Article written by Helen Evans on 28th August 2018.

What's going on with lost litigation claims?

Helen Evans of 4 New Square examines the recent authorities looking at negligently conducted litigation, and asks if change is in store when the topic reaches the Supreme Court in late 2018.

"Lost litigation" claims arise in an eclectic range of different ways- from a divorcing spouse who has lost the chance to pursue a claim for a fair share of the matrimonial assets, to a company whose lawyers have failed to advise about all the types of claim that can be brought against a delinquent director, to a claimant who missed the limitation period governing a personal injury claim (to give but a few examples). When the disappointed client then pursues the negligent lawyers, the court has to grapple with what the likely outcome would have been if the original litigation had been properly pursued.

The court usually proceeds on an "*Allied Maples"* basis: i.e. it asks whether there was a real and substantial chance of the claimant achieving the outcome that he or she says he would have achieved if his case had been properly pursued by his lawyers. The courts have repeatedly emphasised that it is not appropriate to fight out "a trial within a trial", and that it is "the prospects and not the hypothetical decision in the lost trial that have to be investigated": see e.g. the comments of Rix LJ in *Dixon v Clement Jones Solicitors* [2005] PNLR 6.

Despite the broad ground covered by "lost litigation" claims, the authorities governing them tend to be drawn from a surprisingly narrow field. Until recently the main principles were generated from cases where claims had been struck out for want of prosecution. Why does this matter? It is potentially significant that the key authorities derive from this pool, because in order for a claim to be struck out in the first place, a judge must have concluded that a fair trial was no longer possible. The starting point, therefore, for this type of "lost litigation" claim is that the case before the court was not capable of being adequately tried by anyone.

Against this backdrop, it is not surprising that the courts have repeatedly emphasised that it is not the function of the court trying the professional negligence case to have a "trial within a trial". The point was made in *Hanif v Middleweeks* [2000] Lloyd's Rep PN 920, (as well as *Dixon v Clement Jones* as cited above), and was repeated last year by the Court of Appeal in *Perry v Raleys* [2017] PNLR. 27.

Hanif was a case where a nightclub owner's counterclaim against his insurers arising out of a fire was struck out for want of prosecution. The first instance judge observed that "the evidence I have heard is somewhat scant and probably scantier than what would have been heard by a Judge trying the original action had such trial taken place". The judge- and the Court of Appeal- therefore perceived the court's role as "to assess whether there were any, and if so what, significant prospects under the original counterclaim" rather than to decide the issues on the counterclaim as an underlying court might have done. *Dixon* was another case where an action was struck out due to delay and could not be fairly tried, and the court followed *Hanif.*

By contrast, *Perry v Raleys* was an industrial injury case brought by a coal miner who was able to give evidence himself and also to call expert evidence in the "lost litigation" claim. Is it right that such a claim should be treated in the same way?

In *Perry v Raleys,* the Court of Appeal did not draw any distinction between the *Hanif/Dixon* style case (where a claim has been struck out for want of prosecution and was not capable of a fair trial) on the one hand, and the *Perry* style case (where there is considerable evidence available to the court trying the negligence action) on the other. Instead it applied what it perceived as the orthodox approach of only examining what the prospects were of the claimant succeeding. It observed that there "sound public policy reasons for such an approach", namely that it is "far too easy for negligent solicitors, or, perhaps more pertinently, their insurers, to raise huge obstacles to claimants such as Mr Perry from pursuing their claims, if the latter are required, effectively, to prove in the litigation against solicitors that they would have succeeded in making such a claim against the [original defendant]".

It may be the case that professionals sued by their client are apt to raise every issue that the original defendant would have dredged up in the underlying trial, but the Court of Appeal's observation only looks at the issue from the claimant's perspective. Defendant professionals sued in lost litigation cases often express surprise that a former client, who had less than 50% prospects of winning his or her original claim, now appears to have a stronger claim against his lawyers than he had against the original defendant (albeit that the negligence claim is worth less). Is that fair?

And there is a further challenge relating to the "no trial within a trial"/"you only assess the prospects" approach- what should a court do where a claimant exaggerates the value of the original litigation that he has lost the chance of pursuing? Take the example at the start of this article of a spouse who has lost the chance of pursuing a suitably sized claim in the context of a divorce. What if he or she says that she would have recovered a wholly unrealistic proportion of the matrimonial assets or that the assets were worth an inflated sum? Should the court proceed on the basis of a low prospect of the claimant recovering his or her exaggerated outcome? Or should it try to get to grips with the range of likely orders that the court would have made in the ancillary relief proceedings between the spouses? The first approach is arguably artificial; the latter approach arguably veers towards the "trial within a trial" territory.

There are pitfalls, including those identified above, in the current approach to lost litigation cases that are ripe for reconsideration. *Perry v Raleys* is proceeding to the Supreme Court in late 2018. It may be followed (if permission to appeal is granted) by *Edwards v Hugh James Ford Simey* [2018] PNLR 30, another case arising from a mishandled industrial injury claim. Although the main focus of the *Edwards* case was on whether evidence that would not have been available at the original trial date in the "lost litigation" could be adduced at the trial of a professional negligence claim, there are strong conceptual overlaps with *Perry*. Both *Perry* and *Edwards* call into question what the function is of the court trying the negligence claim. In *Edwards,* the defendant solicitors argued (in reliance on cases like *Harrison v Bloom Camillin* [2001] PNLR 195) that when dealing with a professional negligence claim, if some or all of the issues of loss from the underlying proceedings can still be fairly tried, then they should be tried.

Harrison contains the observation that "in some loss of a chance cases the court may think it right to view the prospects on a fairly broad brush basis; in other cases it may be correct to look at the prospects in far greater detail". The tendency of the reported authorities has been to adopt the broad brush approach. Is it time for a rethink about the latter?

Helen Evans, 4 New Square
hm.evans@4newsquare.com