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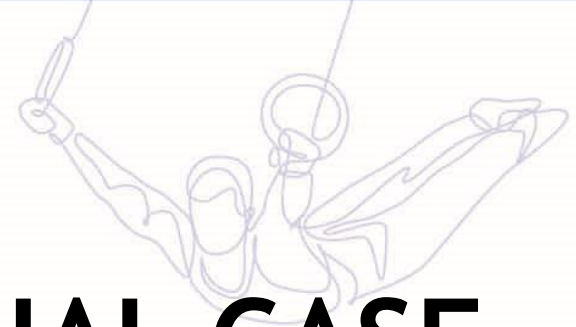
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LEGAL UPDATE - ANNUAL CASE LAW FIX DURING COVID-19

Helen Brown and Hannah Beddis

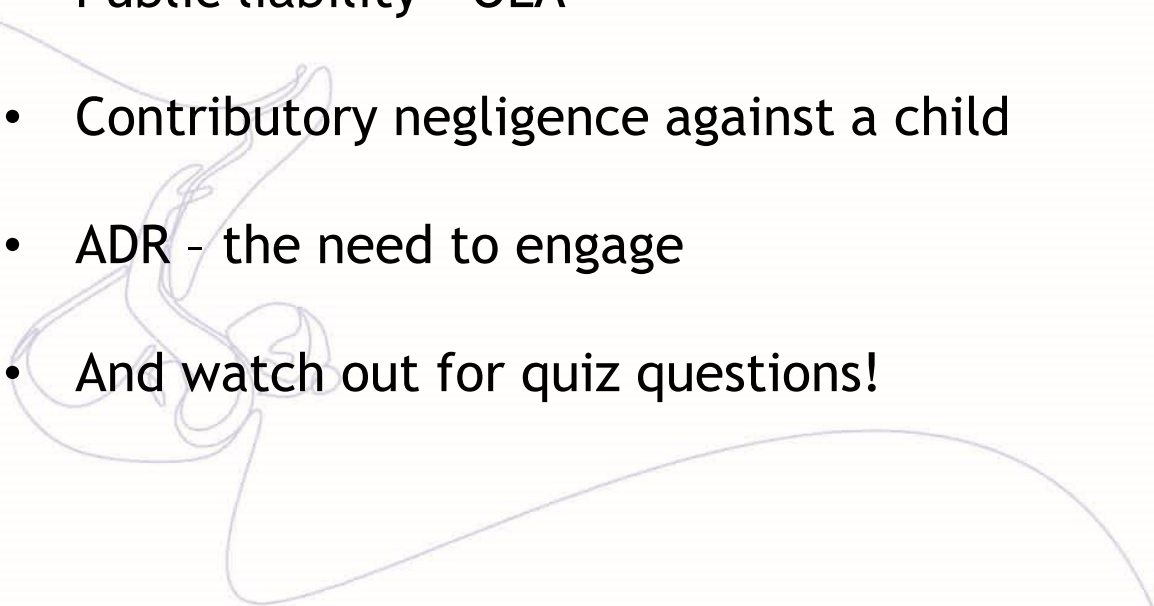


Weightmans



What are we going to cover today?

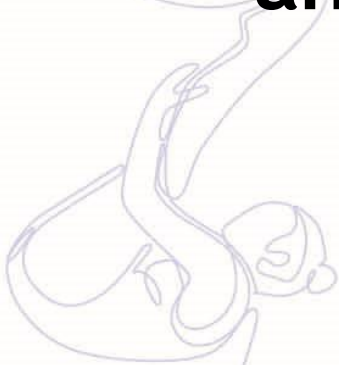


- Employers' liability - assaults and defective equipment
 - VL - order restored?
 - Public liability - OLA
 - Contributory negligence against a child
 - ADR - the need to engage
 - And watch out for quiz questions!
- 

It's quiz time!
Quiz - Q1



What date was the first UK lockdown announced by Boris Johnson?





COVID impact on courts

Courts affected just like everyone else!

A number of courts suspended operations

Unprecedented fall in volumes

Nightingale courts set up to assist with capacity

Facts & figures - Civil Justice Statistics

Where are we one year on?

Average time for fast and multi track cases to get to trial during
January - March 2020 was 59.6 weeks

In same period in 2021 this jumped to 73.4 weeks

Employer's liability - Going back to basics

- *Norfolk County Council v Sharon Durrant [2020] EWHC 3590*
- Teaching assistant assaulted by pupil at school
- Important reminder that claimant has to show:
 - a) Duty
 - b) Breach
 - c) Causation - breach of duty caused damage/loss



Durrant v Norfolk - continued

- Claimant alleged - did not escalate his behaviour, that school had systems in place but did not operate effectively
- School's evidence - all incidents considered but had to adapt policies to deal with child's particular needs, no complaints, forms not filled in but would have made no difference
- Interesting comments made by Judge re the claimant
- Judgment did not address the issue of causation
- High Court found no breach of duty!

Strict liability is dead - or is it?



- *Mr Steven Johnson v National Platforms Limited*
- Defective equipment - new area of challenge
- Platform operator at work, cage dropped and left him hanging!
- Breach of regulations does not create right to compensation in light of ERRA
- What about - Employer's Liability (Defective Equipment) Act 1969



Johnson v Nationwide Platforms - continued

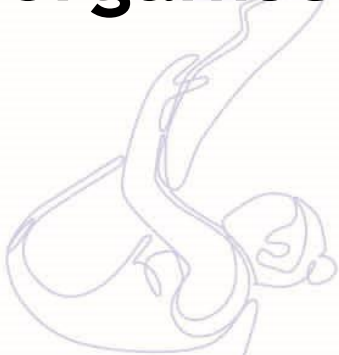


- Defendant liable under Employer's Liability (Defective Equipment) Act 1969 Act
- Requirements for a claim under 1969 Act:
 - a) Employee suffers injury at work
 - b) Injury due to defective equipment
 - c) Equipment provided by the employer
 - d) Defect attributable to fault of 3rd party

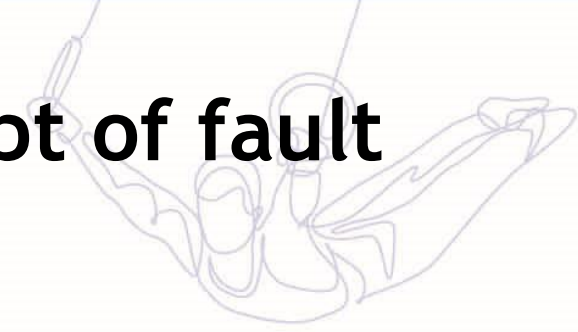
It's quiz time!
Quiz - Q2



What was the name of the BBC telethon organised during lockdown in April 2020?



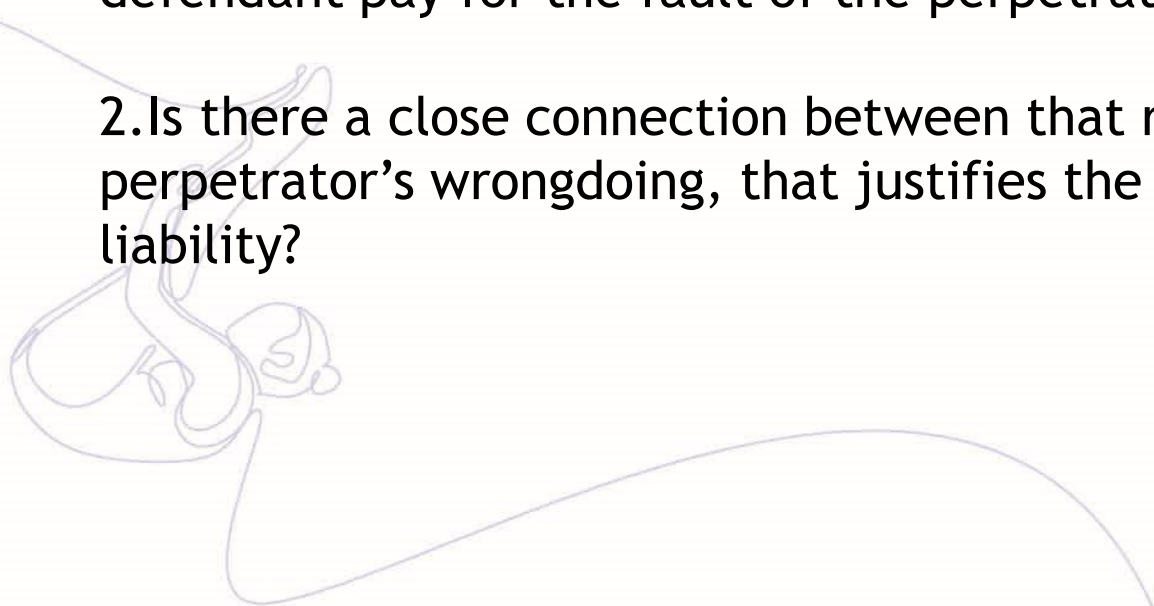
VL - strict liability - no concept of fault



- Two stage test:

1. Is there a relationship between the perpetrator (tortfeasor) and the defendant which makes it proper for the law to make the defendant pay for the fault of the perpetrator?

2. Is there a close connection between that relationship, and the perpetrator's wrongdoing, that justifies the imposition of no-fault liability?



Vicarious liability stage 1 - order restored?

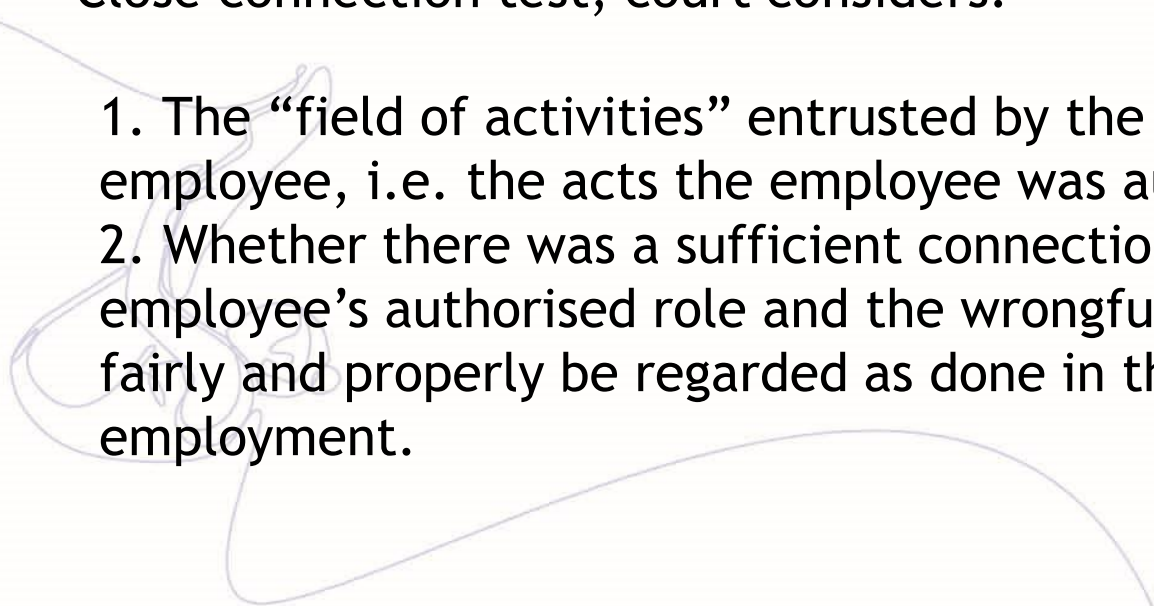
Various Claimants v Barclays Bank [2020] UKSC 13

- Remains a distinction between employment/akin to employment and independent contractor
- Doctor was “in business on his own account as a medical practitioner”
- “viewed objectively, [not] anything close to an employee”
- Five criteria from *Various Claimants v Catholic Child Welfare Society* were not a test but may be helpful in doubtful cases [(i) D has means; (ii) activity on D’s behalf; (iii) activity part of D’s business; (iv) D created risk by giving task to person; and (v) D exercising some control].

Vicarious liability stage 2 - order restored?

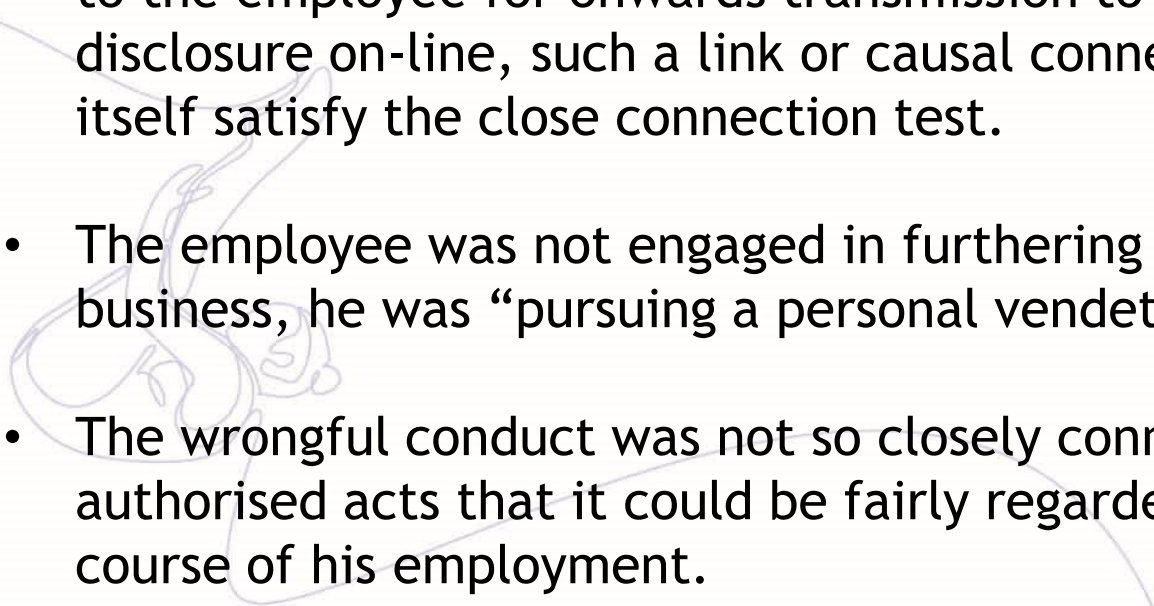


Various v Morrison [2020] UKSC 12.

- Intentional data breach by a disgruntled employee.
 - Close connection test, court considers:
 1. The “field of activities” entrusted by the employer to the employee, i.e. the acts the employee was authorised to do; and
 2. Whether there was a sufficient connection between the employee’s authorised role and the wrongful conduct that it may fairly and properly be regarded as done in the ordinary course of employment.
- 

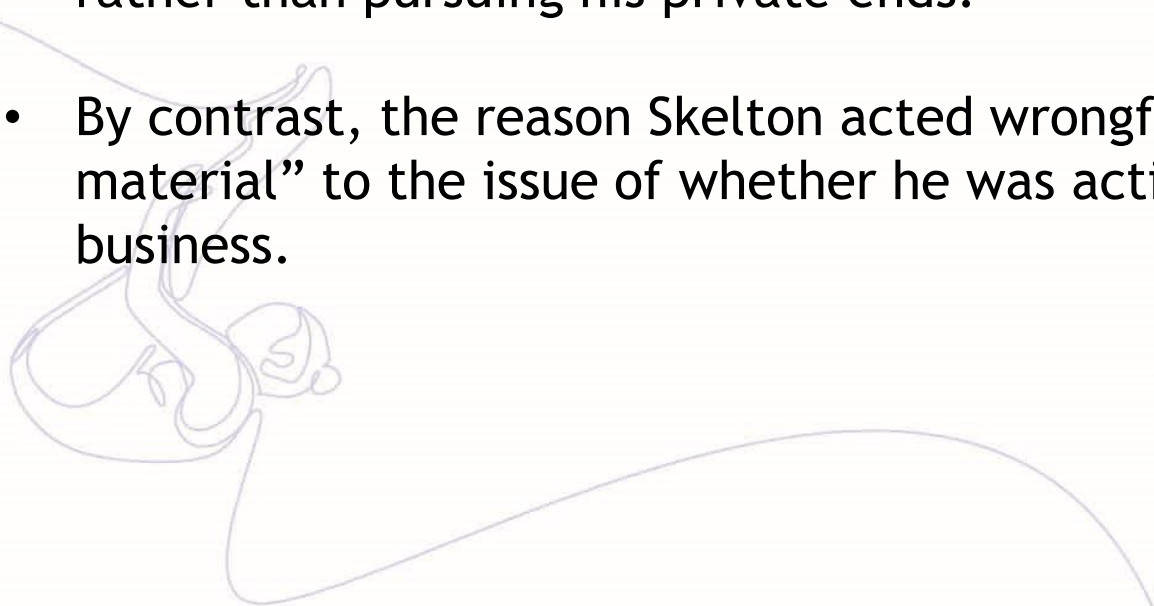
Vicarious liability stage 2 - order restored?



- Disclosure of personal data on-line not part of employee's field of activities; not an act he was authorised to do.
 - Despite “close temporal link” between the provision of the data to the employee for onwards transmission to auditors and his disclosure on-line, such a link or causal connection does not in itself satisfy the close connection test.
 - The employee was not engaged in furthering his employer's business, he was “pursuing a personal vendetta”.
 - The wrongful conduct was not so closely connected with his authorised acts that it could be fairly regarded as done in the course of his employment.
- 

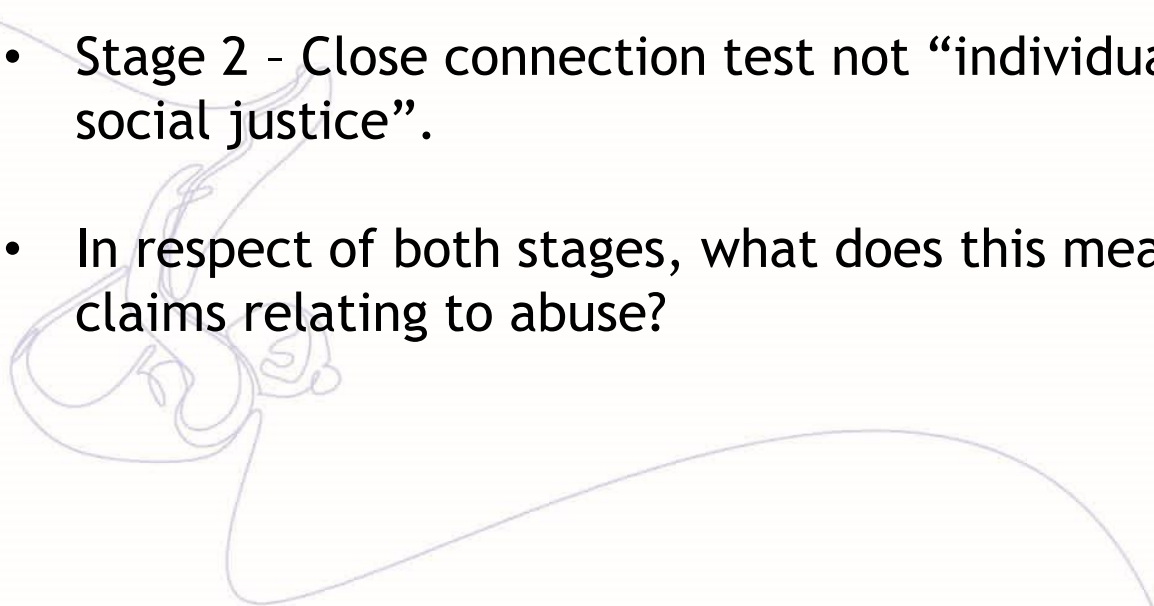
Vicarious liability stage 2 - the Q of motive



- Mohamud - “motive is irrelevant”.
 - Only irrelevant because the judge had already concluded that the employee was (wrongly) going about his employer’s business rather than pursuing his private ends.
 - By contrast, the reason Skelton acted wrongfully was “highly material” to the issue of whether he was acting on his employer’s business.
- 

Vicarious liability stage 2 - where are we now?



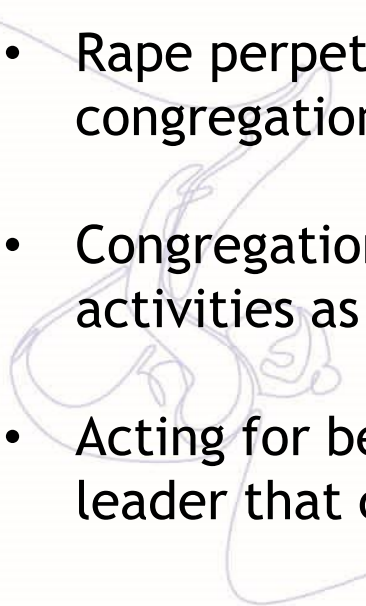
- Vicarious liability has a reduced scope.
 - Stage 1 - generally no liability for independent contractor.
 - Stage 2 - Close connection test not “individual judges’ sense of social justice”.
 - In respect of both stages, what does this mean in context of claims relating to abuse?
- 

Vicarious liability - abuse claims



Stage 1 - outside obvious cases, the five criteria will probably still be relevant.

BXB v Watch Tower and Bible Tract Society [2020] EWHC 156

- Rape perpetrated by one and elder of a Jehovah's witness congregation
 - Congregations act through their elders and he was carrying out activities as an integral part of D's business activities
 - Acting for benefit of D and had powers conferred on him as a leader that created a risk of abuse of power
- 

Vicarious liability - abuse claims



Stage 1.

JXJ v Institute of Christian Brothers (De La Salle) [2020]

- Abuse by lay member of staff at school
- School run by board of managers that employed the staff
- Relationship between staff and Institute not akin to employment
- Brothers integral part of business of school but staff not integral part of Institute, no obligations to the Institute
- Institute exercised a degree of control over the school's operation but this did not extend to establishing a relationship akin to employment with the staff
- More restrictive approach of Barclays followed

Vicarious liability - abuse claims



Stage 2 - close connection.

- Mohamud(2)
- “the close connection test has been applied differently in cases concerned with the sexual abuse of children”
- “...a more tailored version of the test is applied in such cases” that takes account of “the employer’s conferral of authority on the employee over the victims”

BXB v Watch Tower and Bible Tract Society [2020] EWHC 156

- abuser’s status and authority bestowed on him by D important
- D created the conditions in which they were alone together

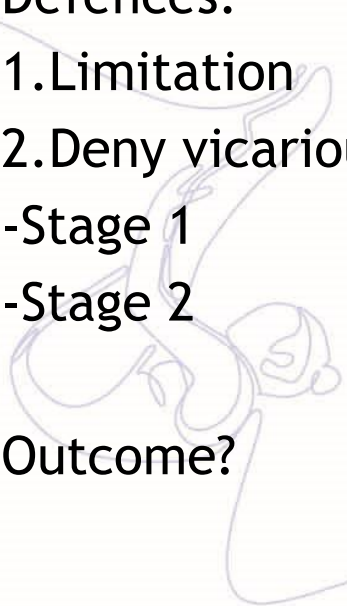
Vicarious liability - abuse claims



DSN v Blackpool Football Club [2020] EWHC 676

Sexual abuse claim arising from events over 30 years ago

Defences:

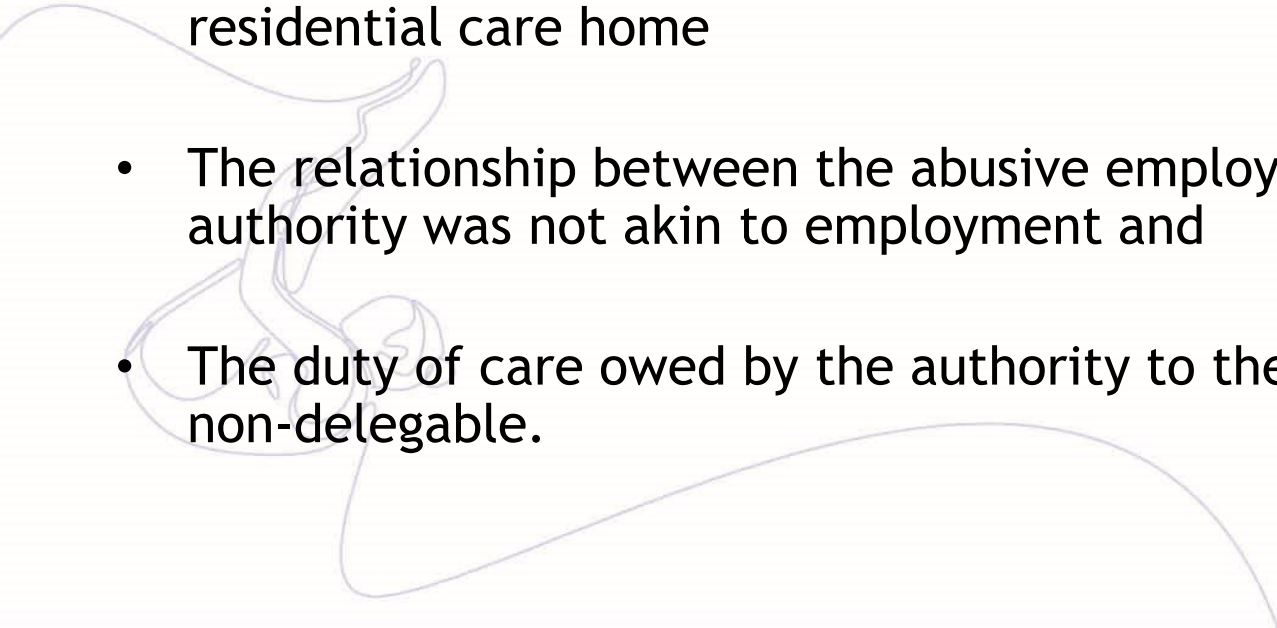
1. Limitation
 2. Deny vicarious liability
- Stage 1
 - Stage 2
- 

Outcome?

Vicarious liability and finally



SKX-v-Manchester City Council [2021] EWHC 782 (QB)

- The local authority was not liable (in the absence of fault) for sexual assaults committed by an employee of the private residential care home
 - The relationship between the abusive employee and the placing authority was not akin to employment and
 - The duty of care owed by the authority to the claimant was not non-delegable.
- 

It's quiz time!
Quiz - Q3



Who said "Follow the guidance, don't tear the pants out of it, and don't go further than the guidance actually says."



Occupiers liability - Lock your doors!!

Al Najjar v The Cumberland Hotel [2020] EWCA Civ 1716

- Tragic case, violent attack on hotel guests
- Occupiers' Liability Act 1957 duty owed BUT...
- Should hotel owner be liable for failing to prevent a theft and attack on guests by a 3rd party?



Al Najjar v The Cumberland Hotel - continued



- Assumption of responsibility considered but limited to duty to take reasonable care
- Hotel had reasonable security measures in place
- Did not need to greet every guest
- Case dismissed at first instance and decision upheld on appeal
- Important reminder about being able to evidence systems and policies

OLA and voluntary acceptance of risk



The White Lion Hotel v James [2021] EWCA Civ 31

- Hot summer evening, late night, drinks and a hotel stay (the ALARM conference in pre-covid times!)
- Christopher James (deceased) fell 9 metres from 2nd floor window of hotel
- Considerations under OLA 1957:
 - a) Was there a danger/breach of duty?
 - b) Did that danger/breach cause the accident?
 - c) Did CJ voluntarily accept the risk? S2(5) OLA no duty on occupier for risks willingly accepted

James v White Lion Hotel - continued

- Defendant liable at first instance, 60% contributory negligence
- Appeal - Had court failed to apply principle from *Tomlinson*? Does S2(5) OLA apply?
- Criminal proceedings - guilty plea, had not risk assessed
- Would have fit restrictors @ cost £7 each
- Court distinguished *Tomlinson* and line of cases that followed
- No absolute principle that cannot recover if you take obvious risk!!

OLA - Who occupies a property like this?

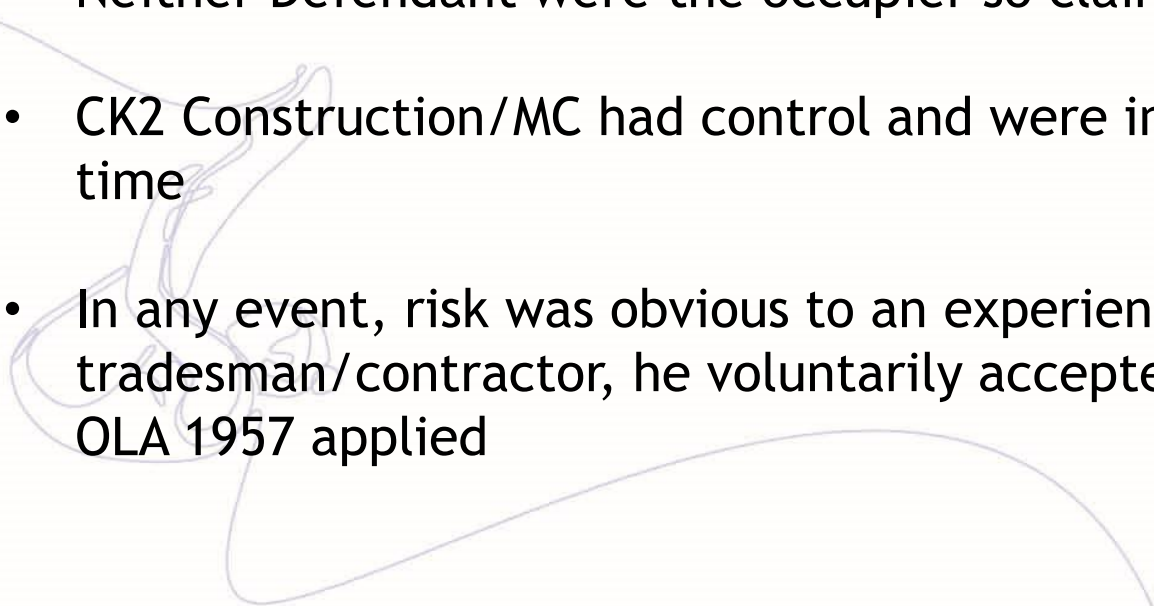
*Ian Mathewson v Charlotte Crump & Kristopher Crump [2020]
EWHC 3167*

- Who is an occupier? Can be more than one occupier
- Plasterer fell through chipboard floor
- Family tree:
 - a) Charlotte Crump married to KC
 - b) Kristopher Crump son of MC and married to CC
 - c) Maurice Crump owner of CK2 Construction, the company undertaking renovation
- Claim brought against CC as D1 and KC as D2



Mathewson v Crump - continued

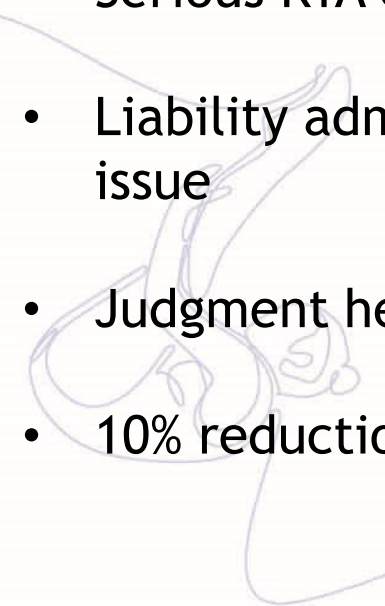


- Not clear why CK2 Construction/MC not pursued
 - Claimant - litigant in person at trial
 - Neither Defendant were the occupier so claim failed!
 - CK2 Construction/MC had control and were in occupation at the time
 - In any event, risk was obvious to an experienced tradesman/contractor, he voluntarily accepted the risk - S2(5) OLA 1957 applied
- 

Contributory negligence and children



Saboor Gul (a Child Proceeding by his Father and Litigation Friend Ghafoor Gul) v Mr James McDonagh, Motor Insurers Bureau [2021] EWHC 97

- Serious RTA case involving a child aged 13
 - Liability admitted, contributory negligence heard as a preliminary issue
 - Judgment helpfully sets out rules re con neg and children
 - 10% reduction made
- 



It's quiz time!
Quiz - Q4



**Which hospital was Boris Johnson
admitted to after contracting Covid-19?**



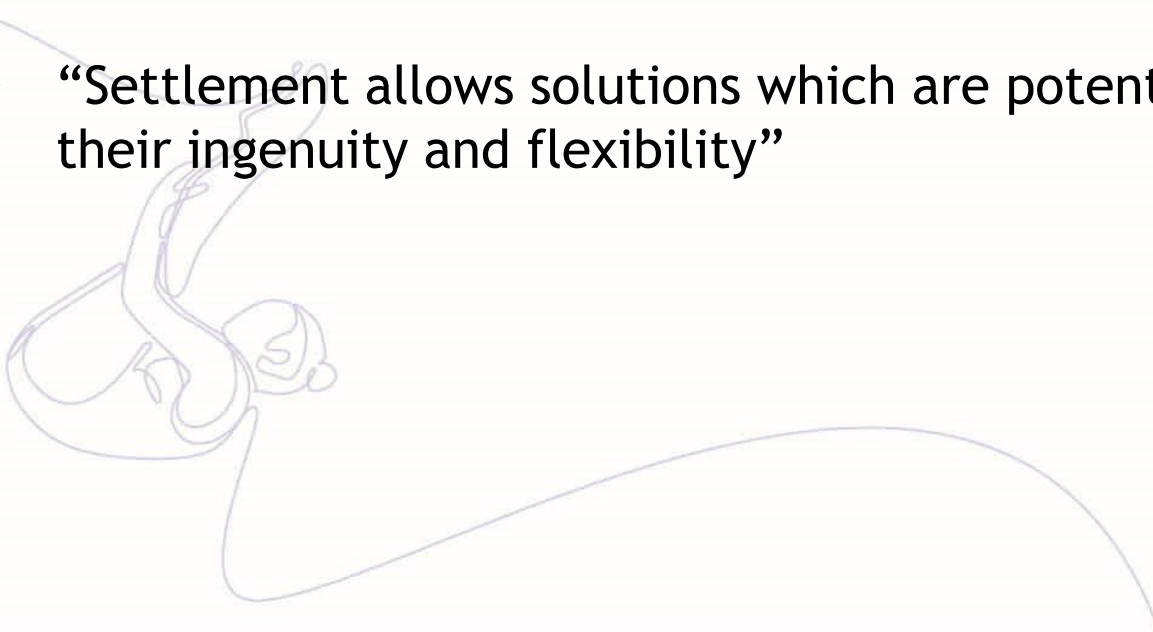
Failure to engage in ADR - back to DSN v Blackpool Football Club [2020] EWHC 676

- 19.1.18 Claim Form issued
- 16.3.18 Cl's p36 offer of £50k. No response from D
- 30.10.18 Directions - parties must consider ADR at all stages. Must file witness statement within 21 days if refuse proposal
- 26.2.19 Cl's p36 offer of £20k. No response from D.
- 30.10.19 Cl "invite your client to enter into settlement negotiations". D decline - "continues to believe that it has a strong defence...no purpose served by any form of ADR".
- 2.12.19 Cl's p36 offer of £10,000. D "continues to believe that it has a defence to this claim"

DSN v Blackpool Football Club [2020]

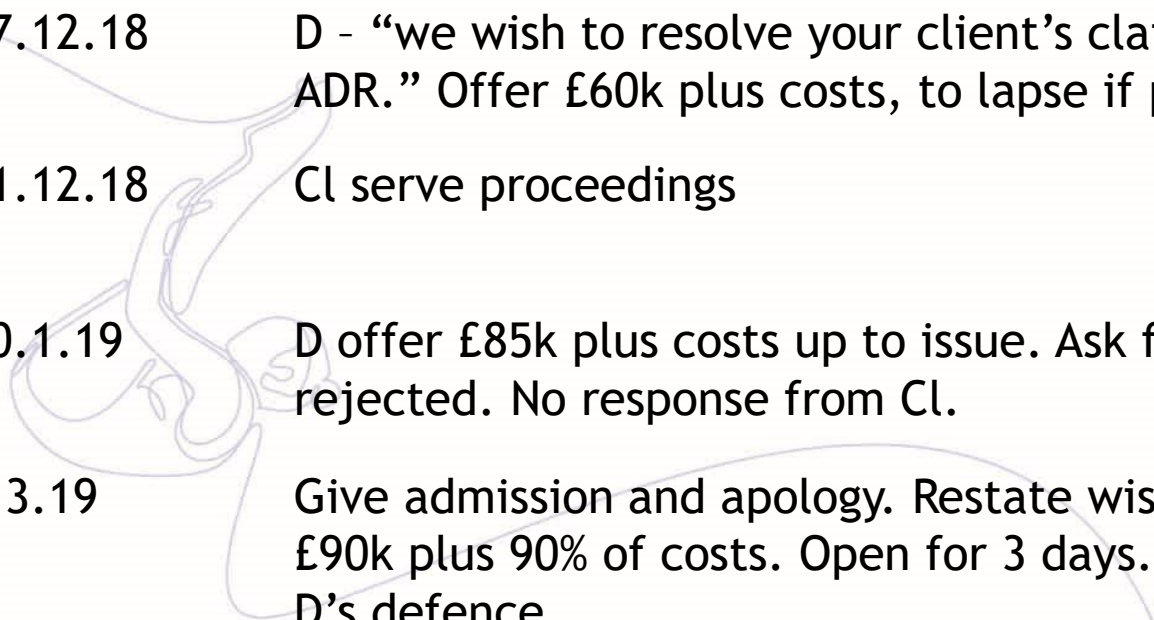
EWHC 676

- D's reasons for refusing to engage in ADR inadequate.
- “No defence, however strong, by itself justifies a failure to engage in any kind of ADR”
- “Settlement allows solutions which are potentially limitless in their ingenuity and flexibility”



Roxanne Pallett v MGN [2021] EWHC 76



- 24.9.18 Cl intimate claim
- 26.9.18 D refuse to give early disclosure. Suggest ADR. Cl say need disclosure first
- 17.12.18 D - “we wish to resolve your client’s claim, amicably, through ADR.” Offer £60k plus costs, to lapse if proceedings served.
- 21.12.18 Cl serve proceedings
- 10.1.19 D offer £85k plus costs up to issue. Ask for explanation if offer rejected. No response from Cl.
- 1.3.19 Give admission and apology. Restate wish to resolve claim. Offer £90k plus 90% of costs. Open for 3 days. Cl said she wanted to see D’s defence.
- 

Roxanne Pallett v MGN [2021] EWHC 76

- “Parties are obliged to make reasonable efforts to settle, and to respond properly to p36 offers made by the other side...obliged to conduct litigation collaboratively”

OMV Petron SA v Glencore International [2017]

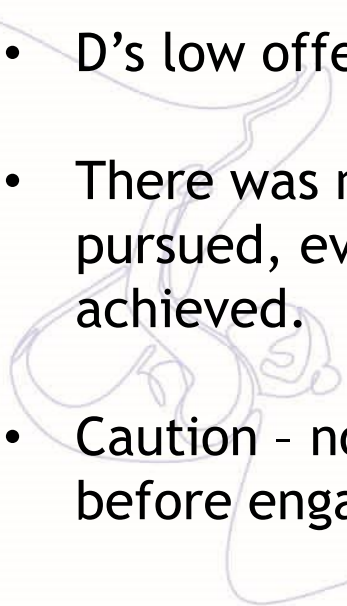
- “to remain silent in the face of an offer to mediate is, absent exceptional circumstances, unreasonable conduct meriting a costs sanction, even in cases where mediation is unlikely to succeed”

Thakkar v Patel [2017]

Roxanne Pallett v MGN [2021] EWHC 76



Court decided:

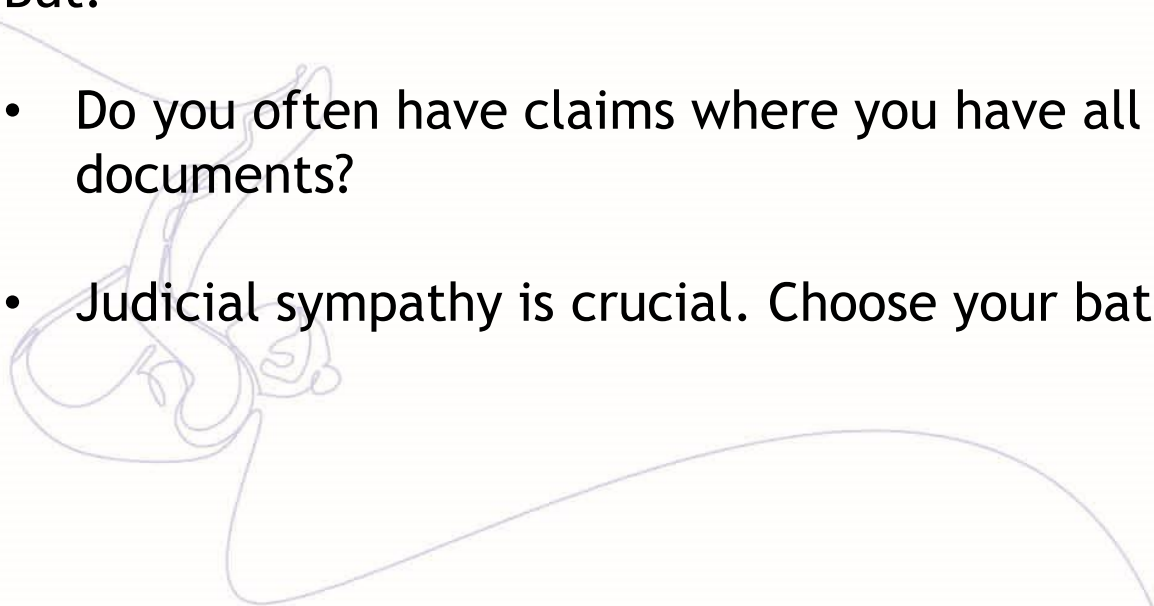
- C's insistence on receiving disclosure before negotiating was reasonable, given one-sided nature of disclosure
 - D's low offers and hectoring tone did not encourage settlement
 - There was no lost opportunity to settle which C should have pursued, even if no certainty that settlement would have been achieved.
 - Caution - not a green light for C's to insist on full disclosure before engaging with ADR.
- 

Roxanne Pallett v MGN [2021] EWHC 76



- Every case turns on facts.
- Phone hacking claims are distinctive.

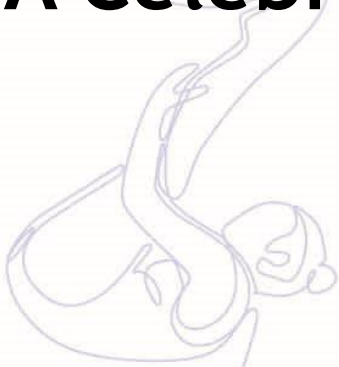
But:

- Do you often have claims where you have all the liability documents?
 - Judicial sympathy is crucial. Choose your battles.
- 

It's quiz time!
Quiz - Q5



**Which castle was the 2020 edition of I'm
A Celebrity filmed in?**



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