Michaelmas Term
[2019] UKSC 54
On appeal from: [2018] EWCA Civ 1299

JUDGMENT

Edwards on behalf of the estate of the late Thomas Arthur Watkins (Respondent) *v* Hugh James Ford Simey Solicitors (Appellant)

before

Lady Hale, President
Lord Reed, Deputy President
Lord Lloyd-Jones
Lord Sales
Lord Thomas

JUDGMENT GIVEN ON

20 November 2019

Heard on 25 July 2019

Appellant	*Respondent*
Michael Pooles QC Matthew Jackson (Instructed by DAC Beachcroft LLP (Bristol))	Richard Copnall Abigail Telford (Instructed by BPS Law LLP (Manchester))

LORD LLOYD-JONES: (with whom Lady Hale, Lord Reed, Lord Sales and Lord Thomas agree)

1. Mr Thomas Arthur Watkins lived near Tredegar in South Wales. He was employed by the National Coal Board (later British Coal Corporation) ("British Coal") as a miner from 1964 until 1985. In that employment he was required to use vibratory tools and as a result of such exposure, in common with very many other miners, Mr Watkins developed Vibration White Finger ("VWF") which is a form of Hand/Arm Vibration Syndrome ("HAVS"). He first experienced the symptoms, which consist of whitening, stiffness, numbness and tingling of the fingers of both hands, not later than the early 1980s. After he left the employment of British Coal in 1985, he worked as a driver of road sweeping vehicles until he retired in 1997. Shortly after that he was diagnosed with osteoarthritis in both knees which became increasingly acute. One symptom of VWF can be a reduction in grip strength and manual dexterity in the fingers. A common, although not invariable, consequence is that a person suffering from these conditions becomes unable, without assistance, to carry out routine domestic tasks such as gardening, do it yourself or car maintenance.

The Scheme

2. A group of test cases, representative of some 25,000 similar claims, established that British Coal had been negligent in failing to take reasonable steps to limit the exposure of employed miners to VWF from the excessive use of vibratory tools (*Armstrong v British Coal Corpn* [1998] CLY 975). As a result, the Department for Trade and Industry ("DTI"), which had assumed responsibility for British Coal's relevant liabilities, set up a scheme in 1999 to provide tariff-based compensation to miners who suffered from VWF as a result of exposure to excessive vibration ("the Scheme"). The Scheme was administered pursuant to a Claims Handling Arrangement ("the CHA") dated 22 January 1999 and made between the DTI and a group of solicitors' firms representing claimant miners suffering from VWF. The central objective of the CHA was to enable very large numbers of similar claims to be presented, examined and resolved expeditiously. 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. The Scheme provided for compensation to be paid for pain, suffering and loss of amenity ("General Damages"), and for handicap on the labour market and other financial losses ("Special Damages") including past and/or future loss of earnings. Pursuant to a Services Agreement dated 9 May 2000 the special damages could include a services award for qualifying miners in respect of the need for assistance in performing domestic tasks.

3. Under the Scheme, each claimant was required to complete a questionnaire on his work history and IRISC, the claims handling organisation which acted on behalf of the DTI, would then allocate him to a particular occupational group, depending on his likely exposure to vibration. He would then undergo a medical examination in accordance with a defined Medical Assessment Process ("MAP") by a doctor appointed under the Scheme. The resulting MAP 1 report was in standard format and was intended to determine whether the claimant suffered from VWF and, if so, the severity of the condition by reference to the stagings on the Stockholm Workshop Scale. The "V" score was a measure of the vascular symptoms and depended largely on reporting from the patient. The extension of blanching was recorded diagrammatically by the examining doctor. The sensori-neural signs and symptoms were assessed partly from the claimant's account and partly by standardised testing, the results of which were recorded as "Sn" markings. It was open to a claimant to challenge the findings of the MAP 1 report but there was no provision for IRISC to do so. Within 56 days of receipt of the MAP 1 report IRISC was obliged to make an offer of compensation or to reject the claim with reasons.

4. The Services Agreement of 9 May 2000 was incorporated in the CHA as Schedule 7(1). It recorded an agreed approach to compensation for services. The respective medical experts of the parties to the Scheme rejected the idea that there should be an individual assessment of each claimant's ability to carry out particular household tasks. Instead it was agreed that

> "an assumption be made that once the condition had reached a certain level(s) causation it should be presumed that a man could no longer carry out certain tasks without assistance. The examining doctor would then merely have to consider whether there were any other conditions (VWF apart) which of themselves would have prevented the man from undertaking the task in question thereby rebutting the presumption." (Schedule 7.1, paragraph 3.1(ii))

Six tasks were identified for this purpose: gardening work, window cleaning, do it yourself, decorating, car washing and car maintenance (Schedule 7.1, paragraph 3.3).

5. Claims under the Services Agreement were processed in the following way. The experts produced a matrix identifying in respect of each staging of 2V and 2Sn late, or higher, the tasks for which a claimant would be presumed to require assistance. Once a claimant had a staging of at least 2V or 2Sn late, a claimant was entitled to a services award if he had previously performed one of the identified tasks, but now required assistance to do so as a result of his VWF. Men at 2V on the scale would be expected to have difficulty with all tasks except do it yourself and

decorating and at 3V would be expected to have difficulty with decorating. It was further assumed that the condition would not have deteriorated since cessation of exposure to vibration (Schedule 7.1, paragraphs 4.1, 4.2). A claimant did not have to show that his condition wholly disabled or prevented him from carrying out the relevant task. It was enough that he could no longer carry it out without assistance. The approach left to be determined when a claimant reached the relevant stages, whether he suffered from any other conditions which would have prevented him from continuing to carry out any tasks in any event ("co-morbidity"), and, if so, what that condition was, when it developed and the extent to which it compromised his ability to carry out the relevant tasks expressed on a scale of nil, material, moderate, serious and complete (Schedule 7.1, paragraphs 3.7, 5.1).

6. Factual evidence concerning a services claim was presented by a simple questionnaire completed by the claimant. Because it would be impracticable to investigate individual claims in any detail, the Scheme provided that "broad assumptions will be made about the average assistance that would be required for the particular task by the individual at the relevant stage" (Schedule 7.1, paragraph 6.7). Schedule 7 stated that "practical and other considerations militate against other than a tariff based approach given the number of claims and the need for a quick, efficient and inexpensive approach to their settlement." (Schedule 7, paragraph 6.2) In addition, a claimant's most recent helpers would complete questionnaires. A claimant would then be sent for a further medical examination ("MAP 2") which was solely concerned to consider whether there were any other conditions which, of themselves, would have prevented the claimant from undertaking the task in question.

7. A claimant was not usually contacted by IRISC concerning his claim, but helpers were. This normally consisted of a telephone interview, which might last 15 minutes, during which the helper would be asked whether he or she had assisted with the tasks claimed and, if so, when they started to do so. Even where the helper was out by a few years on dates, the information in the questionnaire would still be accepted.

8. On receipt of the questionnaires, IRISC would consider each claim on its merits, adopting a pragmatic approach. If IRISC did not accept the claim entirely it had to set out in detail the reasons for rejecting the claim in whole or part. Compensation was calculated by application of a multiplier/multiplicand approach and an index-linked tariff was set in respect of each task according to the particular staging. IRISC could reject a claim for services in whole or in part if a claimant's work history after leaving the mining industry was such as to indicate that his ability to carry out the relevant tasks was not impaired. However, in order to be entitled to rebut the presumption that a man with a particular claimant's stagings could not carry out the relevant tasks without assistance, IRISC had to discharge the burden of establishing that the work actually carried out by the claimant was such as to

demonstrate that he could reasonably be expected to carry out all aspects of the task without assistance. Pending resolution of the services claim, a claimant was entitled to receive an interim payment in respect of his claim for general damages and handicap on the labour market.

Mr Watkins's claim

9. In February 1999 Mr Watkins instructed Hugh James Ford Simey Solicitors ("the appellant") to act for him in relation to a claim under the Scheme. His claim was notified to the DTI's claims handlers on 10 February 1999. By November 1999 Mrs Barbara Kinsey, litigation solicitor within the appellant firm, had assumed responsibility for many VWF claims, including that of Mr Watkins, at the appellant's office in Bargoed and, from 2001, Treharris. On 31 January 2000 Mr Watkins underwent an interview and examination performed in part by Dr Chadha, a general practitioner appointed under the Scheme, and in part by an unnamed laboratory technician, to assess whether he was suffering from VWF and, if so, how his condition should be categorised under the Stockholm Workshop Scale for its vascular and sensorineural components. This was referred to as a Medical Assessment Process 1 ("MAP 1") examination. In a report dated 3 February 2000 Dr Chadha indicated that Mr Watkins suffered from VWF with stagings of 3V and 3Sn bilaterally (ie in both hands). Those stagings were sufficient for Mr Watkins to obtain general damages and to entitle him to a presumption in his favour that he satisfied the qualifying requirements for a services award.

10. Mr Watkins did choose to seek a services award. He and his assistants completed the necessary questionnaires which were sent to the DTI's claims handlers on 23 March 2001. They initially sought to deny Mr Watkins's entire claim on the basis that he had not been exposed to excessive vibration while working for British Coal. The appellant challenged that decision and eventually the claims handlers were persuaded to accept Mr Watkins's claim under the Scheme. As a result of this delay, it was not until 12 February 2003 that the claims handlers wrote to the appellant, offering Mr Watkins the sum of £9,478 "in full and final settlement of all [Mr Watkins's] claims arising out of his exposure to vibration during the course of his employment with the British Coal Corporation". £9,478 was the tariff award for general damages to which Mr Watkins would have been entitled under the Scheme on the basis of the stagings of 3V and 3Sn bilaterally. The offer made did not include any allowance for a services award. The appellant wrote to Mr Watkins on 18 February 2003, reporting the offer which had been received and advising him as to what would be involved should he wish to proceed with a special damages claim. On 23 February 2003 Mr Watkins spoke by telephone with Mrs Kinsey at the appellant and told her that "he didn't want to proceed any further with the special damages claim as he had other conditions and had had various operations which in his view prevented him from carrying out certain tasks". He indicated that he was quite happy to continue with general damages only and would accept the

offer. Mr Watkins completed a form of acceptance on 24 February 2003 and the appellant wrote to the claims handlers on 27 February 2003 accepting the offer in full and final settlement of Mr Watkins's VWF claim against British Coal.

The professional negligence proceedings

11. Nearly five years later, in January 2008, Mr Watkins, having seen a newspaper advertisement offering assistance to any ex-miner who may have had his VWF claim settled at an undervalue, instructed fresh solicitors, who issued proceedings against the appellant on 11 August 2010. By the amended particulars of claim it is contended that as a result of the appellant's negligence, Mr Watkins has lost the opportunity to bring a services claim under the Scheme or otherwise. That lost opportunity is quantified at £6,126.22 plus interest.

12. On 22 October 2010, His Honour Judge Hawkesworth QC made an order in relation to a number of claims against solicitors arising out of the Scheme, directing that disputes about expert evidence and disclosure be dealt with at a hearing before him. The six test cases identified in the order did not include Mr Watkins's claim. Following a hearing, by order dated 3 May 2011 Judge Hawkesworth ordered that his directions should apply "to all prospective and existing claims alleging negligence against solicitors in the context of the advice given by those solicitors in respect of claims for damages [under the Scheme]". He directed that expert evidence should be obtained in the form of a report by a single joint expert. A schedule to the order set out a standard form letter of instruction to such a single joint expert in terms approved by the judge.

13. That standard form was adopted in the letter dated 21 January 2013 by which the parties to the present proceedings jointly instructed Mr Tennant, a consultant vascular surgeon. It stated:

> "It is an issue in the proceedings whether Mr Watkins would, if properly advised, in fact have brought a Services claim at all. Whether Mr Watkins was, as a result of HAVS, in fact disabled from carrying out (in whole or in part) the tasks he alleges would have formed the basis of his Services claim is relevant to that issue. Accordingly, we wish jointly to instruct you to carry out a medical examination of Mr Watkins and, on the basis of that examination and your consideration of the documents referred to below and attached to this letter, to prepare a report stating your opinion as to whether Mr Watkins is and was at any time from the date of onset of HAVS symptoms:

> (1) Disabled by HAVS as a matter of fact and, to the extent that he was, unable to carry out (in whole or in part), without assistance, the tasks which he alleges would have formed the basis of his Services Claim; and
>
> (2) Suffering from any co-morbid medical condition which would, in any event, have affected his ability to carry out those tasks without assistance.
>
> In relation to co-morbidity, could you please express your opinion as to whether any such co-morbidity was at any time since the date of onset of HAVS symptoms: nil; minor; moderate; serious; complete (ie would have prevented the carrying out of the task in any event) …
>
> If, in the course of your medical examination, you conclude that Mr Watkins does not, in fact, suffer from HAVS, you should report that opinion in your Report."

The letter made clear that the expert was not to apply in Mr Watkins's favour the presumption under the Scheme that he could no longer carry out the relevant tasks without assistance by reason of his VWF staging.

14. Mr Tennant examined Mr Watkins and, in a report dated 17 May 2013, he stated:

> "Mr Watkins gives a good description of vasospasm and is graded 1V in this report as the white discolouration reaches the distal interphalangeal joint. The only abnormality on testing was of a mild lack of dexterity. As there is no other sensory loss in a warm environment, in my opinion this amounts only to HAVS grade Sn1. There is certainly no justification for Sn3 at this examination, and to reach Sn2 would require evidence of reduced sensory perception, which I could not demonstrate. Grading of 1V, 1Sn would not be expected to produce any disability in the domains tested below."

15. In response to further questions from Mr Watkins's solicitors, Mr Tennant confirmed on 23 June 2013 that Mr Watkins met the criteria for the diagnosis of HAVS. He further stated that it was apparent at interview that the client had devolved certain tasks to others in the long term.

16. Mr Watkins died in January 2014 at the age of 72. His daughter, Mrs Jean Edwards, was appointed to continue the claim on behalf of Mr Watkins's estate.

17. The trial of the claim against the appellant took place in the County Court at Leeds before Mr Recorder Miller in March 2016. The parties had permission to rely on Mr Tennant's written evidence at trial but an application by the appellant, made in advance of trial, for permission to call Mr Tennant was refused and that order was not appealed. The statements of Mr Watkins were admitted as hearsay evidence. In a reserved judgment, handed down on 16 May 2016, the judge held that the claim in negligence was not time barred, that the advice contained in the appellant's letter dated 18 February 2003 had been negligent and that if Mr Watkins had received appropriate advice, he would probably have decided to reject the settlement offer of £9,478 and would have continued to pursue his services claim. However, the judge also held that Mr Watkins had suffered no loss and accordingly he dismissed the claim against the appellant. He observed:

> "If, as here, expert or other evidence which post-dates the settlement or other disposal of the original claim, establishes beyond any (or any but negligible) doubt that the claim could and would have been resolved only in one specific way had that evidence been available to the parties and the tribunal at the time, then the Court in the professional negligence action has the 'full facts' adverted to by Laws LJ in *Whitehead [v Searle* [2009] 1 WLR 549, para 20] and should find accordingly, thereby avoiding an uncovenanted windfall or correcting injustice to a claimant whose case has turned out to be undoubtedly stronger than had been previously assumed. In the case of Mr Watkins, I can and should find that his chose in action has been shown to have had no value given the damages actually paid to him; another way of putting it is that, as I have found on the 'full facts', his services claim had no chance of success, for the same reason: it is beyond a peradventure that faced with Mr Tennant's clinical findings and conclusions any award would have fallen short of £9,478. It is fanciful to assume otherwise."

The judge took that view because on the consultant's findings Mr Watkins would only have been offered £1,790 for general damages and a services claim would not have been possible.

18. On appeal to the Court of Appeal (Underhill, Irwin and Singh LJJ) the appeal was allowed: [2018] PNLR 30. The Court of Appeal, influenced by the decision of the Court of Appeal in *Perry v Raleys Solicitors* [2017] PNLR 27 (more recently

reversed by this Court [2019] 2 WLR 636) held that the trial judge had been wrong to conduct a trial within a trial to determine the value of Mr Watkins's claim against the DTI and to determine the severity of his VWF. It further held that the judge had been wrong to determine these matters on the basis of the evidence of Mr Tennant, since that evidence would not have been available at the time of Mr Watkins's notional services claim under the Scheme. Irwin LJ observed (at para 70) that it would be particularly inappropriate to lose sight of what would have been the outcome under the Scheme by reference to after-coming evidence which would not have been brought into being at the time. The Court of Appeal further acknowledged exceptions in the case of fraud and in cases, such as *Whitehead v Searle* [2009] 1 WLR 549, where the consequences of a supervening event were of such a significant or serious scale that public policy required a departure from normal principles in order to do justice between the parties. In its view, such circumstances did not exist in the present case.

19. The appellant now appeals to this court with the permission of this court. Although the appellant sought to appeal on 14 (partly overlapping) grounds, permission was limited to the sole question of whether the prospects of success of the claim are to be judged as at the date when the claim was lost or at the date when damages are awarded and it directed that the parties consider the relevance of the principle in *Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426, namely that where the court assessing damages has knowledge of what has actually happened it should not speculate about what might have happened but base itself on what is now known to have happened. (See McGregor on Damages, 20th ed (2018), para 10-118.). Although this was the reason why permission to appeal was granted, the Court has concluded, in the light of the wide-ranging arguments presented to us, that the *Bwllfa* principle is not relevant in the particular circumstances of this case.

20. On behalf of the appellant, Mr Michael Pooles QC submits that the trial judge was right to rely on the evidence of Mr Tennant for four reasons.

> (1) In the circumstances of this case, the question whether Mr Watkins had suffered loss should be determined as at the date of the trial of the claim against the appellant, applying the *Bwllfa* principle.
>
> (2) In a professional negligence claim arising from personal injury litigation, the issue of loss should be determined as at the date of the trial of the professional negligence proceedings as it would have been in personal injury litigation (*Golden Strait Corpn v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 AC 353, per Lord Bingham of Cornhill at para 13).

(3) Even if the issue of loss should be determined at an earlier date, the Court should in making that determination take account of all of the evidence available at the trial of the professional negligence proceedings, following the decisions in *Charles v Hugh James Jones & Jenkins* [2000] 1 WLR 1278, *Dudarec v Andrews* [2006] 1 WLR 3002 and *Whitehead v Searle*, as this would enable the court to make a more accurate assessment of what the original personal injury claim was actually worth.

(4) That evidence was needed in the present case to enable the issue of loss to be determined "with all the adversarial rigour of a trial" as required by the Supreme Court in *Perry v Raleys Solicitors*: [2019] 2 WLR 636, para 19.

21. On behalf of the respondent, Mr Richard Copnall submits that the court should assess the prospects of success as at the date when the claim was lost, on the facts as they were and the evidence available at that time, subject to the following established exceptions.

(1) Evidence that would have been available, in the absence of negligence, at the time the claim was lost will be admissible (*Charles*; *Dudarec v Andrews* [2006] 1 WLR 3002).

(2) Evidence of the original parties' attitude to settlement at the time that the claim was lost will be admissible (*Somatra Ltd v Sinclair Roche and Temperley* [2003] 2 Lloyd's Rep 855).

(3) Evidence of dishonesty or misconduct will be admissible (*Perry*; *Green v Collyer-Bristow* [1999] Lloyd's Law Rep PN 798).

(4) Evidence of any accomplished fact within the meaning of the *Bwllfa* principle will be admissible.

Discussion

22. We are concerned with a claim in the tort of negligence. Although the claim for breach of contract was time barred, the judge held that, by virtue of section 14A of the Limitation Act 1980, as inserted by section 1 of the Latent Damage Act 1986 (Special time limit for negligence actions where facts relevant to cause of action are not known at date of accrual), the claim in negligence was not. In order to succeed in negligence against Mr Watkins' former solicitors his estate had to establish a

negligent breach of duty, causation and loss. A negligent breach of duty was found by the judge, on the basis that the appellant's letter of 18 February 2003 was misleading and deficient in a number of respects and those features were not corrected in the subsequent conversation between Mr Watkins and Mrs Kinsey on 23 February 2003. There has been no appeal against that conclusion. In addition, the judge made a finding that, had Mr Watkins received non-negligent advice, he would have pursued an honest services claim. That claim had already been notified and supporting statements provided. The judge considered that, had Mr Watkins been more fully and accurately informed as to where he stood and how the scheme operated, he would probably have instructed Mrs Kinsey to let the services claim and a MAP 2 medical examination proceed. The judge expressly rejected the submission on behalf of the appellants that, in reality, Mr Watkins had realised that his evidence in support of the services claim was grossly exaggerated or invented and, as a result, he had discontinued it for fear of getting into trouble or losing out financially further down the line. There has been no appeal against that conclusion. Accordingly, the issue considered by the Supreme Court in *Perry v Raleys Solicitors* does not arise in this case and, in my view, that decision has no direct bearing on the issues which we have to decide.

23. For the claim by Mr Watkins's estate to succeed, however, it is also necessary to prove loss. There is a legal burden on the estate to prove that in losing the opportunity to pursue the claim Mr Watkins has lost something of value ie that his claim had a real and substantial rather than merely a negligible prospect of success. It is only if the estate can establish that Mr Watkins's chances of success in pursuing his service claim were more than negligible that it is appropriate to go on to evaluate those chances on a loss of chance basis by making a realistic assessment of what would have happened had the original claim been pursued (*Mount v Barker Austin* [1998] PNLR 493 per Simon Brown LJ at pp 510D to 511C). In the view of Mr Recorder Miller, the present claim failed at the first hurdle. On the basis of the evidence of Mr Tennant the judge considered that Mr Watkins's chose in action had no value given the damages actually paid to him. It was clear, in his view, that any award would have fallen short of the £9,478 which Mr Watkins had already received under the settlement.

24. Against this background, the argument before this court has focussed on the issue of the admissibility in a professional negligence action of subsequently acquired evidence relating to the value of the original claim, an issue on which we have heard elaborate submissions. However, it is not necessary to express a concluded view in relation to these matters because the evidence contained in Mr Tennant's report was not relevant to any issue before the court in the professional negligence proceedings. As a result, the authorities relied on by the appellant are not relevant in the particular circumstances of this case.

25. It is important not to lose sight of the fact that Mr Watkins's original claim was a claim within the Scheme and not one made in the course of conventional civil litigation. It is necessary to consider whether Mr Watkins's original claim, which was accepted by the judge to be an honest claim, was of more than negligible value within the context of the Scheme. When the evidence of Mr Tennant is considered in this light, it is not the knock-out blow which the appellant suggests.

26. The Scheme has been described by Irwin LJ in the Court of Appeal and by counsel before us as a rough and ready scheme. This is a fair description. It was intended to provide an efficient and economic system for dealing with a huge number of claims in a way that was broadly fair. No doubt, it was considered that the decision not to require a detailed medical assessment of the level of disability of every claimant for a services award was justified by the savings in cost. A deliberate decision was taken to deal with services claims by reference to presumptions derived from the diagnosis and staging found at MAP 1, as opposed to requiring a precise assessment of the underlying disability. Medical assessment in the MAP 2 procedure was to be limited to the issue of co-morbidity. More specifically, there was no provision within the Scheme whereby the DTI could appeal against a general award, nor did the Scheme contemplate reopening or reassessing the diagnosis or staging of the condition or the entitlement to a general award established at MAP 1. Recoverability under the Scheme, therefore, did not depend on entitlement at common law nor did it correspond with what might have been the outcome in conventional civil proceedings. In this case Mr Watkins lost the value of his claim under the Scheme as it would have been administered in accordance with its terms.

27. In this regard it is instructive to consider why Judge Hawkesworth QC made the order in the professional negligence proceedings for further medical reports. In his judgment of 3 May 2011, he explained that it was common ground that the claims were for the lost chance to bring a claim under the MAP 2 procedure. On behalf of the claimants it was contended that the scope of the medical evidence should be a replication of the MAP 2 procedure which was limited to the issue of comorbidity, while on behalf of the defendants it was contended, initially at least, that there should be a more comprehensive medical examination by a consultant specialist which could revisit the original diagnosis of VWF as well as address the issue of comorbidity. For the claimants it was submitted that because the MAP 2 examination did not revisit or reopen the original diagnosis it would not be appropriate for the medical expert in the professional negligence proceedings to address them. During the hearing, however, it became clear that counsel for the defendants were not contending for a medical examination in order to revisit the diagnosis and staging of the VWF condition, but in order to evaluate the claimants' case on causation ie in order to assess whether a claimant's failure to pursue a services claim arose from negligent advice or from an inability to assert truthfully that he had lost the ability to perform those specified activities which would enable him to bring a claim for a services award. It was said that the extent of disability was relevant to that issue, while the medical examination in the MAP 1 procedure was

predominantly directed at diagnosis and staging of the condition as opposed to the level of disability.

> "Miss Foster [who appeared for four defendant firms of solicitors] did not seek to say that the fact of a MAP 1 diagnosis and its consequences for the subsequent progression to a services claim could be called into question. However, the defendants were entitled to investigate the implied averment that had the claimant been properly advised he would have made a services claim." (at para 7)

The judge seems to have made the order for expert reports on that basis but expressly left open (at para 9) the question as to the extent to which any findings by an examining doctor could or could not be taken into account in valuing the loss of a chance to bring a services claim.

28. The joint letter of instruction sent to Mr Tennant on 21 January 2015 (set out at para 13, above) reflected this reasoning. As a result, the instructions and the resulting medical examination and report departed significantly from those in a MAP 2 procedure. Most significantly, the expert was not to apply the presumption resulting from the diagnosis and staging at MAP 1 which applied under the Scheme.

29. Mr Tennant's report may have been relevant to the issue of causation in the claim by Mr Watkins's estate against his former solicitors. However, the judge decided that issue in favour of the estate, finding that if Mr Watkins had received non-negligent advice he would have pursued an honest services claim. That conclusion has not been challenged on appeal. In my view, Mr Tennant's report is not relevant to the issue of loss. We must assume that had Mr Watkins pursued a services claim the Scheme would have operated in accordance with its provisions. The conclusion of Dr Chadha that Mr Watkins was suffering at the level of 3V, 3Sn bilaterally had entitled him, under the tariffs applied within the Scheme, to an award of general damages of £9,478 and also created a rebuttable presumption that he did require assistance with the tasks prescribed under Schedule 7 of CHA. Mr Watkins would have had to undergo a second medical examination but that would have been limited to assessing co-morbidity. There would have been no equivalent of Mr Tennant's report, no reassessment of the diagnosis or staging found in the MAP 1 procedure and no reduction of the general award. Entitlement to a services award would have been decided in accordance with the procedure described at paras 4 - 8 above. The appellant now seeks to add to the counterfactual situation the effect of a further medical examination and report which would never have been commissioned. There is no justification for such a modification of the counterfactual situation and the judge erred in taking it into account when concluding that the lost claim was of no value.

30. When Mr Tennant conducted his examination of Mr Watkins and prepared his report, he acted in accordance with his instructions in expressing his view as to whether and to what extent Mr Watkins was disabled by HAVS as a matter of fact and, to the extent he was, unable to carry out without assistance the tasks which formed the basis of his services claim. His opinion is set out at para 14 above. However, he then proceeded to set out his opinion on co-morbidity in accordance with the Scheme by taking as his starting point the conclusions of Dr Chadha (3V, 3Sn) as in the MAP 1 report and grading disability for the purpose of a services claim on that basis. In doing so he provided an insight into the value of the claim which Mr Watkins lost. For each of the five activities relevant to Mr Watkins's case (car washing, car maintenance, gardening, DIY and decorating) his disability is assessed as complete. Mr Tennant states that on the basis of the MAP 1 report his HAVS would be expected to produce severe or complete disability in the tested domains. The only comorbidity to take into account is Mr Watkins's arthritic knees and this results in a comorbidity finding of moderate in all of the tested domains other than gardening where the finding is severe. In these circumstances I am unable to accept that the services claim had no chance of success and that the claim lost was of no value.

31. At the heart of this case lies Mr Pooles's assertion that Mr Tennant's report shows that because of an error Mr Watkins had already been over-compensated and that a professional negligence claim should reflect his true entitlement to just compensation and not what would have been an uncovenanted windfall. However, this overlooks the nature and operation of the Scheme. 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. We are not concerned here with a claim in conventional civil proceedings but with a scheme possessing unusual features. The evidence in question, the report of Mr Tennant, is simply not relevant when constructing the counterfactual situation which would have arisen if Mr Watkins's solicitors had fulfilled their duty to him.

32. I consider, therefore, that the Recorder erred in concluding that Mr Watkins's services claim could and would have been resolved only in one specific way had Mr Tennant's report, or its equivalent, been available to IRISC and in concluding that the claim had been shown to have no value given the award already paid. On the contrary, Mr Watkins had lost a claim under the Scheme of some value and the Recorder should have proceeded to assess its value on a loss of opportunity basis. I would therefore dismiss the appeal and remit the matter for assessment of the value of the loss of the opportunity to pursue the services claim.