Author

Andrew Spencer

Professional Negligence Briefing

Balancing probabilities and loss of a chance

It's trite law that claims for lost litigation opportunities are treated as claims for a lost chance. Similarly, the claimant has to prove his case on the balance of probabilities. But how do these two propositions interact? And where should the line be drawn between the part of the claim which the claimant has to prove on a loss of a chance basis, and those matters that fall to be considered by the court when determining the size of the lost chance? These issues arose in the recent case of *Perry v Raleys Solicitors* [2017] EWCA Civ 314.

Mr Perry was a former coal miner who developed Hand Arm Vibration Syndrome ("HAVS") as a result of using vibration tools at work. He instructed the Defendant to pursue a claim for compensation under the Department of Trade and Industry's tariff-based compensation scheme for injured miners ("the Scheme"). The Scheme provided for recovery of various heads of loss, including for services. A claimant was entitled to compensation for services if his HAVS was sufficiently bad (by reference to the Stockholm Workshop Scale), and if the claimant had previously undertaken one of a list of tasks, but was no longer able to do so without assistance.

Mr Perry was examined for the purposes of the Scheme. His HAVS was found to be sufficiently serious to justify a claim for services. No claim was made, however, and Mr Perry settled his claim for general damages only. Some years later, Mr Perry sued his former solicitors, claiming damages for the lost opportunity of claiming compensation for services.

The judge proceeded on the basis that the Claimant had to prove the "factual matrix" behind the claim, which he considered was:-

a) Whether, on the balance of probabilities, the Claimant was unable to carry out any of the relevant tasks without assistance;
b) Whether the Claimant could have honestly advanced a claim for services; and
c) Whether if, properly advised, the Claimant would have brought a services claim, on the assumption he was acting honestly.

The first-instance judge was not impressed by the Claimant's evidence, or that of his supporting witnesses. Notwithstanding the judge accepted the medical evidence that the Claimant suffered from HAVS to a high degree, the judge was not persuaded that the Claimant had proved he was unable to carry out any of the relevant tasks without assistance. The judge was not satisfied the Claimant could have brought an honest claim for loss of services. The judge rejected the Claimant's evidence and dismissed the claim.

The Claimant appealed. His main argument was that the judge had approached causation in the wrong way, and had, in the name of making findings about the "factual matrix", in effect conducted a "mini-trial" of the Claimant's eligibility for compensation for services.

The Court of Appeal allowed the appeal, making a large number of criticisms of the judgment below. Most importantly for these purposes, however, the Court of Appeal held that the judge was "wholly wrong… as a matter of principle" to engage in a factual determination of whether, on the balance of probabilities, the Claimant "could have brought an 'honest' services claim. In reality the judge carried out a determination on the balance of probabilities as to whether (the Claimant) would have succeeded in his services claim against the DTI" (at 28).

The Court of Appeal make clear that the correct questions for the judge to ask were:-

1) Whether, at the date the underlying claim was settled, the Claimant would have pursued a services claim had he been properly advised. This did not involve enquiring whether such a claim would have succeeded.
2) What the chances of a services claim would have been. The judge answered this, holding that it had an 80% chance of success.

Both parties agreed that public policy should prevent a claimant recovering compensation if the underlying claim was dishonest. The Court of Appeal accepted that it would be open for a judge to find that the Claimant would not, or could not, have brought an honest claim. However, Defendant bore the burden of proving this: it would do so as the party making this assertion. And the Defendant would have a heavy evidential burden in this case, given the supportive medical evidence. It was never put fairly and squarely to the Claimant that it would have been dishonest for him to make a services claim, or that he had been lying or exaggerating to medical experts. The evidence was insufficient for the judge to have been able to make this finding.

When a court is assessing the value of a lost chance, it is examining the prospects of success of a case that would have gone to trial years earlier. Often, by the time the professional negligence case is determined, matters that were uncertain before have become clear. Something wholly unexpected may even have occurred radically altering the value of the claim.

This arose in *Dudarec v Andrews* [2006] EWCA Civ 256. There, the Claimant was injured in a road traffic accident. He was diagnosed with a false traumatic aneurysm of the left carotid artery, which prevented him from working. The Claimant declined an operation which would have rectified the condition. The Claimant brought a personal injury claim which was struck out because of his solicitor's negligence. The solicitor argued damages in the underlying action would have been reduced by the Claimant's failure to mitigate his losses. However, subsequent medical evidence proved that the Claimant did not have this condition. If this was admissible in the professional negligence claim, there would be no question of failure to mitigate. But neither would a claim for ongoing loss of earnings be made out.

Similarly, in *Whitehead v Searle* [2008] EWCA Civ 285 the underlying Claimant had unexpectedly died, dramatically reducing the value of her claim.

In these cases the court was faced with a dilemma. The Claimants sought to be restored to the position they would have been in but for the breach. In both of these cases, but for the breach damages would have been assessed before these supervening events. However, should the court do this, ignoring the fact that this would provide an unjustified windfall?

The answer was that these supervening events should not be ignored. The court should not speculate about uncertainty where it knows the answer, thanks to subsequent evidence. And if supervening events show that the damages that may have been awarded at the notional trial date would have been too high, this should be taken account of in a professional negligence claim. The purpose of damages is to provide just compensation to a wronged party – and this usually, but not always, involves restoring the claimant to the position s/he would have been in but for the breach.

Drawing these strands together, it seems clear that, on different facts, a professional negligence case could be dismissed on the basis that the underlying claim was dishonest. Subsequent events, if sufficiently probative – such as a successful prosecution for benefit fraud, perhaps – could be used by a defendant to make this out.

Likewise, a professional negligence claim following mishandled personal injury litigation can be resisted if it can be shown that the claimant does not, in fact, have the relevant underlying condition (*Dudarec*). How, precisely, this is to be determined without falling into the error of conducting a mini-trial remains to be fully worked out.

By Andrew Spencer

Andrew Spencer has particular expertise in professional negligence, personal injury and property matters. Andrew is recommended in the Chambers and Partners UK Bar Guide 2017 for professional negligence, travel and international personal injury.