

# C of A “undermines” Jackson

Ruling “gives litigants *carte blanche*” to ignore new costs rules

A landmark Court of Appeal costs case “gives litigants *carte blanche* to ignore the new rules”, costs lawyers and defendant lawyers have said.

The court held there was “good reason” for claimant Sylvia Henry to go over her approved costs budget by more than £268,000 in her successful defamation suit against *The Sun* newspaper, in *Henry v News Group Newspapers Ltd* [2013] EWCA Civ 19.

Parties to a civil action will need to prepare a detailed costs budget and stick to it from 1 April, when Lord Justice Jackson’s costs reforms come into force.

Henry’s lawyers failed to comply with a practice direction requiring regular communications between each

side’s solicitors on the costs budget, but were otherwise thought by the judge to have incurred “reasonable and proportionate” costs.

In his judgment, Lord Justice Moore-Bick said “good reason” was “likely to depend on, among other things, how the proceedings have been managed, whether they have developed in a way that was not foreseen when the relevant case management orders were made, whether the costs incurred are proportionate to what is in issue and whether the parties have been on an equal footing”.

Iain Stark, chairman of the Association of Costs Lawyers, says: “This ruling gives litigants *carte blanche* to ignore the new rules—and satellite litigation is certain to follow.



Greene: “sting in the tail”

“Post April it looks like we will be waiting, as in the bad old days of the ‘Costs War’, for cases to reach the Court of Appeal, thus paralysing the courts underneath and the everyday administration of justice. This will produce greater uncertainty, exactly what the Jackson reforms were supposed to stop.”

Rod Evans, president of the Forum of Insurance Lawyers (FOIL), says the court has

“seemingly undermined the implementation of the Jackson reforms”, while David Greene, partner at Edwin Coe solicitors and *NLJ* consultant editor, says: “The sting is in the tail of the judgment, in which the court looks to the future in that the Court of Appeal said the new regime post 1 April will be applied more vigorously—live in fear!”

Henry, a senior social worker at Haringey Council, was subjected to a fierce and defamatory campaign by *The Sun* following the death of the child known as Baby P. The newspaper later accepted its statements contained no truth whatsoever, and published an apology.

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## Manslaughter rise

### Corporate

An increasing number of prosecutions for corporate manslaughter are being brought against businesses where deaths occur as a result of serious management failures.

There have only been three convictions so far since the Corporate Manslaughter and Corporate Homicide Act 2007 came into force in April 2008—but these are just the “tip of the iceberg”, says Simon Joyston-Bechal, partner at law firm Pinsent Masons.

In fact, the number of new corporate manslaughter cases opened by the Crown Prosecution Service has risen by 40%, from 45 in 2011 to 63 in 2012, according to

figures gathered by Pinsent Masons. A total of 141 cases have been opened since records began in 2009, and 56 cases are currently still under investigation.

“A low number of convictions could lead businesses to think corporate manslaughter is an option little used by prosecutors,” says Joyston-Bechal, who acted for the defence in the first prosecution.

“However, corporate manslaughter cases are complex and can take a long time to come to trial.”

Gerard Forlin QC says the increase is a warning for companies and organisations that “any death in the workplace scenario will trigger a full police investigation and inquest”.

## Salaries favour men

### Profession

Female lawyers are paid about £50,000 less per year on average than their male counterparts, a 2013 market report has shown.

Research by legal recruiters Laurence Simons among nearly 1,000 in-house and private practice lawyers found men received an average of £162,689 last year, whereas women received £111,293. The average bonus for men was £47,496, compared to £23,622 for women. The average salary for men was £115,193, compared to £87,671 for women.

However, the gap is narrowing—men have seen a £5,000 drop on their previous year’s average, while women

have enjoyed a rise of more than £1,000.

The past year has also seen the proportion of female partners at magic circle firms rise slightly from 16% to 18%. Linklaters leads the field with a 22% female partnership.

The need to retain female lawyers and reverse gender inequality in terms of salary and promotion is a serious issue for the top firms.

Many City law firms have set “gender targets” to increase the number of talented women in high-level positions, and seven law firms, including magic circle firm Linklaters, have signed up to a government initiative on the issue, *Think, Act, Report* (see *NLJ*, 18 January 2013, p 28).

# The privilege card

Legal professional privilege is for lawyers only

Legal professional privilege (LPP) applies only to qualified solicitors and barristers, the Supreme Court has held.

In a majority 5:2 verdict, the court ruled that the scope of LLP did not extend to accountants offering legal advice on a tax matter, in *Prudential plc and Prudential (Gibraltar) Ltd v Special Commissioner of Income Tax and Philip Pandolfo (HM Inspector of Taxes)* [2013] UKSC 1.

Prudential had argued that accountants advising on a tax avoidance scheme could not be compelled to disclose their communications because they were bound by LLP and therefore owed absolute confidentiality to their client.

However, the court agreed with the Court of Appeal's



**Barristers:** the privileged life

view that extending LPP to other professionals was a matter for Parliament not the courts.

James Bullock, head of litigation and compliance at Pinsent Masons, says: "LPP is a rule of evidence designed to protect individuals against disclosure to the court.

"It is therefore about the rights of litigants—not, as some have sought to portray it, about professionals lining their pockets.

"There are many interested parties...it is also an issue for other professionals who provide advice on 'the law'—for instance, surveyors and planning consultants."

Desmond Hudson, chief executive of the Law Society, which intervened in the case, says: "The relationship between a solicitor or barrister and his or her client is a precious human right, tested and refined by centuries of common law.

"Legal professional privilege supports the process of law, speeding the conviction of the guilty and securing the acquittal of the innocent."

Lord Neuberger's summing up of the decision and reasons is the first to be posted on the Supreme Court's new YouTube channel: [www.youtube.com/uksupremecourt](http://www.youtube.com/uksupremecourt).

## Competition

### New "opt-out" competition regime

Collective actions brought against companies that breach competition law could require all affected consumers—not just those who bring the legal action—to be compensated.

Business secretary Vince Cable proposed four major reforms to competition law this week. These include "opt-out" collective actions. Only consumers who opt out of the collective action would not be eligible for compensation. The rest would be automatically included. Proposed safeguards to stop frivolous litigation include a ban on contingency fees, not allowing treble damages, and maintaining the "loser pays" rule.

Cable wants to boost the position of the Competition Appeal Tribunal by giving it powers to grant injunctions and hear stand-alone as well as follow-on cases, and creating a fast-track for simpler cases. He wants to promote the use of alternative dispute resolution, and hopes to give the Competition and Markets Authority a limited role in certifying redress schemes.

He also wants to protect whistleblowers who inform on cartels, a subject on which the European Commission is expected to announce proposals in the next few months. Cable said the government would consider introducing its own

proposals if the Commission failed to act.

Richard Lloyd, executive director of consumer group Which?, says the proposals will "give consumers more power against unscrupulous businesses".

However, Katja Hall, chief policy director of the Confederation of British Industry, says: "The government has let the litigation genie out of the bottle by adopting US-style collective actions.

"By grouping potential claimants together indiscriminately these 'opt-out' actions fail the growth test and will fuel a litigation culture in the UK," she added.

## NEWS IN BRIEF

### Flood risk

Conveyancers need to carry out more flood searches if they want to protect themselves against the risk of negligence claims, according to Richard Hinton, business development director of property search provider SearchFlow. Hinton says conveyancers should take account of hazards such as thawing snow and saturated groundwater, particularly in Wales, which was badly hit by the recent snow.

### Fines for lawyers

How much should solicitors be fined for breaching the Code of Conduct? The Solicitors Regulation Authority (SRA) has proposed new guidelines on fines, and is asking solicitors for their opinions. The consultation will run until 19 April, and can be found on the SRA website at [www.sra.org.uk/consultations](http://www.sra.org.uk/consultations).

### Patent land grab

Applications for international patents for computer products have jumped to an all-time high, according to figures obtained by Sweet & Maxwell. The number of applications made under the Patent Co-operation Treaty has risen by 19%, from nearly 12,000 in 2011 to more than 14,000 in 2012. Under the Treaty, companies can apply for patents in each of the 146 signatory states simultaneously.

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