Butterworths Personal Injury Litigation Service

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FATAL ACCIDENTS

Swift v Secretary of State for Justice [2013] EWCA Civ 193

Court of Appeal dismisses cohabitee's dependency claim

(Lord Dyson MR, Lewison and Treacy LJJ)

The facts:

The claimant had been cohabiting with the deceased as his common law wife for about 6 months when he was killed at work in an accident for which his employers accepted responsibility. The claimant was pregnant and later gave

birth to a child. The child was able to make a claim for loss of dependency under s 1(3)(e) of the Fatal Accidents Act 1976 (FAA) but the claimant was prevented by the definition of "dependant" in s 1(3)(b) which excluded "common law" marriages where the parties had not cohabited for at least 2 years.

Relevant excerpt challenged:

Section 1 – Right of action for wrongful act causing death.

(1) If death is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.

(2) Subject to section 1A(2) below, every such action shall be for the benefit of the dependants of the person ("the deceased") whose death has been so caused.

(3) In this Act "dependant" means –

(a) the wife or husband or former wife or husband of the deceased;

(aa) the civil partner or former civil partner of the deceased;

(b) any person who –

(i) was living with the deceased in the same household immediately before the date of the death; and

(ii) had been living with the deceased in the same household for at least two years before that date; and

(iii) was living during the whole of that period as the husband or wife or civil partner of the deceased;

The claimant contended that s 1(3)(b) is incompatible with her rights under art 14 (prohibition of discrimination) in conjunction with art 8 (right to a private and family life) of the European Convention on Human Rights.

The FAA treats differently married dependants from those who cohabit. The former have an automatic right to be treated as a dependant, no matter how short the marriage was prior to the accident; whereas cohabitees must have been living together for at least 2 years to qualify. Was this discriminatory?

Her claim was dismissed at first instance and she appealed.

The decision:

The Court of Appeal unanimously upheld the first instance decision, dismissing the appeal. The HRC principles had not been infringed. It held that due to the social and economic implications of enlarging the class of dependants, Parliament had a wide margin of discretion in the way it applied the HRC principles in its legislation. The decision by Parliament to restrict a cohabitee's right to claim damages for the wrongful death of their partner by

imposing a 2 year qualifying period was deemed to be a proportionate and expedient means of ensuring that a dependant's relationship had a sufficient degree of permanency to entitle a claim under the Act.

Comment:

The decision appears to ignore an obvious common-sense inference: that any couple that decides to have a child most probably also has every intention of entering into a permanent relationship. This is why, as long ago as 1999, the Law Commission Report, "Claims for Wrongful Death" (Law Com No 263), recognised that our national law was out of keeping with modern perceptions. It proposed a new s 1(3)(h) residual class of claimant defined as '*any other person who was being wholly or partly maintained by the deceased immediately before the death or who would, but for the death, have been so maintained at a time beginning after the death*'. This new category of dependant differed from the others, in that it was qualified, not absolute: the claimant would have to establish actual dependency; thus preventing speculative claims. This proposal, whose emphasis was on proof of dependency as opposed to consanguinity or constancy, was eventually endorsed by the Labour government in 1999 after a consultation process before being incorporated into the Civil Law Reform Bill of 2009. Unfortunately these measures were dropped by the present Government.

The Court of Appeal rightly believes that its hands are tied by the legislation, however out of keeping the FAA may be with modern perceptions. According to the Office of National Statistics there are 5.9 million people co-habiting in the UK. Perhaps the time has come for our politicians to realise the need to reform the anomalous and prejudicial treatment of cohabitees not only under the FAA but also under our common law, especially after the Supreme Court's ruling in *Jones v Kernott* [2011] UKSC 53.

It should be noted that the statutory bereavement award increased, in line with the 10% increase in general damages, from £11,800 to £12,980 for deaths occurring on or after 1 April 2013.

CONTRIBUTION CLAIM

Williams v Estate of Williams (Deceased) [2013] EWCA Civ 455

Ruling that mother 25% liable for choosing the wrong safety seat for her infant upheld

(Arden, Elias and Black LJJ)

The facts:

The case facts and first instance decision was reported in detail in BPILS Bulletin No 108 as *Hughes (by her litigation friend) v Estate of Dayne Joshua Williams (deceased) and another [2012]* EWHC 1078 (QB), [2012] All ER (D) 133 (Apr). This was essentially a dispute between two motor insurers; the

other driver's insurer sought a contribution from Ms Williams as a joint tortfeasor under the Civil Liability (Contribution) Act 1978.

A young mother had made what had turned out to be the wrong choice between two different types of child restraint she had installed in her car. By promoting her infant to a booster seat instead of a child seat which had a 5-point harness, she disregarded the manufacturer's instructions which indicated that her child was too small for the booster seat she had selected and that serious injury could result from its misuse. An accident ensued through the negligent driving of another vehicle and the infant was injured because the booster seat was inadequate protection for her child.

The trial judge had followed the Court of Appeal ratio in *Jones v*] *Wilkins* [2001] RTR19 which held that Lord Denning's dicta in *Froom v Butcher* [1976] QB 286, [1975] 3 All ER 520 was also relevant to the allocation of liability for the damage between joint tortfeasors. In view of the causative effect of Ms William's actions, a contribution of 25% was held to be appropriate.

The decision:

The mother's appeal was dismissed and the first instance decision was upheld unanimously on all counts.

MESOTHELIOMA

International Energy Group Ltd v Zurich Insurance Plc UK [2013] EWCA Civ 39

Fairchild principle restored to its pre Barker v Corus concept – as an exception to the normal rule of causation and not as founding a new tort of wrongful exposure to the risk of asbestos

(Maurice Kay VP, Toulson and Aikens LJJ)

The facts:

The claimant was an employer based in Guernsey that had recently settled a claim by one of its former employees. It was accepted by all concerned that the employee had contracted mesothelioma from being culpably exposed to asbestos during the course of his employment by them between 1961 and 1988. The employer sought to recover its outlay from one of several insurers from whom it had purchased employers liability insurance cover on a yearly basis. In keeping with many employers, its insurance records were incomplete: it was unable to identify the insurers for about 19 years; representing approximately 70% of the period that the employee was culpably exposed.

Zurich was on risk for approximately 22% of the relevant period. It contended that it was only liable for its proportionate share of the employee's loss calculated by reference to the time it was on risk as a proportion of the whole period. This would have left the employer exposed to funding the vast majority of the employee's claim.

Section 3 of the Compensation Act 2006 reversed the House of Lords' ruling in *Barker v Corus UK Ltd* [2006] 3 All ER 785 that mesothelioma claims are apportionable. However, Zurich argued that because Guernsey was subject to English common law but not affected by s 3 Compensation Act 2006 the House of Lords' *ratio* in *Barker v Corus UK Ltd* [2006] 3 All ER 785 still applied in Guernsey. In *Barker* the House of Lords had not only ruled inter alia: (i) that mesothelioma claims were capable of apportionment notwithstanding their classification as divisible injuries but it premised this on (ii) its new interpretation of the special rule in *Fairchild v Glenhaven Funeral Services Ltd* [2002] 3 All ER 305. This new interpretation metamorphosed the *Fairchild* dictum from a discrete exception to the 'but for' causational rule into a new and distinct tort of exposing an individual to an increased risk of suffering mesothelioma. This innovation facilitated the apportionment of liability for wrongful exposure to asbestos on a time-based basis.

The first instance decision of Cook J predated the benchmark "Trigger Litigation" ruling in *Durham v BAI (Run Off) Ltd (in scheme of arrangement)* [2012] 2 All ER (Comm) 1187 in which Mance LJ's powerful and meticulously reasoned judgment disapproved of the *Barker* ratio. Cook J was obliged by precedent to follow the *Barker* dicta. Fortunately, by the time this case reached the Court of Appeal, Lord Mance's judgment was to hand.

The decision:

The employer's appeal was allowed and Zurich was liable to indemnify its policyholder for the full amount of the loss notwithstanding that it would have only been on risk for a proportion of the total exposure.

Comment:

What Lord Mance's impressive leading judgment in *Durham* achieved was to expose the fact that the Supreme Court's reasoning in *Barker* was erroneous: that the House of Lords had not incepted a new tort in *Fairchild*; it had merely relaxed the normal tort law causation test.

It will be recalled that under the modified rule in *Fairchild*, if a claimant could show that he or she had been culpably exposed to asbestos and that this had materially increased the risk that mesothelioma would occur, then that would be sufficient for the courts to find that that particular exposure had caused the disease. This removes the injustice caused by the "rock of uncertainty" presented by the scientific impossibility, with our present very limited understanding of the aetiology of this disease, to prove which particular wrongful exposure to asbestos dust was causative of the disease. *Durham* has therefore consigned the *Barker* ratio to complete obsolescence.

Now, only one orthodox interpretation of *Fairchild* exists, and this Lord Mance summarised in *Durham* as follows:

> "the rule can now be stated as being that when a victim contracts mesothelioma each person who has, in breach of duty, been responsible for exposing the victim to a significant quantity of asbestos dust and

thus creating a 'material increase in risk' of the victim contracting the disease will be held to be jointly and severally liable in respect of the disease".

IEG confirms that what section 3 of the 2006 Act began, by abolishing the apportionability of liability for mesothelioma, *Durham* completed, by disapproving the innovative reinterpretation of the Fairchild exception that had been advanced in *Barker* as a way of squaring the circle: so as to permit apportionment of what would otherwise be an indivisible loss. *Durham* confirms that liability for mesothelioma is indivisible and not apportionable.

The practical implication of the restored *Fairchild* rule is that provided an employer can trace at least one valid EL insurance policy during which it can be established that the employer culpably exposed its employee to a materially increased risk of mesothelioma, it should be fully covered by that policy.

HIGHWAYS ACT

AC & DC v TR & Devon County Council [2013] EWCA Civ 418

Highway Authority's departure from Code of Practice not automatic breach of s41 Highways Act 1980

(Lloyd LJ, Lord Hughes and Sir Stanley Burnton)

The facts:

C was a passenger who was gravely injured when his driver's land rover crashed into some trees. The incident occurred on a straight section of a two lane country road. The driver had lost control whilst overtaking another vehicle as the offside wheels entered a rut caused by the edge of the road crumbling. C's claim against the driver was settled but the latter issued a Part 20 claim against Devon CC, as the highway authority responsible for maintaining the road. It was established that Devon CC's policy was to inspect the road once every 6 months. However an authoritative non statutory national code of practice, Well Maintained Highways, prescribed monthly inspections for this category of road.

At first instance Slade J held that the DCC were fully liable. The defect in the road constituted a danger that breached the highway authority's duty to maintain under s 41 of the 1980 Act. Their inability to justify the departure from the national code of practice demonstrated that they had failed to show such care as in all the circumstances was reasonably required and accordingly the statutory defence under s 58 failed. The driver was found not to be contributorily negligent. DCC appealed.

The decision:

The appeal was upheld in part. As to the liability of DCC under s 41, the first instance judge's approach was criticised. The national code of practice was not mandatory; it did not set an absolute standard, it was merely relevant evidence of a suitable standard. A departure from the code was not of itself

unreasonable. The Code post date DCC's own policy. Evidence was adduced from other local authorities to show that DCC's inspection rates for this category of road was in keeping with other such bodies, *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 considered. However, as DCC had constructive knowledge of the likelihood that this particular stretch of the road would suffer damage of this kind at this time of the year, its failure to inspect more regularly prevented it raising a s 58 defence. Even so, the driver was found to be 50% contributorily negligent because the damaged road would have been visible to a careful driver as it was approached and there was sufficient room for him to have avoided it, even during the overtaking manoeuvre.

SUICIDE

Jones (by Caldwell) v First Tier Tribunal and another [2013] UKSC 19

No entitlement to claim under the Criminal Injuries Compensation Scheme 2001 for a victim indirectly affected by another's suicide

(Lord Hope DP, Lord Walker, Lady Hale, Lord Sumption and Lord Carnwath SCJJ)

The facts:

D ran into the middle of the central lane of a six lane carriageway, turned to face an oncoming truck and raised his arms to embrace the inevitable. The truck hit and killed D but in braking to avoid him it hit J's lorry, destroying J's cab and throwing him out onto the road where he sustained very serious long term injuries. It was accepted that D had intended to commit suicide.

J's application for an award from the Criminal Injuries Compensation Authority was rejected on the ground that he was not the victim of a criminal injury. Paragraph 8 of the Criminal Injuries Compensation Scheme 2001, provides:

> "For the purposes of this Scheme, 'criminal injury' means one or more personal injuries as described in the following paragraph, being an injury sustained in Great Britain and directly attributable to: (a) a crime of violence (including arson, fire-raising or an act of poisoning)…"

The CICA was not satisfied that D had intended to cause harm nor that he had been reckless in that regard. It contended he lacked the necessary *mens rea* to constitute a crime. His appeal to the First Tier Tribunal failed. The FTT found that D had not committed an offence of inflicting grievous bodily harm under s 20 Offences Against the Persons Act 1861. He then appealed to the Court of Appeal which overturned the initial decision. It reasoned that if D had committed an offence under s 20 of the 1861 Act then there would have been a crime of violence and J could claim. An offence under s 20 involves inflicting serious bodily harm to another person through conduct which the accused himself foresaw would cause some harm to another person. It held that it was highly improbable that anyone who ran into the

path of traffic on a busy motorway would not at the very least foresee the possibility of an accident and, as a consequence, harm being caused to other road users. The CICA appealed to the Supreme Court.

The decision:

The Supreme Court overruled the Court of Appeal and allowed the appeal, dismissing J's claim under the CIC scheme. It had been up to the FTT to determine whether D had committed an offence. It had applied the right test for whether he had committed a crime under s 20 of the 1861 Act and came to the conclusion that he had not. It finding that D had not committed a crime required no further examination of whether D's actions were consistent with violence.

PERIODICAL PAYMENTS

Follett v Wallace [2013] EWCA Civ 146

Periodical Payments Orders with strings attached

(Mummery, Richards and Leveson LJJ)

The facts:

The claimant sustained catastrophic injuries in a motor accident for which Aviva's policyholder was liable. The parties agreed in principle on a settlement that comprised both a lump sum award and periodical payments; so far, so good. However, Aviva wanted to impose a term that made the claimant's entitlement to his damages dependent on his undergoing medical examinations at their behest. The injured victim was understandably unhappy about this.

At first instance Judge McKenna rejected the insurer's application seeking to make the periodical payments conditional on the claimant agreeing to future medical examinations at the insurer's request. He thought that this was neither reasonable nor proportionate. He also held, probably quite properly, that the court had no jurisdiction to make such an order or to impose these conditions.

It should be noted that under the long established finality principle, a compensating insurer is not permitted to have a claimant re-examined once a lump sum award has been agreed or awarded; except perhaps where fraud is alleged. So why should the position be any different if the award is paid by way of an annualised income stream under a periodical payments order?

The decision:

Unfortunately the Court of Appeal disagreed.

It claimed an innate jurisdiction, derived it seems by implication from s 2 of the Damages Act 1996, to deal with periodical payments on an ongoing basis. In doing so, the Court appears to have completely ignored the Damages

(Variation of Periodical Payments) Order 2005 which effectively confers an ongoing jurisdiction for the court, but only where a variable payments order has been made.

It then proceeded to impose the following conditions to the periodical payments order:

> "The Defence Insurer shall be entitled to require the Claimant to undergo medical examination at its request upon reasonable notice being given to the Claimant at any time during the Claimant's life time, such medical examinations to be limited to obtaining a medical opinion as to the Claimant's general health in order to obtain a quotation for the purchase cost of an annuity to fund the periodical payments and/or (not more frequently than once every seven years) for the express purposes of reviewing its reserve. The cost of any such examination, to include any reasonable costs and any loss of earnings incurred by the Claimant in attending the examination, shall be paid by the defence insurer. The Claimant shall have permission to apply to the court in the event of reasonable concern as to the nature or extent of any such examination."

> "Following a request by the Defence Insurer in writing on or before 1 November each year, the Claimant shall obtain and provide to the Defence Insurer by 1 December each year, commencing 1 December 2012, written confirmation from his GP or other medical adviser dated not before 1 November of the same year confirming that the GP or medical adviser has seen the Claimant on or after that date and that the Claimant is still alive, in default of which the obligation of the Defence Insurer to make instalment payments to the Claimant shall be suspended until seven days after the written confirmation (dated not more than one month before the date of its submission) is provided to the Defence Insurer."

Comment:

Whilst the second provision accords with common practice, the first flies in the face of the long established clean break doctrine. It bestows absolutely no benefit on the claimant and its imposition is an indulgence to suit the convenience of those insurers who choose to fund their payments on a rolling basis from their revenues, as opposed to funding it by purchasing the "one off" annuity anticipated by the enabling legislation.

The Damages Act 1996 (as amended by the Courts Act 2003) does not exclude claimants from the finality principle, save to the limited extent permitted under the Damages (Variation of Periodical Payments) Order 2005. This sets out the circumstances that empower a court in certain very specific circumstances to provide in an order for periodical payments that it may be varied. Section 2 of the 2005 Order provides:

If there is proved or admitted to be a chance that at some definite or indefinite time in the future the claimant will —

(a) as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration, or

(b) enjoy some significant improvement in his physical or mental condition, where that condition had been adversely affected as a result of that act or omission,

the court may, on the application of a party, with the agreement of all the parties, or of its own initiative, provide in an order for periodical payments that it may be varied.

As no mention of the 2005 order is made it is safe to assume that this was a simple periodical payments order.

The opening words of Leveson LJ's judgment (the only reasoned decision) were prescient:

> "The calculation of damages in catastrophic injury cases involves substantial sums of money and is or can be extremely complex. "

It is a shame then that the Ministry of Justice has failed to provide sufficient judicial training on periodical payments and arguably even more unfortunate *if* the relevant provisions were not drawn to the attention of the court by the advocates concerned.

This ruling has the potential to introduce a sinister turn of events. This ruling shackles this claimant to a life-long burden of having to attend further medical examinations at the behest of the compensating insurers. Whilst this ruling does not permit any future revaluation of the periodical payments, it nevertheless compromises one collateral aspect of the finality principle, in the way it imposes a continuing relationship between a victim and the wrongdoer's insurers. It is arguable that the legitimate interests of victims appear to have been subordinated to the commercial interests of the motor insurers. What may be expedient for a mendicant on state benefits is inappropriate for a victim of a tortfeasor.

It is to be hoped that that this ruling will not be misconstrued in other cases by insurers seeking to rely on these post settlement medical reports to argue for a reduction in the level of the payments. No variation of a periodical payment order is permissible save where provided for within the original settlement or order or within the 2005 Order cited above. In future, where a *Follet* provision is sought, practitioners would be wise to ensure that a medical examination is really necessary and to restrict their number and insist on dictating the precise terms under which the medical examination is to be conducted, so it is confined solely to issues affecting the victim's longevity and nothing more.

RH v University Hospitals Bristol [2013] EWHC 299 (QB)

New periodical payments model order

(Swift J)

A new model of periodical payments order has been agreed in claims that involve the NHSLA.

The model order provides formulae by which the calculation of each year's indexation of periodical payments can take account of any change between the 'first release' ASHE 6115 data published by the ONS in November of the previous year and the "revised" data published during the current year. The new model order takes into account the fact that ASHE 6115 has been reclassified by splitting it into two separate new Standard Occupational Codes (SOC), ASHE 6145 ("care workers and home carers") and ASHE 6146 ("senior care workers"). The judgment and an explanatory note are available to download from the Judiciary website at: http://www.judiciary.gov.uk.

NON PARTY COSTS ORDERS

Flatman v Germany; Weddall v Barchester Health Care Ltd (Law Society intervening) [2013] EWCA Civ 278

No automatic right to non party costs order against solicitors funding claims under CFA with no ATE in place

(Lord Justice Mummery, Lord Justice Richards and Lord Justice Leveson)

The facts:

The appeal featured the same firm of claimant solicitors (GMS Law) in two entirely separate personal injury actions featuring different accidents but the same defendant insurers. The solicitors had acted under a conditional fee agreement, and in each claim there was no ATE insurance cover. In one of the claims the approach of the solicitors, in the face of a barrister's opinion that assessed the claim having only a 20–25% prospect of success, had been to press on regardless; notwithstanding the client's specific instructions not to do so without ATE insurance. Both claims failed. The absence of any ATE policy jeopardised the insurer's prospects of recovering their costs entitlement.

The insurers were suspicious as to the degree to which both claims had been funded by the solicitors and their ultimate intention was to seek non party costs orders against the claimant solicitors. The insurers applied for the claimant solicitors to be joined as a party to the actions and for disclosure of their clients' source of funding, with particular emphasis being paid to the disbursements, which were thought to have been funded directly by the firm. The insurer's applications failed at first instance but on appeal Eady J overturned that decision. He ordered that the solicitors disclose their funding arrangements. He opined that by funding the claimants' disbursements, the solicitors might have stepped "outside the 'normal role' of a solicitor". Furthermore it was arguable that as the solicitors had also stood to gain in substantial costs together with a success fee uplift had the claims succeeded it

was arguable that they had an interest in the proceedings that might justify a third party costs order against them. The claimants appealed the order for disclosure.

The key issue:

Although this was superficially an appeal against an order for disclosure of the claimant's funding arrangements, the gravamen of the insurer's case was that they believed they were entitled to apply for a third party costs order against the solicitors under s 51 of the Senior Courts Act 1981. In essence, the insurer's suspicion was that the claimant solicitors had crossed the line between merely facilitating access to justice through funding the claim under a CFA, (which was permitted under Section 58 of the Courts and Legal Services Act 1990) by funding the claim to such an extent that they had a real interest in the litigation and could be considered in reality to be a party against whom a third party costs order could properly be made. They argued, as a matter of "fairness and reasonableness" that those who encourage litigation by committing their funds to it for substantial financial gain should have a corresponding liability for the consequences.

The Law Society intervened, arguing that a solicitor is not acting outside their normal remit where the firm funds disbursements on behalf of a client on the basis that the costs will be recovered from the other side in the event of success but will not be recovered from the client if the claim fails.

The decision:

Whilst the Court of Appeal dismissed the claimant's appeal and upheld the disclosure order, it disapproved of Eady J's reasoning.

In Leveson LJ's leading judgment (uniformly approved by the other Lords Justices of Appeal) he ruled that the mere fact that a solicitor pays his client's disbursements does not of itself cross the boundary of normal funding behaviour and thus expose that solicitor to a third party costs order. This is because the enabling legislation anticipates that solicitor might fund its client's disbursements.

However, on the disclosure point: as the solicitors had agreed to indemnify their client (as is lawful), they could not deny the existence of that indemnity nor prevent their client from relying upon it. Accordingly disclosure of the funding arrangements was justified.

The saga will no doubt continue as disclosure is made. It seems likely that the insurers have a strong case to argue for a third party costs order in one of the claims: where the claimant solicitors persisted with a decidedly risky claim, apparently against their own client wishes. If substantiated, this may well be deemed to cross the boundary of normality referred to above.

Comment:

The implications of this decision are just as relevant to new CFA provisions and qualified costs shifting regime post 1 April 2013 as they are to the former, pre April 2013 regime. This judgment, and in particular Leveson LJ's helpful

review of the authorities on the exercise of the court's discretion to make third party costs orders and to order disclosure of funding arrangements is essential reading for anyone contemplating testing the limit to which a solicitor can fund or "prime pump" litigation for claimants of limited means. These are highly fact specific considerations.

The key lesson to be drawn from this case is that Court of Appeal has confirmed that solicitors are entitled to act either on a normal fee or under a CFA for an impecunious client whom they know or suspect will not be able to pay their own (or the other side's costs) if unsuccessful. Solicitors will not risk personal liability for funding an unemployed client's claim under a CFA if ATE is unavailable or unaffordable; the same applies to solicitors who effectively indemnify their client's liability for disbursements. Funding disbursements in this way does not make the solicitor, a "real party" to the action.

It should be remembered that in *Sibthorpe and another v London Borough of Southwark* [2011] EWCA Civ 25 the Court of Appeal upheld the validity of a CFA that also offered a complete indemnity against their own and the opponent's costs in the event of the client's claim failing. The wider issue here is one of access to justice. Insurers are unlikely to circumvent the costs protection afforded by the QOCS by these means alone.

Heron v TNT (UK) Ltd and another [2013] EWCA Civ 469

The ineptitude of a solicitor who mistakenly fails to obtain ATE insurance and then hides this from the client does not of itself justify a non party costs order

(Leveson, Beatson and Gloster LJJ)

The facts:

This case history reads like an inventory of bungles. The claimant instructed a firm, MTG, in his personal injury claim against his employers. He entered into a CFA but his solicitors failed to submit the ATE insurance proposal form that had been completed. The defendants made a Part 36 offer that was substantially less than the claimant's Part 36 offer and which was subsequently beaten at trial. Later, the claimant's medical evidence indicated that the claimant faced a high risk of failing to beat the defendant's offer to settle. The solicitors could have applied for ATE at that stage but did not. The client was not informed of the very real risk to which he was exposed.

The insurers secured an order against the claimant for costs from the date of the expiry of the relevant date for their first Part 36 offer. They then sought a non party costs order under s 51 of the Senior Courts Act 1981 and applied to join the solicitors as a party to the action for these purposes. They contended that the solicitor's failure to obtain ATE insurance or to warn the client of the risk he faced had not just created a conflict of interest but had changed their relationship: they were now in a real sense a party to the action in that they were now pursuing it on their own account in the hope of extricating themselves from their predicament. The trial judge refused the

insurer's application after finding no evidence to suggest any conscious impropriety, as opposed to ineptitude, and he concluded that the ins and outs of the case did not take it out of the ordinary run of things. The insurers appealed.

The decision:

The appeal was dismissed.

The Court of Appeal saw no reason to overturn the trial judge's factual findings. As to his decision, whilst a non-party costs order can be made against legal representatives, such an order is exceptional in the sense that it is out of the ordinary run of cases. These are highly fact specific decisions that are subject to the nuances of degree. A non party costs order will be likely where the non-party not only funds the proceedings but also substantially controls them or at any rate benefits from them. However, against this, it is also well established that a solicitor is entitled to act on a CFA for an impecunious client whom they know or suspect will not be able to pay their own (or the other side's costs) if unsuccessful.

It was the wider policy issues that determined this appeal. If one accepted the premise that due to the solicitor's breach of duty to their client (in not obtaining ATE cover and compounding this by not informing the client of the risk he faced) the solicitors were acting in the proceedings on their own account as a real party to the action, then that opened the door to similar arguments every time a solicitor is negligent in the conduct of litigation (thereby giving rise to a conflict) and thereby causes an opposing party to incur costs that might not otherwise have been incurred. The threat of extensive satellite litigation on this theme is not something that the Court of Appeal is prepared to countenance.

CENTRAL LONDON HOURLY RATES

Royal Devon and Exeter NHS Foundation Trust v Acres [2013] EWHC 652 (QB)

Special circumstances justified a Plymouth based client instructing central London solicitors

Mr Justice Cranston

The facts:

A senior radiographer brought a claim against her employer, an NHS trust for repetitive strain injury, and was medically retired. She belonged to the Society of Radiologists who advised her to consult a local Plymouth based firm. This she did and that firm refused to act on the merits. The Society then funded a second opinion from a central London firm it used, the second opinion was supportive. The Society backed her claim on condition that she instruct this central London based solicitors in whom they reposed sufficient confidence to instruct on an hourly retainer. The Society was of the view that

special expertise and knowledge of this kind of work was necessary to successfully prosecute this type of RSI claim.

Although the claim was initially valued at £140,000 it was settled for only £8,000.

The trust objected to the claimant's costs of £79,203.97 and the employment of a London firm, citing the usual authorities.

At first instance the costs judge ruled

(i) the costs were not disproportionate in all the circumstances of the case;

(ii) that the appropriate grade of fee earner for a claim valued at £140,000 was grade A; and

(iii) notwithstanding the above, the claim had not warranted a grade A fee earner in central London; firms outside London could have run the claim.

He made what to some might seem a counter-intuitive finding that to the extent that the issues and the claim were out of the ordinary, that could have been addressed by increasing the hourly rate for that work, rather than by altering the locality – (as though increasing the hourly rate could adequately compensate for lack of expertise). He allowed an hourly rate of £280 per hour.

Both parties appealed, the trust against the use of the London solicitors and the scale of costs and the claimant against the hourly rate.

The decision:

In both cases the appeals were dismissed. The costs judge's findings and the exercise of discretion were justified. The use of a central London firm was justified in the circumstances by the local firm's refusal to act.

Comment:

Costs challenges of this kind are highly fact specific and it would be unwise to infer from this instance that the mere fact that a local firm has declined to act on the merits is sufficient justification for packing the case off from the provinces to a central London firm. Practitioners should bear in mind *Truscott v Truscott, Wraith v Sheffield Forgemasters Ltd* [1998] 1 All ER 82 and the relevant considerations to be taken into account when instructing London solicitors:

The importance of the matter to the claimant.

The legal and factual complexities.

The location of the claimant's home.

Any well founded dissatisfaction with the original solicitors.

Whether the new (London based) solicitors had been recommended.

The location of the firm, their accessibility to the claimant and their readiness to attend the relevant court;

What, if anything, he might reasonably be expected to know of the fees likely to be charged by them as compared with the fees of other solicitors whom he might reasonably be expected to have considered.

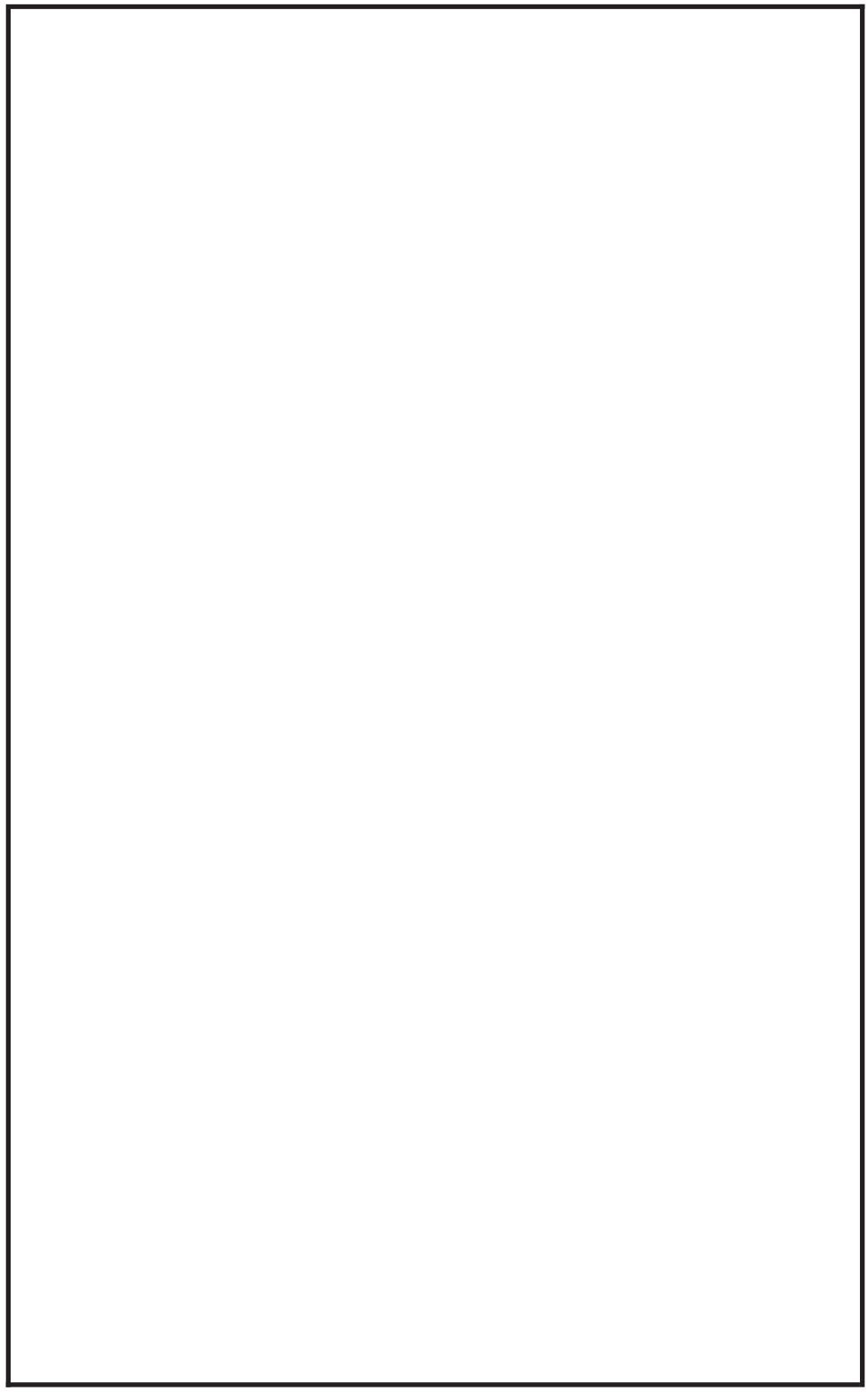
HEALTH AND SAFETY

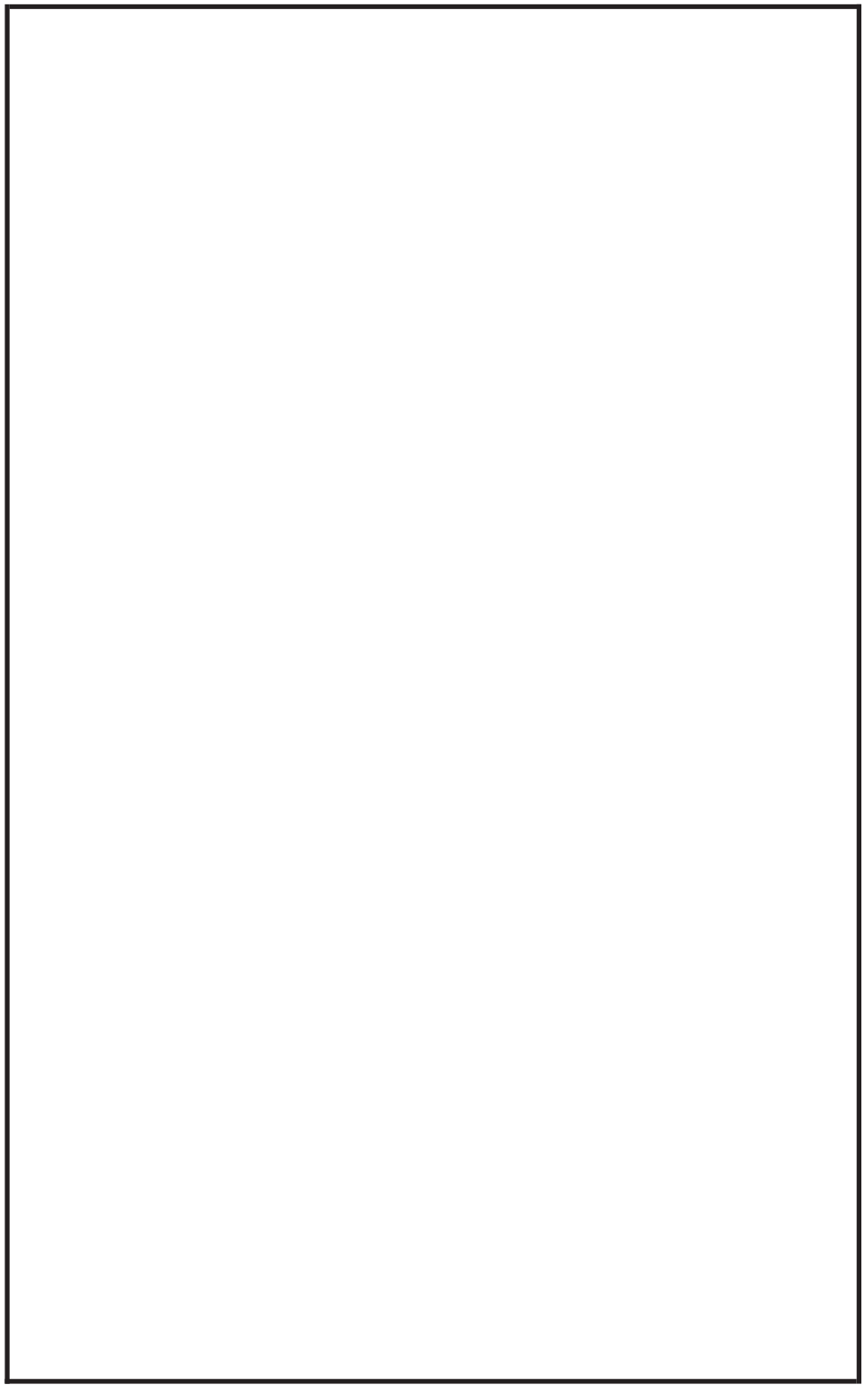
The Enterprise and Regulatory Reform Bill 2012

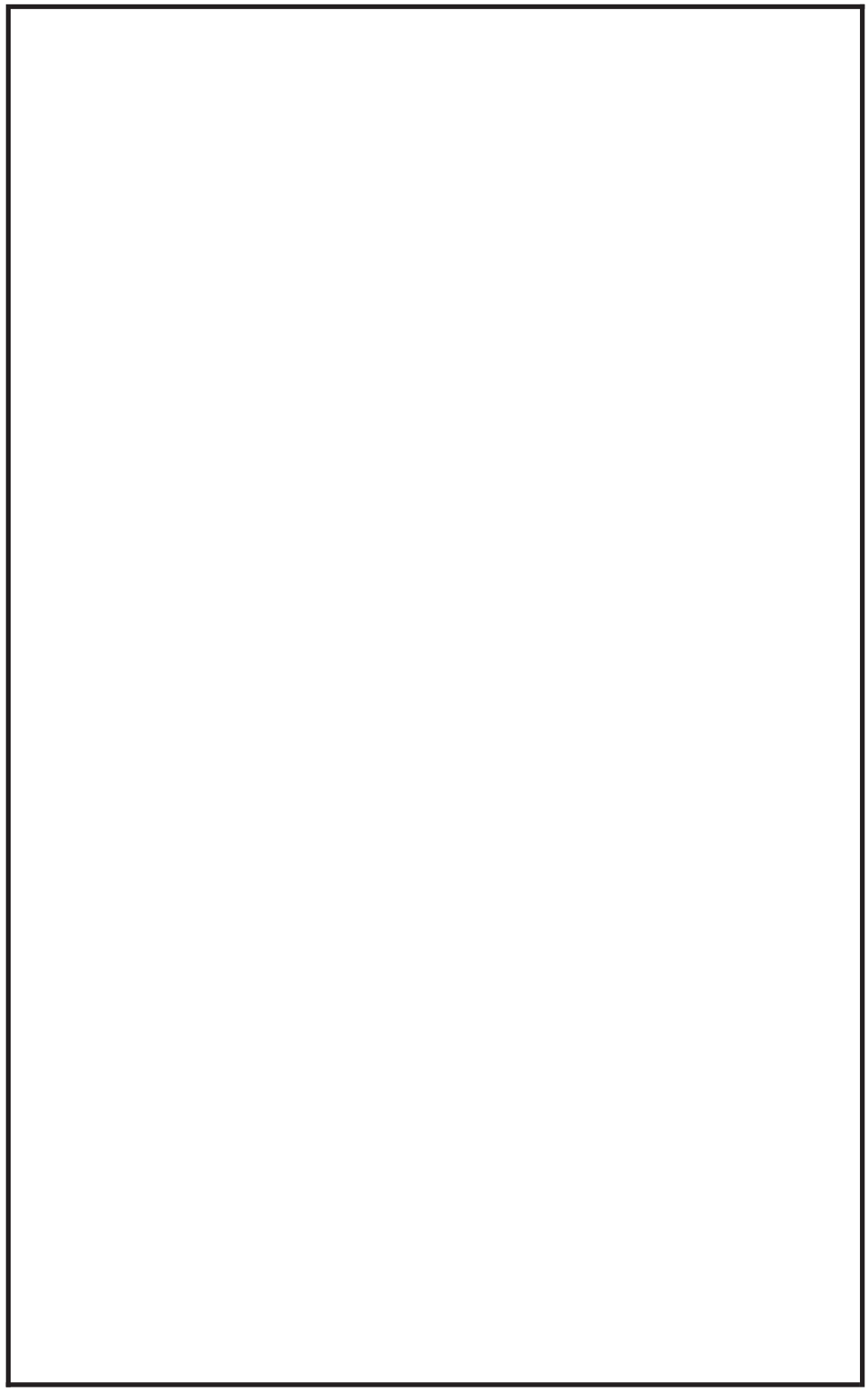
This Bill received the Royal Assent in April 2013. Section 62 of the Bill (the Act has yet to be published at the time this bulletin was prepared) amends s47 Health and Safety Act 1974 so as to remove strict liability where a breach of regulations causes actionable damage. This reverses over a century of established legal practice.

In October 2011 Professor Lofstedt published his review of health and safety legislation in which he recommended simplifying and streamlining the extensive body of regulations, focusing enforcement on higher risk businesses, clarifying requirements, and rebalancing the civil litigation system. He advised the Government against making any radical change to our health and safety legislation. He recommended that the strict liability provisions should be reviewed and either qualified by "reasonable practicability" or altered to prevent civil liability resulting from a breach. The Bill goes further than the Professor's recommendations.

Once the Act is implemented, a claim for compensation arising out of a breach of health and safety legislation will require the claimant to prove that the employer has been negligent, save where an exception applies or in circumstances where a European directive or regulation imposes strict liability.







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