APIL DAMAGES SIG MEETING – 11th APRIL 2013

CHANCES & DAMAGES – an update on loss of chance claims

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Loss of a chance – some history

1. It has long been recognized that a claimant can recover damages on the basis of a *loss of a chance*. However the case law in this area has not always been easy to follow and some uncertainty remains amongst practitioners and judges as to when and how it should apply. The result is that some cases are not maximized to their true potential.

2. This seminar charts the history of the key authorities dealing with loss of a chance and provides some guidance on its practical application. The seminar also moves on to highlight some of the areas to look out for involving chances and damages generally.

Mallett v. McMonagle [1970] AC 166

3. One of the starting points when assessing the quantification of damages based upon chances is the speech of Lord Diplock at p176:

"*The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions for determining what was. In determining what did happen in the past the court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or what would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that the particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards*".

Analysis: The key distinction to be made is between causation leading to loss (proven on the balance of probabilities) and the quantification of loss (which can be determined on the basis of a quantification of chances). Once the claimant has proven on the balance of probabilities that an accident or clinical negligence has caused injury leading to financial loss and the loss depends upon a hypothetical state of facts then it is open to a judge to quantify such losses on a percentage chance basis. The quantification of loss is different to causation and different tests apply.

It is a well known principle that the assessment of future damages post trial is based upon an assessment of chances. However, it is less well understood that a claim for the loss of a chance can apply in relation to past lost, because the hypothetical facts that the court is aiming to assess may be after the date of the accident but potentially before the date of trial.

Davies v. Taylor [1974] A.C. 207

4. The key facts relating to this claim were as follows:

i) The claimant's husband had died in a RTA;

ii) The marriage had lasted for 13 years prior to death and there were no children;

iii) Unknown to the deceased whilst they were living together, the claimant wife had an affair. 5 weeks before the RTA the claimant had left the deceased and he had learnt of her adultery;

iv) Despite the affair, the deceased remained very anxious for reconciliation and made several offers to this effect. However the claimant was unwilling to accept these offers;

v) Shortly before his death in the RTA the deceased instituted divorce proceedings

5. Following the death the claimant brought an action under the Fatal Accident Acts 1846 – 1959 [*before* FAA 1976] and the LRMPA 1934. At the trial at first instance, Bridge J dismissed the FAA claim on the basis that she had not proven that a reconciliation with her husband, had he lived, was more probable than not.

6. The Claimant appealed the decision to the Court of Appeal and then the HOL on the basis that the trial judge had asked the wrong question when assessing the prospect of reasonable expectation of pecuniary benefit under the FAAs – namely he had determined the question of whether the Claimant would have returned to her husband on the balance of probabilities but this was not the correct test. Giving the lead judgment in the HOL, Lord Reid [p213] commented as follows:

"*When the question is whether a certain thing is or is not true – whether a certain event did or did not happen – then the court must decide one way or the other. There is no question of chance or probability. Either it did or it did not happen. But the standard of civil proof is a balance of probabilities. If the evidence shows a balance in favour of it having happened then it is proved that it did in fact happen.*

But here we are not and could not be seeking a decision either that the wife would or that she would not have returned to her husband. You can prove that a past event happened, but you cannot prove that a future event will happen and I do not think the law is so foolish as to suppose that you can. All that you can do is evaluate the chance. Sometimes it is virtually 100%: sometimes virtually nil. But often it is somewhere in between. And if it is somewhere in between I do not see much difference between a probability of 51% and a probability of 49%

….If the balance of probability were the proper test, what is to happen in the two cases which I have supposed of a 60% and a 40% probability. The 40% case will get nothing but what about the 60% case. Is it to get a full award on the basis that it has been proved that the wife would have returned to her husband? That would be the logical result. I can see no ground at all for saying that the 40% case fails altogether but the 60% case gets 100%".

7. At page 223, Lord Cross went further:

"*In <u>assessing damages</u> for such a loss the court ought not as, I see it, to decide on the balance of probabilities whether or not the deceased, if he or she had lived, would in fact have given financial support to the plaintiff. If that was the correct approach then it would follow that if the court held that the chances were 6 to 4 in favour of the view that the deceased would have provided support the plaintiff would be compensated on the same basis as if the odds had been 9 to 1 in his favour, whereas if the chances were held to be 6 to*

4 against the provision of support the plaintiff would get nothing. That can hardly be right. In such cases so long as the chance of future support which the plaintiff has lost was substantial or fairly capable of valuation the court ought, I think, to set a value on it even though it was less, and possibly much less, than a 50% chance".

8. Notwithstanding this, the appeal was still dismissed by the HOL on the basis that the claimant appellant had not shown any significant chance or probability that she would have been reconciled with her husband and their received a pecuniary benefit but for his death.

Analysis: In order to sound in damages, the lost chance must have been substantial or real rather than merely speculative [see further below under Langford v. Hebran]. The burden is upon the claimant to prove his or her loss: hence he / she should adduce as much factual and / or expert evidence as possible in order to establish the existence and extent of the lost chance.

Allied Maples Group v. Simmonds [1995] All ER 907

9. One of the leading loss of a chance cases, in the context of solicitors negligence leading to loss. The key facts were as follows:

i) The claimants purchased a number of businesses and commercial properties from a rival company;

ii) After completion it became apparent that one of the companies that had been purchased had onerous liabilities for which the claimants would now be responsible;

iii) The claimants were unable to reclaim these liabilities from the vendor rival company under the terms of the sale. It was held at trial that the claimants' solicitors who had acted on the purchase had been negligent for failing to warn about the potential for such liabilities and that if they had known of this risk the claimants would have taken steps to obtain a warranty from the vendor rival company or seek alternative protection;

iv) The Court of Appeal held that where the claimant's loss depended on the hypothetical actions of a third party (in this case the vendor rival company), either in addition to action by the claimant or independently of such action, then the issue fell within the sphere of quantification of damages rather than causation. Therefore, the Claimant need only prove that there was a substantial, and not merely a speculative, chance that the third party would have acted to eliminate any such loss to the Claimant (as opposed to proving this on the balance of probabilities).

Analysis: The reference to the hypothetical acts of a third party has continued to cause some confusion amongst practitioners and judges. Some subsequent cases [to be discussed later in the talk] appear to suggest that the loss of a chance approach will only apply if the case is one that involves the hypothetical acts of third parties. However, I would respectfully

submit that this is incorrect. The confusion arises because Allied Maples was a case concerning causation of loss not quantification of loss. Once a claimant has proven on the balance of probabilities that an accident / clinical negligence has led to injury and loss, it is open to the court to quantify that loss on the basis of percentage chances. It just so happens that any claim for loss of a chance will almost inevitably involve some element of third party hypothetical involvement.

Doyle v. Wallace [1998] PIQR Q146

11. Probably the best known case involving a loss of a chance, this time within the context of a loss of earnings claim.

12. The facts of the claim were as follows:

    i) The claimant was age 19 when she suffered moderately severe brain damage in an accident leaving her cognitively impaired;

    ii) The claimant's primary claim for both past and future earnings was that, but for the accident, she would have qualified and been employed as a drama teacher in 1993. Alternatively, as a fall back, she would have certainly obtained clerical or administrative work;

    iii) It was contended that the claimant's chances of becoming a teacher were not less than 50% and that he past and future loss of earnings should be assessed on the basis baseline earnings in clerical / admin work and 50% of the additional higher earnings that she would have received as a teacher. This approach was adopted by the judge at trial;

    iv) On appeal, the defendant argued that the proper test to be applied was what would have probably happened but for the accident and the claimant had not proven on the balance of probabilities that she would have earned anything other than baseline earnings. The Court of Appeal dismissed the appeal, relying on Davies and Allied Maples Group.

    Analysis: Although reliance was placed upon the decision in Allied Maples, at no stage in his leading judgment did Otton LJ set out what the hypothetical acts of the third party upon which Miss. Doyle's loss depended actually were – an example of the confusion caused by this concept – although third parties would have certainly played a part. The decision in Doyle v. Wallace is a straightforward example of a claimant establishing causation (i.e. brain injury leading to a loss of career) and a court quantifying damages based on the lost chance of achieving a specific career path (where the balance of probabilities do not apply).

Langford v. Hebran [2001] EWCA Civ 361

13. Another well known case involving a loss of a chance applied to loss of earnings. The facts were as follows:

    i) The claimant had been working as a trainee bricklayer for 5 months prior to the accident. He had also been a very successful kick-boxer culminating in him winning the world light-middleweight championship approximately 10 months prior to the accident;

    ii) The claimant relied upon expert forensic accountancy evidence from Maurice Faull to build a claim for loss of earnings using a baseline claim as a bricklayer and part-time fighter and then using 4 alternative scenarios (based upon escalating success and earnings in the claimant's kickboxing career). Chances were allocated to each of these 4 scenarios and damages awarded based upon these percentage chances;

    iii) Upon appeal, the Court of Appeal rejected the defendant's argument that a loss of a chance approach is only appropriate where the court has to consider a single lost opportunity and was not appropriate where there are a number of possibilities. The Court of Appeal also rejected the contention that there was no evidence to justify the percentage chance figures adopted, albeit it applied its own chosen percentage chance to both past and future loss and concluded that a further final discount was appropriate to the global claim for loss of earnings to reflect the many contingencies attendant on each scenario.

    Analysis: In this case, the Court of Appeal makes no reference to Allied Maples or the acts of a hypothetical third party – although once again third parties would have certainly been involved in the hypothetical state of facts. Instead the decision is put simply on the basis of a quantification of loss based upon the assessment of lost chances.

Finnis v. Caulfield [2002] All ER (D) 353

14. A very useful case to quote when representing a claimant who has failed to declare all of his pre-accident income. The case is also helpful in the context of loss of a chance and past losses in personal injury cases [*paragraph 10 judgment HHJ Grenfell]:*

    "It is sometimes erroneously thought that all findings of fact on which a claim for past loss is based should be made on the balance of probabilities, namely to consider whether a particular fact was more likely than not to have occurred and then to treat it as a certainty, whereas if it was less likely to have occurred to ignore it completely. Although Mallett v. McMonagle was a Fatal Accident Act case, the principle stated by Lord Diplock is in logic applicable to ordinary personal injury claims".

15. In Finnis, the key issue was whether the claimant had proved a loss of a chance of enhancing his earning capacity as a skilled flooring craftsman by expanding into a floor fitting company, employing staff and competing in the construction market. It was held that, whilst the claimant lacked a number of important skills to run such a company, he was ambitious and had the support of an able and ambitious wife. The court held that there was some evidence to support a loss of a chance, but the contingencies involved were such that only a modest lump sum would be appropriate to reflect the claim.

Analysis: The quantification of the potential profits resulting from a missed business venture are often very difficult to quantify and a broad brush lump sum award will often be deemed appropriate to reflect the loss of such a chance unless cogent evidence is available.

Herring v. MOD [2003] EWCA Civ 528

16. A very important decision, as it reminds us of the proper use of claims involving a loss of a chance and where this approach is not appropriate.

17. The facts of the claim were as follows:

i) The claimant suffered serious spinal injuries in a parachuting accident in 1994;

ii) Prior to the accident the claimant had been in the TA with links to the SAS. He was a qualified sports coach and an SAS standard physical training instructor earning circa £20,000 per annum gross. He was contemplating a career in the police force and pursuing an HND course in law;

iii) Expert employment evidence indicated that the claimant was very well suited to a role within the police force and likely to be selected after the application process. His claim was advanced on the basis that, but for the accident, he would have started in the police force on a salary of £15,438 per annum gross and then progressed to the rank of sergeant within 5 years earnings £26,242 per annum gross where he would have stayed until age 55;

iv) At trial the defendant argued that there was no certainty of the claimant being selected for the police, or that he would have been promoted to sergeant. In the circumstances, the defendant argued that the claim should be calculated on the basis of a loss of a chance of achieving such a career model;

vi) At trial, HHJ Masterman found as follows:

"*I find, to the extent of virtual certainty, that when the time was right the Claimant would have applied to the police. That could not have been before June 1996. Depending on recruitment opportunities at the time, I believe he would have applied fairly soon after that but undoubtedly waiting until he had completed his degree in 1997, had he embarked on that in 1995. The probability is therefore that he would have applied by autumn 1997 at the age of 30.*

I further find, on a wealth of evidence, that there is a strong likelihood that his application would have been successful. How far he would then have progressed is inevitably less certain although my impression of the Claimant, shared by Mr Pask and Mr Ames [who were employment experts], is that his expectation could not reasonably run higher than attaining the rank of Sergeant, which I find he would have attained within 7 years. Of course one cannot entirely rule out the possibility that he might have gone further, but on statistical grounds, as well as considering his academic background and all the information about him, and my assessment of his character and personality, I think that progress beyond Sergeant is too speculative and therefore sufficiently unlikely not to call for evaluation in percentage terms."

vii) HHJ Masterman went on to add:

"*The authorities show that provided a chance is substantial, rather than a speculative one, a Claimant will receive compensation even if he cannot show that it is more probable than not that the chance would have fallen in his favour. That plainly does justice to a Claimant who would otherwise received nothing because he could not show a loss on the balance of probabilities. Does that still apply where the Claimant can show a loss on the balance of probabilities, more so if there is a strong likelihood?*

This seems to me to be a common enough situation. An employee is injured in the course of his employment. His loss is based on the probability that he would have continued to work for that employer or in that industry or profession but it ignores the fact that the current employer may go out of business or the employee may be made redundant or markets may change and so on. Plainly there is a chance of such things happening, quite apart from the factors which give rise to the Ogden tables. In cases like these a court has to weigh up various factors and attempt to arrive at a fair balance, fair in the sense that it properly compensates the injured Claimant but reflects future uncertainties so that the end result is neither over−compensation nor under−compensation.

In the present case there cannot be certainty that the Claimant would have become a police officer, less so that he would have been promoted to sergeant. On the other hand I am satisfied that there is, as I have said, a strong likelihood that he would have succeeded in his application to the police. But would he have remained in the police throughout his career? He might have become disenchanted, or been injured, or found it incompatible with family life. There are inevitably more uncertainties than with a Claimant who is already established in a career and has a 'track record'.

In my judgment the fairest way of reflecting the lack of certainty in a case such as this is to calculate the Claimant's loss on the basis that he would have become a police officer, rising to sergeant within seven years and then to discount the normal multiplier to reflect the uncertainties on which I have touched"

viii) In order to account for the uncertainties alluded to above, HHJ Masterman reduced the Claimant's multiplier for earnings but for the accident (within the police force) by approximately 25%.

18. On appeal, giving the unanimous judgment of the Court of Appeal, Potter LJ addressed the approach to future compensation for loss of earnings in cases of this type. Most importantly, at paragraphs 23-26, he commented as follows:

"In any claim for injury to earning capacity based on long−term disability, the task of the court in assessing a fair figure for future earnings loss can only be effected by forming a view as to the most likely future working career ('the career model') of the claimant had he not been injured. Where, at the time of the accident, a claimant is in an established job or field of work in which he was likely to have remained but for the accident, the working assumption is that he would have done so and the conventional multiplier/multiplicand method of calculation is adopted, the court taking into account any reasonable prospects of promotion and/or movement to a higher salary scale or into a better remunerated field of work, by adjusting the multiplicand at an appropriate point along the scale of the multiplier. However, if a move of job or change of career at some stage is probable, it need only be allowed for so far as it is likely to increase or decrease the level of the claimant's earnings at the stage of his career at which it is regarded as likely to happen. If such a move or change is unlikely significantly to affect the future level of earnings, it may be ignored in the multiplicand/multiplier exercise, save that it will generally be appropriate to make a (moderate) discount in the multiplier in respect of contingencies or 'the vicissitudes of life'.

In the situation of a young claimant who has not yet been in employment at the time of injury but is still in education or has otherwise not embarked on his career, or (as in this case) one who has taken time out from employment in order to acquire a further qualification for a desired change of direction, it may or may not be appropriate to select a specific career model in his chosen field. In this connection the court will have regard to the claimant's previous performance, expressed intentions and ambitions, the opportunities reasonably open to him and any steps he has already taken to pursue a particular path. In many cases it will not be possible to identify a specific career model and it may be necessary simply to resort to national average earnings figures for persons of the claimant's ability and qualifications in his likely field(s) of activity. In other cases, however, it may be possible with confidence to select a career model appropriate to be used as the multiplicand for calculating loss. In either case, the purpose and function of the exercise is simply to select an appropriate 'baseline' for calculation of the claimant's probable future earnings whatever his future occupation may in fact turn out to be. Thus if the career model chosen is based upon a specific occupation (such as the police force in this case), the chance or possibility that the claimant will not in the event enter that occupation or, having done so, may leave it, will not be significant if the likelihood is that he will find alternative employment at a similar level of remuneration.

<u>These are truisms so far as the conventional approach to the assessment of injury to earning capacity is concerned. Similarly, it is a truism that the assessment of future loss in this field is in a broad sense the assessment of a chance or, more accurately, a series of chances as to the likely future progress of the claimant in obtaining, retaining or changing his employment, obtaining promotion, or otherwise increasing his remuneration. Nonetheless, such assessment has not traditionally been regarded as necessitating application of the technique of percentage assessment for 'loss of a chance' based on the likely actions of third parties, as articulated by Stuart−Smith LJ in the Allied Maples case. In cases such as Doyle v Wallace and Langford v Hebran the court has in special circumstances felt obliged to adopt such a method in order to calculate particular aspects of the claimant's future loss claim. However, those decisions have not purported generally to replace the traditional method of adjusting the multiplier or multiplicand within the career model appropriate to the particular claimant so</u>

as to reflect (a) the likelihood of an increase in earnings at some point in the claimant's career and (b) those contingencies/vicissitudes in respect of which a discount appears to be appropriate.

The cases in which the percentage 'loss of a chance' approach has been adopted appear to me to be those where the chance to be assessed has been the chance that the career of the claimant will take a particular course leading to significantly higher overall earnings than those which it is otherwise reasonable to take as the baseline for calculation. Thus, it was appropriate in Doyle v Wallace to assess on a percentage basis the chance that the claimant might have a remunerative career as a drama teacher rather than the more prosaic baseline activity of clerical or administrative work. Similarly, in Langford v Hebran the same technique was applied to the chance that the appellant might become a highly successful full−time kick−boxing champion, rather than a bricklayer with 5 fights a year at what might be called 'journeyman level'. In a case where the career model adopted by the judge has been chosen because it is itself the appropriate baseline and/or is one of a number of alternatives likely to give more or less similar results, then it is neither necessary nor appropriate to adopt the percentage chance approach in respect of the possibility that the particular career identified will not be followed after all. That seems to be me to be the position in this case"

Analysis: In the majority of cases the judge's task will be to adopt a reasonable model for the career earnings of a particular claimant, both in the past and future. It will not be appropriate to adopt a loss of a chance approach in the typical case involving a claimant in steady employment with an established / secure pattern of career progression or potential employment within a range of occupations that lead to similar remuneration.

The loss of a chance model comes into play when there is a case specific chance that the claimant could have earned *significantly* more with a potential job / contract / business opportunity but for the accident. In these circumstances, the appropriate method of calculation is to take a baseline of predicted earnings but for the accident and then add-on to this award based upon the percentage chance of the claimant securing such enhanced earnings but for the accident (as with Doyle and Langford). However, how does one determine what is *significantly* more? In most applicable cases, I would suggest that the schedule of loss should include alternative scenarios. A primary contention can be made that the career model that has been adopted is reasonable and therefore no percentage chances need be taken into account – i.e. the claimant recovers the full pleaded loss. As a secondary contention, in the event that the increases in earnings associated with the pleaded career progression are deemed *significantly* more, the schedule should highlight that a claim for such increases will be made on a loss of a chance basis.

Appleton v. El Safty [2007] EWHC 631 (QB) / Collett v. Smith [2008] EWHC 1962 (QB)

19. 2 very interesting football cases involving the loss of a chance approach to damages that are very helpful when constructing complex schedules.

20. It is to be noted that in Appleton, Clarke J made findings in relation to past losses of earnings on the balance of probabilities in relation to the first 3 years after the injury and on a percentage chance basis in the fourth year (i.e. the year immediately preceding trial). For the future, his assessment was based on the percentage chance of different scenarios being realised.

21. Similarly, in Collett, Swift J only applied the loss of a chance methodology in relation to post trial earnings only, preferring the balance of probabilities for past losses. Why is this? The answer is that Swift J appears to have felt that there was no significant uncertainty as to the claimant's career path and earnings prior to the trial, with very strong evidence to support a career model under contract at Manchester United and then a transfer to a leading championship club. At paragraph 93 of her judgment, Swift J reminded herself that:

"*Where there is significant uncertainty as to whether the chance would have materialised, the appropriate course is to apply a discount, reflecting the prospects that the chance would, but for the injury, have materialised. If no significant uncertainty arises, no discount is appropriate and the full amount of damages should be awarded*".

22. Having calculated the past loss of earnings of Benjamin Collett, Swift J proceeded to make a modest discount (5% for the last 2 footballing seasons preceding the trial) to reflect the risk of injury and other contingencies.

Analysis: The decisions in relation to past loss of earnings in Appleton and Collett need to be seen in the context of the decision in Herring v. MOD. In effect, Clarke J and Swift J were adopting a career model for past loss of earnings that they deemed to give rise to no significant uncertainty – namely it was a reasonable career model that could be used as a single baseline without having to resort to the loss of a chance principle. This was not the case with future loss of earnings, which were dependent on the prospect of the claimants sustaining a career at championship or premiership level (giving rise to a significant disparity in earnings) and questions of management potential.

Clarke v. Maltby [2010] EWHC 1201 (QB)

23. The facts of this claim were as follows:

i) The claimant (age 45) suffered multiple injuries in a RTA including a brain injury;

ii) Prior to the accident the claimant had been a solicitor in private practice. The central issue before the court at trial was the degree to which the brain injury had affected her capacity to function as a solicitor specialising in banking related transactions;

iii) The claimant contended that her symptoms were attributable to the brain injury and that their effect was that she was unable to pursue her career as a solicitor in private practice and thereby had a markedly reduced earning capacity;

iv) The defendant submitted that the claimant remained capable of working full-time in private practice as a fixed-share equity partner of a regional firm of solicitors. However the defendant conceded that, in view of her continuing symptoms, the claimant would be acting reasonably if she were to decide to withdraw from private practice and take up less onerous employment as an employee of a business or organisation in the private or public sectors;

v) At trial Owen J held that there could be no explanation for the claimant's continuing cognitive and behavioural problems other than traumatic brain injury and that she would not be able to sustain the required level of performance as a solicitor undertaking transactional work in the field in which she had specialised;

vi) In assessing future loss, the appropriate approach was to consider a number of alternative scenarios, based on a claimant's prospective attainment of higher levels of success, each scenario carrying a percentage chance of earnings over and above the "basic" income that he or she would have received, and to award damages for future loss of earnings based on the same basic income plus the lost chance of higher earnings calculated by reference to the percentage chance of attaining the higher levels of success [as per Langford v. Hebran];

vii) Adopting that approach in the instant case, three scenarios arose (i) a 100% chance that the Claimant would attain a fixed share equity partnership in a regional law firm; (ii) an 85% chance that the Claimant would go on to join a medium size city or central London law firm as a partner and (iii) a 30% chance that the Claimant would join a large or medium size city or central London firm as a partner;

viii) The Claimant's loss of earnings claim would, accordingly, be assessed by assuming a 100% chance of achieving the base line scenario with a salary of £110,000, plus 85% of the differential between that scenario and the income that she would have received under the second scenario, assessed at £130,000, and 30% of the difference between her prospective earnings under the second scenario and the income she would have received under the third, assessed at £180,000;

ix) This loss of a chance approach applied equally to past and future loss of earnings.

Analysis: the judgment in Clarke contains some very helpful appendixes highlighting the mathematical approach to such calculations. By way of example, the notional earning capacity but for the accident to the date of judgment based upon the loss of a chance approach is as follows:

SCENARIO	EARNINGS / ADDITIONAL EARNINGS OVER AND ABOVE PREVIOUS SCENARIO	% CHANCE	AWARD
At least achieving the base line career model at (i) above	£321,877	100%	£321,877
At least achieving the middle stage career model at (ii) above	[£349,806 - £321,877] = £27,929	85%	£ 23,740
Achieving the optimum career model at (iii) above	[£419,452 - £349,806] = £69,646	30%	£ 20,894
			£366,511

XYZ v. Portsmouth Hospitals NHS Trust [2011] EWHC 243 (QB)

24. A clinical negligence case where a 39 year old man underwent negligent surgery leading to renal failure and further complications. The key issue in the case was whether the claimant should recover loss of earnings on the basis that he was about to set up a market research business within the pharmaceutical industry which would have proved successful.

25. At trial, Spencer J found as a matter of virtual certainty that that claimant would have started up such a business in the absence of the negligent surgery and that it would have achieved a turnover of £2 million within 2 years. In the circumstances, there was no need to apply a percentage discount to reflect the chance he would not have done so and the £2 million figure could safely be taken as a baseline. However, Spencer J proceeded to apply a series of percentage chances to the claimant achieving a more significant turnover (rising to £10 million) over a period of 10 years and assessed damages on the basis of these percentage chances, with a final global discount applied for contingencies in general. At paragraph 54 of the judgment, Spencer J commented as follows:

"*It is common ground that in a case such as this, where there cannot be certainty as to the way in which the claimant's business would have developed, the court can properly assess damages by evaluating the chance that particular events would have happened at particular times*"

Analysis: the critical evidence in establishing the loss of a chance in this case came from a witness who had developed a highly successful market research agency of his own, in which the claimant had worked for several years. It was found that this key witness was exceptionally well placed to provide the court with a reliable and objective assessment of the claimant's prospects of success in establishing and developing the proposed business. A forensic accountant was also instructed to analyse the accounts of this comparator business with a view to assessing the prospects of the new business and its likely profitability.

It is also interesting that, in his analysis of relevant case law, no reference was made by Spencer J to Allied Maples Group. Indeed, this was a classic example of a case where the loss of a chance was very much focused on the hypothetical acts of the claimant rather than any third parties, albeit third parties would have presumably played a part.

Mann v. Bahri; LTL 11/4/2012

26. A very recent case involving an 18 year old male who sustained brain damage in a RTA leading to cognitive impairments. The claim was put forward on the basis that, but for the accident, the claimant would have certainly achieved a successful career as a plumber (the baseline) but he also had a 50% chance of obtaining a place at university and thereafter higher earnings in a graduate career.

27. At trial, the judge (HHJ Burke QC) queried whether the correct approach to the claim was to decide whether the claimant would or would not have gone to university and pursued a graduate career on the balance of probabilities or whether this was a case involving loss of a chance. The fact that the trial judge had to moot this point is an example of how rarely most judges get to adjudicate on complex personal injury cases!

28. Both parties agreed that, in principle, this was a case involving loss of a chance. However, the defendant argued that there was no loss of a chance in this case as the evidence overwhelmingly pointed to the fact that the claimant would not have achieved the necessary qualifications to be accepted at university. HHJ Burke concluded that, although unlikely, he could not exclude the existence of a significant chance that, but for the accident, the claimant would have retaken exams and achieved sufficient grades to get into university and follow a graduate path. He assessed this chance at 20% and awarded damages for loss of earnings at 20% of the difference between baseline earnings as a plumber and the additional earnings that a graduate career would have provided.

29. Interestingly (perhaps because he was not directed to many of the other applicable cases), HHJ Burke's analysis of the loss of a chance approach was predicated largely on the decision

in Allied Maples. He appears to assert that the loss of a chance method will only apply in cases where the claimant's loss depends upon hypothetical actions of a third party (in this case, this would have been prospective universities offering places and thereafter prospective employers offering graduate roles).

Analysis: this case offers a further example of the uncertainty amongst the judiciary about the application of the loss of a chance approach. The claimant had clearly demonstrated causation of loss arising from brain injury and a significant chance that he had lost the opportunity to achieve a graduate career. Against this background, I would respectfully submit that the focus should have been on measuring that lost chance, not consideration of whether this case fell into a category involving the hypothetical acts of third parties.

Areas to look out for

1) Remember: a claim based on a loss of a chance should not be overused – it is usually appropriate to adopt a reasonable career model without reference to a loss of a chance [as per Herring v. MOD]

2) Equally, there are cases crying out for a claim based on a loss of a chance that will be undervalued if not pursued

3) Expert forensic accountancy evidence is likely to be critical in most complex loss of a chance claims involving loss of earnings: Maurice Faull at HSC is highly recommended for these types of cases

4) Remember that a claim based on a loss of a chance may also apply to a claim for loss of pension rights and other associated employment benefits: see Brown v. MOD [2006] EWCA Civ 546

5) When making a claim for future medical expenses on a percentage chance basis, make sure you also account for the cost of addressing any follow up surgery or expenses flowing from the failure of future surgery

6) Remember to look at all angles in the claim and work closely with the medico-legal experts: care or accommodation regimes may be static at the time of assessment, but is there a chance that the position will change in the future leading to increased cost? If so, this needs to be quantified and accounted for in damages

7) Are there areas where the boundaries can be pushed further? For example, could an argument be made, using the statistics for marriage breakdown following traumatic brain injury, for a percentage of the cost of legal fees associated with divorce based upon the increased percentage chances of this occurring?

Stuart McKechnie

9 Gough Square

Stuart McKechnie
Year of call 1997

Memberships

- Association of Personal Injury Lawyers
- Personal Injury Bar Association

Personal Injury

Stuart is listed as a Leading Junior in the Chambers and Partners (Band 1) and Legal 500 Clients' Guides where he is variously described as "widely considered to be a future silk", "admired for his amazing service", "a rising star", "seriously talented", "a real specialist in catastrophic injury cases" and "noted for providing clear advice that can be followed with confidence". Stuart was awarded the title of Personal Injury Barrister of the Year at the 2011 Eclipse Proclaim Personal Injury Awards. In September 2012 it was announced that Stuart had been shortlisted as Personal Injury / Clinical Negligence Junior of the Year at the Chambers & Partners Bar Awards.

In 2012 Stuart was appointed as 1 of only 3 Barrister members of the editorial team for the next 2 editions of the Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases. The appointment was made following a formal interview process under the chairmanship of Mr Justice Burnett and recognises Stuart's prominent position within the field of personal injury law.

Stuart has extensive experience in a complete range of personal injury work but specialises in high value catastrophic claims involving complex issues and multiple experts. Much of his practice is at the High Court.

Stuart is an author of the APIL Guide to Catastrophic Injury Claims, published by Jordans, being the definitive guide to running high value personal injury and clinical negligence actions. He also writes for Kemp: Practice and Procedure on the subject of PPOs and Butterworths Personal Injury Litigation Practice on the subject of quantum.

In 2012, Stuart advised and represented claimants in cases with a combined value in excess of £30 million. In addition to the high value cases that he undertakes on his own, Stuart is currently instructed as junior counsel on a number of catastrophic injury claims.

In October 2011 Stuart was selected as the only Barrister to join the Technical Board responsible for reviewing the Law Society's Personal Injury Panel for solicitors nationwide.

Clinical Negligence

Stuart has undertaken a wide range of cases acting exclusively for claimants and his experience includes orthoapedic, gynaecological, urological, dental and ophthalmic cases together with general surgical and nursing errors. In 2011 Stuart represented a young premiership academy footballer in a claim against a club surgeon for negligent treatment leading to the curtailment of his footballing career.