeal dismissed the claimant's appeal.

30 The case raised substantially the same issues relating to the defence of illegality as had been before the House of Lords in 2009 in *Gray v Thames Trains Ltd*.[50] That decision was binding on the High Court and Court of Appeal. However, the conceptual basis of the illegality doctrine had subsequently been reviewed and clarified by the Supreme Court in *Patel v Mirza* in 2016.[51] The key question for the Supreme Court was whether *Gray* was '*Patel* compliant'.

b) Judgment of the Court

31 The Supreme Court dismissed the appeal, ruling that the claim was indeed barred for reasons of illegality. The approach taken by the House of Lords on materially similar facts in *Gray v Thames Trains Ltd*[52] was '*Patel* compliant' and remains good law. The Supreme Court declined the claimant's invitation either to distinguish the House of Lords' decision[53] or to depart from it.[54] The fundamental policy consideration relied on in *Gray* was the need for consistency so as to maintain the integrity of the legal system, which was the very matter that in *Patel* was held to be the underlying policy question.[55] Further, the need for consistency between criminal and civil law was correctly considered in *Gray* to justify the application of the defence of illegality even in a case in which the claimant's responsibility for committing a crime was diminished and the sentence imposed includes no penal element.[56] Other general policy considerations also supported the denial of the claim for illegality, including the need to maintain public confidence in the law[57] and the undesirability of taking public funds away from the NHS to compensate for the consequences of criminal conviction.[58] Looking at the matter more broadly, having a clear rule that unlawful killing never pays would support the criminal law's deterrent purpose and the fundamental importance of the right to life, as well

[50] [2009] UKHL 33, [2009] 1 AC 1339.
[51] [2016] UKSC 42, [2017] AC 467.
[52] See also *Clunis v Camden and Islington Health Authority* [1998] QB 978, an earlier decision of the Court of Appeal, also on materially similar facts.
[53] Para 86 per Lord Hamblen, with whose judgment the other Justices agreed.
[54] Para 145 per Lord Hamblen.
[55] Para 94 per Lord Hamblen.
[56] Paras 105–06 and 109 per Lord Hamblen.
[57] Para 126 per Lord Hamblen.
[58] Para 127 per Lord Hamblen.

as the public interest in public condemnation and due punishment.[59] (para 131).

32 Countervailing policy considerations in favour of liability - for example that victims should get compensation and negligent injurers should pay - were insufficiently weighty to counter the policy considerations supporting the application of the illegality defence.[60]

33 Denial of the claim on grounds of illegality would not be disproportionate, having regard to the very serious offence committed, the centrality of the criminal conduct to the causation of the various losses, the intentional nature of the conduct, and the marked disparity between the claimant's intentional and unlawful killing and the defendant's negligence.[61]

c) Commentary

34 *Ex turpi causa non oritur actio*: 'no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.'[62] This well-known dictum neatly encapsulates the defence of illegality as it exists in the modern law. In the context of tort law, the defence has been applied to bar claims by, for example, a burglar injured by the negligent driving of his getaway driver,[63] a pillion passenger in a motorbike accident after urging the driver on to ever more reckless and dangerous riding, seeking to scare other road users,[64] and by the habitual crook who tried to evade the clutches of the law by jumping from his second floor window, fractured his skull on landing, and sought to blame the police for negligence in their pursuit of him.[65]

35 A pivotal moment in the onward development of the defence came with the decision of the UK Supreme Court in *Patel v Mirza* in 2016. This brought clarification of the conceptual basis of the illegality doctrine and how the courts should apply it in future. To quote the Court: 'The essential rationale of the doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system.'[66] This policy-based approach entails a three-stage inquiry. First, would allowing the claim be consistent with the policy behind the prohibition breached and other

59 Para 131 per Lord Hamblen.
60 Paras 132–37 per Lord Hamblen.
61 Paras 138–43 per Lord Hamblen
62 *Holman v Johnson* (1775) 1 Cowper's King's Bench Reports 341, 343 per Lord Mansfield
63 *Ashton v Turner* [1981] QB 137; *Joyce v O'Brien* [2013] EWCA Civ 546, [2014] 1 WLR 70.
64 *Pitts v Hunt* [1991] 1 QB 24.
65 *Vellino v Chief Constable of Greater Manchester Police* [2001] EWCA Civ 1249, [2002] 1 WLR 218.
66 [2017] AC 467, para 120 per Lord Toulson.

relevant policies? If not, secondly, are those policy considerations outweighed by countervailing factors that *support* allowing the claim – for example, the general desirability of enabling victims of negligent conduct to recover damages, and deterring such negligence in future? Thirdly, would it be 'disproportionate' to bar the claim for reasons of policy, having regard to such factors as the seriousness of the offence committed, its centrality to the causation of the damage, and the relative culpability of the parties.

36 *Patel*, the leading case, was not in fact a case about tortious liability. It concerned illegal contracts – illustrating that the illegality defence has application across civil law, not just in tort. For tort lawyers, it raised questions whether the approach applied by the courts in tort cases prior to *Patel* was consistent with the new decision. Was the tort case law, as it was put in *Henderson*, '*Patel* compliant'?

37 In *Henderson*, the main focus of attention was on the 2009 decision of the House of Lords in *Gray v Thames Trains*. This was a case of manslaughter by a man who had suffered serious psychiatric injury in a train crash and later fatally stabbed a motorist in a road rage incident. Like the claimant in *Henderson*, he was convicted of the offence and detained under a hospital order. He brought an action for damages against the train company, but the House of Lords rejected the claim by reason of illegality. In the Law Lords' analysis, the defence consisted of two related rules of public policy, one narrow, the other wider. The narrow rule of public policy was the need to avoid inconsistency in the law whereby a civil court awards damages for the consequences of a sentence imposed by the criminal courts. The claimant could not therefore recover damages for his loss of liberty and foregone earnings consequent on his mandatory detention. The wider rule of public policy was this: 'you cannot recover compensation for loss which you have suffered in consequence of your own criminal act'.[67] As the claimant's potential liability to compensate his victim's dependants, and his feelings of guilt and remorse, were all consequences of his criminal act, it followed that these too fell within the scope of the illegality defence.

38 Ruling that *Gray* was indeed '*Patel* compliant', the Supreme Court accepted in *Henderson* that the earlier case demonstrated how *Patel* 'plays out' in this type of situation.[68] The clearly stated rules in *Gray*, based on sound public policy, should be followed in comparable cases in future. Applying them on the instant facts, all Henderson's claims were therefore defeated by reason of illegality, some heads of damage falling within the narrow rule in *Gray*, others within the wider rule.

[67] [2009] 1 AC 1339, para 29 per Lord Hoffmann.
[68] Para 145 per Lord Hamblen.

39 We might ask whether *Patel* changes the scope of the illegality defence in tort law at all. Though the *Henderson* judgment mostly emphasises the continued validity of the pre-*Patel* tort case-law, there is at least one subtle but significant difference inasmuch as 'proportionality' is now expressly considered as one of the three distinct stages of analysis. This provides a convincing rationale for excluding the defence from minor criminal infractions, such as failure to wear a seatbelt in a car, where contributory negligence produces a nuanced and therefore fairer outcome.[69] To that extent, the new approach from *Patel* and *Henderson* is a welcome clarification of what was latent in the existing law, but not express.

40 By way of footnote, on the same day it handed down its *Henderson* judgment, the Supreme Court also decided a second illegality appeal, *Grondona v Stoffel & Co*.[70] The claimant participated in a mortgage fraud by making an application for a home loan over a leasehold property she had bought from her accomplice a few months earlier for a third of the price. The purpose of the fraud was to raise capital finance for the accomplice from a high street lender which he would not otherwise have been able to obtain. The defendant solicitors were negligent in failing to register with the Land Registry either the transaction or the mortgage lender's charge over the property. The claimant defaulted on the mortgage repayments and the mortgage lender brought proceedings against her to obtain a money judgment. She defended the claim and sought an indemnity, contribution and/or damages from the defendant solicitors. The defendants resisted the claim on the basis that the claimant's purpose in instructing them was to further a fraud and that they were therefore entitled to rely on the defence of illegality. The Supreme Court rejected the defence. Following the approach of *Patel v Mirza*, the underlying purpose of the prohibition against fraud would not be significantly enhanced by a denial of this claim, whereas other relevant public policies would be adversely impacted, particularly that 'conveyancing solicitors should perform their duties to their clients diligently and without negligence and that, in the event of a negligent breach of duty, those who use their services should be entitled to seek a civil remedy for the loss they have suffered.'[71] Compared with *Henderson*, *Grondona* was thus a case in which the balancing of policy considerations required by *Patel v Mirza* produced a different (pro-claimant) outcome.

[69] Cf *Joyce v O'Brien* [2014] 1 WLR 50, para 51, where Elias LJ expressly stated that the defence does not extend to minor traffic offences. See also *Delaney v Pickett* [2011] EWCA Civ 1532, [2012] 1 WLR 2149, para 49 f per Ward LJ (effectively asking whether the conduct was heinous enough to be the sort of crime covered by the defence).

[70] [2020] UKSC 42, [2021] AC 540 (30 October 2020). Judgment available online at https://www.supremecourt.uk/cases/docs/uksc-2018-0187-judgment.pdf

[71] Para 32 per Lord Lloyd-Jones, with whose judgment the other Justices agreed.

5. Personal Injury

a) Trends in Personal Injury Claims

41 After a slight increase in the total number of recorded personal injury claims in 2019, 2020 brought a continuation of the longer-term decline in claims numbers. The overall volume of personal injury claims has now reduced in six of the last seven years, testimony to 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.[72] There were 829,252 recorded personal injury claims in 2019/2020, as compared to 862,356 in 2018/2019, 853,615 in 2017/2018 and 978,816 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 79% (653,052) of the total. Given the data collection dates (1 April to 31 March), and the usual time lag between injury and claim, it is doubtful that this year's figures have been significantly affected by the COVID-19 pandemic. Its impact in 2020/2021 is likely to be substantial, however, especially given the greatly reduced road traffic during the extended periods of lockdown restrictions.

b) Significant decisions

42 *ABC v St George's Healthcare NHS Trust*:[73] The claimant sought damages for the failure of three NHS Trusts to alert her to the risk that she had inherited the gene for Huntington's disease in time for her to terminate her pregnancy. She alleged that this failure caused her to continue her pregnancy, suffer psychiatric damage and incur consequential losses. The defendant Trusts had become aware of the risk through diagnosis of the claimant's father, but he had declined to consent to the disclosure of the information to her and the defendants' clinicians took the view that they should not override his confidentiality. The Trusts denied that they owed the claimant a duty of care, or, if they did owe a duty of care, that they were in breach of such duty, or, if they were in breach of duty, that it had caused the claimant any injury inasmuch as the evi-

[72] For details of the most significant 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>.

[73] [2020] EWHC 455 (QB) (28 February 2020). Judgment available online at https://www.bailii.org/ew/cases/EWHC/QB/2020/455.html. Noted by *J O'Sullivan* [2020] CLJ 214. In previous proceedings (*ABC v St George's Healthcare* [2017] EWCA Civ 336) the Court of Appeal had rejected the defendant's application to strike out the claim on the basis that it disclosed no reasonable cause of action and ordered that the matter should proceed to trial.

dence did not establish that she would have had a termination but for such breach. The judge (Yeo J) rejected the claim, though she found that one of the three defendant Trusts had owed the claimant a duty of care as a patient (like her father) of its family therapy team. She was not a patient of the other two defendant Trusts and they owed her no duty of care. The Trust owing her a duty of care had not, however, breached that duty on the facts as the decision not to disclose was supported by a responsible body of medical opinion and was a matter of judgment open to the defendant Trust after balancing the competing interests. Further the claimant had not established on the balance of probabilities that she would have undergone a termination had the risk been disclosed to her during her pregnancy.

43 *Lewis v Wandsworth London Borough Council*:[74] The claimant was struck in the eye and injured by a ball struck from a game of cricket being played in the London park in which she was walking. The cricket pitch was laid out in a small area of the park and was bounded by a pathway along which the claimant had been walking when she was struck. The trial judge ruled that the defendant council was negligent in failing to warn that cricket was being played, using a hard ball, and in the bounding of the pitch with a pathway. On appeal to the High Court, Stewart J ruled that the judgment in the court below had been wrong. On his analysis, allowing pedestrians to walk along the path when a cricket match was taking place was reasonably safe, the prospects of an accident (albeit nasty if it occurred) being remote. The council's failure to warn was immaterial as it was obvious that a game of cricket was being played and reasonable observers would have known that, given it was a serious game between teams wearing cricket whites, a hard ball was being used. The decision warrants a mention because of its close similarity to the facts of the iconic decision of the House of Lords in *Bolton v Stone*.[75]

44 *Toombes v Mitchell*:[76] The claimant was born with a congenital developmental defect limiting her mobility and causing incontinence. She alleged that the cause of her physical disability was her mother's failure to take folic acid before her conception which was due in turn to the negligent advice of her doctor, the defendant. The defendant argued this was a claim for wrongful life and hence excluded both by the provisions of the Congenital Disabilities (Civil Liability) Act 1976 and at common law.[77] At the trial of this preliminary issue, Lambert J ruled that the requirements for a claim under the 1976 Act were met and that the case-law on wrongful life was not relevant. The three components of the statutory claim were a wrongful act, an 'occurrence' of a defined nature (eg one which affected either parent of the child in his or her

[74] [2020] EWHC 3205 (QB) (26 November 2020). Judgment available online at https://www.bailii.org/ew/cases/EWHC/QB/2020/3205.html

[75] [1951] AC 850.

[76] [2020] EWHC 3506 (QB) (21 December 2020). Judgment available online at https://www.bailii.org/ew/cases/EWHC/QB/2020/3506.html.

[77] Relying on *McKay v Essex Area Health Authority* [1982] 2 All ER 771.

ability to have a normal, healthy child) and a child born disabled. The defendant argued that there was no occurrence of the required nature, but Lambert J disagreed. Though the failure to take folic acid was not itself an occurrence—defined in terms of something happening—the relevant occurrence could be found in the act of sexual intercourse without the protective benefit of the folic acid. Further, the wrongful life case-law had no application to pre-conception negligence, with which the present case was concerned. The claimant therefore had a lawful claim for damages for personal injury arising from her disability.

45 *XX v Whittingdon Hospital NHS Trust*:[78] The claimant was rendered infertile by the clinical negligence of the defendant Trust after smear tests and biopsies the Trust conducted on her failed to identify her cervical cancer. When she was ultimately diagnosed, she followed medical advice in undergoing chemo-radiotherapy even though this would deprive her of the ability to bear children. Before the treatment, she underwent a round of ovarian stimulation and egg collection as a result of which she had a number of mature eggs available to be fertilised using her partner's sperm and borne by a surrogate. The evidence was that she could have two children by this route but, bearing in mind her and her partner's desire for a larger family, would have to use donor eggs to have the two further children that they wanted. The question that ultimately reached the Supreme Court was whether she could recover the cost of the intended surrogacy arrangements, and in particular whether she could do so even for a commercial surrogacy in California, notwithstanding the prohibition against making commercial surrogacy arrangements in the UK. She preferred the Californian option because surrogacy agreements there are binding, whereas they are not in the UK, and also suffer from other disadvantages. The Supreme Court ruled unanimously that the claimant was entitled to damages for the cost of lawful (non-commercial) surrogacy in the UK, whether with her own eggs or with donor eggs. A 3-2 majority of the Supreme Court also ruled that she was entitled to damages for the cost of the foreign commercial surrogacy, the award of such damages not being contrary to public policy. Delivering the majority judgment, Baroness Hale noted that this conclusion was supported by recent legal and attitudinal developments, including the judicial and governmental support for surrogacy as a valid way of creating family relationships, as well as the widespread use and social acceptability of assisted reproduction.

[78] [2020] UKSC 14, [2021] AC 275 (1 April 2020). Judgment available online at https://www.supremecourt.uk/cases/docs/uksc-2019-0013-judgment.pdf.

C. LITERATURE

1. Nicholas J McBride, The Humanity of Private Law, Part I: Explanation, Oxford: Hart Publishing, 2019; *id*, The Humanity of Private Law, Part II: Evaluation, Oxford: Hart Publishing, 2020

46 It would be impossible to do justice here to the ambitious project undertaken by the author in this two-part publication, and futile to attempt more than a partial description at a high level of generality, highlighting such elements as bear most directly on the law of tort. The key claim is that private law's core concern is to promote the flourishing of its subjects, but the conception of human flourishing that it adopts is 'incorrect' (Part I, 33), and for that reason private law fails to achieve its potential and should be reformed. Part I critiques rival accounts of the private law that see it as (for example) promoting the goal of wealth maximisation or maximising our independence subject to constraints of equality, before identifying the conception of human flourishing that is dominant in Western culture and presenting an explanation of private law in its terms. Part II evaluates three possible models of human flourishing, reiterates the claim that the model currently presupposed by private law (now termed 'the possessions model') is deficient, and proposes that human flourishing is best seen as a quest to lead a truthful life ('the journey model'). For the tort lawyer, the chief interest in these volumes is likely to be the author's attempts to link his analysis with particular features of the law of tort—for example, the interests that tort law protects, the objective standard of care, the exceptions admitted to the normal but-for test of factual causation, and the concepts of strict and vicarious liability. There is a lot in these volumes to digest, and much detailed and intricate analysis to admire, whether one is inclined to accept the main thesis or not.

2. Textbooks

47 *Simon Deakin/Zoe Adams*, Markesinis & Deakin's Tort Law (Oxford: Oxford University Press, 8th edn, 2019); *Paula Giliker*, Tort (London: Sweet & Maxwell, 7th edn, 2020); *James Goudkamp/Donal Nolan*, Winfield & Jolowicz on Tort (London: Sweet & Maxwell, 20th edn, 2020); *Kirsty Horsey/Erika Rackley*, Kidner's Casebook on Torts (Oxford: Oxford University Press, 15th edn, 2019); *Rachel Mulheron*, Principles of Tort Law (Cambridge: Cambridge University Press, 2nd edn, 2020)

3. Practitioner Reference Works

48 *James Goudkamp/Donal Nolan*, Contributory Negligence in the Twenty-First Century (Oxford: Oxford University Press, 2019); *Michael Jones* (general ed), Clerk & Lindsell on Torts (London: Sweet & Maxwell, Common Law Library, 23rd edn, 2018)

4. Selected Journal Articles

49 **Negligence:** *AJ Bell/J McCunn*, Professional Negligence in 2020: The Year in Review (2021) 37 PN 5; *AK Burin*, The positive duty of prevention in the common law and the Convention (2020) 40 LS 209; *M-B Dembour/J Turner/C Barrow*, When are occupiers in breach of their duty of care? The advantages of a systematic test (2020) 40 LS 95

50 **Causation:** *CM Lam*, Revisiting loss of chance in medical negligence: employing public policy positively as justification (2020) 36 PN 105; *MDG Platt*, What Would the Defendant have Done but for the Wrong? (2020) 40 OJLS 28; *G Turton*, Causation and Risk in Negligence and Human Rights Law [2020] CLJ 148

51 **Clinical Negligence:** *TT Arvind/AM McMahon*, Responsiveness and the Role of Rights in Medical Law: Lessons from Montgomery (2020) 28 Med L Rev 445; *P Case*, The jaded cliche of 'defensive medical practice': from magically convincing to empirically (un)convincing? (2020) PN 49; *E Cave/C Purshouse*, Think of the Children: Liability for Non-Disclosure of Information Post-Montgomery (2020) 28 Med L Rev 270; *A Mulligan*, A vindicatory approach to tortious liability for mistakes in assisted human reproduction (2020) 40 LS 55

52 **Vicarious Liability:** *S Todd*, Various Liability on the Move - But Where Should It Stop? (2020) 7 Journal of International and Comparative Law 1

53 **Damages:** *V Janeček*, Public interest damages (2020) 40 LS 589; *S Steel/R Stevens*, The secondary legal duty to pay damages (2020) 136 LQR 283

54 **Liability for Autonomous Vehicles:** *M Channon*, Automated and Electric Vehicles Act 2018: An Evaluation in light of Proactive Law and Regulatory Disconnect (2019) 10 European Journal of Law and Technology, issue 2; *J Davey*, By Insurers, For Insurers: The UK's Liability Regime for Autonomous Vehicles (2020) 13 J Tort Law 163; *K Oliphant*, Liability for Road Accidents Caused by Driverless Cars [2019] Singapore Comparative Law Review 190