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Case Comment

‘Honestly, what are the chances?!’ Causation and quantification of a claim for the loss of a chance in professional negligence claims where the claimant’s honesty is in dispute.

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Subject: Negligence

Other related subjects: Professional Negligence; Personal Injury; Damages

Keywords: Solicitors; Loss of chance; Dishonesty; Legal advice; Vibration White Finger

Case: *Perry v Raleys Solicitors* [2019] UKSC 5

Introduction

One current phenomenon in the professional negligence landscape is the tranche of claims against solicitors arising from the under-settlement of personal injury claims. This has given appellate courts opportunities to re-examine the correct approach to be followed in professional negligence claims.¹ In *Perry v Raleys Solicitors*,² a recent example which reached the Supreme Court, Lord Briggs readily acknowledged that the ‘assessment of causation and loss in cases of professional negligence has given rise to difficult conceptual and practical issues which have troubled the courts on many occasions’.³ *Perry* is largely an unremarkable reassertion of orthodoxy but it does clarify issues of wider practical significance for those bringing and defending professional negligence claims beyond solicitors’ negligence in undersettling personal injury claims.

¹ Examples include *Procter v Raleys Solicitors* [2015] EWCA Civ 400, [2015] PNLR 24; *Raleys Solicitors v Barnaby* [2014] EWCA Civ 686, [2014] 5 WLUK 750; *Perry v Raleys Solicitors* [2017] EWCA Civ 314, [2017] PNLR 27; *Thomas v Hugh James Ford Simey* [2017] EWCA Civ 1303, [2018] PNLR 5; and *Edwards v Hugh James Ford Simey* [2018] EWCA Civ 1299, [2018] PNLR 30.

² *Perry v Raleys Solicitors* [2019] UKSC 5, [2019] 2 WLR 636.

³ *Perry* (n2) at [15].

The underlying claim

The claimant was a retired miner who developed a condition, Vibration White Finger ('VWF')⁴ caused by his employer's systemic negligence.⁵ The employers established a compensation Scheme with a 'light-touch' evidential standard, to manage the volume of claims.⁶ Over 107,000 claims were made under the Scheme.⁷ The claimant instructed the defendant firm to pursue his claim under the Scheme. A medical expert diagnosed his condition on a recognised scale. This entitled him to a compensation award calculated according to a tariff, and a rebuttable presumption in his favour to an additional 'Services Award' to compensate claimants for assistance provided by others with household tasks from which they were incapacitated because of the condition. The defendant firm failed to advise the claimant about any claim for a Services Award, and settled the claimant's claim for a payment only of tariff-based compensation for his injury.

The professional negligence claim

Nearly a decade later, the claimant had consulted new solicitors and issued a professional negligence claim against the defendant firm, claiming that its failure to advise about a claim for a

⁴ VWF is a Hand Arm Vibration Syndrome ('HAVS') condition which can affect grip strength and manual dexterity, and often causes those with the condition to need assistance from others with household tasks such as DIY, decorating, gardening and car maintenance.

⁵ Established in group test litigation in *Armstrong v British Coal Corporation* [1998] EWCA Civ 1359, [1997] 8 Med LR 259.

⁶ *Perry* (Court of Appeal, n1) [9] (Gloster LJ) and *Edwards* (n1) [70] (Irwin LJ).

⁷ *Edwards* (n1) [6] (Irwin LJ).

Services Award had caused the claimant to lose the opportunity to bring a successful Services Award claim in the relevant time period.⁸

The defendant firm denied any breach of duty until two days before trial, but disputed causation, alleging that the claimant could not honestly have made a Services Award claim because he was not as incapacitated as he had contended.⁹ The claim proceeded to trial.¹⁰

The trial

At trial before HHJ Saffman, the claimant's counsel conceded the need for the claimant to prove that he would have honestly made a Services Award claim. The judge decided that the issue should be tested with some rigour. A two-day trial followed, including cross-examination of the claimant, his wife, and two sons, close scrutiny of written expert medical reports, medical records and evidence including photographs from the claimant's social media appearing to depict the claimant's residual post-injury capacity for tasks for which he claimed assistance was needed and provided. HHJ Saffman remained evidently unimpressed with the inconsistencies in the evidence. Dismissing the claim, he found¹¹ that the claimant suffered from a complete lack of credibility as a witness. Evidence from family members who allegedly assisted him could not rescue the claimant's position. He had not been as incapacitated as he had alleged, so he would not have met the threshold for a Services Award. He would not have been able to make an

⁸ The claim was quantified at approximately £17,300 plus interest.

⁹ There was no dispute that, before the claimant claimed to have become unfit to do so, he had carried out without assistance all the tasks which he was alleging that he could no longer carry out without assistance. *Perry* (Court of Appeal, n1) [16] (Gloster LJ).

¹⁰ The defendant firm raised a limitation defence, which was ultimately unsuccessful. This is outside the scope of this piece.

¹¹ In a judgment variously complimented by Lord Briggs in *Perry* (n2) at [15] as a 'detailed and lucid reserved judgment' and at [62] as being 'careful.'

honest claim. The defendant's negligence had not caused the claimant actionable loss.¹² The claimant appealed.

The appeal to the Court of Appeal

The Court of Appeal¹³ strongly criticised the defendant's strategy and the trial judge's approach to testing the threshold issue of whether the claimant would have made an honest claim. The judge had held an impermissible 'trial within a trial'¹⁴ and had wrongly required the claimant to prove this on the balance of probabilities, rather than leave it to a 'loss of a chance' analysis.¹⁵ The Court's displeasure at the defendant's litigation strategy was also reflected strongly in the decision awarding interest to the claimant.¹⁶

¹² In the alternative, the judge would have held that the claimant had an 80% prospect of success in a Services Award claim, to reflect a discount for the chance that the other causes of the claimant's alleged incapacity would have reduced the award.

¹³ *Perry* (Court of Appeal, n1). Lady Justice Gloster gave the leading judgment, with which Lord Justice McFarlane and Sir Stephen Tomlinson agreed.

¹⁴ *Perry* (Court of Appeal, n1) [68] (Gloster LJ). See also Gavin Henderson, 'Trial within a trial? No chance.' (2017) 139 Rep B 7-8.

¹⁵ In a particularly strident passage worth citing in full, Gloster LJ remarked that 'It is far too easy for negligent solicitors, or, perhaps more pertinently, their insurers, to raise huge obstacles to claimants such as Mr Perry from pursuing their claims, if the latter are required, effectively, to prove in the litigation against solicitors that they would have succeeded in making such a claim against the third party. Raleys' defence in the present case is an unfortunate exemplar of insurers putting the claimant to proof of every issue in the underlying claim. Such an approach is intellectually unsound; it requires the court, inevitably many years later, to investigate whether a claimant, who as here, may be unsophisticated and not have kept records, to prove what he or she would have done many years earlier. In cases of admitted or proven negligence, on the part of solicitors or other professionals, that should not be the correct approach.' *Perry* (Court of Appeal, n1) [36] (Gloster LJ).

¹⁶ The claimant was awarded interest at a rate of 8% per annum prior to the judgment below partly because the defendant's litigation strategy deserved sanction. *Perry* (Court of Appeal, n1) [68] (Gloster LJ). See also Dominic Regan, 'Watch your behaviour' (2017) 109 Litigation Funding 8-9.

The Court allowed the claimant's appeal and reversed the judge's decision.¹⁷ The defendant appealed to the Supreme Court.

The decision of the Supreme Court

The Supreme Court allowed the defendant's appeal.¹⁸ In a clear, unanimous, single judgment, Lord Briggs restated the relevant governing principles and clarified the proper approach to be adopted in resolving professional negligence disputes.

The first welcome clarification was that there was 'no sensible basis in principle' for distinguishing between approaches for considering 'lost litigation' and 'loss of a bargain' claims.¹⁹ The similarities outweigh the differences.

The well-understood threshold for an actionable 'loss of a chance', the claimant needing to prove that he or she has lost a real and substantial chance of a more favourable outcome,²⁰ was approved, with one additional ingredient. Earlier authority identified that a claimant's claim needed to have a basis in law. A 'nuisance value claim' was insufficient.²¹ Dishonest claims

¹⁷ The Court concluded that it was appropriate not to remit the matter back to the judge, and instead adopted the judge's alternative conclusion on the loss of a discounted value of the claim.

¹⁸ Baroness Hale of Richmond PSC, Lord Wilson, Lord Hodge, Lord Lloyd-Jones and Lord Briggs JJSC

¹⁹ *Perry* (n2) at [21].

²⁰ *Kitchen v Royal Air Force Association* [1958] 1 WLR 563, 576 (Lord Evershed MR); *Allied Maples Group Ltd v Simmons & Simmons (a firm)* [1995] 1 WLR 1602 (Stuart Smith LJ) and *Mount v Barker Austin* [1998] PNLR 493 at 510-511 (Simon Brown LJ).

²¹ *Kitchen* (n20) 573 (Lord Evershed MR at 575).

should be treated likewise.²² The claimant must prove that he or she would have honestly made a claim.²³

The two-stage approach adopted by the Court of Appeal in *Allied Maples Group Ltd v Simmons & Simmons (a firm)*²⁴ and followed subsequently was approved. Lord Briggs described this as a ‘clear and common-sense’ and ‘sensible, fair and practicable dividing line’²⁵ engaging two questions.

The first approaches causation traditionally, requiring the claimant to prove, on the balance of probabilities, that if he had been properly advised, he would have taken any necessary steps required of him to convert that advice into some financially measurable advantage to him.²⁶

The second question, properly analysed, is a question of the quantification of loss: what would have happened after the claimant had taken that step? It considers issues of futurity or counter-factuality dependent on how third parties other than the claimant²⁷ would have behaved.²⁸ This question should be determined by assessing the chances of the claimant having lost a favourable outcome²⁹ because it was ‘simply unfair to require the client to prove the facts in the underlying

²² *Perry* (n2) at [26].

²³ Lord Briggs rejected the somewhat brave application by the claimant’s counsel to resile from the concession made at trial that a claimant needed to prove that the claim was honest.

²⁴ *Allied Maples* (n20).

²⁵ *Perry* (n2) at [20].

²⁶ *Perry* (n2) at [25].

²⁷ Such as opponents and their legal representatives, lay witnesses, expert witnesses, and, in a lost litigation case, the judge.

²⁸ *Perry* (n2) at [21].

²⁹ *Perry* (n2) at [20]. In *Allied Maples* (n20), although differing on the application to the facts, the members of the Court of Appeal (Stuart-Smith, Hobhouse and Millett LJJ) confirmed the two-stage approach unanimously. The decision was later approved by the House of Lords in *Gregg v Scott* [2005] UKHL 2, [2005] 2 AC 176, at [11] by Lord Nicholls and [83] by Lord Hoffmann.

(lost) claim as part of his professional negligence claim'.³⁰ The general rule is that when evaluating this loss of a chance, the court does not undertake a trial within a trial.³¹

The first question is an 'essential' issue³² of such 'fundamental importance'³³ that it is usually fair to place the burden on the claimant to answer this first question on the balance of probabilities;³⁴ after all, the claimant is ordinarily the person best-placed to prove what he or she would have done, although there are exceptions to that ordinary burden.³⁵

A 'trial within a trial' of the first question was permissible. There was no self-standing reason in principle or in justice why either party to the negligence proceedings should be deprived of the full benefit of an adversarial trial of that first question with all the forensic tools at the parties' disposal. If it can be fairly tried, then it must be properly tried.³⁶ A mere interplay between the two questions would not of itself be a good reason not to subject them to the rigour of a trial.

³⁰ *Perry* (n2) at [18].

³¹ *Perry* (n2) at [24]. See also *Dixon v Clement Jones Solicitors* [2005] PNLR 6 [27] (Rix LJ), 'there is no requirement in such a loss of a chance case to fight out a trial within a trial, indeed the authorities show as a whole that is what should be avoided. It is the prospects and not the hypothetical decision in the lost trial that have to be investigated.'

³² *Perry* (n2) at [21].

³³ *Perry* (n2) at [23-24]. If the claimant fails at this hurdle, the claim fails on causation but if the claimant overcomes the hurdle, the claim moves to the next stage without any discount for the counter-factual that the claimant might not have taken the step. See also *Allied Maples* (n20) at 1610 [G-H] (Stuart-Smith LJ)

³⁴ *Perry* (n2) at [20].

³⁵ *Perry* (n2) at [21]. Sometimes it may be unfair to require the claimant to meet this ordinary burden, such as where there was an 'unusual combination of passage of time and scarcity of other probative material, beyond his own unaided recollection' In *Sharif v Garrett & Co* [2001] EWCA Civ 1269, [2002] 1 WLR 3118 the claimant's underlying claim against a broker, which had been initiated, could no longer be tried fairly because of the solicitors' delay.

³⁶ *Perry* (n2) at [24] and [41]. Lord Briggs concluded that all authorities since *Allied Maples* were consistent on the point, with the possible exception of *Dixon* (n31).

In *Perry*, HHJ Saffman had been entitled and obliged to weigh in the evidential balance his perception of the claimant's dishonesty when addressing the first question. The claimant's pre-injury capacity, and the need for and extent of any actual assistance were squarely within the claimant's own knowledge.³⁷ It was fair for his assertions to be subjected to forensic analysis by a searching comparison with evidence. Expert evidence about the claimant's loss of functional capacity was not determinative of what assistance the claimant had actually received, since much of the expert's reasoning relied on information relayed to him by the claimant during interview. The claimant had failed to discharge the burden. The Court of Appeal had been wrong to reproach the trial judge and had wrongly interfered with facts found at first instance.³⁸ The Supreme Court allowed the defendant's appeal.

Discussion

The decision in *Perry* significantly helps to address defendants' recent perceptions of a trend towards a relaxed approach to causation unfairly benefitting claimants. A trial within a trial, of the first issue, benefits defendants by testing the claimant's case on causation issue with some rigour. In deprecating that approach undertaken by HHJ Saffman, the Court of Appeal had been critical of this and other tools deployed to benefit defendants. It was considered that 'It is far too easy for negligent solicitors, or, perhaps more pertinently, their insurers, to raise huge obstacles to claimants such as Mr Perry from pursuing their claims'.³⁹ The Supreme Court's

³⁷ *Perry* (n2) at [30].

³⁸ In doing so, the Supreme Court also gave a valuable reminder of the respect to be accorded to the trial judge's approach to the assessment of the evidence, and the strict limits on the ability of an appellate court to reverse those findings. This is outside the scope of this piece.

³⁹ *Perry* (Court of Appeal, n1) [36] (Gloster LJ).

decision restores the forensic value of a trial within a trial, moving the pendulum back towards defendants.

The emphasis on consistency between negligent advice in contentious matters⁴⁰ and transactional work⁴¹ is to be welcomed, but the implications extend to other fields.⁴² This may feed the themes in *Perry* through to commercially-oriented 'loss of a bargain' claims with more sophisticated claimant personalities and attitude to reputation and financial risks in broader contexts.

The inclusion of honesty as an additional element to the threshold for an actionable claim for 'loss of a chance' is unsurprising, accompanied as it was by a modern, firm signal discouraging dishonest underlying claims and, by extension, later professional negligence claims constructed on a foundation of dishonesty. This reinforces other initiatives to tackle the scourge of dishonest claims, particularly in personal injury claims,⁴³ which have emerged since the claimant's original underlying claim.

⁴⁰ Such as a claimant's loss of the opportunity to institute a claim, as in *Perry*, where the court can still fairly try the issue, and those 'lost litigation' claims arising from delay, where a fair trial is no longer possible because of the passage of time.

⁴¹ For example, a claimant's loss of an opportunity to achieve a more favourable outcome in a negotiated transaction, such as in *Allied Maples* (n20).

⁴² Although the courts steadfastly adopt a different approach to 'loss of a chance' claims where the more favourable outcome lost by the claimant is a more favourable medical outcome following the clinical negligence of healthcare practitioners: *Gregg v Scott* (n29).

⁴³ *Perry* (n2) at [26]. Some key initiatives in this context include the Criminal Justice and Courts Act 2015, section 57, and the loss of protection to claimants of Qualified One-Way Costs Shifting ('QOCS') in CPR 44.13 to 44.17 from 1 April 2013. More broadly, insurers have increasingly vigilant and sophisticated counter-fraud strategies which include pursuing civil claims in the tort of deceit against dishonest claimants, bringing proceedings for contempt of court in respect of dishonest statements of case and witness statements, and, in an investigatory context, closely examining the social media accounts of claimants and associates. Further reform to tackle a perceived problem of low value soft-tissue injury claims are found in the yet-to-be-implemented Part 1 of the Civil Liability Act 2018.

This clearly-articulated public policy in refusing to reward dishonesty may also interact with the multi-factorial approach of Lord Toulson in *Patel v Mirza*⁴⁴ when determining fairness in the application of the defence of illegality. Determining honesty is familiar territory for a court, but can become clouded. One example is where the claimant's beliefs about the cause and effect of a medical condition linked to a head of damage is shaped by the condition itself, such as a genuine functional overlay or a complex pain disorder, on which expert evidence may become significant. The claimant's beliefs may also be shaped by advice, and in a professional negligence context when viewing past legal advice through a retrospective lens, the blurred boundaries of the concept of 'fundamental dishonesty' may have contributed to a lack of focus in advising claimants about that threshold. It remains to be seen how far the honesty of a claimant becomes an issue beyond the 'light-touch' Scheme in *Perry*⁴⁵ and extends further into mainstream personal injury litigation or even in commercial 'loss of a bargain' claims.

The wholehearted endorsement of the two-stage approach from *Allied Maples* nearly a quarter of a century on should assuage concerns by those sensing movement in the dividing line between

⁴⁴ *Patel v Mirza* [2016] UKSC 42, [2017] AC 467. The question of the extent to which the decision in *Patel* affects the application of pre-*Patel* precedent in tort claims will be considered by the Supreme Court when it decides the appeal from the Court of Appeal's decision in *Henderson v Dorset Healthcare University NHS Foundation Trust* [2018] EWCA Civ 1841, [2018] 3 WLR 1651.

⁴⁵ Lord Briggs expressly referred to personal injury claims for damages for whiplash-associated disorder. There are some important parallels and crucial differences between VWF and whiplash claims.

the questions⁴⁶ who have argued that this has led to some courts relaxing the rigour of the first question by introducing the ‘loss of a chance’ approach from the second question.⁴⁷

In accepting the need for the rigour of a ‘trial within a trial’ of the first question, where appropriate,⁴⁸ *Perry* further reassures defendants. The intense focus on the first question turning on the credibility of the claimant and his witnesses illustrates the potential value of oral evidence tested under cross-examination, against contemporaneous medical records and, as in this case, social media evidence of functional capacity.⁴⁹ It opens a vista of witnesses relied on by the claimant now being exposed to cross-examination, which may be a valuable tool to disincentivise dishonest claims at an earlier stage. Defendants have welcomed the rejection of concerns expressed by Gloster LJ in the Court of Appeal⁵⁰ about inadequacies in the way in which allegations of dishonesty were put to the unsophisticated claimant. Likewise, the respect to be

⁴⁶ Particularly following Gloster LJ’s observations in the Court of Appeal in the present case. If they represent one aspect of public policy – considering the fairness of a process from the claimant’s perspective, then Lord Briggs’ judgment in the Supreme Court represents countervailing public policy aspects of fairness to the defendant and society more broadly. *McGregor on Damages* (20th edn) 10-041, commenting on *Chaplin v Hicks* [1911] 2 KB 786 CA, remarks that ‘since the opening salvo in *Chaplin v Hicks*, loss of a chance has moved in all directions, backwards and forwards. Just as Burroughs J famously said in *Richardson v Mellish* (1824) 2 Bing 229, 252, of public policy that “it is a very unruly horse and when you get astride it you never know where it will carry you.” The same could well be said of loss of a chance.’ The decisions in *Perry* arguably change horses mid-race.

⁴⁷ See also *Dixon* (n31) [27] (Rix LJ).

⁴⁸ It is often self-evident that the claimant satisfies the first question. Jackson & Powell on Professional Liability (8th edn) 11-296 go as far as to identify a factual presumption. Examples include *Kitchen* (n20), *Mount* (n20) at 510-511 (Simon Brown LJ) and *Hanif v Middleweeks (a firm)* [2000] Lloyd’s Rep PN 920. A more recent example of this, since *Perry*, is *Waraich v Ansari Solicitors (A Firm)* [2019] EWHC 1038 (Comm), [2019] 4 WLUK 394 where HHJ Pearce identified (at [86]) that the claimants there had shown considerable willingness to pursue litigation. The very fact of pursuing their professional negligence claim to trial showed a willingness on their part to do so, even if it has involved them in cost, and a willingness on the part of lawyers to pursue the claim. He had no hesitation in concluding that they would have commenced the claim.

⁴⁹ *Edwards* (n1) [40] (Irwin LJ); *Barnaby* (n1) [15] (Maurice Kay LJ).

⁵⁰ *Perry* (Court of Appeal, n1) [46] (Gloster LJ).

accorded to the trial judge in evaluating and weighing all the evidence, and recognising the need to contextualise expert evidence relaying information provided by the claimant, even testing the evidence of a single joint expert by cross-examination, may also increase litigation risks but may drive claims to trial.⁵¹

Perry represents the latest in a stream of cases flowing from the under-settlement of personal injury claims, which are probing the fairness to both parties of aspects of the law of professional negligence, and where the stakes remain high.⁵²

The battle is not over. Recently, Lord Justice Irwin remarked that his intuition was that under-settlements were widespread and that '[t]he costs risk now being primarily borne by lawyers, insurers and even potentially claims farmers, are a potent force towards under-settlement'.⁵³

The next salvo in the ongoing battle in this field will be *Edwards*⁵⁴ where the Supreme Court will again revisit notions of fairness when it considers the admissibility of evidence of post-breach events after the notional trial date when evaluating the loss of a chance arising from a

⁵¹ While it might have been better if the expert witness had been called for cross-examination, the judge was not obliged to prefer the expert's opinion.

⁵² It is noteworthy that the professional negligence claim was conducted on a conditional fee agreement, engaged leading and junior counsel for both parties in the Court of Appeal and Supreme Court and the estimated costs exceeded damages by a factor of 10, in the context of an underlying claim amounting to less than £20,000.

⁵³ Lord Justice Irwin, 'Can compensation bring satisfaction? What do damages for personal injury represent?', Personal Injury Bar Association Annual Lecture, 15 November 2018 <https://www.judiciary.uk/wp-content/uploads/2018/11/Irwin-lj-piba-lecture.pdf> (last accessed 21/5/19)

⁵⁴ The Supreme Court is expected to hear the appeal from the Court of Appeal's decision in *Edwards* (n1) later in 2019.

mishandled VWF claim. Tensions in the principles applying balance of fairness in resolving professional negligence claims remain to be determined.

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