Bulletin 112 **December 2013**

Butterworths Personal Injury Litigation Service

Bulletin Editor
Nicholas Bevan

Filing instructions: This Bulletin includes material available up to 2 December 2013.

Please file immediately behind the Bulletins Guidecard, in Binder 6. **The Binder should now contain Bulletins 98 to 112**.

COSTS

Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537

Well-intentioned incompetence will not usually attract relief from a sanction unless the default is trivial

(***Dyson MR, Richards and Elias LJJ***)

The Master of the Rolls has delivered a harsh warning that the Draconian sanctions introduced under the 1 April 2013 amendments to the Civil Procedure Rules will be rigorously applied by the Courts. In doing so he has attracted a fair degree of opprobrium but his message, however unpalatable, is one that every civil litigation practitioner should take to heart. His judgment, and in particular the guidance offered at paragraph 40 and following, is essential reading.

The facts: A defamation action already notable through its association with the 'Plebgate' scandal, is likely to be made notorious after a master decided to effectively disallow all the claimant's profit, costs and disbursements (apart from the court fees) for filing a costs budget 6 days late. Practice Direction 51D Defamation Proceedings Costs Management Scheme applied and this required costs budgets to be filed not less than 7 days before the date of the CMC hearing. The defendant used a costs expert to prepare its budget and had no difficulty in complying. The claimant was a small firm that was suffering from staff shortages and other urgent commitments that stretched its resources. It only filed its budget on the eve of the CMC. This resulted in the CMC being adjourned.

PD51D did not provide for sanctions. So the Master looked at and applied the new costs budgeting provisions CPR 3.12 to 3.18, which apply to civil actions after 1 April 2013.

The sanction imposed by the Master was to treat the claimant as having filed a budget which listed only the applicable court fees; a penalty that carried a £0.5 million price tag.

The claimant appealed against the Master's order arguing that: (i) it did not reflect the fact that the breach of PD 51D was easily remedied; (ii) the breaches caused no prejudice to the defendant; (iii) it had no lasting effect on the conduct of the litigation; (iv) the breach was minor; (v) the claimant had no history of default; and (vi) the order caused prejudice to the claimant (although no evidence was submitted to establish this point). The master refused relief from the sanction and the claimant appealed.

The decision: The appeal was dismissed.

CPR 3.9 requires a court to consider the need (i) for litigation to be conducted efficiently and at proportionate cost and (ii) to enforce compliance with rules, practice directions and court orders. The Court of Appeal held that these considerations are of paramount concern. They reflect a deliberate shift of emphasis imposed by the post-Jackson civil justice reforms. Although CPR 3.9 requires the court to consider '*all* the *circumstances of the case, so as to enable it to deal justly with the application*' and although this is capable of including the other factors listed in the earlier version of this rule (e.g. whether the breach was intentional, the applicant's other conduct, whether relief was sought promptly etc) the two considerations listed above are paramount and they trump all other factors.

The claimant failed to establish any hardship or to furnish a good reason for the delay. Accordingly the Master's decision was upheld

We are given useful guidance on how the courts will apply CPR 3.9 at paragraphs 40 to 46 of the judgment. If the breach is anything other than trivial then a heavy burden lies on the defaulting party to persuade the court to grant the relief. Unless there is a very good reason (e.g. serious illness or injury of the party's solicitor or some other intervening factor) then the presumption will be that the sanction imposed, whether by court order or automatically under the rules, is appropriate and should not be disturbed. Inadvertent default through oversight or pressure of work are likely to be given scant regard, as these salutary words from the judgment make clear: '*Solicitors cannot take on too much work and expect to be able to persuade a court that this is a good reason for their failure to meet deadlines*'.

Comment: Although this was a defamation action and CPR 3.12 to 3.18 do not apply directly to the case, the Court of Appeal held that the Master was right to apply these provisions by way of analogy, in the absence of any express provision in PD51D. Accordingly the court's consideration and treatment of these provisions are therefore highly relevant to personal injury litigators.

By way of a footnote, or perhaps an epitaph, it is worth noting that the Court approved Lord Dyson MR's earlier comments taken from his recent lecture on the Jackson reforms delivered in March this year, in which he observed:

> 'The tougher, more robust approach to rule-compliance and relief from sanctions is intended to ensure that justice can be done in the majority of cases. This requires an acknowledgement that the achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations …(these obligations)… serve the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the court enables them to do so.'

This message may be unwelcome but that is no reason to shoot the messenger. The Court of Appeal's hands were tied; no other outcome was likely or in the writer's view perhaps even possible.

One of the most subtle (and to many, invidious) changes wrought by the new CPR, has been the redefinition, within the CPR 1 Overriding Objective of what is meant by the term 'Justice'. This now appears to be something considerably less than the ideal form envisaged by the ancients or by more recent conventional jurisprudence. The rights of individuals to a just determination are now subordinated to the perceived greater public good of rigid adherence to the CPR. Cutting off the hand of a pick-pocket may be an effective means changing someone's behaviour but in a modern civilised society this kind of Procrustean approach is generally thought to be neither proportional, just nor intelligent. Depriving a litigant of the right to recover his legal costs for a relatively innocuous non-contumelious bungle, albeit one that wasted the court's time (hardly the most wicked act!) when other far more proportionate sanctions are available and appropriate, does rather stick in one's craw; if only for its lack of moderation. It would be easy to summon up the spectre of a dystopian legal system in which increasingly oppressive sanctions are imposed by manic rule committee gnomes and then exploited by an avaricious privatised Court Service, the latter is apparently under consideration by the present Government, however I prefer to live in hope!

The lessons to be learnt from this ruling are that those firms that have failed to undertake a post-Jackson risk assessment and to review their fee earner caseloads as well as their training and general competence on CPR rule compliance run the risk of suffering a nasty costly surprise. I am reminded of Samuel Johnson's wry note that the knowledge of an impending penalty does indeed concentrate the mind wonderfully!

There can be no doubt that the courts will now follow this robust approach to imposing the sanctions. Two high court judges who adopted a more lenient (proportionate?) approach were named and shamed in this judgment. Civil litigators operate in a grave new world, one that will show scant sympathy for the pressures that many practitioners face as they seek to increase caseloads to make up for the savage hair cut on recoverable costs. A wise practitioner friend of mind mentioned that there could be a silver lining to all of this: it is great business for costs draftsmen!

EMPLOYERS LIABILITY / ASBESTOS RELATED CLAIMS

McDonald v (1) Dept for Local Government (2) National Grid Electricity [2013] EWCA

Regulation 2 (a) Asbestos Industry Regulations 1931 applied to a visiting lorry driver

(***Lord Dyson, MR, McCombe and Gloster LJJ***)

The facts: The claimant was diagnosed with mesothelioma and was too ill to attend the first instance trial. His evidence was admitted under the Civil Evidence Act 1968. He contended that he had contracted this disease during his employment by D1 as a lorry driver between 1954 and 1959. It was claimed that his duties had included collecting pulverised fuel ash from Battersea Power Station, which D2 had operated. He claimed to have made 68 collections over the four year period.

He alleged that he was indirectly exposed to asbestos dust whilst attending the power station. His case was that asbestos dust was regularly released into the air from routine heat insulation maintenance and repair operations undertaken by the operator's employers on site. He contended that these activities involved: mixing asbestos powder in oil drums prior to its application as well as the lagging operations themselves that included removal of defective lagging. The mixing of the asbestos lagging was undertaken in large oil drums and this was said by the claimant to have produced visible clouds of dust in the air when he was only 10 to 15 feet away. He claimed that the site was generally very dusty.

Although the lagging operations were carried out at a different location at the power station, the claimant alleged that as there was often a queue of lorries, he was usually on site for 1–2 hours during which time he became friendly with a number of the workers and that this often brought him into close proximity with the asbestos lagging operations. The claimant's statement gave the impression that he was constantly standing in a cloud of asbestos dust.

The claimant contended that D1, his employer, was liable at common law for failing to take reasonable care for his safety and for failing to warn him of the dangers involved. His claims against D2 were founded on three separate causes of action:

- Breach of the common law duty of care,
- Breach of s47 (1) Factories Act 1937,
- Regulation 2 (a) Asbestos Industry Regulations 1931.

The trial judge did not accept the degree of exposure that the claimant's statements described. HHJ Denyer QC found:

> 'The inevitable conclusion has to be that any exposure was at a modest level on a limited number of occasions over a relatively short period of time.'

As to the allegation of breaches of the common law duty, he considered *Williams v University of Birmingham* [2011] CWCA Civ 1242 and held that in the mid to late 1950s …

> '… it would not reasonably have been foreseen that the quantities and intensity of any asbestos dust given off to which this Claimant was exposed would be likely to be injurious or offensive to his health.'

The decision: The claims in common law negligence were dismissed for much the same reasons as at first instance.

The appeal turned on whether, notwithstanding the fact that D2 could not have been expected to foresee the hazard presented by low intermittent exposure to asbestos dust, D2 was liable for breach of statutory duty.

It should be noted that the claimant's exposure predated the publication of two seminal papers in 1965 in the USA and UK by Dr Muriel Newhouse and Mrs Hilda Thompson. These papers indicated that minimal exposure to asbestos dust is capable of causing mesothelioma and that asbestos dust presents not only an occupational hazard but also a serious health risk to those indirectly exposed, such as to those living close to an affected factory or their families.

Accordingly the claims in negligence against D1 and D2 were dismissed. He also dismissed the claims against D2 based on breach of statutory duty under the Factories Act 1937 and the Asbestos Industry Regulations 1931. The claimant appealed.

The decision: The claims in common law negligence were dismissed for much the same reasons as at first instance.

The appeal turned on whether, notwithstanding the fact that D2 could not have been expected to foresee the hazard presented by low intermittent exposure to asbestos dust, D2 was liable for breach of statutory duty.

Section 47(1) Factories Act 1937

The relevant part of section 47(1) provides:

> '… In *every factory* in which, *in connection with any process carried on*, there is given off any dust or fume or other impurity of such a character and to such an extent as to be *likely to be injurious* or offensive to the persons employed, or any *substantial quantity* of dust of any kind, all practicable measures shall be taken to protect the persons employed against the inhalation of the dust or fume or other impurity and to prevent it accumulating in any work room, and in particular, where the nature of the process makes it practicable, exhaust appliances shall be provided and maintained …' emphasis added

The Court of Appeal approved its earlier decision in *Banks v Woodhall Duckham* [1995] 30 November (CA) (unreported) to the effect that section 47(1) only applies to someone 'employed' in the process carried on in a 'factory'. This did not apply in McDonald's case: as the protection does not extend to visitors. The Court of Appeal also held that McDonald had not

proved ‘substantial’ exposure. It had already been established that the exposure was not of a kind that would have been foreseen as ‘likely to be injurious’ as the quality of such foresight, applying the *Baker v Quantum Clothing* [2011] UKSC 17 dicta, was not an absolute term but a relative one that took into account the developing awareness of the risk posed by the exposure to asbestos dust. Thus the hazard was not of a kind that would, at that time, have been perceived by a reasonable and well informed power station owner to be likely to be injurious to visitors.

Accordingly, for all of the above reasons, the Court of Appeal held that D2 had not committed a breach of section 47.

The Asbestos Industry Regulations 1931

These Regulations apply to all factories and workshops or parts thereof in which the following processes or any of them are carried on:-

(i) breaking, crushing, disintegrating, opening and grinding of asbestos, and the mixing or sieving of asbestos, and all processes involving manipulation of asbestos, incidental thereto;

(ii) all processes in the manufacture of asbestos textiles, including preparatory and finishing processes;

(iii) the making of insulation slabs or sections, composed wholly or partly of asbestos, and processes incidental thereto;

(iv) the making or repairing of insulating mattresses, composed wholly or partly of asbestos, and processes incidental thereto;

(v) sawing, grinding, turning, abrading and polishing, in the dry state, of articles composed wholly or partly of asbestos in the manufacture of such articles;

(vi) the cleaning of any chambers, fixtures and appliances for the collection of asbestos dust produced in any of the foregoing processes.

The duties, including the duty to suppress dust (see below), are imposed subject to the following proviso:

> ‘Provided that nothing in these Regulations shall apply to any factory or workshop or part thereof in which the process of mixing of asbestos or repair of insulating mattresses or any process specified in (v) or any cleaning of machinery or other plant used in connection with any such process, is carried on, so long as

(a) such process or work is carried on occasionally only and no person is employed therein for more than eight hours in any week, and

(b) no other process specified in the foregoing paragraphs is carried on.’

The operative part of the Regulations provides:

> ‘It shall be the duty of the occupier to observe Part I of these Regulations’.

Then, in Part I, Regulation 2 imposes an absolute duty on an occupier in the following terms:

> '2. (a) Mixing or blending by hand of asbestos shall not be carried on except with an exhaust draught effected by mechanical means so designed and maintained as to ensure as far as practicable the suppression of dust during the processes.
>
> (b) In premises that are constructed or re-constructed after the date of these Regulations the mixing or blending by hand of asbestos shall not be done except in a special room or place in which no other work is ordinarily carried on.'

D2 was unable to prove that the mixing operations were carried on only occasionally or that either practical steps had been taken to provide an exhaust draught or that such steps were not practical. The Court of Appeal ruled that the burden of establishing these potential defences lay on the defence. Furthermore, as foresight of the risk of injury was not required, the decisive issue was whether the mixing operations alleged to have taken place at Battersea Power Station fell within the scope of the Regulations.

D2 referred to the Court of Appeal's earlier ruling in *Banks* (supra) where it had held that the 1931 Regulations did not apply to the lagging of pipes in a steel works to contend that they did not apply to lagging at a power station, such as that operated by D2. But this did not answer the claimant's allegations about the dust raised in mixing the lagging compound.

The Court of Appeal held that it was bound by its earlier ruling in *Cherry Tree Machine Co. Ltd. & anor. v Dawson* [2001] EWCA Civ 101, [2001] PIQR P19 in which Hale LJ (who declined to follow Banks) had held that the 1931 Regulations were capable of applying not only to premises where the manufacture or use of asbestos was central to the processes being carried out, but also to other types of premises where relevant processes were carried out: in that case a dry cleaning manufacturer. It did not accept D2's submission that the *Cherry Tree* decision was per incuriam.

In the circumstances, the Court of Appeal found that a breach of statutory duty under the 1931 Regulations had been made out and so it gave judgment to the claimant. However, leave to appeal to the Supreme Court was granted.

Commentary: This case is important for three reasons:

Firstly, to paraphrase Mr Nolan QC who represented D2 in this case (and who succeeded in his defence in *Banks* 18 years before) the Court of Appeal's ruling in *McDonald* is remarkable in the way it illustrates the wide remit of the absolute liability imposed under the 1931 Regulations where there was (a) no foreseeable risk, (b) no breach of duty at common law, (c) no liability under section 47(1) of the 1937 Act for dust of such a character as was 'likely to be injurious' and (d) no infringement of the 'substantial quantity of dust' provisions of section 47 (1) of the 1937 Act.

It is also significant because it seems this claim only succeeded under the 1931 Regulations because the Court of Appeal felt constrained to follow the

Cherry Tree ratio, under the *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 principle by which the Court of Appeal is bound by an earlier decision. The Court of Appeal appears to have had some sympathy with Mr Nolan's contentions that the *Cherry Tree* was wrongly decided and that the Asbestos Industry Regulations 1931, as their title implies, are directed to the asbestos industry alone. Accordingly, it is possible that when this appeal is heard by the Supreme Court, it may disapprove of the *Cherry Tree* decision and restore a narrower scope to the 1931 Regulations; one that restricts its application to industrial manufacture of asbestos products, as opposed to their use elsewhere.

Finally, the case provides an almost textbook illustration of the differences, not only between common law and statutory duties of care but also between the qualified / relative duty of care under generic health and safety legislation on the one hand, where the common law concept of reasonable foresight is relevant, and the asbestos specific regulations that impose an absolute duty, on the other. In the latter case, these regulations are subject only the defence of 'practicality', and that only in the sense of that the precautions stipulated should be impracticable to implement from a physical viewpoint and where an appreciation of the risk presented by the exposure to asbestos is not required.

Billingham v Lloyds British Inspection Services Ltd [2013] EWHC 520

Technical Data Note 13 cited again in low level asbestos exposure claim

(*Bean J*)

The facts: Mr Billingham was employed in the late 1960s at Cottam power station over a six week period. He conducted strength tests by dragging a chain over the top of girders and beams and placing increasing weights on them. The same girders and beams were found to have been lagged with asbestos and the dragging motion of the chain that was held to have disturbed that asbestos. The exposure however was 'for a matter of seconds' each time albeit 'to high levels of concentration, possibly as high as 100 fibre per millilitre'. The exposure therefore breached the levels prescribed by the Department of Employment in the Technical Data Note 13 but only over very short periods of time. TDN 13 detailed the action required to be taken at certain levels of airborne dust concentrations.

The defendants pleaded that the exposure should be averaged over the six week period of Mr Billingham's employment, taking it to comfortably below the TDN13 levels.

The decision: Mr Justice Bean determined that TDN13 did not help the defendant given the exposure levels far exceeded the prescribed limits, albeit for a very short time. He confirmed the question to be determined was not the breach averaged over the weeks and months of employment, but rather the fact that the breach had occurred at all.

This case summary was kindly contributed by Daniel Easton, of Leigh Day, solicitors.

Comment: It will be recalled that in *Williams v University of Birmingham* [2011] CWCA Civ 1242, the Court of Appeal applied the Supreme Court's ruling in *Baker v Quantum Clothing* [2011] UKSC 17 and held that the degree of foresight to be expected of the University was to be judged by the standards of the time, in the 1970s; not by imposing retrospectively a later understanding with hindsight. It found that the likely levels of exposure were below the minimum levels recommended by TDN 13 and held that the defendant university could not have reasonably foreseen the risk posed to an undergraduate from a short period of intermittent exposure to very low levels of asbestos dust in the 1970.

Cooper v Bright Horizons Family Solutions Ltd [2013] EWHC 2349 (QB)

Nursery liable for back injury caused by defective cot mechanism

(***David Pittaway QC***)

The facts: The claimant was a nursery nurse who hurt her back lifting a child from a cot whilst working at the defendant's nursery. She claimed that a sliding side panel on the cot was not working and that this had necessitated her adopting an awkward posture as she stooped over the cot holding the baby in her arms. She brought a claim against the nursery under Provision and Use of Work Equipment Regulations 1998 and the Manual Handling Operations Regulations 1992.

The relevant parts of Regulations 5, 8 and 9 of the Provision and Use of Work Equipment Regulations 1998 provide:

> Regulation 5(1) 'Every employer shall ensure that work equipment is maintained in an efficient state, in efficient working order and in good repair.'
>
> Regulation 8: (1) 'Every employer shall ensure that all persons who use work equipment have available to them adequate health and safety information and, where appropriate, written instructions pertaining to the use of the work equipment.'
>
> Regulation 9, so far as material, provides:—'(1) Every employer shall ensure that all persons who use work equipment have received adequate training for purposes of health and safety, including training in the methods which may be adopted when using the work equipment, any risks which such use may entail and precautions to be taken.'

The relevant parts of the Manual Handling Operations Regulations 1992 are set out in Regulation 4.

The decision: The nursery had a strict duty to ensure that the cot was maintained in an efficient state. It had failed in this regard. The defective side panel had been the cause of the claimant's injury. The claimant had been

required to manually handle a weight, with her arms extended, which exceeded the limit permitted in the nursery's own manual handling risk assessment

Comment: This case predates the implementation of section 69 of the Enterprise and Regulatory Reform Act 2013 which removes the right to bring a civil claim for a breach of health and safety legislation. However, this is one of those cases that would probably have succeeded in common law negligence as the trial judge found there had been a real and foreseeable risk of injury to the claimant undertaking the manoeuvre of putting the baby into the cot without her being able to put the cot side down.

PRESERVATION OF EVIDENCE AND ABUSE OF PROCESS

Matthews v Collins and others [2013] EWHC 2952 (QB)

No abuse of process by claimant where Coroner's office advises disposal of post mortem samples

(*Swift J*)

The facts: The widow of a man who contracted asbestosis and later died from the lung cancer that resulted brought a claim against his former employers under Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Act 1976. She claimed that her husband had been culpably exposed to asbestos dust by his employers between 1973 and 1981 during the course of his employment as a steel cladder. This had involved him in cutting and sawing through asbestos cladding boards on a regular basis.

She was not represented by solicitors at the inquest and afterwards she was contacted the Coroner's office who wanted to know what she wanted to do with the tissue samples taken from her late husband. She was wrongly advised by them that it was the Coroner's normal procedure to dispose of such samples; which she then authorised without informing her solicitors.

The defendant later applied to strike out the claim contending that the claimant's actions in authorising the destruction of the tissue samples was a deliberate action intended to prejudice the prospects of a fair trial and that as a result a fair trial was no longer possible.

The decision: The defendant's application was dismissed.

Mrs Justice Swift found that the claimant's actions had not been culpable. She had relied on the advice given to her by the Coroner. Furthermore, the defendant was unable to show that a fair trial was not possible. The microscopic tests that might otherwise have been undertaken may not have been determinative. Furthermore sufficient evidence remained to enable a fair trial of the issues, including the lay witness evidence of the deceased's work colleagues engineering and medical expert evidence that included a lifetime diagnosis of asbestosis.

Comment: The defendant's application failed because it had no merit. The outcome in this particular case should not obscure the importance in a fatal industrial disease claim of preserving evidence, both documentary and real evidence such as tissue samples. There have been two recent first instance decisions where a failure to preserve such evidence resulted in the claim being struck out*: Weaver (Widow & Personal Representative of Harry L Weaver, deceased) v Contract Services Division Ltd* considered [2009] (unreported decision of the Senior Master, 03.09.2009) and *Irene May Currie v Rio Tinto Plc and others* [2009] (unreported decision of Master Eastman, 06.10.2010).

The judge concluded her judgment with the following postscript:

> 'I propose to send a copy of this judgment to the Chief Coroner with a request that he considers advising all Coroners that, in cases where there has been a verdict that a contributory cause of death was industrial disease, any communication to the deceased's family about the disposal of histological samples should contain advice that, if a claim in respect of the deceased's death is pending, they should consult their solicitor before giving authority for disposal.

In the light of what has happened in this case, it would be good practice also for solicitors instructed by claimants in fatal asbestos claims to advise both their clients and the relevant Coroner's Office that disposal of histological samples should not be undertaken without confirmation from those solicitors that the samples are not required for the purposes of the claim.'

Whilst it is to be hoped that in future Coroner's officers will be better informed about the need to preserve tissue samples in this kind of case, practitioners would be wise not take any chances.

OCCUPIERS LIABILITY

Pierce (a child by his litigation friend Annette Pierce) v West Sussex County Council [2013] EWCA Civ 1230

LEA not liable for schoolboy's self inflicted injury

The facts: A nine year old hurt his hand whilst attending an after-school event at the defendant's school where he was a pupil. However the injury occurred as he was attempting to hit his brother with a swinging blow. He missed and his fist hit a sharp edge on the underside of a water fountain. The trial judge found that as the edge was sharp it had presented a foreseeable danger and that in the absence of a risk assessment the LEA was liable. It is hardly surprising that the LEA appealed the first instance decision.

The decision: The appeal was upheld. The trial judge had failed to consider the common law duty of care under section 2 of the Occupiers Liability Act 1957. Had he done so, he would have found that visitors to the school had been reasonably safe in using the premises, including the water fountain. Any school will have numerous edges that might injure a child who strikes them.

CONFLICT OF LAWS

Stylianou v Toyoshima and another [2013] EWHC 2188 (QB)

England is the correct jurisdiction for an English holidaymaker gravely injured in Western Australia

(***Sir Robert Nelson***)

The facts: An English national was rendered tetraplegic in a road accident in April 2009 whilst holidaying in Western Australia. In November 2009 she issued a claim in Australia against Mr Toyoshima, the Japanese national responsible for the accident, and his insurers, Suncorp, who were based in Queensland. She sought interim payments to fund her immediate care and repatriation to England. Liability was admitted and interim payments were made. The proceedings were then stayed.

Upon her return to the UK, the claimant wanted to issue fresh proceedings in England. The main reasons behind this decision were firstly, that it was no longer possible to travel to Australia due to her condition and that all the remaining issues and evidence concerning her future care and needs lay in this jurisdiction (liability being admitted) and that the lower English discount rate would deliver in real terms a much higher award for her future loss claims than the 6% discount rate in Australia.

She issued the present action in April 2012 (the day before the statutory limitation period expired) and applied for leave to serve the proceedings out of the court's jurisdiction and, because Mr Toyoshima could not be traced, a substituted service order on him via Suncorp's offices.

There were three main issues:

- Which jurisdiction should apply
- Which law should apply
- Was the second action an abuse of process, given the advanced state of the proceedings in Australia?

The decision: Sir Robert refused the Defendant's application to strike out or stay the English proceedings and held:

(1) The consequential financial losses suffered by the Claimant in England constitute damage sustained within the jurisdiction under CPR 6.36 and 6 BPD 3.1(9)(a).

(2) The applicable law is Western Australian law.

(3) The proper place in which to bring the claim is England.

(4) The second action was not an abuse of process.

The jurisdiction issue covered by the Civil Procedure RulesCPR 6.36 and 6.37 required the claimant to establish the following:

- That her tortious loss had been sustained in this jurisdiction, see Practice Direction 6B 3.1
- That there was a serious issue to be tried
- That England was a proper place to bring the claim

The issue as to whether the claimant's damage had been sustained in the United Kingdom was to be determined in the light of the guidance provided within *Booth v Phillips* [2004] 1WLR3292 and *S.A Cooley (by his father and litigation friend) P. A. Cooley v T. R* Ramsey [2008] ILPr27. Although the claimant's physical injury was undoubtedly sustained in Australia, her indirect damage and future losses would be incurred in England. Whilst a different approach is required under Brussels I and again under Rome II, those are different regimes. The EU Rules seek certainty at the price of inflexibility: thus forum conveniens arguments are not permitted. Whereas and by contrast the common law jurisdictional rules adopt a more flexible legal framework that permit a greater discretion. Rome II does not concern jurisdiction and so it does not override CPR 9(a). Consequently, the judge ruled that the claimant's secondary losses satisfied PD 6B 3.1.

No one disputed that there was a serious issue to be tried and so the final hurdle for the claimant was to establish that England was a proper place to bring the claim. The test is different to the similar test under Article 4(3) of Rome II. An important factor in the judge's decision was that the remaining issues in the action concerned quantum not liability. He was also persuaded by the fact that the Claimant is English and she will continue to live and suffer the consequences of her grave injuries here in England. She cannot travel to Australia and the obtaining instructions from her during a hearing would be very difficult for a gravely injured claimant in a different time zone many thousands of miles away. Furthermore, the many expert witnesses are all based in England. Accordingly, he held that the English courts had jurisdiction.

The applicable law covered by Rome II

Under articles 2 and 4(1) of Rome II the basic rule is that the applicable law is the law of the country where the damage occurs, irrespective of the country in which the indirect consequences of that event occur.

There are two exceptions, that can produce a different result: (i) the law of the country where both parties were habitually resident when the damage occurred or (ii) the law of the country with which the case is manifestly more closely connected than the other countries, the parties have the option of choosing, by mutual agreement, the law that will be applicable to their obligation.

The key issue that depended on the outcome was, of course, whether or not the less generous Australian discount rate should be applied in the quantification of the claimant's future loss.

The judge decided that the less flexible interpretation required to deliver the object of Rome II which is to guarantee certainty in the law and to seek to

strike a reasonable balance between the persons claimed to be liable and the person sustaining the damage. He held that Australian law applied to the assessment of the claimant's damages and so her damages would be quantified accordingly

Abuse of process

The judge accepted that there were two valid reasons for the bringing of the proceedings in England. Firstly, the increased damages which might result and, secondly, the need for the Claimant to have the trial in a location where she and the witnesses can attend and deal properly with the litigation.

Comment: This is an interesting if exceptional case that reflects the fact that liability was not in dispute and the grievously injured claimant was residing in England and would remain here indefinitely. It illustrates the different approach to interpreting our common law rules on jurisdiction and applicable law under Rome II.

FRAUD

R v McKenzie [2013] EWCA Crim 1544

Fraudster sentenced to prison for 15 months

The facts: McKenzie and 2 co-accused concocted a bogus insurance claim based on a fictitious road accident in which they claimed to have sustained whiplash injuries. The claim amounted to £33,000. They were charged with and convicted of fraud. The police investigations revealed that D was part of a ring of 70 people who perpetrated these scams and that he had committed 24 similar frauds.

The sentence: McKenzie was sentenced to 15 months' imprisonment and ordered to pay £3,242.00 towards the prosecution costs. His appeal against sentence was dismissed but the costs contribution order was reduced to £1,500 to take into account his reduced financial circumstances.

Comment: This case demonstrates that the law is perfectly capable of protecting insurer's interests where it is properly applied. No doubt this prosecution was made possible due to improved intra-insurer co-operation and the use of an anti-fraud database. Further progress could be made if insurers co-operated with the legal profession in tackling fraud. Insurers need to be more proactive bringing private prosecutions where the Police don't. The insurance industry's current policy of disparaging genuine whiplash injury victims and portraying minor whiplash injury claims as being synonymous with a fraudulent claim is as unfounded as it is disingenuous.

QUANTUM

DD v Tees Esk and Wear Valleys NHS Foundation Trust [2013] (unreported) 13 May 2013

(*Globe J*)

Queen's Bench Division: The claimant was the husband of the deceased (X) who died on February 14, 2008 after taking an overdose of dihydrocodeine.

X had a history of mental health problems. At the date of her death, she was under the care of the defendant trust (D), which admitted that it should have acted to prevent her death by proper management and supervision. In particular, action should have been taken on February 13, 2008, when D knew X had taken an overdose of Lorazepam. If action had been taken, X's subsequent death would have been avoided. D admitted liability.

Damages for pain, suffering and loss of amenity were awarded in respect of X's pain and suffering prior to her death. X had a dependent disabled daughter and brother and a dependency claim was brought in respect of them both. X's daughter had profound learning difficulties and would require extensive substitute care in the future for the rest of her life. The brother, but for the death of X, would have received an on-going dependency for his lifetime. General Damages: £5,000. Damages for bereavement including interest: £13,000. Past loss dependency services to X's daughter and her brother: £113,000. Future dependency under the Fatal Accidents Act 1976 for the dependent brother: £25,000. Future dependency under the 1976 Act for the dependent daughter: £744,000. Total Damages: £900,000.

This report was kindly contributed by Mary Ruck of Byrom Street Chambers.

Correspondence about the contents of this Bulletin should be sent to Barbara Bergin, Editorial LexisNexis Lexis House 30 Farringdon Street London, EC4A 4HH (tel 01545 590208).

Subscription and filing enquiries should be directed to LexisNexis Customer Services, PO Box 1073, Belfast BT10 9AS (tel: +44 (0)84 5370 1234).

Visit LEXISNEXIS direct at www.lexisnexis.co.uk

© Reed Elsevier (UK) Ltd 2013

Published by LexisNexis

Printed and bound in Great Britain by Hobbs the Printers Ltd, Totton, Hampshire

ISBN 978-1-4057-7744-5