**Edwards on behalf of the estate of the late Thomas Arthur Watkins v Hugh James Ford Simey Solicitors**

Supreme Court (Lady Hale P, and Lords Lloyd-Jones, Reed, Sales, Thomas):

20 November 2019

[2019] UKSC 54

*Professional negligence – solicitor – vibration white finger scheme – under settlement of claim – loss of chance – fresh evidence – expert report – subsequent evidence showing claimant’s injury less significant*

The claimant (W) was employed by the National Coal Board as a miner. In that employment he developed Vibration White Finger (“VWF”). The claimant also suffered from osteoarthritis in both knees. The Department for Trade and Industry (“DTI”) set up a scheme to provide compensation to miners who suffered from VWF as a result of exposure to excessive vibration (“the Scheme”).

W instructed the defendant Hugh James Ford Simey Solicitors (H) to act for him in relation to a claim under the Scheme. W undertook a medical assessment process (“MAP 1”) under the Scheme and was diagnosed with VWF with “stagings of 3V and 3Sn bilaterally”. Pursuant to the Scheme this was sufficient for W to obtain general damages and to entitle him to a presumption in his favour that he satisfied the requirements for an additional services award.

The Scheme contained a presumption that once the condition had reached a certain level a person could no longer carry out certain household tasks without assistance. However, for a claimant to pursue a services award the Scheme required claimants to undergo further medical examination (“MAP 2”) which was solely concerned with whether there were any other conditions which, of themselves, would have prevented the claimant from undertaking the task in question.

The claims handlers wrote to H, offering the award for general damages to which W would have been entitled under the Scheme on the basis of his MAP 1 diagnosis “in full and final settlement”. The offer did not include any allowance for a services award. Following negligent advice by H, W accepted the settlement and discontinued his claim for a services award.

W subsequently commenced action against H, contending that as a result of H’s negligence he lost the opportunity to bring a services claim under the Scheme or otherwise. Following W’s death his daughter was appointed to continue the claim on behalf of his estate. For the purposes of the professional negligence claim against H, W was examined by a consultant (T) who concluded that his level of VWF was much lower than diagnosed at MAP 1, which would have yielded an award of less than the amount already received by W.

Mr Recorder Miller at first instance dismissed the claim. He held that had W received non-negligent advice he would have pursued an honest services claim. However, he held that W had suffered no loss. Following T’s evidence the claimant would have been offered a lower sum for general damages and a services claim would not have been possible.

The claimant appealed. The Court of Appeal (Underhill, Irwin, and Singh LJJ) allowed the appeal ([2018] P.N.L.R. 30), holding that the trial judge had been wrong to conduct a trial within a trial to determine the value of W’s claim against the DTI, and the severity of his VWF. Further the judge was wrong to decide these matters on the basis of T’s evidence since it would not have been available at the time of W’s notional services claim under the Scheme.

H appealed to the Supreme Court on the ground of whether the prospects of success of the claim are to be judged as at the date when the claim was lost or at the date when damages are awarded. H argued that the trial judge was right to rely on T’s evidence: the question of whether W had suffered loss should be determined as at the date of the trial of the claim against H; that the court should take account of all of the evidence available at the trial to enable a more accurate assessment of the original claim’s value; and that evidence was needed to enable the issue of loss to be determined “with all the adversarial rigour of a trial” (*Perry v Raleys Solicitors* [2019] UKSC 5; [2019] 2 W.L.R. 636; [2019] P.N.L.R. 17, Para. [19]).

**Held:** The appeal should be dismissed, and the case remitted to the Recorder

1. The claimant lost the value of his claim under the Scheme as it would have been administered in accordance with its terms. The Scheme is intended to provide an efficient, economic, and broadly fair system. Recoverability under it does not depend on entitlement at common law nor does it correspond with what might have been the outcome in conventional civil proceedings.  (Paras. [23], [26])
2. Services claims were dealt by reference to presumptions derived from the MAP 1 procedure. The subsequent MAP 2 procedure was limited to the issue of assessing co-morbidity. There was no provision within the Scheme whereby the DTI could appeal against a general award, nor did the Scheme contemplate reopening or reassessing the diagnosis established at MAP 1. (Paras. [26], [29])
3. The purpose of the medical report obtained for the trial was to evaluate W’s case on causation, and was not relevant to the issue of loss. The judge at first instance found that if W had received non-negligent advice he would have pursued an honest services claim. The report is not relevant to constructing the counterfactual situation which would have arisen if H had fulfilled its duty. To include the report would be to add to the counterfactual situation the effect of a further medical examination which would never have been commissioned. (Paras. [22], [27]-[31])
4. To argue that a professional negligence claim would be a windfall to W overlooks the nature and operation of the Scheme. W has lost a claim under the Scheme of some value, to be assessed on a loss of opportunity basis.  (Para. [31])
5. Since the report was not relevant to any issue before the court, it is not necessary to express a concluded view in relation to the issue of the admissibility in a professional negligence action of subsequently acquired evidence relating to the value of the original claim. (Para. [24])

**Cases referred to in the opinion:**

*Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] A.C. 426

*Armstrong v British Coal Corpn* [1998] C.L.Y. 975

*Mount v Barker Austin* [1998] P.N.L.R. 493

*Green v Collyer-Bristow* [1999] Lloyd’s Rep. P.N. 798

*Charles v Hugh James Jones & Jenkins* [2000] 1 W.L.R. 1278

*Somatra Ltd v Sinclair Roche and Temperley* [2003] EWCA Civ 1474; [2003] 2 Lloyd’s Rep. 855

*Dudarec v Andrews* [2006] EWCA Civ 256; [2006] 1 W.L.R. 3002; [2006] P.N.L.R. 26

*Golden Strait Corpn v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12; [2007] 2 A.C. 353

*Whitehead v Searle* [2008] EWCA Civ 285; [2009] 1 W.L.R. 549; [2008] P.N.L.R. 25

*Perry v Raleys Solicitors* [2017] EWCA Civ 314; [2017] P.N.L.R. 27

*Perry v Raleys Solicitors* [2019] UKSC 5; [2019] 2 W.L.R. 636; [2019] P.N.L.R. 17

**Appeal** from a decision of the Court of Appeal dated June 6, 2018 ([2018] EWCA Civ 1299; [2018] P.N.L.R. 30)

*Michael Pooles QC* and *Matthew Jackson* (instructed by DAC Beachcroft LLP (Bristol)) for the Appellant

*Richard Copnall* and *Abigail Telford* (instructed by BPS Law LLP (Manchester)) for the Respondent

**LORD LLOYD-JONES** (with whom Lady Hale, Lord Reed, Lord Sales and Lord Thomas agree):