

Solicitors' negligence claim settled at mediation for £134k against an original claim for £4.4 million

The claimant (C), who was aged 52 at the time of the accident, suffered very serious brain and other injuries in 1992 on a building site occupied by the Ministry of Defence. He required 24 hour care. Proceedings claiming damages for personal injury were served in February 1995 by our client's insured (D) against four defendants (later reduced to two) but in 2003 the claim was struck out for want of prosecution. C brought a solicitors' negligence claim in 2007 against D, claiming total damages of £4.4 million. C died in January 2008 and the claim was continued by his estate.

Breach of duty in allowing the claim to be struck out was admitted. The percentage loss of chance was in dispute. We argued that the merits of the original claim were doubtful and C was likely at least to have been found contributorily negligent. The defendant against whom the original claim was most likely to have succeeded was uninsured and unlikely to have been able to pay substantial damages.

A key quantum issue was the extent to which actual post-notional trial date (NTD) events should be taken into account in assessing damages. C submitted an extensive claim for future losses, including treatment, case management, transport and equipment. However, whilst accepting that C actually lived for three more years than had

been estimated at the NTD and may have suffered additional losses in this time, we contended that a significant proportion of C's purported losses were never and would never have been incurred. For instance, C resided in a locally-funded care home until his death and only contributed a relatively small amount towards the fees. For C it was argued that he should have been placed in a private care home from the start, which would have increased his loss. However, the care report in the original action concluded that a private care regime would have been inappropriate.

In other cases we have argued that little has changed apart from figures since the notional trial date so this should be ignored; but here, there were good grounds for arguing that subsequent events should be taken into account. *Hibbert Pownall & Newton v Whitehead* was broadly helpful to us.

The claimant rejected a Part 36 offer made at an early stage but round table discussions were subsequently held with counsel present in April 2010, at which the claim settled for £134k plus costs. Neil Block QC was instructed for D.

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Discontinuance of brain injury claim

We acted on behalf of the first defendant (D1) in a claim brought by a claimant for a potentially serious brain injury. We were successful in persuading the claimant to discontinue his claim with no order as to costs whilst securing a contribution towards D1's costs from the second defendant (D2).

The claimant was an HGV driver employed by D1. D1 was a haulage company. D2 was a well known food retailer. The claimant had returned to D2's depot to enable crates to be unloaded. As the claimant opened one of the rear doors of his articulated trailer some crates fell out and struck him on his head. It was alleged that the injury had caused the claimant to develop epilepsy.

It was maintained that D1 was negligent and/or in breach of statutory duty primarily in failing to undertake a suitable risk assessment and provide adequate training. D2 was alleged to have been negligent and/or in breach of statutory duty primarily in failing to ensure that the goods were properly stored.

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We made an early offer to D2 to bear own costs on the basis that D2 took over conduct but this was not accepted. Witness evidence was therefore obtained to refute the allegations, Part 18 questions were put to the claimant and a Part 20 Additional Claim made against D2 for a contractual indemnity pursuant to the Road Haulage Conditions of Carriage 1988.

Supplemental medical evidence was provided which confirmed the causal connection between the epilepsy and the accident was not clearly made out. We took this opportunity to engage in further negotiations between the parties resulting in D2 eventually being persuaded to accept a settlement offer made by the claimant and pay the claimant's costs. As above the claimant was also persuaded to discontinue his claim against D1 with no order as to costs whilst a contribution was secured from D2 towards D1's costs resulting in a satisfactory result for D1 and our insurer client.

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Successful settlement in industrial disease loss of chance claim



We recently settled on favourable terms a professional negligence claim arising out of an industrial disease claim. The claimant's husband had brought a claim against his former employer after developing asbestos pleural disease in 2002. In 2003, he accepted the sum of £13,500 in full and final settlement of his claim. He subsequently developed mesothelioma and died in 2004.

The deceased's widow claimed that our client's insured was negligent in failing

properly to advise the deceased in relation to the risk of him developing mesothelioma and the potential difference in value between a full and final settlement and a provisional damages award, with the option to return to court for a further award in the event of developing mesothelioma.

It was claimed that the defendant should have taken note of the "caution" expressed in the medical evidence. This was that occasionally mesothelioma presents with what appears to be a benign effusion that resolves, only for evidence of mesothelioma to develop months or even a year later, and that reassessment after a year would be helpful in confirming that the deceased's condition was benign. However, the expert cited the

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risk of the deceased developing mesothelioma at 3% and lung cancer at 1%.

The claimant's professional negligence claim was pleaded in the region of £250,000, which included general damages and dependency on the deceased's pension income and services such as gardening and DIY.

Liability was disputed. We argued that the defendant had given proper advice to the deceased. We highlighted the fact that, throughout the claim, the deceased appeared to be concerned about bringing the litigation to an end rather than having it hanging over him as this was causing him equal if not greater anxiety than the concern that he might develop mesothelioma. Further, there was no

evidence that, had different advice been given, the deceased would have reached a different decision regarding the basis of settlement of the claim. Therefore, assessed on a loss of chance basis, which is the appropriate way to deal with such a claim, we argued that the value of the loss of the claimant's chance was nil or nominal.

The claimant made an offer to settle in the sum of £100,000. We responded with a counter offer of £50,000 which was accepted.

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Sources of income when the claimant is self-employed

It is always worthwhile carefully checking the structure of a self employed claimant's business.

In a case we recently settled at mediation, the claimant was unable to continue as a builder as a result of his injuries. On investigation it became apparent that he ran one business as a sole trader and also had a limited company which went into liquidation after the accident. The claimant was a director and 50% shareholder in the company. His wife was company secretary and held the other 50% shareholding. The evidence was that the company was set up to protect the family's assets on large contracts; it was not set up for tax reasons.

It is well established that where a claimant is absent from an incorporated business, the company cannot claim its loss of profits as this is too remote from the tort. Clearly the claimant was entitled to compensation for his loss of salary and benefits from the company.

The claimant relied on various cases which in fact concerned partnerships, including *Ward v Newalls (1998)*, and contended that 100% of the dividends should be treated as the claimant's loss as his wife in reality did little or no work for the company.

We argued first that historically no dividends had been distributed by the company and none were likely in the future, alternatively

that any dividends should be treated as being distributed in the same proportion as the shareholdings, so the claimant should only receive 50% of the dividends.

In the event, the case was settled for a global figure, but it highlights the need to consider the nature of a claimant's sources of income.

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