Butterworths Personal Injury Litigation Service

Bulletin Editor
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Filing instructions: This Bulletin includes material available up to 17 November 2014.

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The Supreme Court's ruling in *McDonald* is one of the most important rulings on liability for asbestos-related industrial disease of the past decade. It is a 'must read' for anyone practicing in this field. However, pressures of work being what they are, the author has dedicated a significant portion of this bulletin to analysing this case.

EMPLOYERS' LIABILITY/ASBESTOS-RELATED DISEASE

McDonald (deceased) v National Grid Electricity Transmission plc [2014] UKSC 53, [2014] 3 WLR 1197

Asbestos Industry Regulations 1931 and the Factories Act 1937* (*FA 1937*) *protect visitors employed by third party contractors

(Lord Neuberger, Lady Hale, Lord Kerr, Lord Clarke and Lord Reed)

The facts: Mr McDonald was diagnosed with mesothelioma and he pursued claims against not just his employers, but also the occupiers of a power station that he had visited during the course of his employment.

The claimant's case was that he had contracted this disease during his employment by Building Research Establishment (a government agency) as a lorry driver between 1954 and 1959. His duties included collecting pulverised fuel ash from Battersea Power Station, which National Grid's predecessor had operated. He claimed to have made 68 collections over the four-year period.

In his evidence he alleged that he had been indirectly exposed to asbestos dust whilst attending the power station.

His case was that during the relevant period asbestos dust was released into the air from routine heat insulation maintenance and repair operations undertaken by the operator's employees on site at the power station. These

activities included preparation work that involved mixing asbestos powder in oil drums that were open to the air prior to its application as well as the lagging operations themselves, which included removing defective lagging.

The mixing of the asbestos 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.

The lagging operations were undertaken at a different location at the power station to that where the claimant collected the pulverised ash. He alleged that as there was often a queue of lorries, he was usually on site for one to two hours during which time he became friendly with a number of the power plan operatives. This led him to visit different parts of the site that he had no need to access in the discharge of his employment duties. His case was that these off site visits (still within the power station complex) often brought him into close proximity with the asbestos lagging operations. The claimant's statement gave the impression that he was regularly exposed to clouds of asbestos dust from these routine lagging operations.

The claimant was too ill to attend the first instance trial, but he was alive at the time of the Court of Appeal hearing but had died by the time the case reached the Supreme Court.

The claimant's case: The claimant argued that 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 claim against the operator of the power station was founded on three separate causes of action:

- breach of the common law duty of care;
- breach of s 47(1) of the FA 1937; and
- breach of reg 2(a) of the Asbestos Industry Regulations 1931 (the '1931 Regulations').

First instance rejection: All the claims were dismissed at first instance. 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] EWCA Civ 1242, [2011] All ER (D) 25 (Nov) (see BPILS Bulletin Issue 105) 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.

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 indicated that even 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. Hitherto it was generally believed that relatively low levels of exposure to this toxic material posed no appreciable threat to health.

Accordingly the claims in negligence against both his employer and the power station occupier were dismissed. He also dismissed the claims against the operator based on breach of statutory under the FA 1937 and the 1931 Regulations. The claimant appealed.

The case before the Supreme Court

The common law claim

The negligence claims (against his employers and the operator) were dismissed by the Court of Appeal for much the same reasons as at first instance: it was not reasonably foreseeable in the 1950s that the quantity and intensity of the claimant's exposure to asbestos would be likely to be harmful. These claims were not pursued in the Supreme Court. This left the statutory claims against the occupier and operator of the power station.

The statutory claims

The Court of Appeal dismissed the claim under the FA 1937 but held that the operator was liable under the 1931 Regulations.

Both parties appealed.

The relevant provisions are as follows:

FA 1937, s 47(1): The relevant part of s 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 …[1]

The Asbestos Industry Regulations 1931: The scope of the regulations is set out in a preface and they are highly specific. They 'apply to all factories and workshops or parts thereof in which the following processes or any of them are carried on:

[1] Emphasis added.

(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;

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

(v) the cleaning of any chambers, fixtures and appliances for the collection of asbestos dust produced in any of the foregoing processes.' [2]

This is then qualified by the following proviso, presumably to lighten the regulatory burden where the hazard posed by exposure was thought to be acceptably low:

> 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, reg 2 imposes an strict 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.

[2] Emphasis added.

The judgment

The arguments were finely balance on either side. A majority of the Supreme Court (2:3) upheld the Court of Appeal's finding that the operator was liable under reg 2 for failing to provide an exhaust draft (Reed and Neuberger LJJ dissenting). However, it also upheld the Court of Appeal's finding that the operator was not liable under s 47 of the FA 1937 claim, albeit for different reasons.

Liability under s 47(1) of the FA 1937

The operators had successfully argued before the Court of Appeal that as the claimant was not employed by the power station operators and as his duties did not require his presence at the locations where he was exposed, he was not an 'employee' within the meaning of s 47(1) and that as a result the statutory provision did not extend to protect the claimant.

Employee need not be employed by factory or workshop

The Supreme Court took a different view. An employee does not have to be engaged in the process that precipitates the hazard, or which creates or releases the substances, nor does he have to prove that he was employed by the operator or occupier of the premises. He does not even have to be actively engaged in fulfilling his employment duties to fall within the ambit of s 47(1). The test is simply whether a person is employed (by someone) in the premises where the exposure occurred.

The process carried on can be ancillary to production

Another contention advanced by the operators was that s 47(1) did not apply to a process that was not part of the output of the factory. This restrictive interpretation was supported by the Court of Appeal in *Brophy v J C Bradfield & Co Ltd* [1955] 3 All ER 286, [1955] 1 WLR 1148 that had ruled that ss 4 and 47(1) of the FA 1937 did not apply to a worker overcome by fumes from a boiler used to heat a factory. This was because power generation was not a process carried on in a factory within the meaning of those sections. In *McDonald*, Lord Kerr thought *Brophy* was wrongly decided:

> … a process in a factory should not be confused with the product that is manufactured. In factories all manner of processes are carried on which contribute to the ultimate manufactured product in varying degrees of closeness.

In the words of Lord Clarke 'a lorry driver who goes to a factory to collect its produce is in a real sense working for the purposes of the factory'. Lord Reed demurred, characterising the claimant's employer as being no more than a customer buying a by-product of the power station.

The quantity of dust when initially released is what counts

The operator argued that any release of a substantial quantity was only relevant to moment when the mixing or lagging operations were undertaken and not to subsequent exposure. The court did not agree. The substantial

nature of the hazard is to be judged at the point of release. The duty to take 'all practicable measures' (which extends to those actively involved in that process and other employees indirectly exposed) is triggered when there is given off any injurious or offensive dust or fume or any substantial quantity of dust of any kind. The statutory provision does not stipulate that the quantity of dust must be substantial at the point of inhalation. It was not necessary for the claimant to prove that he had actually stood in the clouds of asbestos dust, only that he was an employee who had been present in a room where a substantial quantity of dust had been released and that this exposure had caused his disease. The Supreme Court approved the Court of Appeal's finding that it was up to a defendant to establish that it was not practicable to take preventative measures.

Foresight

The importance of differentiating between situations that require foresight and those that don't was stressed.

Lord Kerr formulated a test that takes into account the different approach to be adopted to these two distinct scenarios within s 47(1): one being where the dust, fumes or impurity is 'likely to be injurious', where foresight of injury is a necessary element; the other being where the substance released, although apparently innocuous, is substantial, where foresight of the hazard it may or may not pose is irrelevant. He formulated the following staged approach to test liability under s 47(1):

- First, is the dust, fume or other impurity which is given off of such a character and given off to such an extent as to be likely to be injurious or offensive to the persons employed?
- Second, if not, has any substantial quantity of dust of any kind been given off in the workroom where the claimant was a person employed?
- Third, if the answer to either the first or second question is "yes" are there practicable measures which can be taken to protect the persons employed against inhalation of the dust or fume or other impurity and to prevent its accumulation in any workroom?
- Finally, if the answer to the third question is "yes" have they been taken?

The Court of Appeal had found that *McDonald* had not proved 'substantial' exposure. Nor was his exposure of a kind that would have been foreseen in the 1950s as 'likely to be injurious'. The quality of such foresight, applying the *Baker v Quantum Clothing* [2011] UKSC 17, [2011] 4 All ER 223 dicta (see BPILS Bulletin Issue 102), is not an absolute term but a relative one that takes into account the developing awareness of the risk posed by the exposure to asbestos dust. (See also *Macarthy* below.) So 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.

The decision

The claimant's case under s 47(1) failed because the first instance finding was that he had failed to establish that the quantity of dust released in the lagging operations had been substantial and, as explained above, he could not establish that the risk of injury from this indirect and intermittent exposure would have been reasonably foreseeable by an operator of a power station, judged by the standards of the time.

Liability under reg 2 of the 1931 Regulations

The operators advanced a number of arguments against these regulations applying to the case, including:

- The scope of the regulations, as their title seems to imply, is properly confined to those working the asbestos industry where the manufacture or use of raw asbestos is central to the processes being undertaken. This would not include the use of manufactured products containing asbestos.
- That the meaning of the term 'mixing' in the first preamble did not extend to the mixing of asbestos products with water but only to the initial manufacturing stages when raw asbestos is processed.
- That the claimant, a visiting lorry driver employed by a third party contractor, was not covered by the regulations as their protection only extends to those directly involved in working with asbestos.

The scope of the 1931 Regulations is not confined to the asbestos industry

When the Court of Appeal considered the first of these arguments it is clear that it had some sympathy for the operator who relied on the Court of Appeal's decision in *Banks v Woodhall Duckham Ltd* (30 November 1995, unreported) where it had ruled that the lagging of pipes that may have given rise to dust was not covered by the 1931 Regulations as lagging was not a 'process' undertaken by the steel plant in question.

However, and to Lady Hale's evident relief, the Supreme Court preferred her approach in the Court of Appeal in *Jeromson v Shell Tankers UK Ltd; Dawson v The Cherry Tree Machine Co Ltd* [2001] EWCA Civ 101, (2001) Times, 2 March. *The Cherry Tree* case had featured an apprentice who was employed as a fitter in a factory that manufactured dry cleaners' presses. It had been part of his job to mix asbestos flock with water in a bucket and then apply it to the platens of a press in order to seal them to stop the steam escaping. He was therefore mixing the asbestos as part of the process of manufacturing a product containing asbestos, as opposed to being employed in an industry that manufactured asbestos products. Hale LJ had ruled that notwithstanding the title of the regulations, the mischief that Parliament sought to remedy arose of out processes that used asbestos. She held that the proper focus of the statutory protection was to be found in the six types of processes listed in the preamble to the regulations, as opposed to their title, not the environment in which those processes occurred. *The Cherry Tree* decision was endorsed unanimously by the court.

The reference to mixing is to be given its ordinary dictionary meaning

The Supreme Court also ruled that the term 'mixing' had no special technical meaning. So it was capable of covering the act of mixing of manufactured asbestos powder with water to make a paste for insulating pipes at a power plant. Less clear cut was whether the de-lagging operations involving the cutting away of old lagging containing asbestos was capable of being caught by the 1931 Regulations, however the point was not pursued.

The protection extends to any person on site who is employed

As to the suggestion that the regulations only applied to workers directly mixing asbestos products, Lord Kerr observed that:

> … it would be remarkable if the group to be protected was confined to those who were carrying out the process but those who were at risk from exposure because of their proximity to it should remain unprotected.

The regulations do not discriminate between different classes of employee that inhale the asbestos. Lady Hale agreed, quoting from both Lord Goddard LC and Streatfeild J in *Massey-Harris-Ferguson (Manufacturing) Ltd v Piper* [1956] 2 QB 396, [1956] 2 All ER 722 who stated that it is often the people who are not regularly employed in the factory in question who are most in need of the protection offered by duties of this sort.

The test which they adopted was whether a person was employed in the factory, not whether he was employed by the occupier.

The decision

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.

Commentary

This was a knife-edge decision that could have gone either way; it was also a majority decision (2:3).

Lord Kerr's judgment offers helpful clarification on how to approach liability under s 47(1), when to differentiate between circumstances that require foresight and those that don't, and the wide protective scope of (i) the class of employee and (ii) the nature of processes covered by its provisions. The ruling increases the scope of persons and processes covered by s 47(1).

The ambit of the 1931 Regulations is also extended to embrace any worker employed by a third party contractor to undertake contracting work ancillary to the main function of a workshop or factory, even to those who are not actively performing their employment duties but are in effect visitors socialising in a different part of the building. It will be noted that once the reg 2 criteria are established, liability is strict: it does not require foresight and in the absence of any other significant exposure from a different source, the occupier will be liable for materially increasing the risk of the employee contracting mesothelioma, see *Sienkiewicz v Greif (UK) Ltd; Willmore v Knowsley Metropolitan Borough Council* [2011] UKSC 10, [2011] 2 AC 229, [2011] 2 All ER 857 (see BPILS Bulletin Issue 102).

This case is important for a number of other reasons. First, to paraphrase Mr Nolan QC who represented the operator in this case, 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 s 47(1) of the FA 1937 for dust of such a character as was 'likely to be injurious'; and

(d) no infringement of the '*substantial quantity of dust'* provisions of s 47(1).

Secondly, it is worth noting that s 47(1) and reg 2 are both a special category of statutorily imposed occupiers liability that extends only to employees, as opposed to visitors such as under the Occupiers Liability Act 1957. The case of *Williams v University of Birmingham* illustrates that the degree of foresight required under the common duty of care under the 1957 Act is basically the same as under the basic common law duty of care; contrast that with s 47(1) where there has been a substantial release of dust or with reg 2 that imposes strict liability.

Third, the decision confines the earlier leading authority in *Banks v Woodhall Duckham Ltd* largely to its own facts. In that case, Mr Nolan had successfully defended an operator's liability on similar facts eighteen years before. Banks had been employed by the first defendant as a pipe fitter at two steel works occupied and operated by predecessors of the second defendant. He had worked for two years at each of the sites erecting pipes, breaking into old pipes and knocking off old lagging. His evidence was that his overalls would be smothered in powdered lagging and that it would be in the air for quite some time. He said it would take an hour to two hours to knock such lagging off. He would then fit new pipes and laggers would then attend to fit the new lagging, mixing asbestos in 40 gallon drums and making a lot of mess when opening the bags and mixing the materials.

Claims were made against each defendant (along with other employers of the claimant) at common law and for breaches of s 47(1) and of the 1931 Regulations. The court had dismissed Bank's claim. It accepted Mr Nolan's contentions to the effect that (i) s 47(1) did not apply because the business of lagging pipes was not a 'process' being carried on in the factory; and (ii) that the 1931 Regulations did not apply to the lagging of pipes in a steel works.

The *McDonald* ruling is clear in saying that a process in a factory should not be confused with the product that is manufactured. In factories all manner of processes are carried on that contribute to the ultimate manufactured product in varying degrees of closeness and these are covered by this provision. However, there remains at least some uncertainty as to whether cutting away of lagging and other related insulation maintenance work is covered by the 1931 Regulations (absent the actual mixing of asbestos).

Fourth, the Supreme Court was unanimous in upholding that *The Cherry Tree* decision was correct although Lord Reed who, with Lord Neuberger dissented in the main judgment, gave different reasons.

Finally, *McDonald* illustrates the differences not only between common law and statutory duties of care but it also demonstrates the difference 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 usually relevant (save where under s 47(1) a substantial quantity of dust has been released), and the asbestos specific regulations that impose a strict duty on the other. In the latter case, these regulations are subject only to the defence of 'practicality', and only in the sense 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. The burden of proving that it was impracticable to take measures lies on the defence.

Macarthy (Executor of the Estate of Heward, deceased) v Marks & Spencer plc [2014] EWHC 3183 (QB), [2014] ALL ER (D) 105 (Oct)

Department store not liable for exposing contractor to asbestos from 1976 to 1983

(David Pittaway QC)

The facts: Mr Macarthy (deceased) worked for his family run shop fitting business and later died from mesothelioma. He was exposed to asbestos dust in two different scenarios at various of the defendant's premises first when working as a joiner in 1967 installing asbestolux ceiling tiles, and intermittently between 1967 and 1983 when surveying the ceiling voids at various locations. He was not supplied with any protective equipment until the defendant introduced new health and safety procedures for its contractors in 1984. The claimant brought a claim in negligence and under s 2 of the Occupiers Liability Act 1957.

Section 2(1) provides that an occupier of premises owes the 'common duty of care' to all his visitors except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.

Section 2(2) provides that the common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there

The claimant sought to rely on HSE Guidance Note EH 10 (1976) as evidence of the requisite standard of care to be expected. This note provided that 'exposure to all forms of asbestos dust should be reduced to the minimum that is reasonably practicable'.

The judge made extensive reference to *Williams v University of Birmingham* [2011] EWCA Civ 1242, [2011] All ER (D) 25 (Nov) (see BPILS Bulletin Issue 105). In this mesothelioma case the standards set by Technical Data Note 13 were considered and relied upon. Here the victim was exposed to very low levels over a short period during his undergraduate degree course between 1970 and 1974.

In *Williams* the Court of Appeal had ruled that where exposure was more than de minimis, it was necessary to determine whether, given the degree of actual exposure, it should have been reasonably foreseeable to the occupier (in the *Williams* case: the knowledge a reasonable University should have had in 1974) that as result the claimant would be likely to be exposed to the risk of contracting mesothelioma. To determine that question, the Court of Appeal ruled that it was necessary to make findings about:

- the actual level of exposure to asbestos fibres to which the claimant was exposed;
- what knowledge the occupier ought to have had at the time of exposure about the risks posed by that degree of exposure to asbestos fibres;
- whether, with that knowledge, it was (or should have been) reasonably foreseeable to the occupier that, with that level of exposure, the claimant was likely to be exposed to asbestos-related injury;
- the reasonable steps that the occupier ought to have taken in the light of the exposure to asbestos fibres to which the claimant was exposed; and
- whether the occupier negligently failed to take the necessary reasonable steps.

Although it is now understood that almost any exposure to asbestos dust creates a foreseeable and material risk of the subject contracting mesothelioma, in *Williams* the Court of Appeal held that the degree of foresight to be expected of an occupier 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 HM Factory Inspectorate's guidance in TDN 13, published in March 1970, and so the University escaped liability.

In *Macarthy* the expert evidence indicated that the levels of asbestos that claimant was exposed to would have been less than the control limit in force at the relevant times.

The decision: The claim was dismissed.

The court found that the defendant could not reasonably have been expected to appreciate that exposure at such low levels presented a health risk.

Comment: See the case summary for *McGregor v Genco (FC) Ltd* [2014] All ER (D) 77 (May) in BPILS Bulletin Issue 114 and *Williams* in BPILS Bulletin Issue 105.

CONFLICT OF LAWS

Winrow v Hemphill and another company [2014] EWHC 3164 (QB), [2014] All ER (D) 65 (Oct)

German law still applies even if the claimant and first defendant have returned to live in the UK

(Slade J)

The facts: Two army wives were involved in an accident in which the claimant passenger was injured. The claimant and her husband had been based in Germany for eight years leading up to the date of the accident. The claimant issued proceedings against the driver and her insurers. By that time both the claimant and the driver had returned to live in the UK. The claimant argued that English law should apply, contending that art 4(1) was displaced by art 4(2).

Article 4(1) of Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations ('Rome II') provides: 'Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur'.

Article 4(2) provides an exception to the basic rule in 4(1): 'where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply'.

Article 4(3) provides an escape clause that is rarely invoked: 'Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question'.

Article 4(1) meant that the default position was that German law was the applicable law.

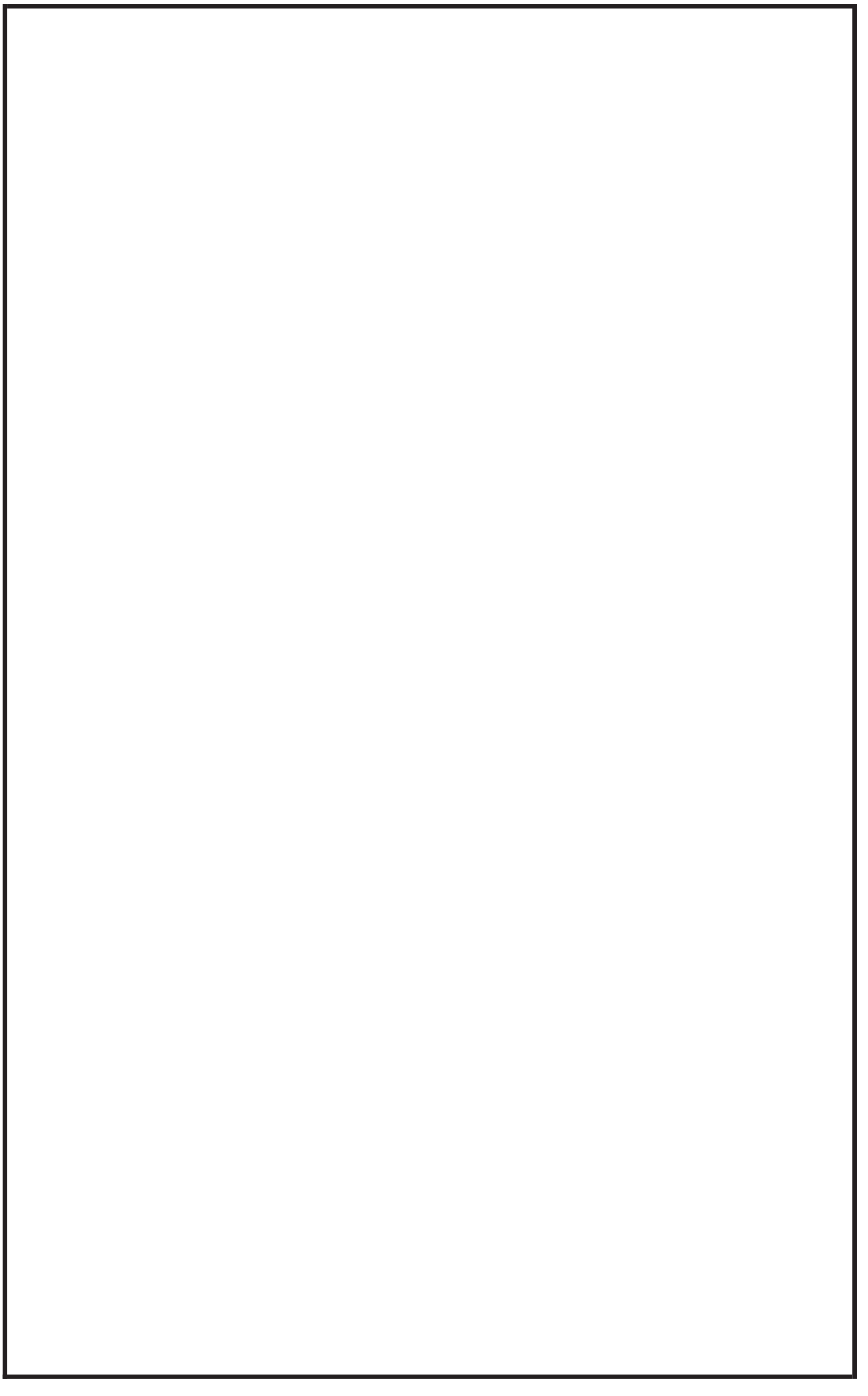
The claimant sought to argue that *Stylianou v Toyoshima and another* [2013] EWHC 2188, [2013] All ER (D) 36 (Aug) and *Wall v Mutuelle de Poitiers Assurances* [2014] EWCA Civ 138, [2014] 3 All ER 340 supported her argument to displace German law with UK law. (See *Where to Sue?* New Law Journal, 9 May 2014, Nicholas Bevan.)

The decision: The applicable law was that of Germany.

The burden is on the claimant to establish that the effect of art 4(1) is displaced by art 4(2) or 4(3). It was evident that at the time of the accident

both parties were resident in Germany where they had live for eight years. The standard required to satisfy art 4(3) is high and she had not satisfied it.

Comment: One of the core aims of Rome II is to deliver certainty and this comes at the cost of freedom of choice. Exceptional circumstances are needed before the normal rule under Rome II can be disapplied.



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