LEGAL DEVELOPMENTS 2019

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ORDER OF EVENTS

- VICARIOUS LIABILITY
- ENTERPRISE ACT DEVELOPMENTS
- EX TURPI CAUSA

VICARIOUS LIABILITY

VICARIOUS LIABILITY (1)

- Immanuel Kant: "Out of the crooked timber of humanity no straight thing was ever made"
- Lord Toulson, SC: "The risk of an employee misusing his position is one of life's unavoidable facts"
- The law historically:
  - Liability for the acts of employees in the course of their employment
  - No liability for independent contractors
  - No liability for the employee "on a frolic of his own" - Joel v. Morison (1834)

VICARIOUS LIABILITY (2)

- **Christian Brothers**, Lord Toulson noted 4 particular areas of development since he 'cut his teeth':
  - An unincorporated association could be liability for the tortious act of its members eg. Thomas v. NUM (1985)
  - Defendant may be vicariously liable for the acts of a tortfeasor even if violation of a duty owed to the Defendant and even if a criminal offence eg. Dubai Aluminium (2002)
  - Vicarious liability can extent to liability for a criminal act of sexual assault eg. Lister v. Hesly Hall (2001)
  - Possible for 2 different defendants each to be liable for the single act of a wrongdoer: Viasystems v. Thermal Transfer

VICARIOUS LIABILITY (3)
THE LAST FEW YEARS

- **Various v. Institute of Christian Brothers** [2012] UKSC 56: vicarious liability on the move as a response to changes in the nature of legal relationships
- **Cox v. Ministry of Justice** [2016] UKSC 10: the prisoner case. Sufficient that there was a defendant carrying on furtherance of its own interests; a defendant could not take advantage of technical arguments about the employment status of the wrongdoer.
- **Mohamud v. Morrisons Supermarkets** [2016] UKSC 11: the correct question is whether there is a sufficient connection between the position in which the wrongdoer is employed and his wrongful conduct so as to the make the employer liable under the principle of social justice.

VICARIOUS LIABILITY (4)
ARMES

- **Armes v. Nottinghamshire County Council** [2017] UKSC 60
- Claimant suffered physical and sexual abuse at the hands of foster parents in 1980s
- Local authority had not been negligent in the selection or supervision of the foster parents
- Supreme Court applied Cox.
  - Torts committed by foster parents in activity carried out for benefit of local authority
  - Risk creation – children vulnerable to abuse
  - Local authority had powers to approval, inspection etc: so a significant degree of control
  - Foster parents had insufficient means to meet substantial awards of damages

A CONCERNING DECISION – openly looking for deep pockets

Lord Hughes, dissenting, was concerned that vicarious liability of would inhibit placements with foster carers but also 'family and friends' placements

VICARIOUS LIABILITY (5) BELLMAN

- **Bellman v. Northampton Recruitment Ltd** [2018] EWCA Civ 1214
  - Christmas Party
  - Separate drinking session after the party
  - Wrongdoer was the managing director – punched employee
  - Serious brain injury when employee fell to the floor
  - Held in a small company with the M/D having wide responsibilities, there was sufficient connection between the director's field of activities and the assault.
  - M/D had committed the assault when exercising authority over a subordinate
  - Irwin LJ: liability would not arise merely because of an argument about work matters where one was senior to the other
- CONCERNING THAT SMALL COMPANIES LEFT MORE VULNERABLE TO VICARIOUS LIABILITY IN SUCH CIRCUMSTANCES THAN LARGE COMPANIES

VICARIOUS LIABILITY (6) SHELBOURNE

- **Shelbourne v. Cancer Research** [2019] EWHC 842
- On the facts of this case, the employer was not found liable
- A visiting scientist lifted a woman on the dancefloor and dropped her, causing a serious back injury
- C argued that D was both negligent and vicariously liable for the drunken scientist's acts. Both rejected.
- Vicarious liability: "field of activities" connected with laboratory work and he was not doing that on the dance floor; not sufficiently connected with his conduct at the party to make Cancer Research liable

VICARIOUS LIABILITY (7)
BARCLAYS BANK

- **Barclays Bank v. Various Claimants** [2018] EWCA Civ 1670:
  - Medical assessment of potential employees by doctor nominated by bank between 1968 – 1984 at doctor's home
  - 126 claimants seen for "Barclays Bank Confidential Medical Report"
  - Bank argued doctor was an independent contractor
  - CA held that changes in employment structures meant that there would be cases involving independent contractors where liability would be established.
  - Medical examinations were integral to the activities of the bank who would wish to employ applicants long-term and were held to be sufficiently closely connected with the relationship between the doctor and the bank and the purpose of that relationship
- PERMISSION GIVEN FOR APPEAL TO SUPREME COURT

VICARIOUS LIABILITY - CONCLUSIONS

- Policy is usually said to get in the way of principle in these cases.
- But Armes and Barclays case have shown clear expansions in the scope of vicarious liable based upon principle.
- A concern to the insurers of large organisations and especially local authorities. What will the SC do in Barclays?
- However, the assault cases concerning 'sufficient connection' (ie. Bellman and Shelbourne) appear more as 'policy' cases looking for the right and just result. See also Various v. Morrisons Supermarkets [2017] EWHC 3113 concerning liability for data breaches
- Inevitable unpredictability in the latter cases: insurers will have to accept that rigorous factual analysis and evidential preparation will be required to improve prospects.

ENTERPRISE ACT DEVELOPMENTS

ENTERPRISE & REGULATORY REFORM ACT 2013

- **69 Civil liability for breach of health and safety duties**
- (1) Section 47 of the Health and Safety at Work etc Act 1974 (civil liability) is amended as set out in subsections (2) to (7).
- (3) For subsection (2) substitute—
- **"(2) Breach of a duty imposed by a statutory instrument containing (whether alone or with other provision) health and safety regulations shall not be actionable except to the extent that regulations under this section so provide.**
- **(2A) Breach of a duty imposed by an existing statutory provision shall not be actionable except to the extent that regulations under this section so provide (including by modifying any of the existing statutory provisions).**

EFFECT OF SECTION 69

- Primarily: HEALTH & SAFETY REGULATIONS NO LONGER CREATE A CIVIL CAUSE OF ACTION. That does not stop the Manual Handling Regulations 1992, Work at Height Regulations 1995 etc still being pleaded….
- Importantly, fault lies at the heart of employer's liability and related public liability claims rather than the strict or absolute liability that many of the regulations created eg. regulation 5 of the Provision and Use of Work Equipment Regulations 1998 and Stark v. Post Office (2000)
- THIS SHOULD IN PRINCIPLE REDUCE EXPOSURE TO INSURERS, BUT HOW IS THAT WORKING IN PRACTICE?

SOME OLDER INDICATIONS

- "the relevance of regulation 3 is that it helps to identify the standard of care to be expected of a reasonable employer" Griffiths v. Vauxhall Motors [2003] EWCA Civ 412, §22 -
- This was a case where at the time of the accident s. 15(1) of the *Management of Health and Safety at Work Regulations 1992* provided: "Breach of a duty imposed by these Regulations shall not confer a right of action in any civil proceedings."

POINTS OF GENERAL INTEREST

- The health & safety legislation remains in force – employers and others can be criminally liable for failing to follow.
- The *Enterprise Act* did not repeal the *Employers' Liability (Defective Equipment) Act 1969* – sometimes forgotten legislation – that makes an employer liable for anyone's negligence concerning work equipment.
- Ministerial statements when the legislation was being passed were to the effect that core safety standards would not be undermined.

GILCHRIST V. ASDA STORES [2015] CSOH 77

- C (5'5 tall) fell off a 'dalek' stool when trying to hang clothes onto hooks 7' high
- 6 pack regulations pleaded as defining the common law standard of care between employer and employee
- Scottish Outer House accepted that existence of statutory regulations showed that harm was foreseeable and that employers must take all reasonable steps to prevent their men from committing breaches

COCKERILL V. CXK LIMITED [2018] EWHC 1155

- C was giving a presentation for her employer (a charity) in an old Victorian school hired for the purpose. C tripped over a 7" step from a lobby into a kitchen area
- D1 was her employer; D2 ran the premises as a community venture
- Notices and a closed door requiring a buzzer were rendered inoperative, but warning tape was in place. Judge held that the tape was sufficient.
- "*The 2013 Act did not repeal the duties themselves. Those duties continue to bind employers in law. So they continue to be relevant to the question of what an employer ought reasonably to do. However by enacting s.69, Parliament evidently intended to make a perceptible change in the legal relationship between employers and employees in this respect. It removed direct actionability by claimants from the enforcement mechanisms to which employers are subject in carrying out those statutory duties….. [a] 'rebalancing' intended by s.69…*"

TONKINS V. TAP (2018)

- C fell off a defective scaffold that he himself had erected.
- Sued another self-employed scaffolder who owned the scaffold
- Case failed because D did not have sufficient control of the operation.
- But HHJ Gore QC refused to follow Cockerill and did not accept that section 69 of the Enterprise Act weakened employer's duties as to what reasonably ought to be done
- Said that Parliament would have repealed the H&S legislation in its entirety if that had been intended.

SO WHERE ARE WE?

- Surprising view that the Enterprise Act would have no effect upon duties owed by employers (and those who have control) of workers' activities
- The common law cannot simply mirror the legislation; otherwise the legislation is pointless
- Will need an appellate decision to give clarity
- My view: is that the law will use, for example, the Work at Height Regulations for 'inspiration' when considering an employee's duties

AN EXAMPLE

- *Regulation 4 of the Work at Height Regulations 2005*:

4.—(1) Every employer shall ensure that work at height is—

(a) properly planned….

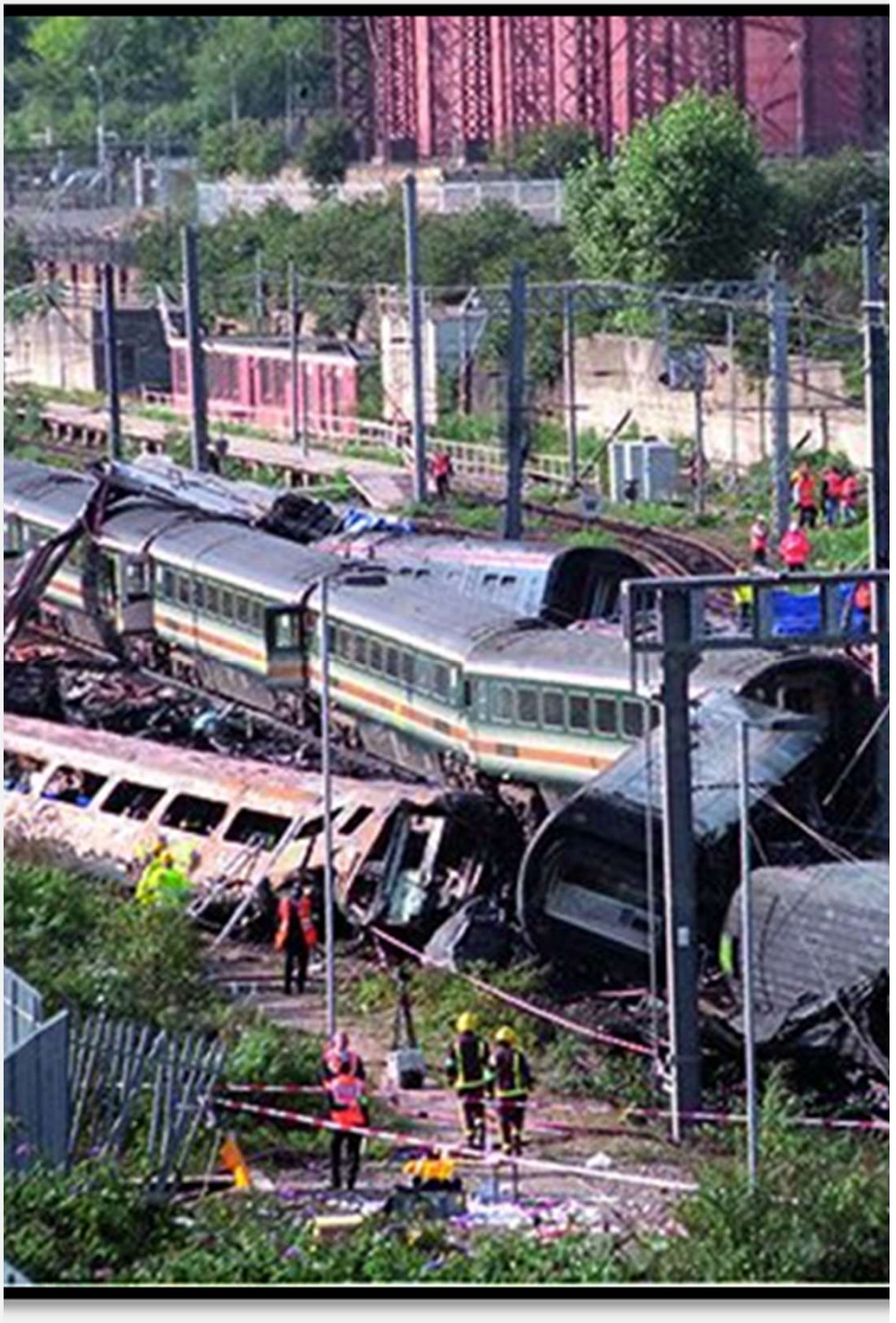
(c) carried out in a manner which is so far as is reasonably practicable safe,

- "As far as is reasonably practicable" would seem a high standard
- Law should after the Enterprise Act just require it to be "reasonably safe" having regard to risk of an accident, how serious injury might be, the cost and practicality of avoidance measures.
- Cf Goldscheider v. Royal Opera House [2018] EWHC 687 – *Control of Noise at Work Regulations* applied stringently to a viola player in the orchestra

EX TURPI CAUSA

THE CAUSATION APPROACH

- **GRAY V. THAMES TRAINS** [2009] UKHL 33 – not so much a principle as a policy, based on causation. Does the criminal activity does form the background, or does the crime cause the accident?
- No value judgement or proportionality appears to be involved in the **Gray** approach.



DILUTING THE PRINCIPLE

- **Hounga v. Allen (2014)** – race discrimination but illegal contract of employment, though employer engaged in human trafficking to get c working. public policy: the rule could on appropriate occasions be expanded or modified. 1) what aspect of public policy founds the defence? 2) is there an aspect of public policy to which it runs counter? Implicit criticism of GRAY v. THAMES TRAINS. Integrity of the legal system said to be paramount.
- **Les Labatoires Servier (2015):** patent infringement case. Supreme Court points out the potential unfairness in application because of disproportionate effect

MIRZA V. PATEL
[2016] UKHL 42

- UNJUST ENRICHMENT CASE: Money given by M to P for purpose of insider trading. Trade didn't happen. P just kept the money. Claim in Unjust Enrichment.
- Was public interest harmed by the enforcement of an illegal contract?
- 3 stage approach recommended:
- **A. Consider the underlying purpose of the prohibition – will it be enhanced by denying the crime?**
- **B. Any other relevant public policy consideration?**
- **C. Whether denial of the claim would be a proportionate response to denial of the claim?**

MIRZA NOT BEING APPLIED IN JOINT ENTERPRISE

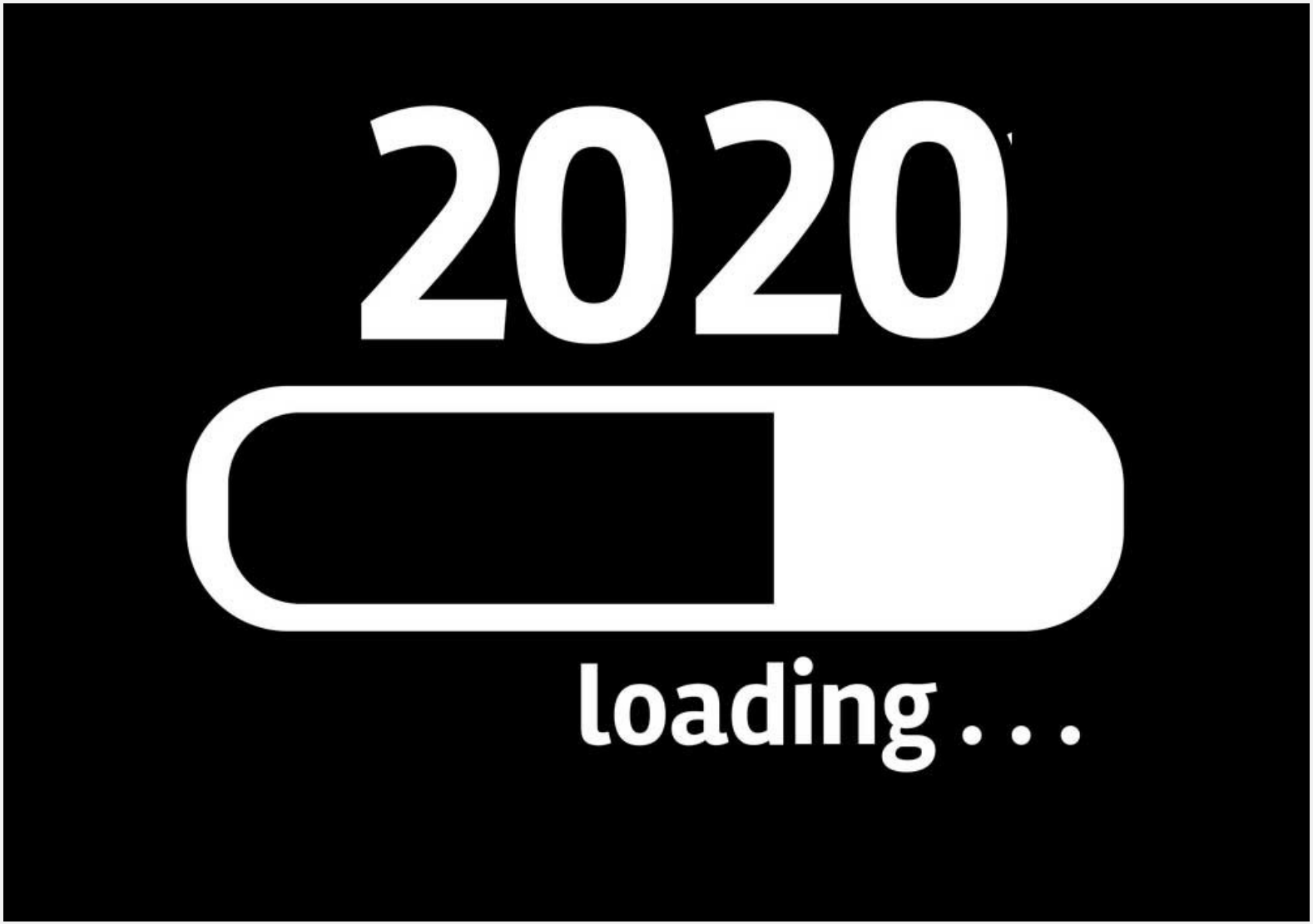
- **Clark v. 1) Farley 2) MIB (2018) –** claimant a pillion passenger on a motorcycle driven into collision with another motorcycle. Ridden by teenagers off-road. On facts failed, as C did not encourage his rider to drive dangerously.
- **Blake v. 1) Croasdale 2) Esure (2018)** – Joint enterprise by drug dealers. Claimant did not cite **MIRZA** but reduced the case to a factual exercise.
- **Wallet v. Vickers (2018)** – racing on dual carriageway. Different gradations of criminal offence. In absence of joint enterprise, dangerous driving would not give rise to *ex turpi causa*. No joint enterprise on facts.

HENDERSON V. DORSET NHS
(2018) EWCA CIV 1841

- Another manslaughter case like **GRAY V. THAMES TRAINS**. C negligently cared for by defendant NHS trust. During psychotic episode killed her mother.
- **MIRZA** held not to overrule **GRAY**. However, the analysis in **MIRZA** was said not to be confined to contract cases.
- Henderson really dealing with "narrow" ex turpi causa ie. crime leading to loss of liberty.
- Does not address whether **MIRZA** affects joint enterprise etc.
- GOING TO THE SUPREME COURT: COURT IS LIKELY TO ANSWER WHETHER MIRZA HAD APPLICABILITY TO ALL AREAS OF LAW INCLUDING TORT AND JOINT ENTERPRISE

PRACTICALLY??

- Take a property damage case: house being used for recreational drug use and a dropped 'spliff' sets the curtains alight and destroys a £3m property in London
- Loss has arisen out of an illegal act.
- But would have happened whatever was in the cigarette
- Suppose drug dealers running a meth lab when the accident happens?
- Suppose the children in bed asleep die in the fire????
- MIRZA v. PATEL more likely to lead to liability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