Issue 20 • September 2006

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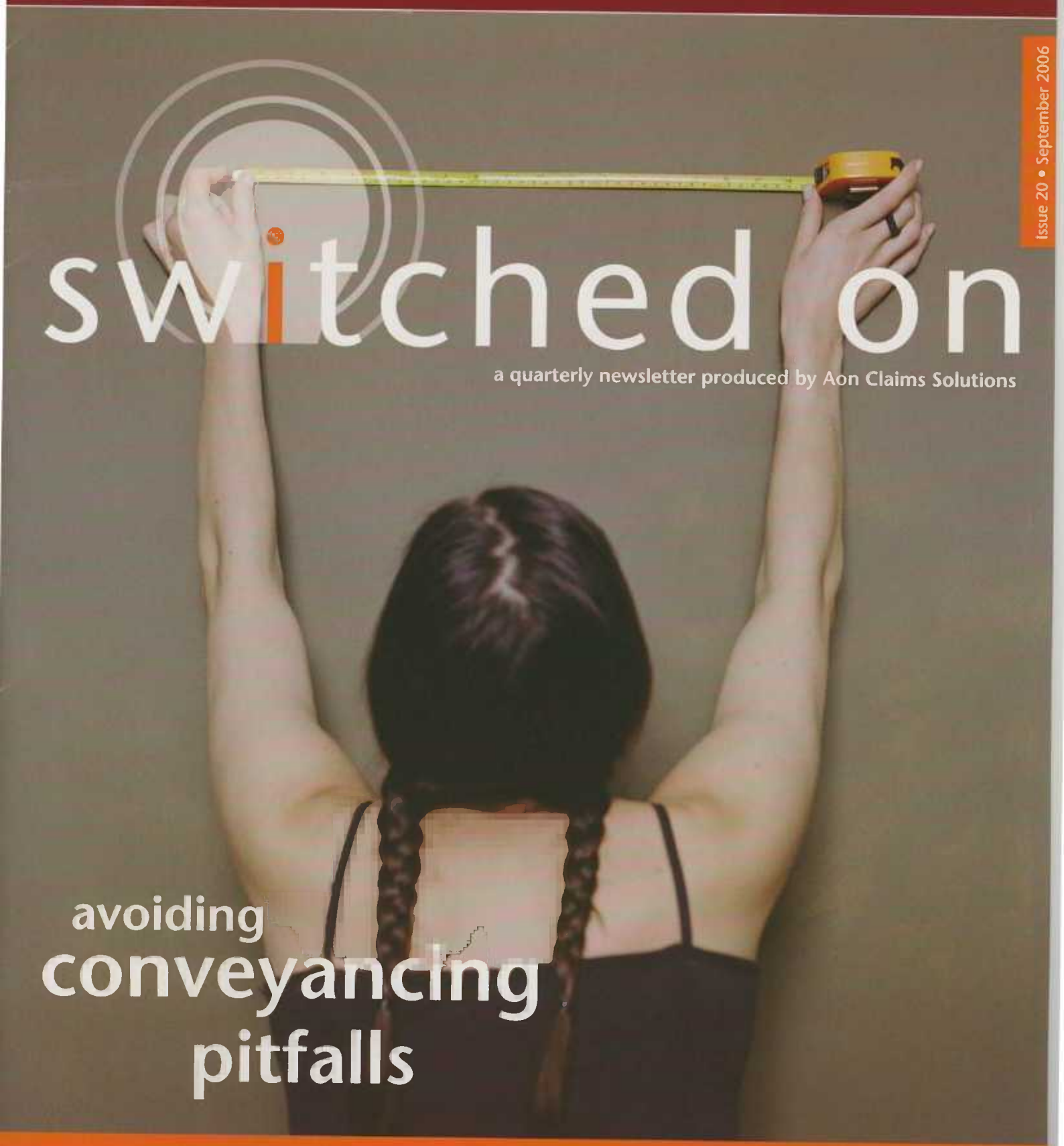
a quarterly newsletter produced by Aon Claims Solutions



avoiding conveyancing pitfalls

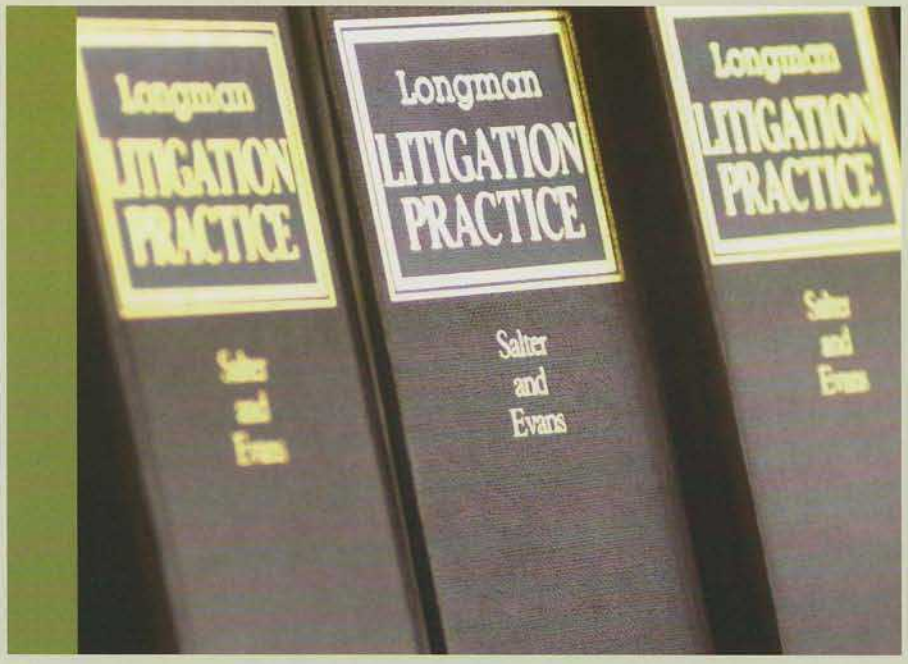
LOSS OF CHANCE

compensating for the loss that never was

The recent decision of the Court of Appeal in *Dudarec v Andrews & Ors* [2006] EWCA Civ. 256 raised a classic dilemma for a court assessing a professional negligence claim against negligent solicitors: when can the court use hindsight to assess a lost chance?

First, a brief reminder. A loss of a chance assessment is only appropriate where the hypothetical actions of a third party determine loss, usually in the context of hypothetical past events (*"If you hadn't breached my contract I would have obtained X from a third party"*). If the question turns solely on the claimant's own hypothetical acts, these must still be resolved on the balance of probabilities. That distinction is made on policy grounds: *Allied Maples v Simmons & Simmons* [1995] 1 WLR 1602.

In professional negligence claims against solicitors involving lost chances to litigate, the hypothetical past event is traditionally viewed as the outcome of a notional trial. Hence the normal



"In professional negligence claims against solicitors involving lost chances to litigate, the hypothetical past event is traditionally viewed as the outcome of a notional trial."

approach is to pick a notional trial date and the court will then assess the chances of a particular claim succeeding at the notional trial.

This approach gives rise to a problem – what are the courts to do when new evidence, critical to the success or value of the original claim, only comes to light in the course of the professional negligence claim, long after the notional trial date has passed?

As a matter of logic, the evidence is relevant only if it would have been available at the notional trial date. This approach is capable of producing unattractive results. The English Court of Appeal expressed a preference for practical justice in *Charles v Hugh James Jones & Jenkins* [2000] WLR 1278. In that case the claimant's personal injury action had been struck out due to her solicitors' neglect. After the notional trial date the claimant's condition deteriorated significantly, increasing the value of the claim.

The Court of Appeal accepted that the notional trial date was the date for assessment, but found that the court could take account of the deterioration on the basis that:

1) a competent solicitor would have obtained the subsequently discovered evidence before the notional trial date (ie, consistent with the logical approach)
2) "in appropriate circumstances…a judge may well be assisted in coming to a view as to the damages which would have been awarded at the notional trial date by knowledge of what had in fact occurred...If a prognosis was somewhat uncertain at that trial date...the judge is entitled to and indeed should, take into account what has in fact occurred" (obiter, and potentially inconsistent with a logical approach)

Dudarec v Andrews & Ors represented a chance for the Court of Appeal to revisit *Charles v Hugh James Jones* and raised for the first time the possibility of reducing damages as a result of new evidence obtained after the notional trial date.

Dr Dudarec was a vet. As long ago as 1982 he was rudely awoken from his slumbers when the van in which he was sleeping was hit by a car. The car driver admitted liability in 1983, proceedings were issued in 1984. In 1996 the action was struck out for want of prosecution.

The sticking point throughout was a mitigation issue. Dr Dudarec was diagnosed early on as having a false aneurysm in one of his arteries. On the basis of this diagnosis he stopped working. An operation was available which would probably have treated the condition, but Dr Dudarec refused the treatment. The risk of complication was 1% but, since the condition was rarely encountered or operated upon, Dr Dudarec was not prepared to take that risk. By 1996 the experts were reporting that his artery was 80% blocked and that the risks of a stroke or worse outweighed the operation risk.

The defendants' case was that Dr Dudarec's refusal to have the operation amounted to a failure to mitigate his loss. If he had had the operation he could have got back to work, certainly by the time of the notional trial in 1996.

In the professional negligence claim the mitigation issue was set down for trial as a preliminary issue. In 2004, whilst awaiting trial, Dr Dudarec had a further scan. This revealed that the assumptions of 10 years or more had been in error. The narrowing of Dr Dudarec's artery was an inconsequential 25–30%. No surgery was required. Dr Dudarec was, and always had been, fit enough to work as a vet.

The main issues for the Court of Appeal were whether recovery of loss of earnings between 1996 and 2004 and/or earnings beyond 2004 could be recovered.

As a matter of logic, if the scan had been available at the notional trial in 1996, the trial judge would not have awarded substantial loss of earnings beyond 1996. Hence the defendants argued that loss should be cut off at that date.

Dr Dudarec argued that the trial judge might not have had the benefit of the 2004 scan results. Thus there was a chance that the notional judge would have awarded him substantial future loss of earnings. Dr Dudarec claimed the percentage chance of him recovering the lost earnings both from 1996 to 2004, and from 2004 onwards.

Waller LJ gave the main judgment. He considered all the possible outcomes of the notional trial. For the period between 1996 and 2004 he accepted that the most likely outcome was that the trial judge would have had before him evidence of the misdiagnosis. The logical conclusion from this was that the notional trial judge would have awarded no loss from 1996. However, Waller LJ (supported by Smith and Sedley LJ) held that the defendant solicitors could not rely upon their own failure to bring on the notional trial to deny the earnings claim prior to 2004. Waller LJ considered that this precluded an allegation of failure to mitigate loss that might otherwise have been made.

This analysis appears to be incomplete, though clearly driven by the desire to find the 'right' result. The difficulty is that a claim for lost earnings which would not have been awarded by the notional trial judge is a claim for an entirely different head of loss. In effect it would be a loss arising from the failure to obtain a proper diagnosis – a claim more naturally directed at the medical professionals than negligent solicitors. This may be sustainable claim, but it does not appear to be a claim that was made by Dr Dudarec.

For the loss claim after 2004 the Court of Appeal was unanimous in finding that the benefit of hindsight should be adopted and no loss awarded. All three members of the court considered that they should rely on known facts rather than speculating about the chances of those facts being known at an earlier stage, following the decision in *Charles v Hugh James*.

Sedley LJ placed reliance on the fact that the court was dealing with facts which were 'knowable' at the date of the notional trial date. The other members of the court agreed that in cases involving the discovery of an entirely new matter the answer may well be that such evidence will be excluded. This leaves open the possibility that 'unknowable facts' or 'entirely new matters' (eg, the subsequent development of a new illness or a miraculous recovery) might yet be excluded from consideration in a loss of chance assessment.

However, all members of the court referred to the example of a claimant with a huge loss of future earnings claim who dies after the notional trial date. Certainly Smith LJ and Waller LJ were of the view that in those circumstances recovery of the 'windfall' should not be made, apparently irrespective of whether the subsequent event was an entirely new and unforeseeable event.

The basis for this apparent anomaly was unexplored, but it can be explained as a broader application of the compensatory principle, trumping the normal basis for assessing professional negligence damages.

So, for the time being at least, it appears that the courts will use the benefit of hindsight in most cases, the pragmatic approach being preferred to the application of strict logic.

Dudarec also touches on a wider issue which may be coming to the fore. Neuberger LJ, has suggested (in a lecture given to the Professional Negligence Bar Association) that the proper date for valuing loss of a chance may be the date when the cause of action accrued. At that date, he suggests, the claimant loses an asset, the valuation of which is dependant upon an assessment of contingencies from that date forward. This 'asset' based analysis is also supported by Lord Hoffman's speech in *Gregg v Scott* [2005] 4 All ER 812.

If this analysis becomes more widely accepted, it could signal a move towards the abandonment of the notional trial date as the predominant benchmark for the valuation of claims against negligent solicitors. A claim would be valued according to all the contingencies that existed at the date the cause of action accrued, including the possibility of settlement or trial, and – per *Dudarec* – taking account of subsequent evidence that reveals the true value of the lost chance. This would avoid some of the awkward evasion of logic in *Dudarec*. It would also be more in line with modern trends in litigation, where a trial of an action is an exceptional outcome rather than a norm.

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