

Professional negligence update

“That is the beauty of the common law; it is a maze not a motorway.” So said Lord Diplock in *Morris v Martin* [1966] 1 QB 716 and a number of recent decisions of the House of Lords and Court of Appeal appear to confirm this. Thus: *Chester v Afshar* [2004] UKHL 41 creates a special rule of causation for informed consent cases (just how special, we deal with below); *Gregg v Scott* [2005] UKHL 2 decides that the loss of a chance rules applicable elsewhere in professional negligence do not apply to clinical negligence cases; *Hilton v Barker Booth & Eastwood* [2005] PNLR 23 requires reconsideration of causation in the context of solicitors’ breaches of the double employment rule; *Moy v Pettman Smith* [2005] PNLR 24 expressly confirms that the law “has not yet developed a clear set of principles governing the terms in which an advocate’s advice should be given.” (per Baroness Hale at para 28); and *The Law Society v Sephton* [2005] PNLR 21 purports to cast a new light on the extent of *Forster v Outred* [1982] 1 WLR 86. *Moy*, *Hilton*, *Sephton* and *Chester* form the basis of this article.

Moy v Pettman Smith

In *Moy*, the House of Lords had to consider the circumstances in which a barrister advising on settlement at the door of the court might be found to have given negligent advice. Unusually, the issue was not, what advice should have been given, but, how full an explanation should have been given. (See, for example, Baroness Hale at para.27.)

The claim in *Moy* was made against solicitors and counsel, both of whom had acted for Moy in a previous clinical negligence action. He complained, in short, that that action had ended badly and blamed his lawyers for that. The background to that complaint was as follows.

After the deadline for service of expert medical evidence passed, it became apparent that further medical evidence was required and an application was made to that effect. Both the district judge and the circuit judge refused the application and the defendant health authority then increased its payment into court to

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£150,000. Counsel advised in conference that this should not be accepted since the claim was probably worth £300,000, but, at the least, he should get £200,000. Counsel directed that the medical expert should attend the trial of the matter even though no permission had been obtained to adduce his further evidence, since counsel proposed making a new application before the trial judge to adduce that evidence.

The trial date arrived. At the door of the court, the health authority made it clear that the offer of £150,000 could still be accepted. Counsel then discussed the matter with Moy and advised that it would be better not to accept the offer and to proceed with the action. She was apparently conscious (although, importantly, she did not explain this in detail to Moy) that she still faced the hurdle of obtaining the judge’s leave to adduce the medical evidence, but she viewed the chance of succeeding on such an application as better than 50 per cent. She was also conscious (although again she did not explain this) that if the application did not succeed, then Moy would have a cause of action against the solicitors for their negligent preparation of the case. She also had in mind that Moy might still

be able to pursue the solicitors if he accepted the £150,000, but considered that there were difficulties with such a course as the solicitors would probably argue that the claimant should not have accepted the money and should have proceeded with the action. Thus it was that counsel concluded that it was in Moy’s interests to press on with the application and the trial. She advised that he should beat the payment into court if they proceeded, although she also told him that he could take the offer and avoid the risks if he so wished. Moy decided to proceed with the action.

The application to adduce the further medical evidence did not go well and, prior to a decision being made by the judge, there were further negotiations between the parties. The health authority was then prepared to offer only £120,000 and insisted that if that offer were accepted, Moy would have to pay the authority’s costs since the date when that sum had been paid into court. Counsel advised Moy that he would have to take the best terms available and advised him to accept the reduced offer. He did so.

In the subsequent professional negligence action, the judge found the solicitors liable for their misconduct of the action, but found that counsel had not been negligent when advising Moy as to settlement at the door of the court. The solicitors appealed the ruling vis-à-vis counsel and the Court of Appeal allowed the appeal, holding that counsel was partly to blame for Moy’s loss.

The issue before the Court of Appeal was whether counsel had been negligent in giving the advice she gave to Moy at the door of the court regarding the initial offer of £150,000. The Court of Appeal held that, although counsel had not been negligent in making her assessment of the prospects of success in the application to adduce evidence, she had been in breach of her duty to Moy in failing to communicate to him a proper assessment of the chances of obtaining more than £150,000. The only proper advice, said the Court of Appeal, that counsel could have given in the light of her own assessment of the

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chances of persuading the court to give leave to adduce further evidence, was that the chances were 50/50. The claimant was not given that advice. The Court of Appeal inferred that had the claimant been given this advice he would have accepted the £150,000 and his losses would have been reduced accordingly.

Counsel appealed to the House of Lords and the House of Lords allowed the appeal. Lord Carswell, who gave the leading speech, said that it was not incumbent upon counsel to spell out all of the reasoning underlying her advice and hence counsel was not in breach of duty in the advice which she gave. Lord Carswell had great difficulty in accepting that if counsel was not at fault (as the Court of Appeal accepted) in deciding to advise Moy to proceed with the action, that she was nevertheless negligent in failing to spell out the considerations which led her to give that advice. Furthermore, Lord Carswell considered it unlikely that Moy would have made any different decision, even had the reasons for counsel's advice been spelled out to him.

Although Lord Carswell did not lay down any hard and fast rules with regard to what counsel should and should not do, he did say that he would be slow to hold advocates to blame for a failure to provide full reasons if they had concentrated on giving clear and readily understood advice to the client about the course of action recommended. He also recognised that the difficulties faced by an

advocate who is advising on acceptance or rejection of a settlement offer are manifold and that the pressures, especially if the advice has to be given at the door of the court, can be heavy. He stated that, in those circumstances, it would be surprising if every such piece of advice were reasoned with as much comprehensive precision as may be applied in hindsight by an appellate tribunal that has had the benefit of extensive argument and leisurely reflection. Furthermore, he said that it would be unfortunate if the principles laid out in *Hall & Co v Simons* [2002] 1 AC 615, the case which removed advocates' immunity from suit, were to be applied in a manner that caused advocates to adopt a practice of defensive advocacy, whether by hedging opinions with qualifications or by giving clients a catalogue of every factor that might affect the course of an action.

Thus, it seems that a barrister will generally not be held to be negligent for failing to explain the reasoning behind his advice, at least if that advice is given at the door of the court. More generally, it is noteworthy that *Moy* is only one of a number of recent cases in which claims against barristers have failed – see, for example, *Luke v Kingsley Smith* [2003] EWHC 3151 (QB), *Popat v Barnes* [2004] EWHC 741 (QB) and *Berk v Hawley* [2005] PNLR 1 – and we suggest that these cases in combination demonstrate just how difficult it can be to mount a successful claim against counsel. Every case must, of course, be considered on its own facts, but underlying that difficulty is the fact that much of what barristers do is properly characterised as the kind of exercise of judgment that is frequently said to be hard to conclude is negligent.

Hilton v Barker Booth & Eastwood

In *Hilton*, the House of Lords considered the question of liability for breach of duty in circumstances where solicitors had acted for two parties where the interests of those two parties conflicted.

The defendant solicitors acted for both the claimant and B in a property transaction in which the claimant agreed to buy a piece of land, build flats on it and sell the developed property to B. B had been a client of the defendant firm in the past and the defendant knew, by virtue of those previous retainers, that B had certain criminal convictions. That fact was not

disclosed by the defendant firm to the claimant. Neither was the fact that the defendant firm was advancing on loan to B the entire deposit in the property transaction which advance served to clothe him with the appearance of a man of substance. Had the claimant been told that B had convictions he would not have entered into the transaction. What in fact happened was that B failed to complete the purchase of the property and the claimant suffered substantial losses in consequence.

The judge at first instance found that the solicitors were in breach of their professional duty in acting for both the claimant and B, but that because the solicitors ought to have ceased to act for the claimant and because the claimant would then have instructed new solicitors who would not have known of the convictions of B, therefore the transaction would have gone ahead as it in fact did and thus the solicitors had not caused the claimant any loss.

On appeal, the Court of Appeal reached much the same conclusion. It held that although the solicitors were in breach of duty in failing to tell the claimant that they could not act for him and that he should seek independent advice, they were not in breach of a duty in failing to disclose to the claimant what they knew of B. To do so (it was conceded) would have been a breach of duty to B. Further, the Court of Appeal found that the retainer between the claimant and the solicitors was subject to an implied exclusion of any general duty of disclosure concerning that which the solicitors were legally obliged to treat as confidential. Hence, as there was no breach of duty in failing to disclose the fact of B's convictions, so it followed that the negligence which was proved, namely, the failure to direct the claimant to receive independent advice elsewhere, had not caused loss because that would not have prevented the transaction proceeding.

The House of Lords took a very different view. Giving the leading judgment, Lord Walker said that there was no such implied term as the Court of Appeal had supposed. Had there been such a term, it would have meant that because the solicitors had failed to tell the claimant to take separate advice and had instead proceeded to act for him in a matter in which they had a personal financial interest, their duty to the

Chester v Afshar

The House of Lords in *Chester v Afshar* created an exception to the usual rules of causation in order to allow the claimant in that case, a patient who alleged that she had not given her properly informed consent to an operation during which she was injured, to succeed. Amongst non-clinical negligence practitioners the big question was whether this decision could be applied in other fields. Could, for example, a solicitor or financial adviser find himself liable even though the claimant could not succeed on "conventional causation principles", as it was put in *Chester*?

In short, the answer is that other professionals are almost certainly not going to be found liable by reference to *Chester*. *Chester* has now twice been considered by the Court of Appeal and on both occasions its wider application was rejected. See *White v Paul Davidson & Taylor* [2004] EWCA Civ 1511, a claim against solicitors, and *Beary v Pall Mall Investments* [2005] EWCA Civ 415, a claim against financial advisers. In particular, Arden LJ noted in *White* that: "[*Chester*] does not establish a new general rule in causation."

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Practice points

- A barrister will generally not be held to be negligent for failing to explain the reasoning behind his advice, at least if that advice is given at the door of the court.
- More generally, recent cases re-emphasise the difficulty of showing that a barrister's exercise of judgment was negligent.
- Solicitors who act, or wish to act, for two clients in relation to the same transaction will need to be extremely careful to ensure that they comply, or will be able to comply, with their obligations to both and will not be able to plead their duties to one to avoid their duties to the other.
- *Forster* may have limits and the House of Lords will be considering the issue shortly.
- *Chester* almost certainly does not apply outside its own facts.

claimant would in some way have been curtailed in order to accommodate their first breach of duty. It was said that the notion that one breach of duty of the solicitors (failure to tell the claimant that they could not act and that he should seek independent advice) could exonerate them in respect of a more serious breach of duty (failure to disclose to the claimant facts that could have saved him from ruin) was contrary to common sense and justice. As, in breach of duty, the solicitors had accepted the retainer, they thereby came under all the duties of a solicitor engaged on such a retainer, and those duties included the duty to disclose to the claimant what they knew about B, notwithstanding that compliance with such a duty might have put them in breach of their duty owed to B.

Thus their Lordships found that there was a breach of duty to the claimant in failing to tell the claimant of B's convictions and imposed liability upon the solicitors for the claimant's loss. Lord Walker was very critical of the solicitors and stated that if a solicitor puts himself in a position of having two irreconcilable duties, it is his own fault, and if he has a personal financial interest that conflicts with this duty, he is even more at fault. Further, he described the solicitor's position in such circumstances as follows:

"Since he may not prefer one duty to another, he must perform both as best he can. This may involve performing one duty to the letter of the obligation, and paying compensation for his failure to perform the other."

The decision in *Hilton* is thus a robust reaffirmation of the rule that a solicitor acting for two clients will in ordinary cir-

cumstances owe each of them precisely the same duties as if the solicitor was engaged by each of them alone. We suggest, however, that it does not really answer the problem identified by the lower courts, namely that, had the solicitors complied with their duties, the claimant would never have discovered anything untoward about B and would therefore have proceeded with the transaction and suffered the same loss. Be that as it may, *Hilton* now represents the law and, if it has a wider application, it is presumably that a defendant may not use what he should have done on an earlier occasion to evade the consequences of the breach in fact sued on by the claimant.

Limitation

The April 2004 update – (2004) 148 SJ 468 – noted that there had then been a number of recent decisions on limitation which concluded, in a variety of different factual circumstances, that the claimant's cause of action should be held to have accrued earlier rather than later. One of those decisions was *Sephton* at first instance, in which the judge expressly adhered to the suggestion of Lord Nicholls in *Nykredit Mortgage Bank v. Edward Erdman* [1997] 1 WLR 1627 that:

"Within the bounds of sense and reasonableness the policy of the law should be to advance, rather than to retard, the accrual of a cause of action."

Somewhat surprisingly, the Court of Appeal, by a majority, overturned that decision and its decision gives rise to interesting questions about the extent of *Forster* and what constitutes loss for the purposes of the Limitation Act 1980.

In short, the case concerned accountants' reports provided to the Law Society by the defendant. The Law Society alleged that those reports had been negligently prepared, that, as a result, it had had to make payments out of the Solicitors Compensation Fund and, accordingly, that the defendant was liable to make good those payments. The defendant contended, and the judge accepted, that the Society's loss occurred when the reports were filed. The Court of Appeal disagreed, holding that the loss occurred on the date on which it resolved for the first time to pay, from the Solicitor's Compensation Fund, compensation to a client whose money was misappropriated after the report in question was provided to the Society. The accrual of the Society's cause

of action was therefore deferred for a considerable period of time.

In support of this rather surprising result, a distinction was drawn between actual loss and a risk of loss. Cases such as *Forster* (claimant suffering actual damage when she executed a mortgage over her property, not when it was called upon) and *Knapp v Ecclesiastical* [1998] 1 Lloyd's Rep IR 390 (damage suffered at the date when a voidable contract of insurance was entered into, not when it was avoided) were distinguished. The majority of the Court of Appeal (Neuberger LJ strongly dissented) said that in such cases actual loss had been suffered at the outset as there had been a diminution in the value of the right or asset in relation to which the defendant in each case was acting or advising. On the other hand, in *Sephton*, the circumstances in which the accountants provided the reports did not involve the Law Society acquiring an asset or right and rather involved the Law Society doing nothing. There was no question of any right or asset of the Law Society being diminished, rather the risk of loss was simply increased because the receipt of a positive report that allowed the practitioner to continue in practice simply permitted a situation to continue in which loss could occur. That was thought insufficient to start time running for limitation purposes.

Whether the Court of Appeal's distinction is a good one and, if so, how it will work in practice remains to be seen. As, however, permission to appeal to the House of Lords has been obtained, we do not propose to dwell on these issues at this time. In practice, those acting for claimants will no doubt continue to want to issue claims as soon as they can and in those relatively few cases that turn on the application of *Sephton*, it is likely to be sensible, once the claim has been heard, to await the decision of the House of Lords.

Conclusion

Returning to where we started, one of the interesting things about many of the cases dealt with here is the level of judicial disagreement they contain. *Moy* and *Hilton* both involved unanimous Houses of Lords disagreeing with unanimous Courts of Appeal and *Chester* and *Gregg* were both 3:2 decisions. One can only hope for a greater level of agreement in the future.