Loss of a chance in the Supreme Court: Perry v Raleys Solicitors

Introduction

More than 20 years after the Court of Appeal's decision in *Allied Maples Group Ltd v Simmons & Simmons (a firm)* [1995] 1 WLR 1602, the Supreme Court in *Perry v Raleys Solicitors* [2019] UKSC 5 has finally had the opportunity to rule on the court's approach to deciding a claim for the loss of a chance in a claim arising from negligently conducted litigation. Its conclusion? A lost litigation claim is no different in principle from any other claim for the loss of a chance, and an examination of the underlying facts in order to decide, on the balance of probabilities, whether the claimant has in fact lost anything of value does not constitute an impermissible "trial within a trial".

The issue

As every professional negligence lawyer knows, to succeed in a claim for a lost chance the claimant must first show that he has lost something of value. *Allied Maples* made clear that to the extent that this question depends on what the claimant would have done, it is to be decided on the balance of probabilities. If that hurdle is passed, then to the extent that the hypothetical favourable outcome depends on the actions of third parties (including judges and opponents), the value of the chance is assessed on a percentage basis, and the fact that the court concludes the prospects of success were less than 50% does not prevent some recovery. The argument in *Perry* concerned the extent to which, at the first stage, the judge was entitled to examine the underlying merits of the claim Mr Perry alleged he had lost the chance to bring.

Background

Mr Perry was a miner who had developed Vibration White Finger ("VWF") caused by excessive use of vibratory tools in the course of his employment with the National Coal Board. This condition had afflicted a vast number of former miners and in 1999 the Department of Trade and Industry had set up a tariff-based compensation scheme to resolve the very large number of claims without the need for conventional litigation. Certain solicitors' firms, of which Raleys was one, were appointed to act on behalf of the claimant miners in what was a formulaic process whereby if the claimant met certain defined criteria, compensation would be awarded in accordance with the tariff.

One aspect of the compensation was an award akin to an award of general damages. In order to qualify, the claimant miner had to undergo a medical examination and interview designed to establish the severity of his VWF, in accordance with an internationally recognised scale.

Compensation akin to an award of special damages was also potentially available, and one aspect of that compensation was a "Services Award". This could be made if the claimant met what the parties termed the "factual matrix". If a claimant could show i) that before he developed VWF he had carried out certain domestic tasks without assistance; ii) that because of his VWF he could no longer carry out those tasks without assistance; and iii) that he had in fact received assistance from others to carry out those tasks, he would qualify for a Services Award.

The Scheme provided that once a claimant was shown, through the medical examination, to be suffering from VWF above a certain level on the scale, a rebuttable presumption arose that he was

entitled to a services award. However, he would still have to demonstrate, by completing a standard form questionnaire, which tasks he had undertaken without assistance prior to developing VWF, and which of those they continued to undertake afterward, but only with assistance.

Mr Perry underwent a medical examination in 1997 which showed that he suffered from VWF in both hands at a level which, following the introduction of the Scheme, triggered the presumption of an entitlement to a services award. However, his claim under the Scheme was compromised for a payment of general damages only. Almost 10 years later he launched professional negligence proceedings against Raleys, contending that the firm had negligently failed to advise him of his entitlement to a Services Award, and he had therefore lost the opportunity of bringing such a claim. In the professional negligence claim, he asserted that he had previously carried out all six of the specified tasks without assistance, and that he now needed assistance with those tasks from his sons and wife.

The judgments below

Mr Perry's claim was rejected by the trial judge on the basis that on the evidence, he had not in fact suffered from any significant disability in performing any of the six tasks, so that he could not honestly have made a claim for a Services Award. His claim therefore failed on causation: properly advised, he would, on the balance of probabilities, never have advanced a claim.

The Court of Appeal held the judge had made an error of law in addressing the issue of causation: he had wrongly conducted a "trial within a trial" of the very question which would have arisen if Mr Perry had made a claim for a Services Award, namely whether in fact, as a result of his VWF, he needed assistance in carrying out the six domestic tasks which he had previously been able to carry out unaided. Secondly, the Court of Appeal concluded that the judge wrongly imposed the burden upon Mr Perry to prove that fact on the balance of probabilities, contrary to what it considered was well-settled authority about the burden upon a claimant in relation to causation in a professional negligence claim. The Court of Appeal also allowed the appeal on two further grounds based on criticism of the judge's approach to the evidence.

The decision in the Supreme Court

The Supreme Court conducted a thorough review of the authorities on what it called "the assessment of causation and loss in cases of professional negligence" and concluded, in short, that the judge's approach to the law and the evidence had been entirely correct. The following statements of principle emerge:

- There is no distinction in principle between a claim about the loss, due to negligence, of the opportunity to achieve a more favourable outcome in a negotiated transaction and a claim about the loss of an opportunity to institute a legal claim. In both cases the taking of some positive step by the client, once in receipt of competent advice, is an essential (although not necessarily sufficient) element in the chain of causation. In both cases the client will be best placed to assist the court with the question whether he would have taken the requisite initiating steps (see para 22).
- If the answer to the question whether the client would, properly advised, have taken the requisite initiating step may be illuminated by reference to facts which, if disputed, would have fallen to be investigated in the underlying claim, this is not of itself a good reason not to subject them to the full forensic rigour of a trial (see paras 19 and 24).

- A claimant cannot succeed by showing that he would have brought a claim that would in fact have been dishonest. Nuisance value claims fall outside the category of lost claims for which damages may be claimed in professional negligence; so, a fortiori, must dishonest claims (see para 26).
- The loss of a chance approach is not directed to the question of whether the claimant would have brought a claim, but to the evaluation of a claim which the court is satisfied would have been brought. It is where the question for the court turns upon the assessment of the lost chance that it is generally inappropriate to conduct a trial within a trial (see para 31).

Applying that approach, Mr Perry's claim failed because, on the basis of facts which were known to him at the time he instructed Raleys (i.e. that, as the judge had found, he was not in fact disabled from carrying out any of the six tasks), he could not honestly have given Raleys instructions that would have led to his being advised that he was entitled to a Services Award. The judge's findings in that respect should not have been disturbed: he had had the benefit of hearing from the witnesses and the assessment of their credibility was pre-eminently a matter for him.

Points to note

The mere fact that an issue which is relevant to the question of whether the claimant would have taken a particular step is also relevant to the evaluation of the lost chance, then, does not prevent the judge, in deciding causation, from deciding that issue on the balance of probabilities. This clarification is welcome.

That does not mean that any claimant in a "lost litigation" claim has to prove that his or her claim would probably have been successful: the Supreme Court rejected that aspect of the Court of Appeal's decision because that, the Supreme Court held, was not what the judge had done.

However, the claimant's perception of the likely prospects of success must be relevant to causation. Although there is no difference in principle between a lost claim and any other lost commercial opportunity, in practice the prospects of success are often determinative of the parties' decisions as to whether to proceed in litigation, when clients may be prepared to take greater risks in other contexts.

Significantly, though, the facts which would have prevented Mr Perry from being advised to advance a claim were within his own knowledge, and just as capable of being determined at the professional negligence trial as they would have been in 1999. Whilst it is clear that the legal and evidential burden is on the claimant to show that he or she would have brought a claim if properly advised, it remains to be seen whether the courts will adopt a less stringent approach to the discharge of that burden in circumstances where facts that would have been material to the advice given can no longer be established because of the original solicitors' negligence.

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13 February 2019