

625. Striking out – non compliance with court order – court to exercise discretion where unfair to allow claim to continue

[Civil Procedure Rules 1998 (SI 1998 3132) Part 3 r.3.4(2).]

H suffered from pain possibly attributable to an infection caused by the aftermath of birth of her child in July 1982. H, who maintained that she had only learnt of the possible cause in April 1984, consulted solicitors, BB, in January 1987 in relation to a claim in medical negligence. In April 1989 BB issued a writ which expired a year later without being served. Subsequently, H instructed a firm of solicitors, JWT, in November 1993 to bring an action in negligence against BB. In April 1996 the court notified BB's solicitors, BLG, that the claim appeared to have been automatically struck out. BLG informed JWT in February 1997, who advised H to instruct another firm. H eventually found WB, who were able to act for her. Counsel having advised

WB in July 1998 that the action had not been automatically struck out, BLG finally concurred but in March 1999 proceeded to apply to strike out the action for want of prosecution. The order was granted and upheld on appeal on the grounds that there had been inordinate and inexcusable delay and that a fair trial was no longer possible owing to the passage of time. H appealed.

Held, dismissing the appeal, that the unqualified discretion of the court to strike out for non compliance with a court order under the Civil Procedure Rules 1998 Part 3 r.3.4(2) should be exercised, given that it would be unfair to allow the claim to continue as it could not succeed and would be a waste of public and insurance funds. There was no action in negligence where no damage had been suffered. In the instant case, BB's failure to serve proceedings had not caused loss due to the limitation period having expired within three years of the occurrence of harm to H and prior to her instructing BB. Further, H's own medical evidence did not support her claim. Accordingly it was bound to fail on the basis of both limitation and liability, *Biguzzi v. Rank Leisure Plc* [1999] 1 W.L.R. 1926, [1999] C.L.Y. 367 applied. It was observed that had the claim been viable the non compliance might not have been sufficient to justify striking out. BB would not have been able to take advantage of the time lost through the confusion surrounding the automatic strike out and, arguably, the passage of time would not have had a detrimental affect on witness evidence due to the probable reliance of the witnesses on their notes.

HARRIS v. BOLT BURDON [2000] C.P. Rep. 70. Sedley, L.J., CA.

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