13 February 2019

PRESS SUMMARY

Perry (Respondent) v Raleys Solicitors (Appellant)
[2019] UKSC 5
On appeal from: [2017] EWCA Civ 314

JUSTICES: Lady Hale (President), Lord Wilson, Lord Hodge, Lord Lloyd-Jones, Lord Briggs

BACKGROUND TO THE APPEAL

The respondent, Mr Perry, is a retired miner. By the time he stopped working, he was suffering from a condition known as Vibration White Finger ("VWF"). Common symptoms include a reduction in grip strength and manual dexterity, often leading to an inability to carry out routine domestic tasks unaided.

In the late 1990s, a group of test cases established that the National Coal Board (later British Coal) had been negligent in failing to take reasonable steps to limit the exposure of its miners to VWF from the excessive use of vibratory tools. In 1999, the Department for Trade and Industry ("DTI") set up a scheme ("the Scheme") to provide tariff-based compensation (i.e. based on the severity of the injury) to miners suffering from VWF following exposure to excessive vibration. The Scheme was administered under a Claims Handling Arrangement dated 22 January 1999 made between the DTI and solicitors' firms representing miners.

The Scheme contemplated the making of two main types of compensatory award to such miners, which broadly reflected general and special damages for personal injuries. Pursuant to a Services Agreement dated 9 May 2000, special damages could include a Services Award to qualifying miners. This depended on establishing what became known as "the factual matrix". In summary: (1) prior ability to undertake one or more of six defined routine domestic tasks ("the six tasks") without assistance; (2) current inability to undertake those tasks without assistance because of VWF; and (3) current receipt of the necessary assistance with those tasks from others. The six tasks were gardening, window cleaning, DIY, decorating, car washing, and car maintenance.

Qualification for a general damages award required affected miners to undertake a medical interview and examination designed to assess the severity of their VWF. Sufferers at certain high levels of severity also became entitled to a rebuttable presumption that they qualified for a Services Award. The Scheme provided for relatively light-touch checks of Services Award claims. Compensation was payable to qualifying claimants according to an index-linked tariff. Proportionate deductions could be made if a further medical examination showed that there were other contributing medical conditions.

Mr Perry engaged the appellant law firm, Raleys, to pursue a VWF claim in October 1996. His claim ultimately fell within the Scheme. In October 1997, he was given medical ratings ('stagings') sufficient both for him to obtain general damages and for a Services Award to be presumed. However, Mr Perry settled his claim in November 1999 for the payment of general damages only (£11,600) and made no claim for a Services Award within the specified time. He made a professional negligence claim against Raleys in February 2009, claiming that the firm's negligent failure to give him competent legal advice deprived him of the chance to claim a Services Award. His estimated loss was £17,300.17 plus interest.

At trial in the County Court, Raleys ultimately admitted breach of duty, but denied causation of loss. It also alleged that his claim was time-barred. The trial judge, Judge Saffman, rejected the limitation defence, but held that Mr Perry had not proved that Raleys' breach of duty had caused him any loss. This conclusion was based on the finding that Mr Perry's VWF had not caused him any significant disability in performing any of the six tasks without assistance, such that he could not have been able

to make an honest claim for a Services Award. The judge dismissed the claim, but nonetheless proceeded to make findings on the assessment of damages. The Court of Appeal reversed the finding on causation and concluded that the alternative findings on quantum meant a re-trial was unnecessary. It granted Mr Perry loss of chance damages of £14,556.15 plus interest. Raleys appealed to the Supreme Court, seeking restoration of Judge Saffman's order.

JUDGMENT

The Supreme Court allows the appeal and restores the order of the County Court judge. Lord Briggs gives the sole judgment, with which all members of the Court agree.

REASONS FOR THE JUDGMENT

Loss of chance damages have been developed by the courts to deal with the difficulties arising from the assessment of counter-factual and future events **[16]**. In both types of situation, the courts at times depart from the ordinary burden on a claimant to prove the facts required for a successful claim on the balance of probabilities (i.e. more likely than not) standard **[17-18]**. However, this does not mean that the basic requirement that a negligence claim requires proof that loss has been caused by the breach of duty is abandoned **[19]**. The correct approach, following *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602 (CA), is to require a claimant to prove what he or she would have done on the balance of probabilities, while what others would have done (if relevant) depends on a loss of chance evaluation **[20-21]**. These principles apply equally to negligence claims based on loss of the opportunity to achieve a better outcome in a negotiated transaction and ones, as in this case, based on loss of the chance to bring a legal claim **[22]**.

It is not unfair to subject medical and oral evidence as to facts within the claimant's own knowledge to forensic analysis on the balance of probabilities standard **[30]**. The case law only establishes that, where the question for the court is one which turns on the assessment of a lost chance, it is generally inappropriate to conduct a trial within a trial **[31]**. It does not establish a principle that it is always wrong to try an issue relevant to causation in a professional negligence case, merely because that issue would have fallen for determination in the underlying claim (lost due to alleged negligence) **[35-37]**. Whether an issue should be tried to the usual standard depends on whether it concerns the claimant's conduct (where it should be) or third party conduct (only requiring a real and substantial chance) **[37]**.

Applying this approach, Mr Perry needed to prove that, properly advised by Raleys, he would have made a claim to a Services Award under the Scheme within time **[25]**. Further, the judge was correct to impose the additional requirement of the claim having to be an honest claim **[25]**. A concession in the courts below had been rightly made as to the honest claim requirement, because: (1) a claimant giving an honest description of his or her condition to a solicitor would not be advised to bring a claim if the facts were insufficient; (2) a court may fairly presume that the client would only make honest claims; and (3) it is not the proper role of the courts to reward dishonest claimants **[25-27]**.

On the facts, Mr Perry had to believe the following to bring an honest claim: (1) before developing VWF, he had carried out all or some of the six tasks without assistance; (2) after developing VWF, he needed assistance in carrying out all or some of those tasks; and (3) the need for assistance was due to complications from VWF **[28]**. Question (3) might require expert medical opinion, but all the other necessary elements fell within his own knowledge **[29]**. Such facts do not raise issues of counter-factuality or futurity which engage loss of chance principles **[30]**. Accordingly, Judge Saffman had made no legal error in conducting a trial of the issue whether Mr Perry would (or could) have brought an honest claim for a Services Award **[41]**. Further, the judge did not (wrongly) apply a second causation hurdle requiring Mr Perry to prove that his claim would have been successful (not merely honest) **[42-48]**. In addition, the Court of Appeal wrongly interfered with the judge's factual determination – the very stringent test for appellate court interference was not met in this case **[49-66]**.

References in square brackets are to paragraphs in the judgment.