Valuing Bungled Litigation, *Edwards V Hugh James Ford Simey*

Article written by Hugh Evans, June 2018

The broad principles as to how to value what has been lost from bungled litigation have been established for a long time. In assessing what the claimant has lost through his lawyers' negligence, most commonly in failing to issue a claim within the limitation period, the court does not attempt to try the original case. Instead, it values the claimant's lost chose in action. Thus, for instance, suppose he had a 50% chance of obtaining £100,000, then (depending on the circumstances) he will be awarded about £50,000 damages in the professional negligence action. The Court will also attempt to set a notional trial or settlement date, value the claim as at that date, and award interest on it from then until trial in the professional negligence action.

The treatment of evidence and facts which occurred after the notional trial date can be controversial. An example might be a medical report casting a new light on the claimant's condition (I will largely consider bungled personal injury cases for simplicity, but the principles apply generally). In principle, it should be reasonably clear whether this should or should not be taken into account. The judge at the notional trial, or the parties at the notional settlement, would not have known about such a development, and the starting point is that the report should be ignored. However, later facts or evidence may be a very good guide as to the evidence which may in fact have been available, and would or should have been if the lawyers had done their job properly and not delayed the claim. Thus a later medical report may show that the claimant had a particular consequence of his condition which should have been known about at the notional trial or settlement date, though it was not, and therefore this fact should be taken into account in the assessment of what the claimant has lost. In contrast, if the claimant developed epilepsy after the notional trial or settlement as a result of the accident which forms the subject matter of the claim, this should not be taken into account. However, the development of epilepsy may indicate that the medical evidence at trial would have been that the claimant had a significant prospect of

developing epilepsy, and damages should be awarded on that basis. What I have been outlining is what we might call the orthodox view.

However, three Court of Appeal cases appear to go much further than the orthodox view in taking into account later facts and evidence. The fundamental error, it seems to me, is to confuse the value of the lost claim with the assessment of the damages which the claimant should have recovered if the original claim were being tried now. The claimant is not recovering damages in the original action. What is or should be awarded is damages for his lost chose in action. That obviously represents, subject to discounts for the loss of a chance, what he would have been awarded then and not now, which in a personal injury case would be damages for his injuries at the notional trial date (or, more likely, at settlement). It is not the same as the value of the personal injury action if it were tried now, nor should it be. Nor is it unjust that the claimant should be awarded what he has lost, namely the value of his chose in action, whether that is more or less than what he would be awarded now if the personal injury action were being tried. Taking account of developments after the notional trial date in this illegitimate way is in principle no different from taking account of evidence as to how the claimant would in fact have frittered away any damages he would have been awarded after the notional trial date, or have made a fortune from them; those considerations should be simply irrelevant.

Whitehead v Searle

The two original cases which considered this issue (and came to the wrong conclusions), *Charles v Hugh James Jones & Jenkins* [2000] 1 WLR 1278 and *Dudarec v Andrews* [2006] EWCA Civ 256; [2006] 1 W.L.R. 3002, were obiter, and can to a large extent be ignored. The third, *Whitehead v Searle* [2008] EWCA Civ 285; [2009] 1 W.L.R. 549, is the leading case, because the reasoning was part of the ratio. The facts in brief were that PM gave birth to a child with spina bifida, and claimed that this should have been diagnosed antenatally and that she would have had a termination if told. Her principal heads of loss were the past and future costs of bringing up the child. The claim was progressed negligently slowly by the defendant solicitors, and PM committed suicide after the time at which the claim should have been brought to trial. There was, of course, no claim available to the child. In a claim brought by PM's estate, the Court of Appeal held that there would be a windfall if PM's death were ignored, and the court should not proceed to assess damages on that footing. Thus there was no claim for the future costs of bringing up the child, which would have been awarded at the notional trial, but in fact were never incurred.

There were three orthodox arguments put forward by the claimant. The first was that the delay by the solicitors did not cause any loss, as there was no danger of the claim being struck out, and at the moment of PM's death her chose in action was intact and included the costs of future care and accommodation. The second argument was that the kind of loss against which it was the solicitors' duty to protect PM were the consequences of the delay if it led to a strike out or vulnerability to it, which was not in question there. The third was that the loss was caused by PM's suicide, which was not the defendant's responsibility.

All three arguments appear to have been accepted by the Court of Appeal (para [20]), and they provide a sensible reason for the Court's conclusion. However, the overarching reason for the decision was that an award of damage should provide just compensation for a wrong done to the claimant, and the solicitors should not be held liable for the failure to secure what was an uncovenanted windfall (see paras [17], [20], [24]-[25] in the judgment of Laws LJ; at [54] Rix LJ agreed with his conclusions and reasoning). As I have suggested, this confuses the valuation of the lost action with the appropriate damages if such an underlying claim were tried now. The Court prayed in aid the principle that when assessing damages, the court should prefer the facts available to prophecies (see paras [25] and [80]), but that only applies as a reason to assess damages later than the date of breach, and is not relevant when the issue is the damages which would have been recovered at the notional trial or settlement, when the later facts would not have been known, and the rather different value of the underlying action if tried now.

Problems with this approach

The problems of this approach may be seen by considering a number of different factual scenarios. I will start with problems identifed by Lord Emslie in *Campbell v Imray* [2004] PNLR 1 at para. [49], and then add some of my own. The Judge said:

> *"Suppose A and B suffer substantially the same injuries in the same accident caused by the same wrongdoer: can it really be right that A, whose action is lost through his solicitors' professional negligence, may end up with a claim substantially higher, or substantially lower, than B whose claim is timeously raised? And what if it is held that A's claim would probably have been settled extra-judicially: is that settlement to be judged by reference to matters of which neither party could possibly have been aware at the material time? Further, suppose that two wrongdoers are jointly and severally liable for the same pursuer's loss, and proceedings are timeously commenced against one but not against the other: can the notional liability of the latter, assessed in professional negligence proceedings, seriously be taken at a level bearing no resemblance to the liability of the former?"*

One can imagine many further difficulties than those identified by Lord Emslie. They mostly depend on whether the case would have settled, something he mentions in his middle example, and the vast majority of claims do settle.

First, suppose there is clear evidence that different barristers had advised both the claimant and the defendant that the value of the claim was (say) £100,000, the claimant had instructed his solicitor to settle for that sum, and the insurers had instructed the original defendant's solicitors to settle for the same sum. If the claimant's solicitors do nothing and the claim is later struck out, the value of the case is very clearly £100,000. The claimant should not be allowed to argue that the valuation of his claim was based on a 10% prospect of developing epilepsy, he has now developed the condition, so his damages should reflect that. Nor should the defendant solicitors be able to say that the valuation at the time reflected the claimant's uncertain job prospects, and as he has subsequently got a secure job the claim should not be worth as much as £100,000. But if those arguments are plainly wrong, it should not be different if the facts are changed a little, so that there is not such clear evidence as to the likelihood and amount of settlement.

Secondly, suppose that the complaint is that the defendant solicitors failed to advise the claimant to take an offer of £100,000, which on the evidence they had was a good offer, perhaps indeed the original defendants had made a mistake in calculating quantum. It would not be a defence to say that the claim then was only worth £80,000, and it would even less be a defence now to say that on present evidence, given subsequent developments, it would only be worth £50,000, nor should the claimant be able to say that in fact if tried now the claim would be worth £150,000. The formulation of the solicitors' negligence may be different from one of simple delay, but surely that should not matter (subject to the orthodox arguments put forward and accepted by the Court of Appeal which I have mentioned). And in any event, other examples can be constructed between the two, for instance failing to make a counteroffer, or failing to embody a settlement in a Court order on behalf of a minor.

Thirdly, suppose, instead, that the complaint is that the solicitor's delay meant that the claim was not settled in 2005 for the £1m which was the original defendant's insurance limit, but instead was settled in 2010 for the same limit, and thus the claimant has lost five year's interest on the sum. The defendant solicitors should not be permitted to say that in fact there has been an astonishing improvement in the claimant's condition after 2010, so his injuries are not even worth £1m now and thus he has no claim. Nor could the claimant be permitted to say that developments in his condition in 2010 mean that his claim would have been worth £1m in 2000

if they had been predicted, so that he can claim interest from that date. Indeed, there is an inherent contradiction between claiming that the case should have been settled sooner, but seeking to rely on later facts and evidence which were unknowable at that earlier date. Again, the facts of these examples are different from the normal case where the claim is simply lost by delay, but it is difficult to see how those differences are material to the principle in issue.

Where to draw the line?

In *Whitehead* the later facts indicated that, with the benefit of hindsight, the claimant would have been overcompensated at the date of notional trial or settlement. What if she had been undercompensated? Laws LJ said, [2008] EWCA Civ 285; [2009] 1 W.L.R. 549 at [29] that "*different considerations might then arise. Nothing I have said is intended to express a view about such a case."* In contrast, in *Charles v Hugh James Jones & Jenkins,* Swinton Thomas LJ suggested that the new principle would work both ways, [2000] 1 WLR 1278 at 1290F:

> " …i*t would be absurd, and in my judgment wrong if, for example at the notional trial date the medical evidence indicated that there was a strong probability that the claimant would in future suffer some adverse medical consequences as a result of the injuries sustained in the accident, but it was shown as at the date of the actual hearing that there was no such risk, that the claimant should recover damages in respect of it. Similarly, if there was evidence as at the notional trial date that the probability was that the claimant would never work again, but at the actual trial date he or she had obtained remunerative employment, it would be wrong not to take that fact into account. Equally, if the evidence was less certain as to the claimant's prospects of obtaining employment at the notional trial date, but it was quite certain as at the actual trial date that she would be unable to go back to work again, that is a fact which can properly be considered by the judge. In my judgment, it would be absurd and wrong in principle to disregard such evidence*."

McGregor on Damages, 19th edn at para 10-099, suggests that the principle should only work one way, which is to reduce damages. He considers that it is an application of the mitigation rule, that there can be no recovery for losses which in fact were avoided unless the matter is collateral. But mitigation does not apply in these circumstances, which is relevant in assessing damages against one defendant, it being wrong to assess those damages at an earlier point if in fact the loss was later avoided. It should not apply when the loss is the damages which would have been recovered at an earlier point from the original defendant by reason of the negligence of the present defendant solicitor.

One further and significant problem in accurately determining damages from the present standpoint is where to draw the line as to what should be taken into account. Where can a principled line be drawn in order to preserve any of the jurisprudence about lost litigation? If there is none, why not jettison it wholesale and simply value the original claim as if the solicitors simply stepped into the shoes of the original defendants?

Thus, for instance, it would appear that one should take into account the fact that a claimant's bad knee has since not become worse, when at the notional trial damages would have been assessed on the basis that the knee merely might get worse. But it is difficult to see in principle why this is different, for instance, from the following. (1) The tariffs to be applied to the personal injury should be the present ones, and not those prevalent at the notional trial date. (2) In assessing future earnings, contrary to the normal principle of taking present earnings and multiplying them by the multiplier, one should take earnings as they have actually increased from the notional trial until now. (3) One should take into account the dramatic increase in damages following the change in the discount rate in March 2017. (4) The value of the personal injury claim should be wholly assessed now, and not at the notional trial date. (5) There should be no discount for the loss of a chance (and, conversely, if the claimant cannot prove his case on the balance of probabilities, he recovers nothing). It is really rather unclear why some changes after the notional trial date, as to the claimant's condition and job prospects, should be taken into account, but not others, and why, if the loss of a chance approach is to be rejected on some issues, it should not be rejected completely.

Edwards v Hugh James Ford Simey

The Court of Appeal have now, at least in part, reasserted the orthodox approach in *Jean Edwards v Hugh James Ford Simey (a firm)* [2018] EWCA Civ 1299. The claim was one of many for undersettlement of a miners' claim for vibration white finger. The deceased had a potential claim for services, as he was unable to undertake particular tasks due to his condition. Under the settlement scheme of those actions, a report was obtained under a defined medical assessment process ("MAP"), which showed his condition was sufficiently serious that there was a presumption that he required assistance in certain tasks. Due to the negligence of his solicitors, he failed to pursue that claim, and instead accepted an offer which did not include any compensation for services.

The judge below assessed the value of the claim against the negligent solicitors on the basis of an expert's report which concluded that the deceased's condition was such that he did not require

any assistance, and therefore rejected the claim. The Court of Appeal reversed the decision. Under the scheme, services were assessed in a rough and ready way, without the use of any medical evidence beyond the report which had been obtained from the MAP. Subsequent medical evidence was not relevant. Irwin LJ, giving the substantial judgment of the Court, with which Singh and Underhill LJJ agreed, correctly stated at para [67]: "*.. what the claimant should recover in the professional negligence claim is not established by answering the question: how much of the original claim can he prove now? Rather it is established by answering the question: what was the value of what he lost then*?"

Irwin LJ explained at para [69] that in *Charles v Hugh James Jones & Jenkins* and *Dudarec v Andrews* the relevant later evidence would and should have been available at the notional trial, and presented no difficulty on the orthodox jurisprudence, although there were obiter comments to the contrary. However, he accepted that *Whitehead v Searle* was different. There, a key element of an award, which was the cost of care for many years, had unexpectedly been proved wrong. He concluded at [73]:

> "*I accept that there is no established threshold over which a party must step before such an after-coming event, which could not and would not have been known, should alter the outcome. However, this is a matter essentially of public policy … so that the Court is forced to recognise that the ordinary principles "would not do justice between the parties", then in my view there must be a requirement for a significant or serious scale to the consequences of the supervening event, before it should be permitted to establish an exception to the normal principle. Unless there is some such threshold, there will be a continuing pressure to admit fresh evidence which would not have been available at the original notional trial, on all aspects of such cases ..*"

This development is to be welcomed. The subverting of orthodox principles of valuing lost or bungled litigation has been seriously curtailed, and it will only happen in unusual cases, those where there is "*a significant or serious scale to the consequences of the supervening event*". The previous three Court of Appeal cases, which potentially undermined the orthodox jurisprudence very significantly, have now been limited in their effect. Furthermore, a rational has been given for doing so, public policy, although that is a somewhat elastic and uncertain concept.

There will continue to be difficulties. What is needed to cross the threshold test which the Court of Appeal has now set? We have one clear example from the facts of *Whitehead v Searle.* Another may be an example given by Smith LJ in *Dudarec v Andrews,* where the Claimant won the lottery after the notional trial date and would have given up work even if fully fit, so there should be no

award for future loss of earnings. Is the threshold to be judged on the basis of the percentage difference between the value of the claim at the notional trial or settlement, and the value of the claim now? If so what percentage? Would the percentage be different depending on the value of the claim? Or should the percentage be based on the one element of the claim which has dramatically changed? I doubt that the Court would be prepared to set any such percentage, but in the absence of such a guideline, it is difficult to assess when the threshold would be crossed.

To return to my five examples, which I had written down before *Edwards v Hugh James Ford Simey,* four of them can be answered with some certainty:

(1) The tariffs to be applied to the personal injury should be the present ones, and not those prevalent at the notional trial date? The tariffs have not changed so significantly that it could be plausibly argued that there is "*a significant or serious scale to the consequences of the supervening event*".

(2) In assessing future earnings, contrary to the normal principle of taking present earnings and multiplying them by the multiplier, one should take earnings as they have actually increased from the notional trial until now? Similarly, it is difficult to see how it could be maintained that the threshold has been crossed,

(3) One should take into account the dramatic increase in damages following the change in the discount rate in March 2017? I think this may be more difficult. Awards for future loss of earnings and future care have increased dramatically with the change from 2.5% to -0.75%. In a case where the bulk of the value of the claim is made up of these two elements, which is not unusual, then for a claimant in his twenties the value of his claim may double.

(4) The value of the personal injury claim should be wholly assessed now, and not at the notional trial date? This is now unarguable.

(5) There should be no discount for the loss of a chance (and, conversely, if the claimant cannot prove his case on the balance of probabilities, he recovers nothing)? This is now unarguable.

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