

personal injury

accepted by the court. Counsel echoed that view and advised further that a finding of contributory negligence was inevitable.

In December 1993, W gave a further inconsistent account of the accident to his expert engineer.

In August 1994, W instructed the second defendant (IM), whose solicitor instructed new counsel to advise. In March 1995, an application for an interim payment was made, but refused by the district judge.

In September 1995, H made a payment into court of just over £80,000 inclusive of CRU. In December 1995, an order was made for a split trial.

In March 1996, IM instructed trial counsel (C) to advise. C was leading counsel, half of whose practice was in personal injury. C advised in consultation that there was a small chance that liability would not be established and that a deduction of up to 50 per cent for contributory negligence would have to be made. The conservative value of the claim was £300,000. The payment into court was advised to be rejected. W was very unhappy with the advice he was given, in particular, on contributory negligence. C advised that much would depend on the trial judge's view of W as a witness. IM subsequently repeated that advice in writing to W.

In December 1996, the parties attended Leeds county court for trial. C discussed the case with W and the expert witness. C and IM both took the view that W would not make a good witness. C advised him to settle the claim and allowed him time to discuss the case alone with IM. C negotiated a settlement of £95,000 plus costs, which he advised W to accept. W expressed himself to be content with the settlement.

W's attitude changed the next day. He complained to IM about what had happened. In December 2002 (one day inside the limitation period), W commenced proceedings against C and IM. In essence, W claimed that he had been negligently advised to settle at an undervalue. C and IM denied any liability.

At trial on breach of duty, it was held that the view taken by C and IM that the reliability of W's evidence and his performance in the witness box were central to success on primary liability was justified and reasonable. The advice to settle was firm, identified the serious risk of losing and could not be criticised. The trial judge endorsed C's view that to settle and obtain some money was better than to lose all as being within the range properly open to C. The judge found that C and IM both reasonably advised W to

settle because there was a serious risk that he would lose in full.

Personal injury litigation

Both actions were settled at a substantial discount compared to the actual likely value of the claim on a full liability basis. In both cases a split trial had been ordered. It follows that the full value of the claim would (probably) not have been fully investigated by either side and (certainly) that full quantum documentation would not have been exchanged.

Split trials are increasingly common in personal injury (including clinical negligence) litigation. They are seen as making better use of court time and resources, but mean that cases may last longer. Split trials are sometimes perceived as favouring claimants, who can hold off from fully investigating the quantum claim. On the one hand, therefore, they place considerable pressure on a defendant in that the claim cannot be valued with precision; on the other, they allow an informed defendant to place pressure on a claimant by offering a money settlement in circumstances where:

- (i) the claimant will not know the final value of his claim;
- (ii) will still face the litigation risk on liability; but
- (iii) still runs the risk that any offer may not be beaten at the quantum trial, with the attendant huge costs risk.

Claimants' lawyers should not attend a liability-only trial without having investigated quantum at all; the likelihood must be that there will be an attempt at a financial settlement at court. Failing to investigate quantum at all so that one cannot deal with such a negotiation is probably failing to provide an optimum service to the client.

For a defendant, the discount for liability risk may be better factored into a money offer than a percentage of liability offer. For a claimant a percentage of liability settlement gives certainty that some money will be paid and that quantum can be fully investigated.

Defendants should consider money offers in all cases where a split trial has been ordered.

Professional negligence litigation

While no new principle is created in either case, the cases are useful examples of settlement decisions and the reasons for settling at an undervalue.

Both judgments cited the leading case of *Moy v Pettman Smith* [2005] 1 WLR 583; both cited Lord Carswell's approval in that case of the following passage from the Canadian case of *Karpenko v Paroian, Courey, Cohen and Houston* [1981] 117 DLR:

"What is relevant and material to the public interest is that an industrious and competent practitioner should not be unduly inhibited in making the decision to settle a case by the apprehension that some judge, viewing the matter subsequently, with all the acuity of vision given by hindsight, and from the calm security of the Bench, may tell him that he should have done otherwise. To the decision to settle a lawyer brings all his talents knowledge and experience, both recollected and existing somewhere below the level of the conscious mind, all his knowledge of the law and its processes. Not least he brings to it his hard-earned knowledge that the trial of a lawsuit is costly, time-consuming and taxing for everyone involved and attended by a host of contingencies, foreseen and unforeseen. Upon all of this he must decide whether he should take what is available by way of settlement, or press on. I can think of few areas where the difficult question of what constitutes negligence, which gives rise to liability, and what constitutes at worst an error in judgment, which does not, is harder to answer. In my view it would be only in the case of some egregious error... that negligence would be found."

There are similarities between the two cases mentioned: both involved settlements at a substantial undervalue; both involved claims on liability which presented significant problems for the claimant. Why, then, was one set of lawyers criticised and the other absolved? The answer requires an analysis of the alleged negligence. The negligence in *Hickman* was in failing to take into account at all a significant factor affecting the likely true value of the claim, namely the prospect that H would never work again. Had the lawyers appreciated the real value of the claim and advised W of it, the offer of settlement would not have been accepted. The true extent of the discount in settlement was simply not appreciated. In *Walker*, the alleged negligence was in advising that there were no (or no real) prospects of winning the claim when it was said there was no or no real prospect of losing. There the lawyers were (implicitly at least) well aware that the settlement was at a substantial undervalue; the true extent of the discount was immaterial to the actual advice to settle, which was dependant on W's likely performance as a witness.

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