Butterworths Personal Injury Litigation Service

Bulletin Editor
Nicholas Bevan

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VICARIOUS LIABILITY

Cox v Ministry of Justice [2014] EWCA Civ 132

MoJ vicariously liable for prisoner

(Lord Justice McCombe, Lord Justice Beatson and Lady Justice Sharp)

The facts: a catering officer was injured by a prisoner's mishap. The prisoner was one of a number in her charge that had been tasked with carrying 25kg sacks of rice up some stairs. One sack split and its contents spilled over the steps, creating a slipping hazard. She told the prisoners to stop and wait until the mess was cleaned up but one prisoner thought he knew better. He ignored her and carried on regardless, slipped on the rice and dropped his load on the catering officer, injuring her in the process.

The case against the MoJ was that it was liable (i) directly, in negligence, and also (ii) vicariously (without regard to fault) for the prisoner's negligence. Both claims were dismissed by HHJ Keyser QC. The claimant appealed.

The decision: the Court of Appeal upheld the appeal and found the MoJ vicariously liability.

Comment: McCombe LJ's leading judgment in *Cox* serves as a useful companion to Phillips LJ's seminal judgment in *Catholic Child Welfare Society v Various Claimants (FC)* [2013] 1 All ER 670 and it is a 'must read' for practitioners seeking to navigate the treacherous and incompletely chartered waters around this area of the law. Vicarious liability is a concept that still eludes a completely watertight definition. It has been aptly described as 'a loss distribution device based on grounds of social and economic policy' by Millet LJ in *Dubai Aluminium Co. Ltd v Salam and Ors* [2002] UKHL 48. (Similar phraseaology was used by the same judge in the landmark sexual abuse ruling in *Lister v Hesley Hall Ltd* [2001] UKHL 22.) Another eminent

jurist, Lord Pearce, has described it as a doctrine; one that 'has not grown from any very clear, logical or legal principle but from social convenience and rough justice'. See *ICI v Shatwell* [1965] AC 656.

Whatever its precise classification (policy, doctrine or concept), vicarious liability is perhaps best understood by what it does. It operates to fix a completely innocent third party with responsibility for someone else's tortious (sometimes criminal) wrong; hence the 'rough justice' epithet. As a bold exception to conventional tort law rules, it is used sparingly and with circumspection: it is not a 'cure all' for every hard luck case. It is deployed where the justice of the situation make it expedient and in keeping with judge made criteria.

The range of situations deemed appropriate for a finding of vicarious liability has widened considerably over the past few years. The courts have taken giant strides in extending its remit in keeping with modern expectations and social change. Whilst it is clearly no longer the case that it is confined to the relationship of 'master and servant', it still seems to have retained at least one foot on *terra cognita* – with phrases such as 'akin to employment' still being in regularly used in many judicial explications.

Although the scope of vicarious liability has been extended to encompass a nightclub owner for a gratuitously vicious bouncer, the Police for a homophobic officer, priests for the abuse of children (extending even to a non-parishioner that had no connection with the church or its youth group), for abuse by nuns and wardens, commercial subsidiaries, an unincorporated association for a bellicose sportsman, between partners in a law firm for a fraud, the dual liability of two subcontractors; yet it is still circumscribed by the need to establish a special relationship between the torfeasor and the unwitting third party.

Establishing new precedent for vicarious liability scenarios will always be a matter of fine judgment; its exercise attracts a correspondingly high litigation risk. This is well illustrated by the first instance decision in *Cox*, in which the trial judge undertook a careful and painstaking review of all the correct authorities but which nevertheless arrived at a different outcome. The deciding factor in the *Cox* appeal was not the degree of control exercised over the perpetrator by the Prison Service, nor whether the prisoners were voluntarily contracted or properly paid but, to paraphrase yet another part of the judgment, whether the wrongful act was 'so much part of the work, "business", or organisation of the person or entity who it is said should be vicariously liable that it is just to make the latter answer for the negligence of the former'.

There are clear echoes of *Caparo Insustries plc v Dickman* [1990] UKHL 2 (whose three-stage test is used to establish a whether a duty of care exists in an unusual case where no obvious precedent exists) in the two-stage test promulgated by Lord Phillips in the *Catholic Child Welfare* case; and for good reason.

The judgment in *Cox* is of particular interest in the way it applies the *Catholic Child Welfare* criteria to a new vicarious liability scenario, see paras 42 to 47 of McCombe LJ's judgment, and it is to be welcomed for the valuable new precedent it has set.

LIMITATION

Collins v Secretary of State for Business Innovation and Skills and another [2014 EWCA]

Prejudice suffered by defendant prior to expiry of limitation period is relevant

(Jackson, Lewison and Macur LJJ)

The facts: Collins worked for various employers at the London Docks between 1947 and 1967 and claimed that he has been culpably exposed to asbestos whilst handling a variety of different types of raw asbestos in hessian sacks. The key dates are as follows:

- Early 2002 – becomes unwell.
- Mid 2002 – diagnosed with in operable lung cancer. Fortunately he responds well to radiotherapy.
- Mid 2003 – date of constructive knowledge under s 14 of the Limitation Act 1980.
- 2008 – discharged.
- July 2009 – sees solicitors advertisement.
- November 2009 – solicitors sent defendant letter of claim.
- May 2012 – solicitors commence proceedings.
- April 2013 – judge upholds defendant's limitation defence.

The claimant appealed against a first instance decision of Nicol J who refused to exercise the court's discretion under s 33 of the Limitation Act 1980 to disapply the statutory limitation period and who struck out his claim. The judge found the claimant's evidence to be inconsistent on important matters that were relevant to the possible apportionment of the claimant's claim between different potential defendants. This was said to be attributable to the claimant's failing memory. He also took into account all the factors listed in s 33(3) including the difficulty of establishing his claim and its relatively modest value. The expert evidence was the risk of lung cancer returning was only about 2%.

The key issue: was whether the court could properly take account of the prejudice occasioned to the defendant between the date of exposure (some time prior to 1967) and the date when the claimant had constructive knowledge under the 1980 Act (found to be mid 2003). The Court of Appeal cited numerous authorities to support the first instance decision to the effect that the court should take this 'first' period of delay into account. That said

the court will accord less weight to this factor. The pre-limitation period effluxion of time is merely one of the relevant factors to take into account.

The decision: the trial judge had been right to treat the lengthy period of historic delay as a factor making it less equitable to extend time under s 33(1), even though less weight is given to this history delay, pre-limitation period effluxion of time is one of the relevant factors to take into account. The appeal was dismissed.

Comment: The fatal delay in this case was of course the six-year delay after the date of constructive knowledge. The claimant's failing memory compounded the defendant's prejudice. That the claim was problematic and also not particularly valuable was also significant. Reading between the lines, the s 33 discretion might have been exercised had the claimant been a better historian and the solicitors issued earlier.

EMPLOYERS LIABILITY

McGregor v Genco (FC) Ltd [2014] All ER (D) 77 (May)

Department store not liable for exposing sales assistant to asbestos in mid 1976

(Mrs Justice Patterson)

The facts: the claimant, who was diagnosed as suffering from mesothelioma in 2012, brought a claim against her former employers whom she alleged had wrongfully exposed her to asbestos dust in mid 1976. She claimed that her employers, a department store, had continued to trade whilst they carried out extensive modifications to their escalators. She alleged that she had been obliged to dust off her stock of shoes several times a day and that the wooden partitioning separating her from one escalator was only a few feet high and a few feet away from her work position. It was found that these works had probably involved taking out and reinstalling asbestos fireproof sheeting and so exposure to asbestos was a possibility. However, the judge found on the balance of probability that the department store had boarded up the areas that were affected to reduce the dust nuisance to the rest of the store. The claimant's case was founded on common law negligence.

The decision: The claim failed. The judge found it probable that the partitioning had been floor to ceiling and on the basis of that assumption the expert evidence was that her exposure to asbestos dust from the works was intermittent and low level, falling below the levels set by the occupational hygiene standards at the time, which are set out in Data Note 13 which was published in 1970. Applying Aikens LJ's dicta in *Williams v University of Birmingham and Another* [2011] EWCA Civ 1242, namely that foresight is not to be judged with the omniscience of hindsight but by the standards at the time of the alleged negligence. The judge found that there had been nothing to put the defendant on notice sufficient for them to make an enquiry as to the possible hazard presented by exposure to asbestos dust from these works.

Comment: This case confirms how difficult it is to establish culpable foresight on the part of owners of premises for minimal levels of exposure to asbestos

in the 1970's, and it follows a line of cases such as *Williams and Lillian Rose Asmussen v Filtrona United Kingdom Limited* [2011] EWHC 1734 and *Abraham v Ireson & son* [2009] EWHC 1958. The successful outcomes in *Sienkiewicz v Greif (UK) Ltd; Willmore v Knowsley Metropolitan Borough Council* [2011] UKSC 10 can arguably be viewed exceptions that prove the rule.

ACCIDENTS ABROAD

Cox v Ergo Versicherung AG [2014] UKSC 22

Fatal Accidents Act 1976* (*FAA 1976*) *disregard has no application where German law applies to foreign accident

(Lord Neuberger P, Lord Mance, Lord Sumption, Lord Toulson, and Lord Hodge)

The facts: Mr Cox, who was domiciled in England, was killed when he was knocked off his bicycle in Germany. The driver responsible was insured with German based insurer Ergo Versicherung AG.

Mrs Cox brought a direct action in England against the foreign insurer, under arts 9 and 11 of the Brussels I Convention (Council Regulation (EC) No 44/2001 of 22 December 2000) relying on the *FBTO Schadeverzekeringen NV v Odenbreit, CJEU Case-463/06* [2007] All ER (D) 206 (Dec) ruling on the direct right of action that subsists in these circumstances.

Liability was not disputed.

The accident predated the application of Rome II (Council Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations). However, it was common ground that the effect of the Private International Law (Miscellaneous Provisions) Act 1995 was that German law applied to the claim. Mrs Cox contended that the FAA 1976 should still govern the way her damages should be assessed.

The applicable German law (governed by s 844 of the Burgerliches Gezetzbuch) requires a victim's right to maintenance be assessed on a full restitution basis but it has strict rules against double recovery.

By comparison, the FAA 1976 creates a statutory exception to our own common law rule against double recovery. This occurs in the way that a dependency claim is treated as crystallising from the moment of death. Sections 3 and 4 expressly leave out of account the remarriage of the widow or her prospects of remarriage as well as benefits that have or will or may accrue as a result of the death. This exception is a result of deliberate Government intervention which was categorised by a majority of the Supreme Court as a matter of substantive law.

The issue: could Mrs Cox benefit from the more generous discount provided under the FAA 1976 when calculating the damages to which she was entitled under German law?

The decision: the Supreme Court ruled that Mrs Cox was not entitled to the more generous approach to quantifying her loss under the FAA 1976.

The Supreme Court followed *Harding v Wealands* [2007] 2 AC 1 which treats the heads of of damage as a matter of substantive law to be determined by the foreign applicable law (in this case Germany), whereas the approach to be adopted in their assessment is a question of procedure that is governed by the law of the forum (in this case England).

Since the FAA 1976 does not have extra-territorial jurisdiction its special rules for quantifying a dependency claim do not apply to Mr Cox's accident in Germany. Although English law applied to the procedural aspects of quantifying Mrs Cox's loss, the court would have to apply the relevant German law governing the basic restitutionary principles.

The result was that the normal common law rule against double recovery applies to this claim, so that Mrs Cox was entitled to her net loss only. This is consistent with the common law 'not a penny less, nor a penny more' principle.

Comment: although this ruling predates Rome II, it will remain just as relevant to accidents on or after 11 January 2009. Under Rome II the old distinction between substantive and procedural law no longer applies. However, see *Wall v Mutuelle DE Pitiers Assurances* below.

Wall v Mutuelle De Pitiers Assurances [2014] EWCA Civ 138

Civil Procedure Rules* (*CPR*) *apply to the evidence required to assess a foreign accident claim even where foreign law and procedural rules apply under Rome II

(Longmore, Jackson and Christopher Clarke LJJ)

The facts: an English motorcyclist was knocked off his bike and grievously injured by a French driver in France. Liability was not disputed.

Mr Wall had a substantial claim for future loss of earnings and long-term care needs. It was common ground that under art 4 of Rome II (see above for full citation) French law applied not just to the issue of primary liability but also to determine 'the existence, the nature and the assessment of damage or the remedy claimed'. The dispute was as to which national rules applied to the adduction of evidence.

The defendant insurer wanted to employ the continental model of inquisitional claims investigation and to use a single joint expert. Under French law the court usually selects one or two medico-legal experts to advise the judge. These experts may rely on experts in other disciplines where necessary and they can incorporate those secondary opinions in their own report. These sub-experts are known to French lawyers as '*sapiteurs*'. There is rarely an opportunity to cross-examine these sub-experts.

The claimant's representative argued that this would not do justice to the claimant's case and sought to rely on their own medical, care and accountancy experts and for the CPR to apply in this regard.

At first instance, Tugendhat J ordered that as art 1.3 of Rome II expressly excludes procedure and evidence from its conflict of law provisions CPR 35 still governed the quantification of the heads of claim permitted under French law. The obligation on the local court to apply French law did not extend to require the court to put itself in the position of a French court and to decide the case in the same way that a French court would have decided it. The defendant insurer appealed.

The decision: the appeal was dismissed.

In presenting the leading judgment, Longmore LJ observed that Rome II does not envisage that the law of the place where the damage occurs should govern the way in which evidence of fact or opinion is to be given to the court which has to determine the case.

He gave three reasons why it would be inappropriate to apply French evidential rules in an English court:

1. English rules of disclosure will not be the same as they are in every foreign country. It would be very odd if the rules of disclosure were not matters of 'evidence and procedure' within the art 1.3 exception.

2. English rules of evidence contemplate the giving of oral evidence by a procedure of examination-in-chief, cross-examination and re-examination of witnesses. Even if the author of a French-style expert report were prepared (as he would have to be) to submit to such a procedure it would be meaningless, to the extent that his or her report incorporated material outside his or her personal expertise.

3. A French court would think it unhelpful (to put it mildly) to be presented with English-style expert evidence about the consequences of an English accident to a French driver or motorcyclist, in the form of reports from experts in (say) ten disciplines presented by each party and having to choose between them without resort to its own method of dealing with expert evidence.

Comment: Under Rome II a claimant is entitled to recover all heads of recoverable loss which are recognised under the foreign applicable law rules. However, when it comes to determining how those damages are assessed that will be subject to the evidential rules of the home court. So that where the foreign applicable law prescribes the kind of loss that is recoverable, that rule is to be imported. However, when it comes to the practical matter of proving how the recoverable loss is to be proved, that is governed by the rules of the home court which, in England, is the CPR.

Longmore LJ opined that French judicial practice and guidelines on the assessment of damages, along the lines of the English Judicial College Guidelines, would be relevant to the English court. Leave had already been granted in *Wall* to admit expert evidence on French law. Although this kind of judicial guidance was 'soft law', it was law nonetheless. Accordingly the 'Dintilhac' heads of loss under the French legal system should be taken into

account by the English the court but it still has discretion to depart from these guidelines, as with the JCB, where appropriate.

UNDERSETTLEMENT AND CAPACITY

Dunhill v Burgin [2014] UKSC 18

Supreme Court rescinds consent order on grounds of incapacity

(Lady Hale DP, Lord Kerr, Lord Dyson, Lord Wilson and Lord Reed)

The facts: A claimant, who was knocked down and injured by a driver, agreed to have her personal injury claim settled on the day of the hearing. She was represented by a barrister and a trainee solicitor at court when her claim was settled in 2003 for £12,500. Unfortunately no one fully appreciated the full extent of her injuries nor that she lacked the requisite mental capacity to settle her claim. The terms of compromise were set out in a consent order signed by both parties' counsel.

Several years later she consulted new solicitors who saw things very differently. They realised that this was far from a straight forward claim and, more to the point, they assessed quantum at a very different order of magnitude: of up to £2 million.

In 2006 her new solicitors applied to set aside the consent order on the grounds that (i) at the time the settlement was agreed the claimant had lacked sufficient mental capacity to conduct her claim so that she should have been a protected party; and (ii) this incapacity made the settlement invalid because, being a protected party, the consent order agreed on her behalf required court approval under CPR 21 to be valid.

21.10

(1) Where a claim is made –

(a) by or on behalf of a child or protected party; or

(b) against a child or protected party,

no settlement, compromise or payment (including any voluntary interim payment) and no acceptance of money paid into court shall be valid, so far as it relates to the claim by, on behalf of or against the child or protected party, without the approval of the court.

The defendant succeeded initially before Mr Justice Silber who held that the claimant's capacity was to be judged by reference to the (less complicated) decisions that she was actually required to take in the action as formulated by the original solicitors. He found that as the claimant could not rebut the presumption that she had that capacity, she was not a protected party. The claimant's appeal to Silber J in the High Court succeeded and the defendant then appealed that decision.

When the matter was considered by the Court of Appeal, Lord Justice Ward held that the claimant's capacity was not to be assessed in the light of what was required of her in 2003, as presented by her lawyers, but by taking into

account her ability to comprehend and to conduct the proceedings as they should have been framed. The case was then ordered to be remitted back to the High Court but as the defendant appealed, and given the important issues involved, the case was referred to the Supreme Court.

The Supreme Court decision: Lady Hale delivered the unanimous judgment. She upheld the Court of Appeal's approach. She held that the correct test was to ask whether the claimant had been fit to conduct the claim, or cause of action that she actually had, as distinct to the case as understood or pleaded by her lawyers.

Applying this standard, she found that the claimant had lacked the requisite capacity to conduct her case at the time her claim was settled. She should have had a litigation friend appointed. As the consent order had not been approved by the court under CPR 2 it was invalid and should be set aside.

In delivering her judgment Lady Hale stated:

> … the policy underlying the Civil Procedure Rules is clear: that children and protected parties require and deserve protection, not only from themselves but also from their legal advisers.… [Approving an earlier commentary on a previous version of the relevant rules[1]] … the objects of the compromise rule was "to protect minors and patients from any lack of skill or experience of their legal advisers which might lead to a settlement of a money claim for far less than it is worth", a sentiment which has been carried forward into the current edition of Civil Procedure.

The consent order being rescinded she remitted the case back for a trial.

Comment: The key point to take away from this ruling is that the CPR 21 applies whenever a party lacks mental capacity to conduct a claim, regardless of whether a party's lack of capacity is known to anyone.

Court approval of settlements on behalf of children and protected parties is an absolute requirement: one that is imposed as a condition precedent to its validity. It applies to all actions governed by the CPR not just personal injury claims.

Whilst is relatively easy to discern whether a client is a child, it is not always so obvious to discern that they have cognitive or other mental incapacity, particularly in the case of the elderly or where a claimant appears to be merely mildly eccentric or forgetful and disorganised; the mental capacity test is a fact specific one. This presents legal practitioners, and in particular defendants, with something of a risk management issue. They should incept appropriate measures to ensure where a party lacks the requisite mental capacity that it is spotted: in appropriate cases this may involve obtaining an expert medical opinion. It is already best practice to routinely address the issue of mental capacity when instructing medical experts where there has been a head injury.

The *Dunhill* ruling is important for three reasons:

- First, it provides clarification on the correct test for determining mental capacity.
- Secondly, it confirms that if a claim is settled or compromised in ignorance of the fact that one of the parties lacks the requisite capacity and the parties agree what ostensibly appears to be a binding agreement, that can be set aside and the claim reopened, notwithstanding the common law rule in *Imperial Loan Co Ltd v Stone* [1892] 1 QB 599. In doing so *Dunhill* demonstrates the ability of the CPR to amend the substantive common law rules that determine the ability of an agent to conclude a binding agreement on behalf of someone lacking the requisite capacity.
- Thirdly, it exposes inconsistencies in the protection afforded to vulnerable individuals under our national law. The standard of protection extended to minors and protected parties under the CPR do not extend to victims of untraced drivers under the Untraced Drivers Agreement 2003. This scheme is administered by the Motor Insurance Bureau (MIB), a private company owned and operated by a coterie of senior motor insurance executives without any supervision or control by the Department for Transport who are ultimately responsible. The lack of any suitable safeguards under the 2003 scheme is an anomaly that requires urgent revision. Without these basic additional safeguards how can those who are deemed to lack the requisite mental capacity to manage their cases be expected to recognise an unfair compromise or settlement offer for what it is; when to make a challenge or objection to the way the MIB have prepared or investigated the claim, or otherwise to spot evidential bias that is such a common feature in the expert evidence procured on behalf of defendant insurers and the MIB alike?

EVIDENCE

Rogers and another v Hoyle [2014] EWCA Civ 257

Crash investigation report admissible in personal injury claim

(Lady Justice Arden, Lord Justice Treacy and Lord Justice C Clarke)

The facts: The family of a former captain in the Royal Marines who was killed in a tragic air accident have successfully resisted the defendant insurer's attempts to exclude a damming Air Accident Investigation Report from being admitted in evidence in their claim against the pilot, who miraculously survived the crash.

The claimants' case is that the accident was caused by the pilot negligently attempting a dangerous loop the loop manoeuvre too close to the ground and without adequate training. The pilot blames a mechanical fault.

As is well known the Air Accident Investigation Branch (AAIB) responsible for investigating such incidents is part of the Department for Transport. Its reports are not commissioned for the parties involved in a civil claim. Its powers are set out in Civil Aviation (Investigation of Air Accidents and

Incidents) Regulations 1996. It is an independent agency and so the form and content of its reports are not governed by the CPR Pt 35 or otherwise.

The admissibility of an AAIB report as evidence in a civil claim has long been established. These reports do not constitute a judicial determination that would be caught by the rule in *Hollington v Hewthorn* [1943] KB 857. It is also well established that it is the role of the court to decide the relevance of the various statements of fact and opinion set out within the report and to judge the weight to be given to them.

In this particular case, the AAIB report's synopsis included the following observation about the biplane in the moments before the crash:

> … [it] was seen by observers on the ground to pull up into a loop and during the manoeuvre it entered a spin from which it did not recover. The manoeuvre started at 1,500 feet and there was insufficient height for the pilot to recover from the subsequent spin.

The report also included various statements of fact and opinion that the claimants sought to rely on to support its case. It expressed the view that there had been insufficient height for the pilot to recover from the loop. It also claimed that the pilot 'was not formally trained in aerobatics and had limited experience of spin recovery'.

The insurers raised a number of technical objections, all of which failed both at first instance and on appeal.

The decision: the AAIB reports are prima facie admissible in evidence in a civil action. The fact that parts of the report may contain unattributed statements and expressions of opinion on matters that the author has no expertise does not make the entire report inadmissible. It is for the trial judge to make use of the report as he thinks fit and to excise from it anything that is inadmissible.

At paragraph 80 of Lord Justice Clarke's judgment he said:

> For the judge to be denied sight of a report of this character – authoritative, independent, prompt and detailed – and for any experts called to be unable to refer to it in court, when it is freely available to the public, is difficult to justify … their use considerably assists the efficient and speedy resolution of claims; and the majority of potential civil claims arising from civil aviation accidents settle on the basis of AAIB reports.

MITCHELL AFTERSHOCKS

This bulletin is primarily concerned with liability issues, however *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 was so important that it was added to Issue 122 in November 2013. As practically every practitioner will know, *Mitchell* is the case the Court of Appeal adopted a draconian approach to an application for relief from sanctions under the new post Jackson civil justice regime. Its key message is that well-intentioned incompetence, nor any other excuse for that matter, will not usually attract relief from

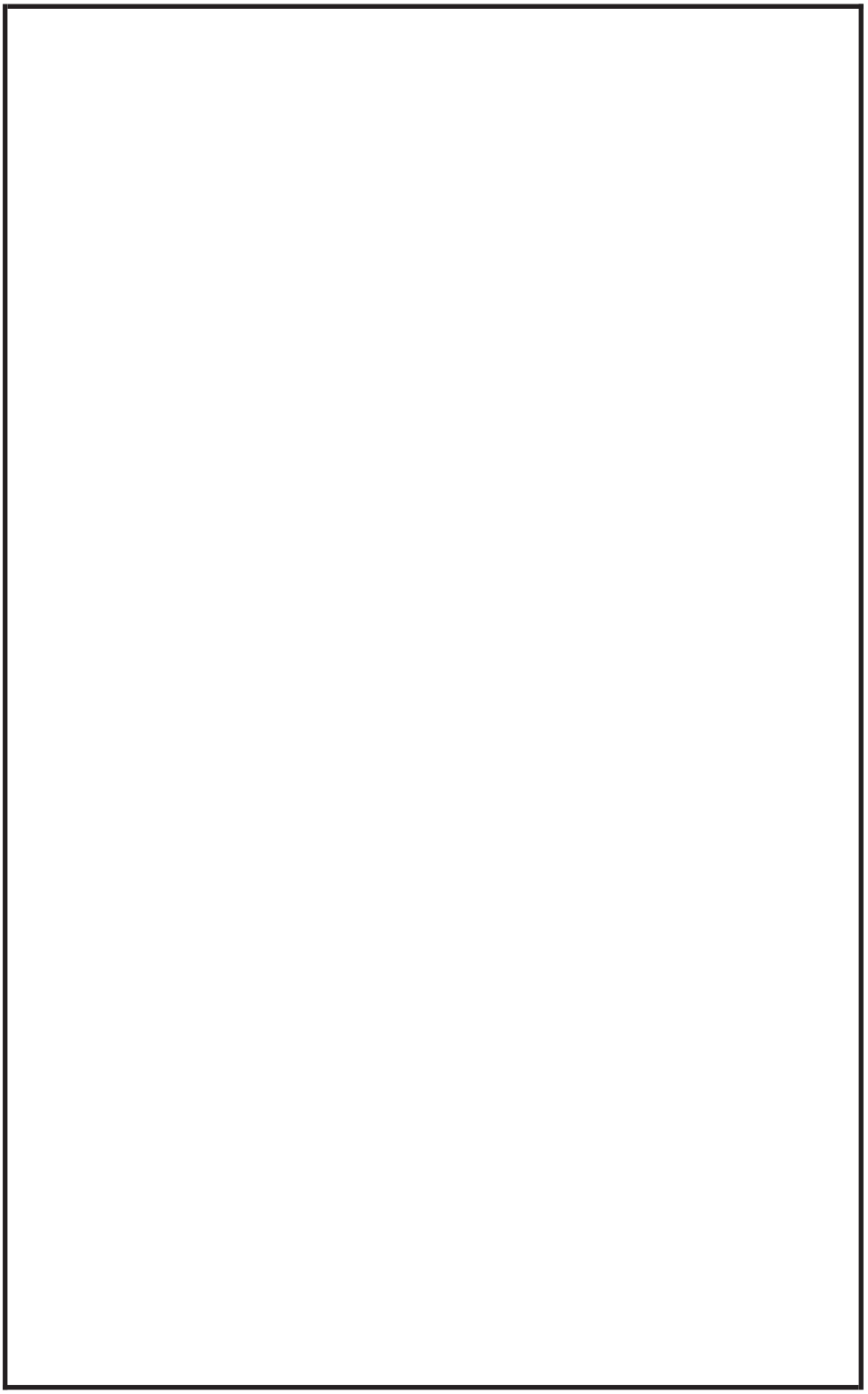
a sanction unless the default is trivial or there is some very good reason such as a debilitating illness; even where the effect of the sanction is wholly disproportionate to the administrative inconvenience caused.

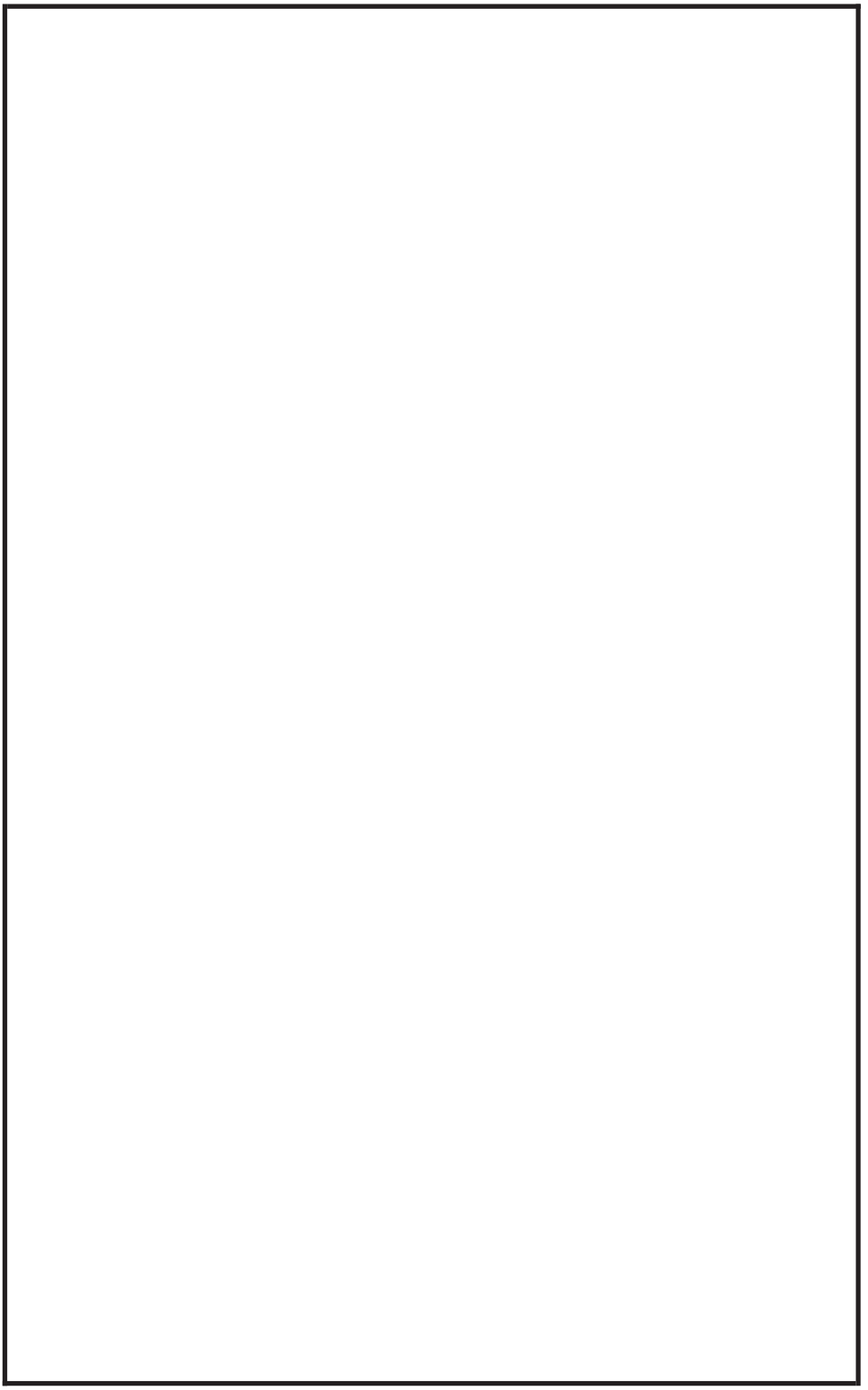
This intolerant approach has now been endorsed by successive Court of Appeal rulings. In *Durrant v Chief Constable of Avon & Somerset Constabulary* [2013] EWCA Civ 1624, Lord Justice Richards judgment is essential reading for practitioners. At para 35 he explains the rationale:

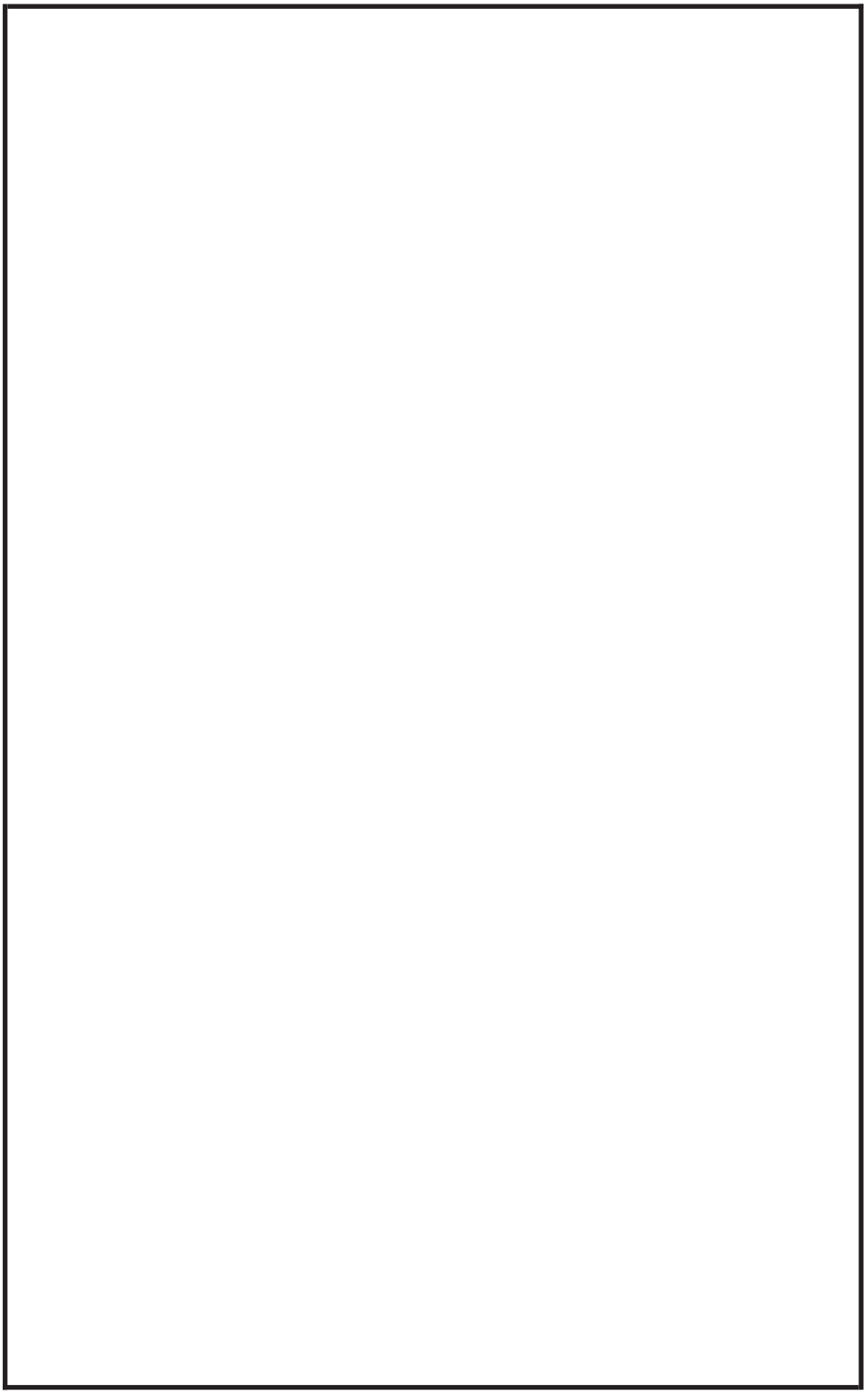
> The judgment in *Mitchell* reiterated (at para 52) that this court will not lightly interfere with a case management decision. It quoted the observation of Lewison LJ in *Mannion v Gray* [2012] EWCA Civ 1667, para 18, that "it is vital for the Court of Appeal to uphold robust fair case management decisions by first instance judges". Equally, however, if the message sent out by *Mitchell* is not to be undermined, it is vital that decisions under CPR 3.9 which fail to follow the robust approach laid down in that case should not be allowed to stand. Failure to follow that approach constitutes an error of principle entitling an appeal court to interfere with the discretionary decision of the first instance judge. It is likely also to lead to a decision that is plainly wrong, justifying intervention on that basis too. We do not share Mr Payne's concern about this leading to an increase in appeals and thereby undermining the efficiency benefits of the Jackson reforms. As is stated at para 48 of the *Mitchell* judgment, "once it is well understood that the courts will adopt a firm line on enforcement, litigation will be conducted in a more disciplined way and there should be fewer applications under CPR 3.9. In other words, once the new culture becomes accepted, there should be less satellite litigation, not more".

Where relief has been granted, it is due to exceptional circumstances. In *Chartwell Estate Agents Ltd v Fergies Properties SA* [2014] EWCA Civ 506, the Court of Appeal provided a further endorsement of *Mitchell* whilst granting the relief sought (even though the breach was not trivial and there was no good reason) because both parties were in default, the claimant's default did not have any significant cost implications and the trial date was unaffected.

The hard line was followed in *Thevarajah v Riordan & Ors* [2014] EWCA Civ 15 and it is now clear that there is no appetite in the Court of Appeal to overturn first instance case management decisions that apply *Mitchell*. It seems that we must all reconcile ourselves to the fact that, under the new post Jackson regime, where a party has made a procedural blunder the wider interests of doing justice between the parties are subordinated to the procedural convenience of the courts.







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