"*Should we shut our eyes and grope in the dark?*"

Case Note on *Edwards on behalf of the estate of the late Thomas Arthur Watkins v Hugh James Ford Simey Solicitors* [2019] UKSC 54

Introduction

The question on appeal to the Supreme Court in *Edwards on behalf of the estate of the late Thomas Arthur Watkins v Hugh James Ford Simey Solicitors* [2019] UKSC 54 was whether the value of the loss in a professional negligence action should be judged as at the date when the underlying claim was lost or at the date when damages are awarded in the professional negligence action.

In dismissing the appeal, the Supreme Court did not give a direct answer to this question and handed down a unanimous decision that was expressly confined to the particular circumstances of the case. [19]

Facts

The late Mr Watkins developed a condition known as vibration white finger ("VWF") whilst employed by the National Coal Board. Mr Watkins instructed Hugh James Ford Simey Solicitors ("the Appellant") to act for him in a claim for damages for his VWF ("the underlying claim").

In 1999, the Department for Trade and Industry set up a standardised, tariff-based compensation scheme for former miners suffering from VWF ("the Scheme"), under which Mr Watkins made the underlying claim, with the Appellant acting as his solicitors.

The Scheme

The operation of the Scheme is significant in *Edwards*. The Scheme was "*rough and ready*" ([2018] EWCA Civ 1299; [2018] PNLR 30 per Irwin LJ at [70]). The Scheme was designed to enable very large numbers of similar claims to be presented, examined and resolved expeditiously and economically without the need for conventional litigation.

The Scheme contemplated the making of two main types of compensatory award to miners suffering from VWF, corresponding broadly with general and special damages for personal injuries.

To merit an award for general damages, a claimant had to undergo an interview and preliminary medical examination ("MAP 1") to establish whether the claimant suffered from VWF and if so, the severity of the condition by reference to stagings on an internationally recognised scale.

If a claimant was shown to be suffering from VWF above a certain level, a rebuttable presumption arose that they were entitled to a services award to cover the need for

assistance in performing specified domestic tasks. The services award was one aspect of the special damages compensation.
If a claimant wished to pursue a services claim, a further examination ("MAP 2") would take place, limited to the issue of co-morbidity, that is, whether the claimant had other conditions that were responsible for any need for services. The MAP 2 did not revisit or reopen the original diagnosis from the MAP 1.

The Underlying Claim

From the MAP 1 examination, Mr Watkins' VWF was categorised at a level that was sufficient for him to obtain general damages and to entitle him to a presumption in his favour that he satisfied the qualifying requirements for a services award.
Although Mr Watkins initially chose to seek a services award, his claim under the Scheme was later settled, with Mr Watkins agreeing to accept an offer of £9,478 in full and final satisfaction of the underlying claim. That offer of £9,478 was the tariff award for general damages to which Mr Watkins would have been entitled under the Scheme on the basis of his MAP 1 VWF stagings. The offer did not include any allowance for a services award.

The Professional Negligence Proceedings

Mr Watkins later sued the Appellant for professional negligence, alleging that the underlying claim had been settled at an undervalue ("the professional negligence proceedings"). He alleged that, as a result of the Appellant's negligence, he had lost the opportunity to bring a services claim under the Scheme. That lost opportunity was quantified at £6,126.22 plus interest.
Pursuant to directions devised by His Honour Judge Hawkesworth QC in relation to a number of similar claims against solicitors arising out of the Scheme, expert evidence was obtained in the form of a report by a single joint expert.
In its judgment, the Supreme Court noted that the reason for the order for further medical reports was not to revisit the diagnosis and staging of the VWF condition in the MAP 1, but to evaluate the claimant's case on causation, i.e. to assess whether a claimant's failure to pursue a services claim arose from negligent advice or from an inability to assert truthfully his entitlement to a services award. [27]-[28] The order left open the question as to the extent to which any findings by the expert could be taken into account in valuing the loss of a chance to bring a services claim.
The jointly instructed medical expert in Mr Watkins' case, who had been instructed not to apply the presumption that would have applied under the Scheme, provided a report that concluded that in fact, Mr Watkins' true VWF staging was actually much lower ("the after-acquired evidence"). Mr Watkins' true staging would have been insufficient for him to have succeeded in his services claim, and indeed, would have yielded an award of only £1,790 for general damages—less than the amount already received by Mr Watkins in the underlying claim. Rather than being under-compensated for his injury, Mr Watkins had in fact been over-compensated for his VWF in the underlying claim.
Accordingly, although the trial judge found that the Appellant had been negligent in failing to properly advise Mr Watkins on settlement, and that, had he been properly advised, he would not have accepted the settlement, the trial judge dismissed the claim on the basis that Mr

Watkins had suffered no loss, concluding that Mr Watkins' lost chose in action had been shown to have had no value. In other words, the trial judge concluded that on the basis of the after-acquired evidence, Mr Watkins' true entitlement had been less than the amount he had actually received in the settlement, such that any services claim he would have pursued would have had no chance of success.

Appeal to the Supreme Court

The trial judge's decision was reversed in the Court of Appeal. The issue on appeal to the Supreme Court was whether the after-acquired evidence could be used in the trial of the professional negligence action or whether the professional negligence action had to be decided on the basis of the facts and evidence as they were at the date when the underlying claim was lost.

Permission to appeal in the case of *Edwards* directed that the parties specifically consider the relevance of the principle in *Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426 ("the *Bwllfa* principle"), namely the principle that, "*with the light before him, why should he shut his eyes and grope in the dark?*"[1] The general proposition of the *Bwllfa* principle has been variously put: "*where facts are available, they are to be preferred to prophecies*";[2] "*the court should not speculate when it knows*";[3] and, "*you need not gaze into the crystal ball when you can read the book*".[4]

The Appellant had argued that the *Bwllfa* principle entitled the trial judge to rely on the after-acquired evidence when considering whether Mr Watkins had suffered any loss as a result of the Appellant's negligence. It was argued that the assessment of loss and quantification of damages should therefore be determined as at the date of the trial of the professional negligence action, rather than at the earlier date when the claim was lost, on the facts as they were and the evidence available at that time.

The Supreme Court disagreed, finding that the *Bwllfa* principle was not relevant to any issue before the court in the professional negligence proceedings, and that it was therefore not necessary to express a view on the admissibility in professional negligence actions of subsequently acquired evidence. [24]

On the facts of the case, it was found that the after-acquired evidence was not relevant to the issue of loss: the professional negligence action had to be decided within the context of the Scheme. [29] Had the services claim been pursued, Mr Watkins would only have had to undergo the MAP 2. There would have been no equivalent to the after-acquired evidence, no reassessment of the diagnosis or staging found in the MAP 1 and no reduction of the general damages award.

The payment of a services award to Mr Watkins would simply have been a consequence of the way in which the Scheme operated and was intended to operate, rather than made on the basis of a further medical examination and report which would not have been commissioned under the Scheme. The trial judge had therefore erred in taking the after-acquired evidence into account when concluding that the lost claim was of no value. [29]

The consequence of the Supreme Court's decision that the after-acquired evidence was not relevant to any issue in the professional negligence proceedings, means that the Appellant may be ordered to pay further compensation to Mr Watkins' estate, in spite of the trial judge's finding that Mr Watkins has already been over-compensated for his original injury. [24]; [32]

Comment

The facts of *Edwards* expose what could be described as a conflict between the principle of full restitution, i.e. that the claimant be put back in the position they would have been in, absent negligence (*restitutio in integrum*), and the compensatory principle, i.e. that the damages awarded should represent no more than the value of that which the claimant has been deprived by the wrong.

In finding in favour of the late Mr Watkins, the Supreme Court implicitly gives effect to the principle of full restitution: the loss compensated by way of a professional negligence action is the lost chose in action, rather than loss assessed as though the professional negligence action was the claim for damages for personal injuries.[5] Put another way, a claimant who would not have been fully compensated for his injuries tortiously inflicted if his solicitor had not been negligent, is therefore not entitled to full compensation if his solicitor is negligent.

This means that after-acquired evidence ought to be ignored to give effect to the principle of full restitution for the lost chose in action, notwithstanding that this may be at the expense of reality, that is, what has in fact happened. As a result, a claimant may be, in reality, over- or under- compensated, which could be said to offend the compensatory principle.

The logic of the Supreme Court arguably produces an intuitively unattractive result in the case of *Edwards*: the principle of restitution requires a claimant be restored to the position he would have been in but for the breach. But for the breach, Mr Watkins would have profited from the Scheme's rough and ready assessment. Mr Watkins therefore lost the chance to be overcompensated under the Scheme, such that he should be awarded the value of the loss of the opportunity to pursue the services claim.

The compensatory principle on the other hand, advocated by the Appellant, dictates that a claimant be compensated for no more and no less than the true loss caused by the breach. The after-acquired evidence demonstrated that Mr Watkins had not suffered any loss. Because he should not be compensated for loss not suffered, Mr Watkins should not be awarded anything. The compensatory principle thus avoids either an uncovenanted windfall or corrects injustice to a claimant whose case has turned out to be stronger than had been previously assumed.

Instead, the Supreme Court decided that the after-acquired evidence was not relevant to the issue of loss. [29] The main reason given was by reference to Judge Hawkesworth QC's directions indicating that the expert evidence was relevant to the issue of causation, decided in Mr Watkins' favour and not appealed. [22]; [27]; [29] The Supreme Court seems to have concluded that the only evidence relevant to the issue of loss was the nature and operation of the Scheme.

The Supreme Court found that Mr Watkins' claim was of more than negligible value and had a chance of success under the provisions of the Scheme. [29]-[31] Had the Appellant not been negligent, the rough and ready operation of the Scheme would have precluded the findings contained in the after-acquired evidence coming to light. The fact that Mr Watkins was not suffering from sufficiently serious VWF would have gone unnoticed. The after-acquired evidence was accordingly not relevant when constructing the counterfactual situation which would have arisen in the context of the Scheme if the Appellant had fulfilled their duty. [29] Mr Watkins' services claim therefore had a chance of success because it would have been administered in accordance with the provisions of the Scheme.

The decision is explicitly confined to the circumstances of the case in the context of the Scheme. Where the Court of Appeal had been more inclined to delineate the characteristics of after-acquired evidence or events relating to the value of the underlying claim that might be admissible in a professional negligence action, the Supreme Court did not express a view on the matter. [24]

The judgment effectively excuses the "*uncovenanted windfall*" on the basis of the rudimentary nature of the Scheme, thereby circumventing the crucial question that both claimant and defendant professional negligence lawyers expected to have been answered in this case. The judgment repeatedly distinguishes the facts of *Edwards* from "*conventional civil litigation*" at [25]; again at [26] and again at [31]. This begs the *Bwllfa* question, "*with the light before us, should we shut our eyes and grope in the dark?*" The question is likely to continue to be answered on a case by case basis.

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1*Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426 at 431.

2*In re Bradberry* [1943] Ch 35 at 45 per Uthwatt J.

3*Curwen v James* [1963] 1 WLR 748 at 753 per Harman LJ.

4*Golden Strait Corpn v Nippon Yusen Kubishika Kaisha* ("*the Golden Victory*") [2007] UKHL 12; [2007] 2 AC 353 at [12] per Lord Bingham (dissenting).

5See Hugh Evans, "Valuing Bungled Litigation and Later Facts" (2019) 35(1) PN 71-75; "Lost Litigation and Later Knowledge" (2007) 23(4) PN 204-212.