Butterworths Personal Injury Litigation Service

Bulletin Editor
Nicholas Bevan

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ROAD TRAFFIC

Case C-162/13 Vnuk v Zavarovalnica Triglav d.d. ECLI:EU:C:2014:2146

Third party motor insurance should cover all types of motor vehicle and use at any location

(M. Ilešič, President of the Chamber, C.G. Fernlund, A. Ó Caoimh, C. Toader and E. Jarašiunas)

The facts: A Slovenian farmworker was injured when he was knocked off a ladder by a reversing tractor and trailer whilst he was stacking bales of hay in a barn loft. The incident occurred in a farm yard on private property. His claim against the driver's motor insurers failed at first instance and he appealed to the Slovenian Supreme Court.

The issue: The court stayed the proceedings and referred the case to the Court of Justice of the European Union (CJEU) to determine whether the duty to insure 'the use of vehicles' within the meaning of art 3(1) of the First Directive on motor insurance (72/166/EEC) covered the accident circumstances.

A number of member states intervened in the proceedings, including the UK, and they argued that the compulsory insurance requirement should not apply to the circumstances of the case.

European legislative provision: The First Motor Insurance Directive: Article 3 of both the First and Sixth Directive on motor insurance (the latter is a consolidating directive that was not in force at the time of the accident) provide:

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

Different emphasises: The court noted the subtle variations of emphasis within the different language editions of the motor insurance directives, the different the ways in which individual member states have implemented the compulsory third party insurance requirement and the importance of a consistent approach. It noted that 'where there is divergence between the language versions of a European Union text, the provision in question must be interpreted by reference to the general scheme and purpose of the rules'.

EU law policy objective of protecting victims: The court made an important observation on its policy that impacts not only how one should interpret the motor insurance directives, but also on the prospects of *Francovich* damages (*Francovich v Italy: C-479/93* [1995] ECR I-3843, [1996] IRLR 355, [1997] 2 BCLC 203) being awarded where an individual has sustained loss caused by a member state's infringement of a directive. It stated that the objective of protecting accident victims was of equal importance to the aim of freeing the movement of persons and goods with a view to achieving the internal market. Hitherto, the social aim of providing compensatory protection was widely considered to be subordinate to the wider objective of encouraging free movement within the EC.

Court of Justice ruling: As to the case before it, the court ruled that the accident circumstances were capable of falling within the scope of insurance cover required under the directives. It referred the case back to the Slovenian courts to make the necessary factual findings.

Vehicles: On the specific issue as to whether a reversing trailer propelled by a tractor was required to be covered by the art 3 insurance 'use of vehicles' requirement, it ruled that it was. Motor vehicle use covers 'any use of a vehicle that is consistent with the normal function of that vehicle' [59].

It also ruled that:

> the fact that a tractor, possibly with a trailer attached, may, in certain circumstances, by used as an agricultural machine has no effect on the finding that such a vehicle corresponds to the concept of "vehicle" in Article 1(1) of the First Directive.

This opens the way to arguments that third party cover extends to the use of a stationary tractor generating electricity or powering agricultural machinery, provided this is a 'normal use'. Compare that with the much narrower definition within s 185 below.

Accident locations: Although the court's characteristically elliptical judgment did not expressly rule that the geographic scope of the duty to insure extended to private property, such as the farm yard where Mr Vnuk was injured, this is the inescapable conclusion to be drawn from the court's

judgment. It appears to have subsumed considerations as to the location of the accident within a broader concept that any motor vehicle use must be covered by insurance. This is clear from its concluding paragraph where it ruled that:

> the concept of "use of vehicles" in that article [viz article 3] covers any use of a vehicle that is consistent with the normal function of that vehicle. That concept may therefore cover the manoeuvre of a tractor in the courtyard of a farm in order to bring the trailer attached to that tractor into a barn, as in the case in the main proceedings, which is a matter for the referring court to determine.

Comment: the UK implications: The CJEU ruling is binding on all UK courts. Accordingly, it is necessary to compare our own national law provision with the minimum insurance requirements imposed under art 3 as interpreted by the CJEU.

UK legislative provision: Part VI of the Road Traffic Act 1988 (RTA 1988)

Section 143(a) provides, inter alia: 'a person must not use a motor vehicle on a road or other public place unless there is in force in relation to the use of the vehicle by that person such a policy of insurance …'.

Section 145 set out the scope of the insurance requirement under s 143. Subsection 3(a) provides inter alia that the policy:

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

Section 185 defines a 'motor vehicle' as '… a mechanically propelled vehicle intended or adapted for use on roads'.

Section 192 defines a road as 'in relation to England and Wales, means any highway and any other road to which the public has access, and includes bridges over which a road passes'.

Flawed UK statutory and extra statutory provision: It will be readily appreciated that ss 143 and 145 of the RTA 1988 restrict the duty to take out third party motor insurance and the scope of cover to be provided by authorised motor insurers in the UK to the 'use of a motor vehicle on a road or other public place'. Section 185 restricts the definition of 'motor vehicle' to 'a mechanically propelled vehicle intended or adapted for use on roads'. These restrictions conflict with the wider scope required by the motor insurance directives, as interpreted by the CJEU.

These same restrictions in the scope of the duty to insure also impact on the Uninsured Drivers Agreement 1999 or the Untraced Drivers Agreement 2003. This is because these agreements inherit the same defective restrictions in geographic and technical scope that taken derive from the RTA 1988.

Gaps in protection: Under UK law those injured by motor vehicles in private lanes and car parks, gated communities and private caravan sites are excluded from the compensatory guarantee provided under the various schemes for which the Secretary of State for Transport is responsible. The same applies to anyone injured on a public road by a motorised vehicle not intended or adapted for road use.

The UK's current national law provision is not only unlawful but it is also lacks common sense. When the life-time compensatory needs of a chronically injured victim can amount to many millions of pounds what possible good is served by exposing these motor accident victims to these arbitrary restrictions? Whilst the tax payer ultimately foots the bill, it seems that motor insurers are free to exploit these UK loopholes to secure unjust windfalls that are denied them under EU law.

Remedies: A European directive does not have direct effect between individuals but it is still possible to benefit from its provisions provided the three conditions set out in *Francovich*, as developed *by Brasserie du Pecheur SA v Germany: C-46/93; R v Secretary of State for Transport, ex p Factortame Ltd: C-48/93* [1996] QB 404, [1996] ECR I-1029, [1996] 2 WLR 506, are met. These are:

- the rule of law infringed must be intended to confer rights on individuals;
- the breach must be sufficiently serious; and
- there must be a direct causal link between the breach of the obligation and the damage sustained by the injured parties.

There can be little doubt that the first and third of these conditions will be met in any case where an insurer refused to pay out because of an unlawful statutory restriction to the scope of third party motor insurance.

Accident victims denied compensation due to the currently flawed restrictions contained in Part VI of the RTA 1988 or under either of the Uninsured Drivers Agreement 1999 or the Untraced Drivers Agreement 2003 have two principal means of redress:

- The first is to cite the relevant European law when presenting their claim against an insurer or the Motor Insurers Bureau and to seek a Community law compliant interpretation of ss 143, 145 and 151 of the RTA 1988 and/or the MIB Agreements.
- If the court considers that the *contra legem* rule prevents it from delivering an EU law consistent interpretation, then the victim may be entitled to *Francovich* damages against the Secretary of State for Transport. However, the right to compensation is not automatic: a party affected by an infringement of a directive will have to satisfy the multi-factored test expounded by Lord Clyde in *R v Secretary of State for Transport, ex parte Factortame Ltd: C-48/93* [2000] 1 AC 524, [1999] 4 All ER 906.

A third option is potentially available in claims against the Motor Insurers Bureau. This is made possible because it is likely that were a properly informed court asked to determine its status it would conclude that it is an emanation of state. The Republic of Ireland's equivalent of the MIB has been held to be an emanation of state. In which case art 3 of the First and Sixth Directives have direct effect against the MIB, enabling an individual affected to ask the court to apply the terms of the Directive as though it were fully and properly transposed into UK law.

Health warning: This is the second time in as many years that the ordinary English meaning of the wording within Part VI of the RTA 1988 has been found to conflict with the minimum standards of compensatory protection required under the Directives on motor insurance, see *Churchill Insurance Company Ltd v Wilkinson; Evans v Equity Claims Ltd* [2012] EWCA Civ 1166, [2012] All ER (D) 157 (Aug).

The conclusion to be drawn from these cases is that we cannot take our national law provision in this area at face value. An EU law comparison should be routinely made when applying or interpreting Part VI of the RTA 1988.

Delaney v Secretary of State for Transport [2014] EWHC 1785 (QB), [2014] All ER (D) 31 (Jun)

Minister liable for breaching European Directives on motor insurance

(Mr Justice Jay)

The facts: In November 2006 the claimant, Sean Delaney, sustained a serious head injury when he was involved in a head on collision. He had been travelling in a sports car driven by Shane Pickett, who accepted full responsibility. Tradewise Insurance Services Ltd insured the vehicle.

The case was complicated somewhat when the emergency services discovered a large quantity of cannabis hidden in Delaney and Pickett's clothing. Pickett, was subsequently jailed for dangerous driving and for possession of a controlled drug.

On learning that their insured had a cannabis dependency, Tradewise obtained a court declaration that their motor policy was rendered void for non-disclosure of this material fact under s 152(2) of the RTA 1988.

The MIB refused his claim, relying on clause 6(1)(e)(iii) of the Uninsured Drivers Agreement 1999. That clause entitled them to exclude any liability because it was established that he knew the vehicle was being used in the course of or furtherance of a crime. The claimant's appeal failed in *Delaney v Pickett* [2011] EWCA Civ 1532. However, that decision was remarkable because no one thought to argue that this clause was inconsistent with the European Motor Insurance Directives, so the issue as to whether the exclusion was lawful was never considered.

Matters were eventually put right in this *Francovich* action. Here, our national law provision for guaranteeing the compensatory rights of motor accident victims was put under proper scrutiny and it was found badly wanting by the judge.

The decision: Mr Justice Jay awarded *Francovich* damages to a passenger who was gravely injured by an uninsured driver. He held that the DfT has deliberately flouted superior European Community law in its implementation the European Motor Insurance Directives.

This decision cannot be anything other than a major embarrassment to the Secretary of State for Transport.

As recently as July 2013 the Minister was blithely asserting in a statement of intent, in the face of numerous written submissions to the contrary, that '… These [MIB]agreements fulfil the UK's obligations under EU motor insurance law …'.

The court's findings:

- That the meaning of the relevant provisions within the European Motor Insurance Directives was clear and obvious to the point that they were 'close to being self-evident'.
- That the DfT would have taken legal advice.
- That the DfT had made a deliberate decision to add an exclusion of liability in clause 6 of the 1999 Agreement when it was clearly not permitted under European law.
- The judge found the DfT 'guilty of a serious breach of Community law' of such severity as to warrant *Francovich* damages.
- He rejected the DfT's plea that its infraction was somehow inadvertent or excusable.
- As to the policy decision, the judge said: 'the best that may be said is that the Defendant decided to run the risk, which was significant, knowing of its existence'.
- The judge repeatedly expressed his surprise at the 'remarkable' lack of any relevant documentary records, when:

  > A provision of this sort must have been the subject-matter of detailed written discussion and deliberation within the department, and (one would have thought) a Ministerial submission. And yet we have nothing.

  As to the DfT's failure to explain its policy position, he described this as a 'deafening silence'.

Wider implications: Many other UK law provisions in this area conflict with European Law. For example, the Minister's statutory provision implementing art 3 of the Sixth Motor Insurance Directive civil liability insurance cover provisions within Part VI of the RTA 1988 was held to be seriously flawed in

Churchill v Wilkinson. In that case, the defect obliged the Court of Appeal to adopt add a 'notional' clause to s 151(8) of the 1988 Act as a stop gap measure.

Bad timing: Mr Justice Jay's ruling could hardly have come at a worse time for the Minister given that he has exposed the DfT for deliberately flouting the minimum standards of protection imposed under the Directives. This is because the European Commission are investigating the UK's systemic breaches of European law in this very area.

Implications of *Delaney*: This decision has profound implications for all RTA practitioners:

- It demonstrates that our national law provision for protecting victims' compensatory entitlement cannot be taken at face value.
- When the correct interpretive approach is applied to our statutory and extra-statutory provision in this area it is revealed as being replete with unlawful exclusions, limitations and exceptions which favour insurers at the expense of innocent victims. This applies not just to the MIB's duty to compensate under the Uninsured Drivers Agreement 1999, but equally to the duty to insure and the insurer's duty to indemnify under Part VI of the RTA 1988 (see *Churchill* above); to the EC Rights against Insurers Regulations 2002; as well as to both the MIB Agreements.
- The evidence suggests that many of these defects are the result of deliberate policy decisions that the DfT have taken but where, strangely, no documentary evidence relating to that decision survives. As a result, all our national law provision in this area is to be treated with circumspection. The judgement ignores the unanimous Court of Appeal ruling in *EUI v Bristol Alliance Partnership* [2012] EWCA Civ 1267, [2012] All ER (D) 120 (Oct) that wrongly confines the application of an important CJEU ruling in *Rafael Bernaldez: C-129/94* [1996] All ER (EC) 741 to criminal cases. I say wrongly because the *Bernaldez* ratio has been extended by the CJEU to civil liability scenarios in a number of subsequent rulings. Jay J applied the *Bernaldez* ruling as well as those of *Candoline and others v Vahinkovakuutusosakeyhtio Pohjola and another (Case C-537/03)* [2005] All ER (D) 375 (Jun) and *Farrell v Whitty and others (Case C-356/05)* [2007] All ER (D) 140 (Apr) to interpret the MIB Agreement. These rulings support only a very restrictive interpretation of the exclusions of liability permitted by the Directives to those expressly provided for within the Directives. This is confined to the provision within art 10.2 of the Sixth Directive (art 1.4 of the Second Directive), namely: against 'persons who voluntarily entered the vehicle which caused the damage or injury when the body can prove that they knew it was uninsured'.
- This judgment gives effect to a long line of Court of Justice rulings which assert that the only circumstances in which a compulsory third party motor insurance policy can exclude or restrict liability to indemnify a third party victim for damage is that set out in what is now art 13

of the Sixth Motor Insurance Directive (art 2.1 of the Second Directive), this is restricted to 'persons who voluntarily entered the vehicle which caused the damage or injury, when the insurer can prove that they knew the vehicle was stolen'. This puts in doubt the ability of an insurer to apply, *ex post facto*, for a court declaration to the effect that an insurance policy is void for material non-disclosure or misrepresentation, even though this is expressly provided for under s 152 of the RTA 1988. Although this occurred in *Delaney* it was not raised as a contentious issue; perhaps it should have been. What is practically beyond any doubt is the fact that policy exclusions and restrictions not specifically listed in s 148 of the RTA 1988 as void against a third party (eg restrictions in use) are unlawful under Community law. This goes against the recent and unanimous ruling by the Court of Appeal in *EUI v Bristol Alliance Partnership* above, even so it is still bad law. Many other infractions exist within this field of law.

Groves v Studley [2014] EWHC 1522 (QB), [2014] All ER (D) 123 (May)

Timing can be an important factor in the causative potency of contributory negligence

(Mr Justice Stewart)

The facts: The claimant, Groves, was part of a day trip to Welshpool in a car driven by his sister. He got drunk and on their way home to Shrewsbury in the early hours of the morning they stopped at a road side cafe. Groves' uncouth and belligerent behaviour resulted in a verbal exchange with another larger party of which Studley was one. As Studley drove his Pergeot out of the cafe lay-by Groves moved to block his way, Studley drove towards him but swerved at the last minute to avoid hitting him. This gave Groves the opportunity to jump on the bonnet of Groves's car.

It is clear that the trial judge had to contend with different accounts of what happened next from a number of not very reliable witnesses. He found that Studley did not panic nor was he fearful of being assaulted by Groves at any time during these events, despite Groves crass behaviour.

Rather than stopping and waiting for Groves to disembark, Studley decided to carry on. Groves managed to get a hand grip on the edge of the bonnet near the windscreen. Studley left the lay-by and continued along A458 Welshpool to Shrewsbury road for about 450 metres at speeds of up to 30 mph before deliberately tipping Groves off by swerving at a bus stop. Groves head struck the kerb causing him serious injury.

Studley gave no evidence and was not called as a witness to explain his conduct. The judge applied Brooke LJ's ratio in *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, concluding that in the complete absence of any evidence from him it was not possible to draw an adverse inference as a result.

The decision: There was little doubt that Studley was liable. In failing to stop or allow Groves to get off the car, he effectively trapped him on the bonnet as he proceeding along the A road. He had deliberately swerved to dislodge Groves whilst moving at speed in the full knowledge that this was likely to cause injury. The central issue in this case was the causative potency of Groves's own conduct.

The judge referred to Hale LJ's judgment in *Eagle v Chambers* [2003] EWCA Civ.1107, [2003] All ER (D) 411 (Jul) at para 10:

> There are … two aspects to apportioning responsibility between claimant and defendant, the respective causative potency of what they have done, and their respective blameworthiness …

Studley's decision to drive as he did and to deliberately swerve as he did justified a liability apportionment of 60% against him. Groves was therefore only 40% contributorily negligent for precipitating the events that eventually led to his grievous injury.

ASSUMPTION OF RESPONSIBILITY

Thompson v The Renwick Group plc [2014] EWCA Civ 635, [2014] All ER (D) 98 (May)

Parent company not liable for its subsidiary's culpable exposure of employees

Rimer, Tomlinson and Underhill

The facts: Thompson developed diffuse pleural thickening through occupational exposure to asbestos dust between 1969 and 1978. He had worked for two companies during this period. The second employer had taken over the business of the first in 1975 and that company was part of The Renwick Group which then became the parent company of Thompson's employer. Neither of the first two companies were worth suing; no responsive insurers could be traced for them, so he argued that the Parent company was liable for his culpable exposure by its subsidiary on the ground that it has assigned to its subsidiary, his employer, a director with health and safety responsibilities.

The claim relied on similarities with the facts in *Chandler v Cape plc* [2012] EWCA Civ 525, [2012] All ER (D) 123 (Apr) where the Court of Appeal had held that a parent company to be liable for the wrongful exposure to asbestos of one of its subsidiary companies. In that case the parent company had assumed responsibility for health and safety throughout its organisation. This case was formulated on grounds that appeared, ostensibly, to echo the factors that had lead the court in *Chandler* to make its finding, since the defendant had reassigned one of its directors to the subsidiary that employed Thompson.

Thompson succeeded at first instance and RG appealed.

The decision: The appeal was upheld and Thompson's claim was dismissed.

RW could not incur liability solely by virtue of it being a parent company or as a result of assigning a director to a subsidiary. It is well established that a director does not by reason only of his position as director owe any duty to creditors or to trustees for creditors of the company. Similarly, a shareholder does not by reason only of his position as shareholder owe any duty to anybody.

The evidence did not support the claimant's contentions that these case facts were comparable to *Chandler*. In any event the case specific findings in *Chandler* were not determinative of the issues so as to have general application, they were at best illustrative. The relevant legal principles are set out in the tripartite test propounded by the House of Lords in *Caparo Industries plc v Dickman* [1990] 2 AC 605, [1990] 1 All ER 568, namely of (i) foreseeability of damage; (ii) proximity and (iii) whether it is fair, just and reasonable to impose a duty of a given scope upon the one party for the benefit of another.

In this case the evidence was insufficient to justify the imposition of a duty of care on the parent company to protect the subsidiary company's employees from the risk of injury arising out of exposure to asbestos at work. In other words it failed the proximity test and so it would not be right to impose a duty of care on the parent company in these circumstances.

SECOND ACTION: ABUSE, ESTOPPLE, LIMITATION

Dowdall v Kenyon & Sons Ltd [2014] EWHC 2822 (QB), [2014] All ER (D) 56 (Aug)

Second action not an abuse of court notwithstanding earlier settlement

(Andrew Edis QC sitting as a Deputy Judge)

The facts: Mr Dowdall was exposed to asbestos dust whilst working for ten different employers between 1965 and 1973. He consulted solicitors with a view to making a claim after he was diagnosed with asbestosis and pleural plaques in 1998. Due to a muddle in the case preparation, it was mistakenly believed that three of the employers were defunct businesses not worth pursuing as no insurers could be traced.

Proceedings were issued against the seven remaining employers in which he sought damages for the symptomatic asbestosis. He also sought a provisional damages award on the basis that the medical evidence indicated that there was a 10% risk that he might later develop mesothelioma. As asbestosis is a dose related disease, his award was apportioned between the different employers to reflect their aliquot share of culpable exposure, in total 60% of the full value of this claim at that time.

The claim was settled by means of a judgment by consent in 2003 for a total of £26,000 and although no provisional damages award was made, Judge Edis found that the settlement had been intended to be in full and final settlement of all his existing claims (para [9]), including an unspecified sum to reflect the risk of mesothelioma materialising.

Tragically, Mr Dowdall's fears were realised when he later developed mesothelioma. A second claim was issued against the three employers who had been omitted from the first action. Strangely, the second action does not appear to have sought to claim these defendants' share of liability for Mr Dowdall's asbestosis but was confined to damages for mesothelioma.

The defendants appealed against a first instance finding in the claimant's favour. They argued:

1. The second action was an abuse of process.
2. The mesothelioma claim was estopped by reason of the full and final settlement achieved in the first action.
3. The claim was statute barred and that the s 33 discretion should not be exercised to disapply the bar.

The decision: The judge held that although the arguments were finely balanced, the second action was neither an abuse of process nor prevented by the earlier settlement. The defendants were indemnified by insurance, would not suffer any significant prejudice and the prospects of success against them were good. Accordingly, taking into account all the relevant circumstances, he decided to exercise his discretion to disapply the limitation period under s 33 of the Limitation Act 1930 and to allow this second action to proceed.

Comment: With the greatest of respect to this learned judge, this decision appears to be wrong. The judgment seems to be premised on a misconception. According to this judgment, the reason why this second action was not prevented by the settlement achieved in the first seems to be as follows:

- The earlier judgment was intended to achieve finality as to:
  - (i) each defendants' aliquot share of liability for the divisible/apportionable injury (asbestosis); and
  - (ii) their joint and severable liability for the 10% risk of Mr Dowdall later contracting mesothelioma.
- However, the finality achieved in (ii) above did not extend to cover the actual onset of mesothelioma, which in the judge's opinion resulted in additional actionable loss.

The judgment rightly acknowledges that mesothelioma is an indivisible/non-apportionable category of disease. This is because it is not a dose related condition: once exposed to the fatal fibre(s), further exposure does not exacerbate the symptoms that will later onset, although it does increase the chances of this fatal disease materialising.

However, the judgment appears to be based on a mistaken interpretation of Mance LJ's Supreme Court judgment in *Durham v BAI (Run Off) Ltd (in scheme of arrangement)* [2012] All ER (D) 201 (Mar), [2012] UKSC 14 (aka 'the Trigger Litigation'). Properly understood, Mance JL's Trigger Litigation ruling disapproved of *Barker v Corus UK Ltd* [2006] UKHL 20, [2006] 2 AC 572, [2006] 3 All ER 785 in which a differently constituted Supreme Court

propounded a new tort of wrongly exposing someone to a materially increased risk of contracting mesothelioma. Lord Mance reaffirmed the long established view that the House of Lords had not incepted a new tort in *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32, [2002] 3 All ER 305; all *Fairchild* did was to relax the normal tort law causation test in these very special circumstances that apply to mesothelioma claims. All other aspects of the tort law matrix remained unaltered: it still requires damage or loss to result.

If we accept Edis's finding that the 2003 judgment in the first action embraced a settlement of the (joint and several liability) of the original defendants for the future onset of this indivisible disease (para [9]) then that settlement ought surely to achieve finality in that regard.

This is because:

(i) There is no free standing tort of wrongfully exposing someone to the risk of mesothelioma (without resultant damage).

(ii) Mesothelioma is an indivisible injury whereby any one defendant whose culpable exposure materially contributes to a victim's risk of contracting mesothelioma is potentially liable for the entire loss resulting, notwithstanding other toritious or non-tortious exposures.

(iii) The 2003 judgment resolved liability for all the loss pleaded in his claim, including the risk that mesothelioma might onset in the future.

(iv) Mr Dowdall decided not to seek a (smaller) specific sum as a provisional damages award, reserving his right to return to the court at a later date for an enhanced award should the fatal disease materialise.

(v) It is irrelevant whether the final settlement represented good value.

(vi) That the second action concerns new defendants is of no assistance to Mr Dowdall if his cause of action has already been settled in full.

The author struggles to reconcile the judge's finding at para [9] ('No doubt some element of the £26,000 was intended to compensate the Claimant for the low risk of developing the very serious condition which has, sadly, now occurred') with that at para [48] ('The Claimant elected to accept a sum for the risk of mesothelioma and in return decided not to seek an order permitting him to return to court in the event that mesothelioma actually developed. The settlement deliberately excluded any sum which would follow from the development of the condition'); a fortiori the inference that Dowdall deliberately reserved the right to return to the court and to seek further damages on the onset of mesothelioma (without having secured a order for provisional damages). This seems both illogical and inimical to the long-standing finality principle. It also appears to confer a double recovery.

The relatively recent introduction of provisional damages, and then periodical payments are exceptions to the basic rule set out within s 49(1) of the Senior Courts Act 1981 that every court should:

> so exercise its jurisdiction in every cause or matter before it as to secure that, as far as possible, all matters in dispute between the parties are completely and finally determined, and all multiplicity of legal proceedings with respect to any of those matters is avoided.

Accordingly, to escape the implications of the finality principle, Mr Dowdall would have had to either obtain a variable periodical payments order under CPR Part 41B or an order granting him provisional damages in this respect under CPR Part 41; whereas he did neither.

It is the writer's belief that the natural inference to draw from the 2003 judgment was that it achieved finality on the mesothelioma claim. In the circumstances, and given the wider implications raised by this decision, an appeal seems likely.

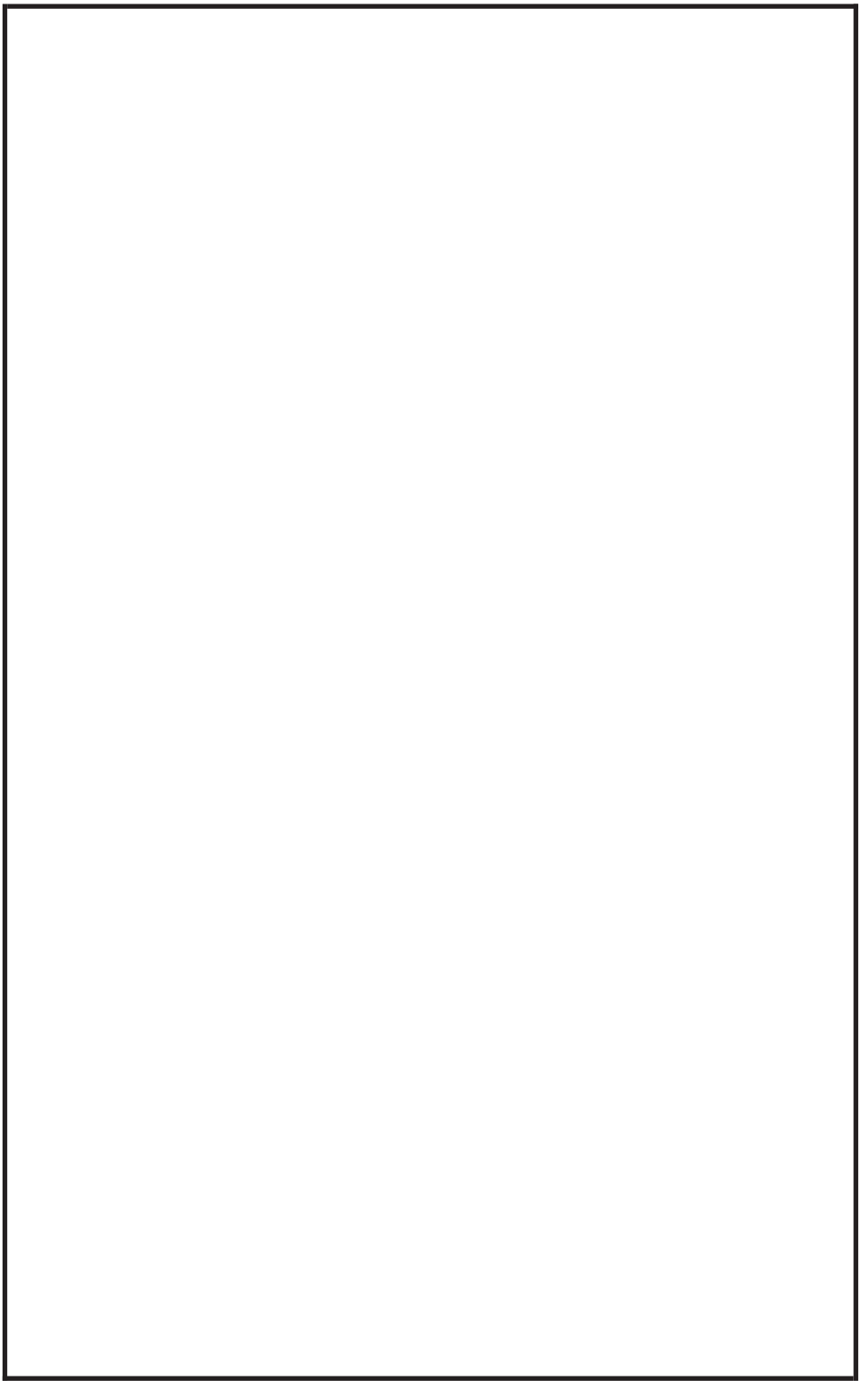
RELIEF FROM SANCTIONS

Denton and others v TH White Ltd and another; Decadent Vapours Ltd v Bevan and others; Utilise TDS Ltd v Davies and others [2014] EWCA Civ 906, [2014] All ER (D) 53 (Jul)

Lord Justice Dyson's 'clarification' of his earlier ruling in *Mitchell v News Group Newspapers Ltd* [2014] 2 All ER 430, [2013] EWCA Civ 1537 in which he made it as clear as day that any failure to comply with a court direction 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 is pretty much a complete *volte face*. The 'robust approach' in *Mitchell* (which others described as 'unjust' and 'draconian') is now heavily qualified due to the veritable tsunami of applications for directions and challenges that ensued. We are now reassured that CPR 3.9 obliges the court to consider all the circumstances of the case so as to enable it to deal justly with the application.

There is a three-stage approach to deciding whether relief should be granted. The first considers the nature of the breach. If it is not serious and significant then it is likely to result in relief being granted, if otherwise the court moves on to consider the remaining two stages. It will consider why the breach occurred and then all the circumstances of the case. Opportunistic objections to relief are likely to result in hefty cost penalties to the objector both in the application itself and overall. 'Triviality' has little remaining relevance under this new or 'clarified' approach.

Comment: It is said that gentlemen perspire but ladies glow. Perhaps it is also the case that where practitioners err the senior judiciary merely reinterpret.



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Published by LexisNexis

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

FSC
www.fsc.org
MIX
Paper from responsible sources
FSC® C020438

ISBN 978-1-4057-8599-0

9 781405 785990