

Supreme Court hands down judgment in *Perry v Raleys Solicitors*

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“To the extent... that the question whether [a claimant] would have been better off depends upon what [a claimant] would have done upon receipt of competent advice, this must be proved by the claimant upon the balance of probabilities” – Supreme Court in *Perry (Respondent) v Raleys Solicitors (Appellant)* UKSC 2017/0092

The Supreme Court has handed down its long awaited Judgment on the appeal brought by the defendant solicitors in the case of *Perry v Raleys Solicitors*.

In a significant Judgment for defendant firms of solicitors and their professional indemnity insurers, the Supreme Court has today reconfirmed that a claimant seeking damages from a firm of solicitors for an alleged loss of opportunity to pursue a litigation claim must first show that, on the balance of probabilities, they would have pursued that lost litigation claim had they been properly advised.

Further, the courts when undertaking that assessment are entitled to try an issue relevant to causation even if that issue would also be relevant to the determination of the loss of chance in the lost litigation claim. Crucially, the claimant must also now demonstrate that a lost litigation claim was the loss of an honest claim.

In this case, the claimant (Mr Perry) issued proceedings against his solicitors (Raleys Solicitors) in 2009. Mr Perry

alleged that Raleys had negligently advised him to settle an underlying claim for damages against his former employers and had failed to advise him of an alternative claim against a third-party in which he might have been able to obtain additional compensation in respect of Vibration White Finger that he had developed during his employment as a miner.

Raleys Solicitors admitted negligence shortly before the County Court trial but denied causation of loss. The trial Judge dismissed Mr Perry's claim. After close scrutiny of the medical and oral evidence available, the Judge found that Mr Perry did not meet the requisite medical criteria and so would not have honestly pursued the lost litigation claim if properly advised. Mr Perry appealed.

The Court of Appeal upheld the appeal in 2016 finding that the trial Judge had misapplied the law on loss of chance claims. It found that the trial Judge had wrongly conducted a trial within a trial by scrutinising the evidence and determining on the balance of probabilities the issue of whether Mr Perry suffered from a significant disability. The Court of Appeal thought that was an issue for determination in the lost litigation claim and so should have been assessed on loss of chance principles and not on the balance of probabilities. Further, the Court of Appeal held that the trial Judge had wrongly imposed an additional new burden on the Claimant that the lost litigation claim must be an honest claim.

Reversing the Court of Appeal's decision, the Supreme Court has today reinforced that the burden of proof in a loss of chance claim lies firmly and squarely upon a claimant. Firstly a claimant must prove, on the balance of probabilities, that they would have pursued the lost litigation claim if properly

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advised and, crucially, the Supreme Court has clarified that a court is fully entitled when performing that assessment to try an issue relevant to causation assessed on the balance of probabilities even if that issue is also relevant to the assessment of the value of the loss of chance.

Upholding the finding of the original trial Judge, the Supreme Court has held that there is also an additional requirement for a claimant to satisfy that the lost litigation claim was an honest one.

It is refreshing to see in the Judgment of Lord Briggs that the Supreme Court recognises that it is not the proper role of the courts to reward dishonest claimants, even if they have been let down by their professional advisors.

This is a significant Judgment and of key importance to the professional indemnity market, especially to insurers of firms of solicitors. The additional burdens placed on claimants is to be welcomed and particularly the clarification from the Supreme Court on the additional honest claim requirement in loss of chance cases.

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