

## UPDATE ON DAMAGES FOR LOSS OF A CHANCE

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### Compensating For the Loss That Never Was

The recent decision of the Court of Appeal in *Dudarec v Andrews & Ors* [2006] 2 All ER 856 (Waller LJ, Smith LJ and Hale LJ), 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 ?

Whilst *Dudarec* is an interesting decision in its own right, the issues considered in that case raise more general questions about the date of valuation of lost chances, whether in the context of professional negligence claims or of other claims for breach of contract or negligence.

#### First Principles

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 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.

#### The Role of Hindsight

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. That is the position in Canadian and Australian jurisdictions: *Johnson v Perez*, *Creed v Perez* (1988) 82 ALR 587 (HC of A); *Mikolaou v Pappasavvas Phillips & Co* (1988) 82 ALR 617; *Rose v Mitton* (1994) 111 DLR (4<sup>th</sup>) 217 CA Nova Scotia.

As a matter of practical justice, the logical 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 (Swinton Thomas LJ, Sir Richard Scott VC, Robert Walker LJ). In that case the claimant's personal injury action had been struck out due to her solicitors' neglect. After the notional trial date the claimants' 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 (i.e. consistent with the logical approach); but that, in any event

(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)

In a concession to logic the court reserved the position where an entirely new condition manifested itself after the notional trial date – "*it may be that it has to be ignored*".

*Charles v Hugh James Jones* was subsequently distinguished by the Scottish Court of Session in *Campbell v Imray* [2004] PNLR 1. The Court of Session was more persuaded by cool logic. Lord Emslie expressed strong disagreement with Swinton Thomas LJ's judgment, taking the view that the logical approach should prevail.

The Court of Appeal's approach in *Dudarec*

*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. Amazingly, the professional negligence trial in 2005 was of a preliminary issue. Dr Dudarec may still be awaiting trial.

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, contrary to recommendations made by his surgeons. The risk of complication was put at 1% but, since the condition was rarely encountered or operated upon, Dr Dudarec was not prepared to take that risk. By the time of the notional trial date in 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 defendant driver's case – and subsequently the defendant solicitors' 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. In fact 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 Court of Appeal was to some extent assisted by the trial judge's finding that the experts would probably have carried out the 2004 scan prior to the notional trial date. The main issues 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 there was a chance that the trial judge might not have had the benefit of the scan, or that the scan might have been misinterpreted. Thus there was a chance that the notional judge would have awarded him substantial future loss of earnings. Hence Dr Dudarec claimed the percentage chance of him recovering the lost earnings both from 1996 to 2004, and from 2004 onwards.

The reasoning of all the Lord Justices on the critical issues is none too clear, possibly because they chose to reject the parties' primary cases and had no doubt about the result that they wished to achieve, namely to allow the claim for loss of earnings up to the date of the 2004 scan, but not thereafter.

It is clear that all three members of the court were prepared to follow the obiter dicta of Swinton Thomas LJ in *Charles v Hugh James*, i.e. to use the benefit of hindsight to avoid speculation, irrespective of whether the evidence would have been available at the notional trial.

Waller LJ 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 appears to have considered this as precluding an allegation of failure to mitigate loss that might otherwise have been made.

This analysis appears to be incomplete, but 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 might have been a sustainable claim, but it does not appear to be a claim that was made by Dr Dudarec.

An alternative analysis might be that the solicitors were estopped by their neglect from denying the future loss claim in respect of the period 1996 to 2004 that would otherwise have been before the notional trial judge. This would at least retain the fiction that the award related to the outcome of the notional trial.

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 - a clear application of the pragmatic approach suggested by Swinton Thomas LJ in *Charles v Hugh James*. This was notwithstanding the real chance that the notional trial judge might have awarded future loss post 2004. 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.

#### An exception for “unknowable” facts ?

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, which he considered should be distinguished from subsequent facts/events which were “unknowable” at the time. 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” (e.g. the subsequent development of a new illness or a miraculous recovery) might yet be excluded from consideration in a loss of chance assessment.

However, it is notable that 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. Sedley LJ’s treatment of this example is more opaque.

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 of professional negligence damages. Death soon after a notional trial date might also give the court the opportunity to assess the chance that the original defendant would have obtained leave to appeal the notional trial judgment, in order to adduce the evidence on appeal, possibly being given leave to do so out of time.

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.

#### Using hindsight in practice

Hindsight has its limitations. For obvious reasons, trial judges are often sceptical about evidence given by witnesses with the benefit of hindsight which happens to favour their own claims. A recent example illustrates just how sceptical judges can be. In *Talisman Property Co v Norton Rose* [2006] EWCA Civ 1104 the Claimant landlord was suing its solicitors for, in effect, negligently tipping off a tenant’s solicitor to the existence of a compensation claim. The value of the lost chance depended upon whether, without the tip-off, the tenant would have sought counsel’s advice concerning the renewal of its lease. The solicitor and property manager for the tenant, who had no axe to grind, gave evidence that they would not have sought such advice. The trial judge rejected their evidence entirely finding that it was 100% certain that advice would have been sought. The Court of Appeal considered that this was taking healthy scepticism of the witnesses’ evidence too far. Whilst a trial judge was entitled to substitute his own speculation for that of the witnesses, a complete rejection went too far, particularly in a case where the witnesses had no interest in the outcome of the assessment. The Court of Appeal split the difference between the trial judge and the witnesses, awarding compensation on the basis of a 50% chance.

### Wider Trends

As mentioned at the outset, *Dudarec* 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. Hindsight could be used in the course of such a process to make a more accurate assessment of the value of the chance lost.

Lord Hoffmann's speech in *Gregg v Scott* [2005] 4 All ER 812 adds some support to this, contrasting lost chances that can be valued as an asset with chances not susceptible to valuation as assets, such as the chance of recovery from illness in *Gregg v Scott*.

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. Some of those sitting the appeal courts appear to favour such a move.

## Other Decisions & Issues for the future

Determination of whether there is a “real or substantial” chance will usually require a factual enquiry where a decision making process is involved, making the issue unsuitable for summary determination. In *Cohen v Kingsley Napley* [2006] EWCA Civ 66, the lost chance depended upon whether the defendant to the claimant’s original action would have made an application to strike out the claimant’s claim for want of prosecution (for which the defendant solicitors were not answerable, due to a limitation defence). There was no doubt that such an application would have succeeded. The Court of Appeal overturned a summary determination in favour of the defendant solicitors, since it was arguable that the defendant might not have made the application.

The robust approach of two trial judges who found no “real or substantial” loss of chance resulting from negligent acts has been upheld by the Court of Appeal in two recent decisions: *Clare v Buckle Mellows* [2005] EWCA Civ 1611 and *Bates v Mishcon de Reya* [2006] EWCA Civ 597

Mixed claimant/third party decisions – where is the dividing line between a claimant’s actions/decisions (assessed on the balance of probabilities) and the actions/decisions of third parties (assessed as a lost chance) ?

Undervaluing the downside – should a 20% prospect mean a 20% recovery ? What about the 80% risk of incurring a substantial costs liability ? Neuberger LJ has indicated that the downside may be being undervalued using the current approach.

*Allied Maples* survived a challenge in *Normans Bay Ltd v Coudert Bros* [2004] All ER (D) 458. However, the *Allied Maples* line of authority may not be immune from attack. There are those who consider that there is a realistic prospect of overturning the approach to pure loss of chance cases laid down in *Allied Maples*, though with each passing year the prospects of this must be dwindling.

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