

DELAYED LITIGATION – THE COURT OF APPEAL CONSIDERS SCOPE OF DUTY, CAUSATION, LOSS; AND EXISTENCE OF DUTIES OF CARE OUTSIDE OF ANY RETAINER

A review of the Court of Appeal’s judgment in *Hibbert Pownall Newton (“HPN”) v Whitehead & McLeish*, which was handed down on 4 April 2008. Davies Arnold Cooper acted for the solicitors, HPN.

This was a factually-complex solicitors’ negligence claim in which the decision at first instance to hold the solicitors responsible for a curtailment of losses in a claim caused by the client’s suicide, may have jarred with the insurance community. It has now been overturned and the claimant also failed to overturn a separate finding regarding the non-existence of a separate duty of care.

Factual background

Paula McLeish (“the Mother”) gave birth in August 1986 to a boy, David, who suffers from spina bifida. The Mother instructed HPN to pursue a claim against the Health Authority for negligently failing to advise her of the risks. Proceedings were issued in 1989; by March 1995, when the Mother committed suicide, they had not been set down for trial. The Health Authority, who had been responsible for some delay, agreed to an adjournment *sine die*. Eventually, Eric Whitehead (“the Father”), subsequently described by Lord Justice Rix as “the prodigal father”, was substituted as administrator of the Mother’s Estate, but by January 1999, under threat of a strike-out application, the claim against the Health Authority was settled, at a level of £20,000 plus costs.

The Father and David commenced proceedings against HPN and the barrister, Barrie Searle. It was alleged that HPN should have resolved the Mother’s claim

before her suicide, which caused a curtailment of future care losses. It was also alleged that both HPN and Mr Searle negligently advised settlement at an undervalue, and also owed the Father and David duties of care in respect of their *personal* claims against the Health Authority, which they failed to discharge.

First instance decision

It was held by Mr Justice Griffith Williams:

- The claim should have been tried before the Mother’s suicide, and HPN were liable to pay damages, albeit vastly-reduced, of £118,629, plus costs, (the “Delay Claim Finding”)
- The claim should not have been settled at less than £35,000 plus costs, but no judgment was entered for this part of the claim, given the Delay Claim Finding, and
- No duty of care was owed to either the Father or David.

HPN appealed the Delay Claim Finding, and the Father appealed the finding that no duty of care was owed to him personally. No appeal was heard in relation to the undersettlement issue. Outstanding issues relating to Mr Searle were compromised.

Appeal

The Court of Appeal unanimously agreed

that the Delay Claim Finding should be reversed, and Lord Justices Laws and Rimer found against Mr Whitehead in relation to his personal claim; on that point, Lord Justice Rix expressed some concerns, but not to the extent of a dissent.

In relation to the Delay Claim Finding, the first instance finding that the Mother’s suicide was unforeseeable was accepted. The Father argued that the Estate was nevertheless to be restored to the position in which it would have been had there been no negligence (the finding of negligence for delay was not appealed), and on that restitutionary basis, the damages recovered would not have been curtailed by the Mother’s death. The judgments of Lord Justices Laws and Rimer, endorsed by Lord Justice Rix, accepted HPN’s submissions that:

- Account should be taken of the events since the notional trial, namely the Mother’s suicide, and HPN should not be penalised for failing to secure an uncovenanted benefit
- There was either no loss, or the loss of a judgment or settlement was not a loss which would attract compensation
- Alternatively the loss could be said to have been caused not by HPN’s negligence but by the Mother’s suicide
- The Mother’s chose in action (her

claim) was worth as much immediately before her death as it had always been worth, save in relation to lost interest, which was not claimed

- It was no part of HPN's duty to achieve for the Mother more than she was entitled to recover in respect of future losses.

In relation to the cross-appeal as to the alleged duty of care owed by HPN in respect of the Father's alleged personal claim, Lord Justice Laws found in the leading judgment:

- A duty of care could not be found to exist by retainer, nor by virtue of the special exception of beneficiaries, nor by assumption of responsibility
- The only basis was that in accordance with *Caparo*, it would be "fair, just and reasonable" for a duty to be imposed
- A "very striking" case would be necessary on this basis
- Notwithstanding that
 - ⇒ HPN did consider whether the Father should be joined in order to recover David's future care costs
 - ⇒ HPN was concerned to ensure David's interests were protected
 a duty was not to be imposed; not even a duty to advise the Father that he may have a claim which should be investigated
- It was not necessary to decide upon the Father's rights against the Health Authority in such circumstances.

Comment

In relation to the first issue, professionals and their insurers will no doubt always argue that the law does not allow the Claimant to recover a windfall element. The Court of Appeal had to consider case law (and *obiter* therein) such as *Dudarec v Andrews*, a 2006 Court of Appeal judgment which has given rise to some debate, and the cases on which that decision was based. The Court of Appeal recognised, as was also found in *Dudarec*, the importance

not to take an excessively narrow view of the restitutionary aim of damages, not only due to "considerations of justice" but also as "the law should not speculate when it knows".

Lord Justice Laws also pointed out that subsequently-gained information is easier to take into account in cases where one is looking at a notional trial, as is usually required in lost or delayed litigation cases, than where an actual trial occurred. Judgments as to what is just do however arise, and Lord Justice Laws made it clear that each case rests on its facts.

On the duty of care issue, professionals and their insurers will be encouraged that even in the unusual circumstances of this case, a duty of care to a third, albeit closely-related party, was not found, and the case was not deemed to be sufficiently "striking" as to warrant its imposition. There were a plethora of factors recognised as to negate against the finding of a duty, including conflict between the family/interests of the Estate and the Father and his interests, the lack of any legal basis of a claim by David, the intricate legal research necessary which would not be paid, and so on.

In summary, this claim raised many issues which commonly arise in solicitors' negligence claims; and solicitors, and other professionals, and their insurers will welcome the findings of the Court of Appeal in respect of the non-existence of a duty of care, the scope of any duty, causation and establishing loss.

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