Butterworths Personal Injury Litigation Service

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Filing instructions: This Bulletin includes material available up to 18 November 2012.

Please file immediately behind the Bulletins Guidecard, in Binder 6. **The Binder should now contain Bulletins 95 to 108**.

RECOVERING FROM RTA INSURERS

Our first case summary is the third in a line of recent Court of Appeal rulings that examine our national law provision for ensuring that victims of motor accidents receive their full compensatory entitlement, independently of the defendant's ability to pay. This is an issue that has preoccupied legislators, the judiciary and legal practitioners alike since at least the first Road Traffic Act was enacted in 1930. In the UK this is achieved in two ways: firstly by imposing an independent statutory duty under Road Traffic Act 1980, s 151 on an authorised motor insurer to satisfy a judgment arising out of a matter for which compulsory third party insurance is required and secondly through the compensatory safety nets provided by the Secretary of State for Transport's arrangement with the Motor Insurers Bureau and the Uninsured and Untraced Drivers Agreements.

However, all is not well. *EUI Ltd v Bristol Alliance Ltd Partnership* (see below) is the second instance, within the space of a year where, in the writer's opinion, the Court of Appeal has failed to interpret the Road Traffic Act 1980 consistently with Community law. The first instance was in *Delaney v Pickett* [2011] EWCA Civ 1532, [2012] 1 WLR 2149, [2012] RTR 187, (2012) Times, 01 February, [2011] All ER (D) 201 (Dec); now under appeal to the Supreme Court. That case was covered in Bulletin 105 in March this year. Since when (in August this year) the Court of Appeal was obliged to incorporate extensive amendments into s151(8) to prevent our National law infringing the EU Motor Vehicle Insurance Directives, in *Churchill Insurance Co Ltd v Wilkinson; Evans v Equity Claims Ltd* [2012] EWCA Civ 1166, [2012] 34 LS Gaz R 23, [2012] NLJR 1217, [2012] All ER (D) 157 (Aug). That case was reported in BPILS Bulletin 107.

The implications of the *Delaney*, *Churchill* and *EUI* appeals are far reaching. It is important to be aware of the full impact that Community law has on the proper construction of the Road Traffic Act and this is why this development is given such extensive coverage within this bulletin.

Bristol Alliance Limited Partnership v EUI Ltd [2012] EWCA Civ 1267, [2012] All ER (D) 120 (Oct)

Court of Appeal rules that a victim's statutory right to compensation under Road Traffic Act 1980, s 151 is restricted to the contractual cover actually provided to the insured driver

(Ward, McFarlane and Smith LJJ)

The facts: Mr Williams, who appears to have suffering from extreme depression, deliberately crashed his car into a building in Bristol in an unsuccessful bid to commit suicide. The impact caused extensive damage to the plate glass windows of the House of Fraser store, estimated at least £200,000. Bristol Alliance (BA) met its assured's property damage claim and then presented a subrogated claim for its outlay against W and his motor insurers, EUI. W was insured to drive under a policy that certified its compliance with s 145 of the Road Traffic Act 1980. However, EUI's motor policy excluded cover for 'damage …'arising as a result of a …deliberate act caused by you …'

The issues: EUI's defence was that because its contractual liability did not extend to deliberate damage a proper construction of s151 meant that they were not obliged to provide statutory either. BA contended that a proper construction of RTA 1980, ss145, 151 and the EU Motor Vehicle Insurance Directives obliged EUI to provide statutory cover regardless.

At first instance: Master Eyre ordered a trial of this question as a preliminary issue. At first instance Tugendhat J found in favour of BA on the basis that a proper interpretation of s145 (3) in the light of the EU Directives requires a motor policy to provide statutory cover for <u>any</u> damage caused by the use of a vehicle on the road. The judge relied on the Court of Appeal's reasoning in *Charlton v Fisher* [2001] EWCA Civ 112, [2002] QB 578, [2001] 1 All ER (Comm) 769, [2001] 3 WLR 1435, [2001] RTR 479, [2001] All ER (D) 20 (Feb).

On Appeal: The Court of Appeal distinguished *Charlton* and upheld EUI's appeal. Ward LJ provided the only reasoned judgment; endorsed unanimously by the other two Lords Justices.

The Court of Appeal's judgment: Ward LJ held that RTA 1980, s151 sets out four preconditions that a third party victim must establish if he is to exercise his statutory right against the defendant's motor insurer [34]:

a. that 'a certificate of insurance has been delivered under section 147' (section 151);

b. that 'a judgment to which this subsection applies is obtained' (section 151(1));

c. that the judgment relates 'to a liability with respect to any matter where liability with respect to that matter is required to be covered by a policy of insurance under section 145', (section 151(2)); and

d. that the liability is 'covered by the terms of the policy … to which the certificate relates', (section 151(2)(a)).

The judge's view was that W should have restricted his use of his car so as to comply with the contractual limitations imposed by the insurance policy. By deliberately crashing his car, his use fell outside the policy cover; that made W, to all intents and purposes, an uninsured driver. EUI were not liable as statutory insurers either as under RTA 1980, s151 because W's actions were not a use 'to which the certificate relates'. The fact that W could not have obtained insurance for such use was disregarded. Accordingly the fourth criterion listed above under section 151(2)(a) was not satisfied and thus BA were unable to recover from EUI under s 151.

As to BA's potential right to claim from the Motor Insurers Bureau under the Uninsured Drivers Agreement 1999 Ward LJ opined that the MIB would not liable to meet such a claim, if presented. His explanation was that clause 6 of that agreement specifically excludes liability for compensating subrogated claims. Accordingly BA, whose *locus standi* was that of a subrogating insurer, would be left empty handed.

Comment: Whilst this judgment offers a painstaking analysis of the conventional approach to construing s151 it fails to give the correct interpretation.

What went wrong: Where the judgment comes to grief is in its treatment of European law. After identifying the relevant Motor Vehicle Insurance Directives and acknowledging *Bernaldez* as the key interpretive ruling from the European Court of Justice, the Court of Appeal then committed a grave error. After conceding that if the ratio in *Bernaldez* had a wide application so that it applied to s 151(2)(a) then '… the way the Road Traffic Act combined with the MIB scheme has always operated is not compliant with the Directives.' [65] Ward LJ then appears to have sought a means of reconciling our national law provision with the relevant European law.

Ward LJ concluded that Community law does not prevent a Member State's freedom to determine the extent of compulsory insurance, in this he cited Andrew Smith J in *AXA Insurance UK plc v Norwich Union Insurance* [2007] EWHC 1046 (Comm), [2008] Lloyd's Rep IR 122 and Lord Clyde in the House of Lords ruling in *Cutter v Eagle Star Insurance Co Ltd, Clarke v Kato* [1998] 4 All ER 417, [1998] 1 WLR 1647, [1999] RTR 153, 163 JP 502, [1998] 43 LS Gaz R 31, [1998] NLJR 1640, 142 Sol Jo LB 278, [1998] All ER (D) 481. Furthermore, he held that the European Court of Justices' ruling in case C-129/94 *Ruiz Bernaldez* [1996] ECR 1–1929 to the effect that:

- Article 3(1) of the First Motor Vehicle Insurance Directive, as developed and supplemented by the Second and Third Directives, must be interpreted as meaning that compulsory motor insurance must enable third-party victims of accidents caused by vehicles to be compensated for all the damage to property and personal injuries sustained by them.

- That this interpretation precludes an insurer from being able to rely on statutory provisions or contractual clauses to refuse to compensate third-party victims of an accident caused by the insured vehicle

… is confined to the facts of that case and does not have a general application. [66 & 67 of the *EUI* Judgment]

It seems that rather than considering the extensive corpus of European jurisprudence, as was the court's constitutional requirement, Ward LJ decided to look elsewhere to shore up the *status quo*. In doing so he followed very closely the line of obiter reasoning employed by a high court judge in a relatively obscure criminal appeal ruling in *Singh v Solihull MBC* [2007] EWHC 552 (Admin), [2007] 2 CMLR 1279, [2007] All ER (D) 330 (Feb). That judgment referred to a number of decisions, now of questionable relevance and currency, and it is regrettable that Ward LJ incorporated these into his judgment [65 – 67]. As it happens, Collins J, arrived at the right conclusion in the *Singh* case. In that case he concluded that the wide scope that the *Bernaldez* interpretation gave to Article 3 of the First Directive did not have the effect of exculpating a defendant in a criminal prosecution for driving without insurance where he drove a car for commercial hire that was only insured for 'social, domestic or pleasure purposes'. This was a valid position to take because the Motor Vehicle Insurance Directives do not seek to harmonise the criminal or civil law of Member States, except where they contradict or undermine the Directive's legislative purpose. They grant Member States a wide discretion on how they chose to implement and enforce the obligation to insure against civil liability. However where the Directives touch upon the nature and extent of the compulsory insurance guarantee extended to third parties, as in the EUI appeal, then the Directives are most certainly binding on Member States (Article 288 Treaty on the Functioning of the European Union) and it should also be remembered that under Articles 220 and 234 The European Community Treaty the Court of Justice is the final arbiter on the interpretation of Community law (see also s3(1) European Communities Act 1972). Accordingly it behoves any national court to interpret a Directive by considering first any relevant rulings by the Court of Justice, instead of referring to relatively obscure domestic decisions even if they may offer a more palatable construction.

In *EUI* it seems that whilst the Court of Appeal paid lip service to the importance of *Bernaldez*, it went on to disregard its implications. What makes this so odd is that *Benaldez* featured another ostensibly insured driver whose use contravened a limitation in his cover; the parallels with the *EUI* case are striking.

Bernaldez: The *Bernaldez* case involved a drunk driver who had caused property damage a road accident. The Seville Criminal Court ordered him to compensate his victim for that damage. However, under the Spanish Compulsory Insurance Rules a motor insurer can exclude liability to compensate damage where this has been caused by an intoxicated driver. The Provincial Court stayed the proceedings and referred the case to the European Court for a preliminary ruling on the question whether [article 3(1) of the First Motor

Vehicle Insurance Directive, Council Directive 72/166/EEC of 24 April 1972] was to be interpreted as meaning that a compulsory insurance contract could provide that in certain cases (in particular where the driver of the vehicle was intoxicated) the insurer was not liable to pay compensation for personal injuries and damage to property caused to third parties by the insured vehicle, or whether in such cases the compulsory insurance contract could provide only that the insurer was to have a right of recovery against the insured. Its ruling was as clear and unambiguous as it was wide ranging in its application. The Spanish insurer could not rely on the intoxicated driver exclusion permitted under its national law, although it could reserve a right of recovery against its insured. The court explained its reasoning thus:

'19. Any other interpretation would have the effect of allowing Member States to limit payment of compensation to third-party victims of a road-traffic accident to certain types of damage, thus bringing about disparities in the treatment of victims depending on where the accident occurred, which is precisely what the directives are intended to avoid. Article 3(1) of the First Directive would then be deprived of its effectiveness.

20. That being so, Article 3(1) of the First Directive precludes an insurer from being able to rely on statutory provisions or contractual clauses to refuse to compensate third-party victims of an accident caused by the insured vehicle.'

The *Bernaldez* judgment went on to indicate that the Directives permit only two exceptions to this wide ranging requirement to guarantee insurance cover for third parties. These are set out in the second and third subparagraphs of Article 2(1) of the Second Motor Vehicle Insurance Directive of 1984 (Council Directive 84/5). They permit an insurer to exclude liability to compensate a third party (i) who is a passenger that knows the vehicle they are voluntarily travelling in has been stolen or (ii) where the third party can claim compensation elsewhere such as from a social security body. Patently, neither exception applied to the *EUI* appeal. The clear implication here is that any other exclusion or limitation is void and contrary to Community law: whether imposed contractually or under the domestic law.

The wide import of *Bernaldez:* There can be little doubt that *Bernaldez* has extended the scope of a Member State's duty to ensure that civil liability is covered by insurance under Article 3 (1) of the First Directive. It achieved this by construing the list of void exclusions in Article 2 (1) of the Second Directive as amounting to no more than a restatement of the all encompassing duty imposed by the First Directive – and in doing so it has arguably taken the original meaning of the wording employed within Article 3 (1) beyond what many would consider to be its ordinary and natural meaning. However, this is hardly a new proposition: *Bernaldez* is now 16 years old! What is more, it has attracted its own coterie of like minded European Jurisprudence which uniformly endorses this interpretation. It has been followed in *Ferreira v Companhia de Seguros Mundial Confianca* SA 2000 ECR 1–6711; Case C-348/98; *Candolin* [2005] ECR I-5745; Case C-537/03; *Farrell v Whitty* 2007 ECJ Case C-356/05; and most recently in

Churchill v Benjamin Wilkinson and Tracy Evans 2011 Case C-442/10 where various limitations in the insurance cover afforded to third parties were challenged successfully by the third party victims affected.

Conclusion: Where the Court of Appeal is unquestionably right is in confirming that if *Bernaldez* does have the wide and general application, which our review of the authorities supports, then our national law provision under the Road Traffic Act and the MIB Agreements infringes Community law.

The implications flowing from Mr Williams's attempted suicide are not limited to the injuries caused to himself and the other luckless driver, nor do they stop at the extensive damage to the House of Fraser store, or even the property insurers who were left empty handed. The *EUI* decision, along with the Court of Appeal's two rulings in *Churchill* should be seen as puncturing any remaining complacency about the sufficiency of our national law provision for third party victims of road accidents and incidents. If one compares it to the Community law requirements, as one must, it is revealed to be shot through with gaps in the protection that if affords to third party victims.

Innocent victims will continue to fall through the gaps in the compensatory safeguards provided under our National law as long the Government continues to procrastinate on the much overdue reform of the Road Traffic Act 1988 and the MIB Agreements. This sorry state of affairs is compounded by what appears to be a widespread confusion about the significance and applicability of Community law in this area, for unless the shortcomings in our national law are challenged, injustices will continue to be perpetrated.

AXN v Worboys [2012] EWHC 1730 (QB), [2012] All ER (D) 212 (Jun)

Insurers' statutory duty under s 151 Road Traffic Act 1980 does not extend to crimes committed by a serial rapist

(Sibler J)

The facts: A London taxi driver was convicted of poisoning and raping a number of his former passengers whom he had inveigled to drink alcohol and which, unbeknown to them, was laced with sedative drugs. He then perpetrated the sexual assaults. Ten claimants sought compensation from W and other claims are anticipated. The Court was required to determine, as a preliminary issue, whether AXN insurers are liable to satisfy the judgment sums awarded to the victims under section 151 of the Road Traffic Act 1988.

The relevant provisions of the Road Traffic Act are:

> '151. — Duty of insurers … to satisfy judgment against person insured …
>
> (1) This section applies where, after a certificate of insurance … has been delivered under section 147 of this Act to the person by whom a policy has been effected … a judgment to which this subsection applies is obtained.

(2) Subsection (1) above applies to judgments relating to a liability with respect to any matter where liability with respect to that matter is required to be covered by a policy of insurance under section 145 of this Act and … -

(a) it is a liability covered by the terms of the policy … to which the certificate relates and the judgment is obtained against any person who is insured by the policy …".[underlining added within the judgment for emphasis]'

'145.— Requirements in respect of policies of insurance.

(1) In order to comply with the requirements of this Part of this Act, a policy of insurance must satisfy the following conditions.

(3) Subject to subsection (4) below, the policy—

(a) must insure such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person or damage to property caused by, or arising out of, the use of the vehicle on a road [or other public place] in Great Britain …".[emphasis added]'

The decision: The judge dismissed the claim after making the following findings:

'1. Did the bodily injuries suffered by the claimants "*arise out of the use of the [Worboys'] vehicle on a road or other public place*" within the meaning of RTA 1988 s145 (3) (a)? No.

2. Were Worboys' deliberate acts of poisoning and of sexual assault such that liability in respect of them (a) was required by RTA 1988 s145 (3)(a) to be covered by a policy of insurance? (b) was covered by the policy issued by the insurers? (a) No. (b) No.

3. Having regard to the limitations on use set out in the certificate of insurance, was Worboys' use of the vehicle at the material times a use insured by the policy issued by the insurers? No.

4. Having regard to the answers to Issues (1)–(3), are the insurers liable, pursuant to RTA 1988 s151, to pay to a claimant any sum payable pursuant to the assumed judgment to be obtained by her against Worboys, or any specified part thereof? No.'

Comment: Although the European Directives received scant consideration within the judgment, they remain highly relevant. The assaults predated the implementation of the Sixth EU Motor Vehicles Insurance Directive. Accordingly, the relevant Community law provision is to be found in Articles 1 and 3 (1) of the First Directive of April 1972 (72/166/EEC). The relevant part provides:

Article 1 of the First Directive, as amended by the Fifth Directive, provides *inter alia*:

> '1. The insurance referred to in Article 3(1) of Directive 72/166/EEC shall cover compulsorily both damage to property and personal injuries'

Article 3 provides, *inter alia:*

> '1. Each Member State shall, subject to Article 4, take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. The extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of these measures.'

…

In the writer's view, the first finding was conclusive and on that basis alone first instance decision is a valid outcome. This is because the Road Traffic Act and the Motor Insurance Directives both appear to require a direct causative link to be established between the use of the vehicle and the infliction of injury or loss sustained. The Judge made a factual finding that the use of the vehicle was only an incidental factor and at the time the assaults were perpetrated, they did not 'arise out of ' the use of the vehicle.

It should be noted that if one applies the European Court of Justice's approach in *Bernaldez*, see above, the fact that the insurance policy did not specifically cover this kind of civil liability was not, of itself, determinative, despite findings 2 and 3 set out above in the decision.

RTA LIABILITY

Hughes (by her litigation friend) v Estate of Dayne Joshua Williams (deceased) and another [2012] EWHC 1078 (QB), [2012] All ER (D) 133 (Apr)

A mother's misjudgement as to what was an appropriate form of restraint for her 3-year-old was negligent and entitled the defendant driver to recover a contribution of 25%

(Blair J)

The facts: Ms Williams was driving her three-year-old daughter Emma in a Seat Leon when it was involved in a collision that was not her fault. Unfortunately Emma was seriously injured. Emma had been sitting on a Graco booster seat in the rear nearside of the Seat Leon, with the seat belt in place. Her old Mammas and Papas Pro Tech seat was still fitted on the offside rear seat.

In what was essentially a dispute between two insurers, the other driver's insurer sought a contribution from Ms Williams as a joint tortfeasor under the Civil Liability (Contribution) Act 1978.

Blair J found that Emma had not been ready to be promoted to the booster seat: she was too young and too short, according to the manufacturer's instructions, and she only just made the minimum recommended weight. If

Emma had been a few months older and 8cm taller, there could have been no criticism of her mother but the Judge found that the booster seat was unsuitable because Emma failed to meet the manufacturer's specifications. This misjudgement was held to be causative. The judge accepted expert medical evidence to the effect that if seated in the 'Pro Tech' child seat Emma's injuries would largely have been avoided.

	Mamas and Papas' 'Pro Tech' child seat	Emma Hughes	Graco' booster child seat
Manufacturers' recommendations	Forward facing child seat, equipped with a 5 point harness		Elevates the passenger's seating position. An attachable seat back, designed to restrain lateral movement, was not fitted.
Approximate age	9 months to 4 years	Just over 3 years and 2 months	4 years to 10 years
Passenger height	Not applicable	Height estimated to be 93 cm centimetres	Between 101 and 145cm
Passenger weight	9 kg to 18 kg	Approximately 15kg	15–36 kg

The decision: Ms Williams was negligent to put this particular child of her age and dimensions on the booster cushion instead of the Pro Tech seat. He followed the Court of Appeal ratio in *Jones v Wilkins* [2001] R.T.R.19 which held that Lord Denning's dicta in *Froom v Butcher* [1976] QB 286, [1975] 3 All ER 520 relevant also the allocation of liability for the damage between joint tortfeasors was followed. In view of the causative effect of Ms William's actions, a contribution of 25% was held to be appropriate.

Probert (by her litigation friend) v Moore [2012] EWHC 2324 (QB), [2012] All ER (D) 75 (Aug)

No contributory negligence for a 13-year-old pedestrian who is not to be judged by the standards of an adult

(D Pittaway QC)

The facts: C, a 13 year old girl, was knocked down and seriously injured by a car as she was walking along a road on a dark December night in 2009. There

was no street lighting, the road undulated and curved and was only 4.65m wide at the scene of the accident. The speed limit was 60mph. C was not wearing any reflective equipment and had been listing to music through headphones. The verge was unsuitable for pedestrians. D was found to have been driving in excess of 50 mph but the judge found that a safe speed would have been 40–45mph. D contended that C was contributorily negligent.

The decision: C's actions were to be judged by that of an ordinary 13 year old. Although she made an ill informed decision to walk home, she was not negligent as she was not to be judged by the standard of an adult. C was entitled to recover her claim in full.

EMPLOYERS LIABILITY

Jones v Secretary of State for Energy and Climate Change [2012] EWHC 2936 (QB), [2012] All ER (D) 271 (Oct)

The Bonnington 'material contribution' test may be an appropriate test for establishing causation of lung cancer

(Swift J)

The facts: in the Phurnacite Workers Group litigation about 250 claimants registered claims under a group litigation order and eight lead claims were selected for this trial. Swift J found that the working conditions in the defendant's factory were grim throughout the 50 years period. The defendant was in breach of its statutory duty under s 47 of the 1937 Factories Act or s 63 of the 1961 Factories Act in respect of those employed in the pitch bays, the briquetting buildings and the batteries until its closure in 1990 due to its exposing its employees to toxic fumes and dust during this time. The lead claims featured the following diseases which the claimants were caused by their exposure: (i) chronic obstructive pulmonary disease (COPD) (ii) chronic bronchitis (CB) and claims for lung cancer, bladder cancer and skin cancer.

The issues: a range of issues were raised by the defendants, including the usual limitation defences. However of particular interest was the approach adopted by Swift J to determining whether the claimants were able to substantiate that the defendant's breach of statutory and common law duty was causative.

Three of the lung cancer victims were also exposed to a non tortuous source of toxicity from their habit of smoking. Various obiter dicta from *Sienkiewicz, (administratrix of the estate of Enid Costello deceased) v Greif (UK) Ltd* [2011] UKSC 10, [2011] 2 AC 229, [2011] 2 All ER 857 and *AB v Ministry of Defence* [2010] EWCA Civ 1317, 117 BMLR 101, [2010] All ER (D) 252 (Nov) seemed to conflict on whether, in a lung cancer case (which is an indivisible disease) the modified causation rule devised in *Bonnington Castings Ltd v Wardlaw* [1956] AC 613, [1956] 1 All ER 615 applied or whether (with the exception of mesothelioma claims) this 'material contribution' test should be restricted to divisible diseases only (that is to say diseases

that are dose related) so as to require a claimant suffering from lung cancer to establish that the culpable / occupational exposure more than doubled the risk of the claimant contracting that disease.

In *Bonnington* the House of Lords had ruled that that in a divisible disease claim the normal causation 'but for test' should be modified so as to enable a claimant to establish causation if the exposure had made a 'material contribution' to the disease.

The decision: Swift J ruled that the rule in *Bonnington* could apply to indivisible injuries (such as lung cancer which once it has developed its severity is not affected by the degree to which the victim is exposed to the carcinogens).

The approach to deciding whether it was appropriate to apply the *Bonnington* test was a threefold one:

'First, I should consider whether it is possible for the Claimants to establish to the required standard (without recourse to the 'doubling of risk' test) that the occupational exposure made any contribution at all to their cancer.

Second, … I should [then] decide whether the occupational exposure is capable of being considered as one of a number of 'cumulative causes' of their cancer.

Third … I must [then] decide whether there is any basis on which the Claimants can establish that the contribution made by the occupational exposure to the development of their cancer was "material".

If all three hurdles are cleared then the *Bonnington* test applies; otherwise it will be necessary to prove causation by satisfying the conventional 'doubles the risk' test.

The causation of two of the three lung cancer claims were successfully established on this basis. The skin cancer claims failed due to lack of sufficient medical evidence. However one of the test chronic obstructive pulmonary disease cases and one bladder cancer claim also succeeded.

Smith v Ministry of Defence [2012] EWCA Civ 1365, [2012] All ER (D) 223 (Oct)

Suitable equipment claims against the MOD restored as it is arguable that they may fall outside the scope of combat immunity

(Newberger MR, Moses and Rimer LJJ)

The facts: 4 claims were brought against the MoD by or on behalf of the estates of soldiers killed on active duty in Iraq. Allegations that the MoD had failed to provide suitable equipment was a common factor in all of these claims. It was also alleged that the MoD's actions had infringed the soldiers right to life under art 2 of the European Convention on Human Rights. Some of the claims were struck out at first instance on the ground that combat immunity applied and / or that art 2 of the Convention did not.

The decision: The Court of Appeal upheld the first instance finding that the Convention did not apply. However, the fact that equipment was in scare supply did not excuse the MoD from owing a duty of care to its employees in the way they were allocated, unless combat immunity applied. As to the latter point, it had been premature to strike out the claims for that reason when it had yet to be determined whether or not it did. These were matters of fact to be decided at trial.

COMPANY RESTORATION

Joddrell v Peaktone Ltd [2012] EWCA Civ 1035, [2012] All ER (D) 287 (Jul)

The retrospective effect of an order under s 1029 Companies Act 2006 is to validate proceedings and their service by post on the registered office during the period of dissolution

(Etherton, Munby and Lewison LJJ)

The facts: C claimed he was suffering from noise induced hearing loss attributable to P's negligence. He issued proceedings and his solicitors posted them to P's last known registered office. Only when they were returned did C's solicitors realise that P had been dissolved. They then applied to restore the company to the register and secured an order under the Companies Act 2006 which restored it to the Companies Register. P then applied to strike out the proceedings on the basis that they had been an abuse of process: issue against a dissolved company. P was successful at first instance but that was overturned in the high court.

The decision: the refusal to strike out was upheld. According to s 1032(1) Companies Act 2006, the effect of the restoration under s1029 is to retrospectively validate an action commenced during its dissolution.

Comment: this is a useful authority as it has the potential to assist claimants who have industrial disease claims that are at or close to the limitation date. It enables them to issue immediately, curing the procedural irregularity caused by a former employer's dissolution by means of an application to restore under s 1029. However, it should be noted that normally it is good practice for the insurers to be notified of the application and for the court should be appraised of any potential limitation issues in the main action within the restoration application.

LIMITATION

Mutua v Foreign and Commonwealth Office [2012] EWHC 2678 (QB), [2012] NLJR 1291, [2012] All ER (D) 48 (Oct)

Limitation Act 1980, s 33 discretion applied to disapply the three year limitation period for victims of alleged torture and mistreatment during the Kenyan uprisings

(McCombe J)

The facts: five claimants alleged that the UK Government was vicariously liable for deliberate assaults and torture perpetrated on them during the Kenyan uprisings between 1954 and 1959. The primary issue was whether the s 33 discretion to disapply the limitation period should be exercised in favour of the claimants, although in some cases the claimants contended that the primary limitation period had not expired. The key question was where a fair trial was possible.

The decision: the judge found that the primary limitation periods had expired. After reciting the relevant authorities on the proper exercise of s 33 and taking into account all the circumstances, including an appraisal of the potential merits of the claims, the judge came to the view that there was sufficient materials surviving to permit a fair trial. Accordingly the s 11 limitation period was disapplied so as to permit the claims to proceed to trial.

DAMAGES

Simmons v Castle [2012] EWCA Civ 1288, [2012] NLJR 1324, [2012] All ER (D) 90 (Oct)

The Court of Appeal revised its earlier statement on the 10% increase in general damages in tort cases, so as to apply from 1 April 2013 where no CFA has been entered into before that date.

COSTS

Patterson v Ministry of Defence [2012] EWHC 2767 (QB), [2012] NLJR 1349, [2012] All ER (D) 127 (Oct)

A non-freezing cold injury is not a 'disease' within the meaning of CPR 45

(Males J)

The facts: C was discharged from the army in 2007 after he sustained a non-freezing cold injury (NFCI) during cold weather survival training in Norway. His claim was settled for £75,000. His solicitors sought to recover his success fee and its percentage amount depended on whether the claim was classified under section IV (injury) or V (disease) of CPR Part 45. C's contended for a 62.5% increase on the basis that the NFCI was a disease. D contended for a lower success fee on the basis that the NFCI was not a disease.

The decision: the judge applied the ordinary and natural meaning for disease. NFCI was not caused by a virus, bacteria or noxious agent or parasite but was instead the result of blood failing to reach parts of the claimant's body as a result of being exposed. NFCI was an injury and Part VI of CPR Part 45 applied.

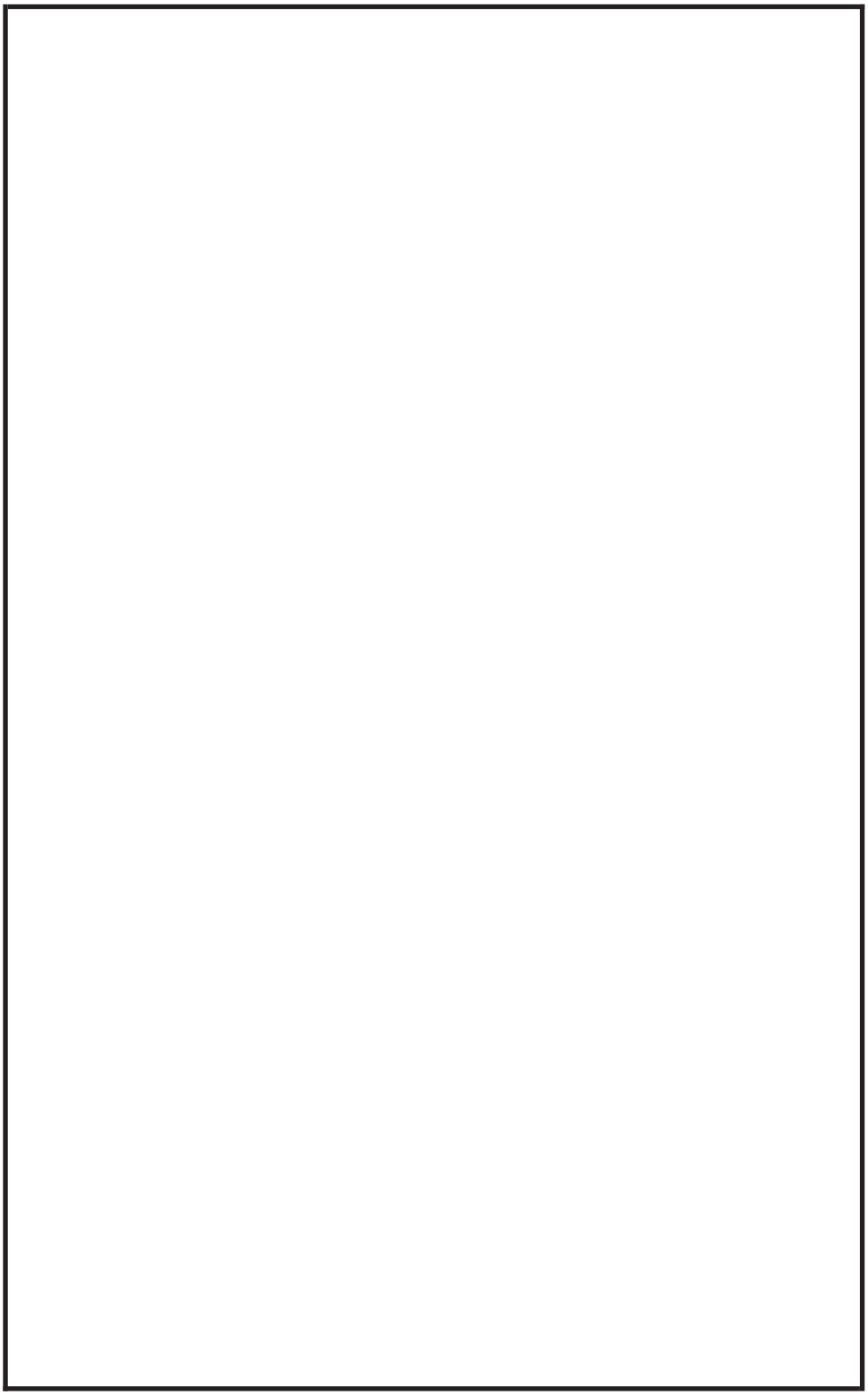
F & C Alternative Investments (Holdings) Ltd v Barthelemy [2012] EWCA Civ 843, [2012] NLJR 872, [2012] All ER (D) 145 (Jun)

Court of Appeal restates the importance of adhering to the correct form of a CPR Part 36 offer if one is to enjoy the rewards under Part 36.14

(Arden, Tomlinson and Davis LJJ)

The facts: the defendants in a commercial dispute made an offer to settle which expressly stated that it was made outside the terms of CPR Part 36. However they reserved the right to refer to the offer if not accepted. It was not accepted by C. D succeeded overall at trial, they recovered more than they had been prepared to accept under their offer to settle. D invited the court to exercise its powers under CPR Part 44 by analogy with CPR Part 36. At first instance the judge took into account the fact that D had had to take out a bridging load to finance the litigation and that this had attracted a high rate of interest. He ordered indemnity costs against C after the date that D had set for the offer to be accepted and rates of interest on the costs that varied between 3% above base rate to 40% above base rate, to reflect different loans taken out by D to fund the claim. C appealed.

The decision: the appeal was upheld. CPR Part 36 is a self contained set of rules that are carefully crafted to set out the requirement necessary to depart from the usual costs rules. It is necessary to comply with those requirements to benefit from the intentionally draconian costs sanctions that they impose. D's offer had not constituted a Part 36 offer. Accordingly the judge had had no jurisdiction to make a cost order under Part 36.14. There was no case for applying CPR Part 44 as though it were CPR Part 36. His only ground for awarding indemnity costs had been C's failure to beat D's offer, that was not a valid justification for such an order. Neither could the high interest rates be supported, the court reduced the rate to 3% above base rate for all the periods.



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