Hilary Term
[2019] UKSC 5
On appeal from: [2017] EWCA Civ 314

JUDGMENT

Perry (Respondent) *v* Raleys Solicitors (Appellant)

before

Lady Hale, President
Lord Wilson
Lord Hodge
Lord Lloyd-Jones
Lord Briggs

JUDGMENT GIVEN ON

13 February 2019

Heard on 27 November 2018

Appellant	*Respondent*
Michael Pooles QC Ben Quiney QC (Instructed by Berrymans Lace Mawer LLP (Manchester))	Jonathan Watt-Pringle QC John Greenbourne (Instructed by Fry Law)

LORD BRIGGS: (with whom Lady Hale, Lord Wilson, Lord Hodge and Lord Lloyd-Jones agree)

Introduction

1. The respondent Mr Frank Perry is a retired miner. Like very many of his colleagues he had, by the time he ceased working underground in 1994, been afflicted with a condition known as Vibration White Finger ("VWF") , which is a particular type of a wider species of condition affecting the hand and the upper limbs collectively known as Hand-Arm Vibration Syndrome ("HAVS"), caused by excessive exposure to the effects of using vibratory tools. One symptom of these conditions can be a reduction in grip strength and manual dexterity in the fingers. A common although not invariable consequence is that the sufferer from these conditions becomes unable, without assistance, to carry out routine domestic tasks such as gardening, DIY or car maintenance.

2. A group of test cases, representative of some 25,000 similar claims, established that there had been negligence on the part of the National Coal Board, later British Coal, in failing to take reasonable steps to limit the exposure of employed miners to VWF from the excessive use of vibratory tools: see *Armstrong v British Coal Corpn* [1998] EWCA Civ1359 [1998] CLY 975. As a result, the Department for Trade and Industry (which had by then assumed responsibility for British Coal's relevant liabilities) set up a scheme ("the Scheme") in 1999 to provide tariff-based compensation to miners who had been exposed to excessive vibration and had therefore suffered from VWF. The Scheme was administered pursuant to a Claims Handling Arrangement ("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, having a common originating cause in British Coal's systemic negligence, to be presented, examined and resolved both effectively and at proportionate cost.

3. 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. Pursuant to a Services Agreement dated 9 May 2000, the special damages could include a Services Award to qualifying miners. This depended upon the claimant establishing what has come to be known as "the factual matrix", namely:

> i) That before he developed VWF he undertook one or more of six routine domestic tasks ("the six tasks"), without assistance;

ii) That he could no longer undertake those tasks without assistance by reason of his VWF; and

iii) That he had received the necessary assistance with those tasks from others.

The six tasks may be summarised as:

1) Gardening

2) Window cleaning

3) DIY

4) Decorating

5) Car washing

6) Car maintenance

4. Qualification for a general damages award required the claimant miner to undertake a medical interview and examination designed to establish, against an internationally recognised scale, the severity of his VWF. Those shown to be sufferers at certain high levels of severity were then also entitled to a rebuttable presumption, in their favour, that they satisfied the qualifying requirements for a Services Award, but they were required nonetheless to demonstrate, by completion of a standard form questionnaire, which of the six tasks they had undertaken without assistance before developing the VWF, and which of the tasks they were no longer able to undertake without assistance. The Scheme provided for a relatively light-touch system of checking claims for Services Awards by the claims handlers, which included questionnaires to be filled in by those assisting the claimant in performing the six tasks and short telephone interviews, usually with one or more of the assistants, rather than with the claimant himself. Compensation was then payable to qualifying claimants in accordance with a detailed index-linked tariff.

5. Proportionate deductions from the tariff amounts were also liable to be made if the claimant's reduced ability to perform the six tasks unaided was caused in part by other contributory medical conditions. For this purpose, claimants were required

to undertake a further medical examination for the purpose of the assessment of co-morbidity, as it was described. Again, the amount of the reductions (if any) from the full Services Award was determined in accordance with a tariff based upon the medical examiner's certification of relevant co-morbid conditions on a scale ranging between nil, material, moderate, serious and complete.

Mr Perry's claim

6. Mr Perry retained the appellant solicitors firm Raleys to pursue a VWF claim on his behalf in October 1996, before the setting up of the Scheme. Following the making of the CHA, his claim continued under the Scheme. In October 1997 Professor Kester reported, after an interview and examination of Mr Perry, that he suffered from VWF, with ratings (or "stagings" in the jargon of the Scheme) of "3V" and "3Sn" bilaterally (that is, in both hands). Those stagings were sufficient both for Mr Perry to obtain general damages and to have entitled him to a presumption in his favour, of the type described above, in the event that he chose to seek a Services Award.

7. In the event however, Mr Perry settled his claim in November 1999 for payment of general damages only, in the sum of £11,600, and made no claim for a Services Award within the available time-frame. Much later, in February 2009, he issued professional negligence proceedings against Raleys, claiming that by reason of their negligent failure to give him appropriate advice, he had lost the opportunity to claim a Services Award, in respect of all of the six tasks, which he quantified in the sum of £17,300.17 plus interest. He asserted that he had performed all the six tasks without assistance before developing VWF, and that he had needed assistance with all those tasks thereafter, which had been provided by his two sons and his wife.

8. In response, Raleys denied a breach of duty and separately denied that any breach (if proved) would have caused Mr Perry any loss. They alleged also that Mr Perry's claim against them was statute barred. Breach of duty was admitted shortly before the trial. The trial judge, Judge Saffman, rejected the limitation defence on its merits.

9. After a two-day trial, which included cross-examination of Mr Perry, his wife and his two sons, the judge concluded that Mr Perry had failed to prove that Raleys' admitted negligent advice had caused him any loss. This was because, in summary, the judge found that the VWF from which Mr Perry was suffering when he settled his claim had not caused him any significant disability in performing any of the six tasks without assistance, sufficient to have enabled him to make an honest claim for a Services Award. He therefore dismissed Mr Perry's claim with costs.

10. In his detailed and lucid reserved judgment (circulated to the parties within ten days of the trial) Judge Saffman explained that it was Mr Perry's complete lack of credibility as a witness that had led to his finding that he would not have been able to make an honest claim for a Services Award. His evidence that he was unable to perform the six domestic tasks without assistance was undermined by his medical records, which showed that he had made no complaint of lack of manual dexterity at the relevant time, by evidence (including photographs) of him engaging in fishing at a time when he said he had given it up due to his manual disability, and by his failure to offer any credible explanation of those disparities between his case and that evidence, when cross-examined about them at length. The judge found that the evidence from his family lacked sufficient credibility to rescue Mr Perry from his difficulties, and that the medical evidence, while supportive of his case, was insufficient to swing the balance in Mr Perry's favour.

11. The judge nonetheless thought it appropriate to assist by setting out the findings which he would have made as to the quantum of Mr Perry's claim, if he had been wrong in rejecting his case on causation. He did so, no doubt, with a view to minimising the risk that an expensive re-trial would be necessary if an appellate court concluded that causation had been established. A main plank in Raleys' defence had been that, even if Mr Perry was to a significant extent incapacitated in performing the six domestic tasks without assistance at the relevant time, this was the result of a chronic back problem, rather than VWF. A single joint medical expert, Mr Tennant, had advised that in his view the contribution made to Mr Perry's relevant disability by back troubles lay between moderate and mild, on the co-morbidity scale adopted by the Scheme. On the assumption that he had been wrong in his primary finding that Mr Perry was not hindered by VWF in performing the six tasks unaided, he held that he would not depart from Mr Tennant's co-morbidity assessment. Finally, and again on the same assumption that he had been wrong about causation, the judge assessed the prospects of success in a Services Award claim, after being discounted by co-morbidity in accordance with the Scheme's tariff, at 80%.

12. On Mr Perry's appeal the Court of Appeal reversed the trial judge on causation, and concluded that his alternative findings as to quantum were sufficiently reliable to make it unnecessary to direct a re-trial: [2017] EWCA Civ 314. Accordingly, they assessed Mr Perry's damages in the same amount as the judge would have assessed them, had he been wrong about causation, namely £14,556.15 plus interest, plus additional amounts pursuant to CPR Part 36.

13. The Court of Appeal reversed the judge on four grounds, two of which amounted in their view to errors of law, and the remaining two to shortcomings in his appraisal of, and conclusions based upon, the evidence. It is convenient to take the errors of law first.

14. The Court of Appeal held first that the judge had, in addressing the issue of causation, wrongly conducted a "trial within a trial" of the very question which would have arisen if Mr Perry had made a claim for a Services Award, namely whether in fact (after he ceased work as a miner) he needed assistance, due to his VWF, in carrying out the six domestic tasks which he had previously been able to carry out unaided. Secondly, the Court of Appeal concluded that the judge wrongly imposed the burden upon Mr Perry to prove that fact on the balance of probabilities. This approach was, in the view of the Court of Appeal, contrary to well-settled authority about the burden upon a claimant in relation to causation, following a breach by a professional person of a duty of care.

The Law about Causation in Professional Negligence cases

15. The assessment of causation and loss in cases of professional negligence has given rise to difficult conceptual and practical issues which have troubled the courts on many occasions. The most recent example at the level of this court is *Gregg v Scott* [2005] UKHL 2; [2005] 2 AC 176 in which the House of Lords had to wrestle with the intractable question whether negligent medical advice, which reduced the patient's prospects of long-term survival from cancer from 42% to 25%, sounded in damages when, probably, he would have died anyway, even if competently treated.

16. Commonly, the main difficulty arises from the fact that the court is required to assess what if any financial or other benefit the client would have obtained in a counter-factual world, the doorway into which assumes that the professional person had complied with, rather than committed a breach of, his duty of care. The everyday task of the court is to determine what, in fact, happened in the real world rather than what probably would have happened in a what-if scenario generally labelled the counter-factual. Similar difficulties arise where the question of causation or assessment of damage depends upon the court forming a view about the likelihood of a future rather than past event.

17. In both those types of situation (that is the future and the counter-factual) the court occasionally departs from the ordinary burden on a claimant to prove facts on the balance or probabilities by having recourse to the concept of loss of opportunity or loss of a chance. Sometimes the court makes such a departure where the strict application of the balance of probability test would produce an absurd result, for example where what has been lost through negligence is a claim with substantial but uncertain prospects of success, where it would be absurd to decide the negligence claim on an all or nothing basis, giving nothing if the prospects of success were 49%, but full damages if they were 51%: see *Hanif v Middleweeks (a firm)* [2000] Lloyd's Rep PN 920 per Mance LJ at para 17. A further reason why this is a generally unrealistic approach is that most claims with evenly balanced prospects of success

or failure are turned into money by being settled, rather than pursued to an all or nothing trial.

18. Sometimes it is simply unfair to visit upon the client the same burden of proving the facts in the underlying (lost) claim as part of his claim against the negligent professional. This may be because of the passage of time following the occasion when, with competent advice, the underlying claim would have been pursued. Sometimes it is because it is simply impracticable to prove, in proceedings against the professional, facts which would ordinarily be provable in proceedings against the third party who would be the defendant to the underlying claim. Disclosure and production of relevant documents might be impossible, and the obtaining of relevant evidence from witnesses might be impracticable. The same departure from the practicable likelihood that the underlying claim would have been settled rather than tried is inherent in any such process of trial within a trial.

19. But none of this means that the common law has simply abandoned the basic requirement that a claim in negligence requires proof that loss has been caused by the breach of duty, still less erected as a self-standing principle that it is always wrong in a professional negligence claim to investigate, with all the adversarial rigour of a trial, facts relevant to the claim that the client has been caused loss by the breach, which it is fair that the client should have to prove.

20. For present purposes the courts have developed a clear and common-sense dividing line between those matters which the client must prove, and those which may better be assessed upon the basis of the evaluation of a lost chance. To the extent (if at all) that the question whether the client would have been better off depends upon what the client would have done upon receipt of competent advice, this must be proved by the claimant upon the balance of probabilities. To the extent that the supposed beneficial outcome depends upon what others would have done, this depends upon a loss of chance evaluation.

21. This sensible, fair and practicable dividing line was laid down by the Court of Appeal in *Allied Maples Group Ltd v Simmons & Simmons (a firm)* [1995] 1 WLR 1602, a decision which received surprisingly little attention in either of the courts below (although, in fairness, the trial judge cited another authority to similar effect: namely *Brown v KMR Services* [1995] 4 All ER 598). Allied Maples had made a corporate takeover of assets and businesses within the Gillow group of companies, during which it was negligently advised by the defendant solicitors in relation to seeking protection against contingent liabilities of subsidiaries within the vendor's group. Allied Maples would have been better off, competently advised, if, but only if: (a) it had raised the matter with Gillow and sought improved warranties and (b) Gillow had responded by providing them. The Court of Appeal held that Allied Maples had to prove point (a) on a balance of probabilities, but that point (b) should

be assessed upon the basis of loss of the chance that Gillow would have responded favourably. The Court of Appeal (Stuart-Smith, Hobhouse and Millett LJJ) were unanimous in that statement of legal principle, although they differed as to the outcome of its application to the facts. It was later approved by the House of Lords in *Gregg v Scott*, at para 11 by Lord Nicholls and para 83 by Lord Hoffmann.

22. The *Allied Maples* case was about the loss, due to negligence, of the opportunity to achieve a more favourable outcome in a negotiated transaction, rather than about the loss of an opportunity to institute a legal claim. But there is no sensible basis in principle for distinguishing between the two, and none was suggested in argument. In both cases the taking of some positive step by the client, once in receipt of competent advice, is an essential (although not necessarily sufficient) element in the chain of causation. In both cases the client will be best placed to assist the court with the question whether he would have taken the requisite initiating steps. He will not by the defendant's breach of duty be unfairly inhibited in proving at a trial against his advisor that he would have done so, save perhaps where there is an unusual combination of passage of time and scarcity of other probative material, beyond his own unaided recollection.

23. Two important consequences flow from the application of this balance of probabilities test to the question what the client would have done, in receipt of competent advice. The first is that it gives rise to an all or nothing outcome, in the usual way. If he proves upon the narrowest balance that he would have brought the relevant claim within time, the client suffers no discount in the value of the claim by reason of the substantial possibility that he might not have done so: see Stuart-Smith LJ in the *Allied Maples* case at [1995] 1 WLR 1602, 1610G-H. By the same token, if he fails, however narrowly, to prove that he would have taken the requisite initiating action, the client gets nothing on account of the less than 50% chance that he might have done so.

24. The second consequence flows directly from the first. Since success or failure in proving on the balance of probabilities that he would have taken the necessary initiating step is of such fundamental importance to the client's claim against his advisor, there is no reason in principle or in justice why either party to the negligence proceedings should be deprived of the full benefit of an adversarial trial of that issue. If it can be fairly tried (which this principle assumes) then it must be properly tried. And if (as in this case) the answer to the question whether the client would, properly advised, have taken the requisite initiating step may be illuminated by reference to facts which, if disputed, would have fallen to be investigated in the underlying claim, this cannot of itself be a good reason not to subject them to the forensic rigour of a trial. As will appear, this has an important bearing on the extent of the general rule that, for the purpose of evaluating the loss of a chance, the court does not undertake a trial within a trial.

25. Applied to the present case, the principle that the client must prove on the balance of probabilities that he would have taken any necessary steps required of him to convert the receipt of competent advice into some financial (or financially measurable) advantage to him means that Mr Perry needed to prove that, properly advised by Raleys, he would have made a claim to a Services Award under the Scheme within time. To this the judge added that it would have to have been an honest claim. He made this addition upon the basis of a concession to that effect by counsel on Mr Perry's behalf, from which Mr Watt-Pringle QC for Mr Perry (who did not appear at the trial) invited this court to permit him to resile, so that the question whether the honesty of the claim was a requirement of Mr Perry's cause of action could be properly argued.

26. Having heard commendably concise argument on the point, I consider that the concession was rightly and properly made. In *Kitchen v Royal Air Force Association* [1958] 1 WLR 563 the plaintiff's husband, a member of the RAF, was electrocuted and killed in the kitchen of his house. His widow lost the opportunity to bring a claim under the Fatal Accidents Act in time due to the negligence of the defendant solicitors. In a leading judgment on the evaluation of the loss of a chance, Lord Evershed MR said this, at p 575:

> "I would add, as was conceded by Mr Neil Lawson, that in such a case it is not enough for the plaintiff to say: 'Though I had no claim in law, still, I had a nuisance value which I could have so utilised as to extract something from the other side and they would have had to pay something to me in order to persuade me to go away.'"

If nuisance value claims fall outside the category of lost claims for which damages may be claimed in negligence against professional advisors, then so, a fortiori, must dishonest claims.

27. That simple conclusion might be thought by many to be too obvious to need further explanation, but it may be fortified in any of the following ways. First, a client honestly describing his condition to his solicitor when considering whether to make a personal injuries claim would not be advised to do so if the facts described did not give rise to a claim. On the contrary, he would be advised not to waste his own money and time upon the pursuit of pointless litigation. Secondly, the court when appraising the assertion that the client would, if properly advised, have made a personal injuries claim, may fairly presume that the client would only make honest claims, and the client would not be permitted to rebut that presumption by a bald assertion of his own propensity for dishonesty. Thirdly, the court simply has no business rewarding dishonest claimants. The extent of dishonest claims for minor personal injuries such as whiplash (which are difficult to disprove) in road traffic

accident cases is already such a blot upon civil litigation that Parliament has considered it necessary to intervene to limit that abuse.

28. Applied to the present case, Mr Perry could only have brought an honest claim for a Services Award if he believed that:

a) He had, prior to developing VWF, carried out the six tasks, or some of them, without assistance,

b) After developing VWF, he needed assistance in carrying out all or some of those tasks, and

c) The reason for his need for that assistance was a lack of grip or manual dexterity in his hands, brought on by VWF.

29. While the question whether a perceived lack of grip or manual dexterity on his part was caused by VWF might be said to be a matter of expert medical opinion, the presence or absence of all the other elements necessary for making an honest claim to a Services Award fell squarely within Mr Perry's own knowledge. He would not, for example, need a doctor to tell him whether he needed assistance in changing the sparking plugs on his car engine and, if he did, whether his difficulty arose from lack of ability to grip or manipulate the requisite spanner, or rather from chronic back pain.

30. Simple facts of that kind, plainly relevant to the question whether Mr Perry could have brought an honest claim if competently advised, do not in themselves fall within either of those categories of futurity or counter-factuality which have traditionally inclined the court to adopt a loss of a chance type of assessment. They are facts about Mr Perry's actual physical condition at the relevant time (that is when he could have made a claim for a Services Award under the Scheme if properly advised), and about his habitual patterns in going about the six types of domestic task. Furthermore, it is the common understanding of medical experts that VWF, once developed, is a relatively stable condition. It gets neither worse nor better once the miner ceases to use vibrating machinery. If one asks without reference to authority whether there would be any unfairness subjecting his assertion that he would have made a claim for a Services Award to forensic analysis including questions about his then manual grip and dexterity and about the extent to which he was assisted in the performance of the relevant domestic tasks, the answer would be no. Nor would it be, on the face of it, unfair to subject his oral evidence about those matters, and that of his alleged family assistants, to a searching comparison with

other evidence about his own concerns about his medical condition at the relevant time, to be derived from GP records.

31. The question remains however whether any of the authorities relied upon by counsel for Mr Perry on this appeal, or by the Court of Appeal in its conclusion that a forensic investigation of that kind at a trial was contrary to principle, really establish any such proposition, where the facts being investigated are relevant to the issue, to be proved by the claimant on the balance of probabilities, whether he would have taken the essential step of bringing an honest claim, upon receipt of competent advice. On analysis, they establish no such proposition. All they do show is that, where the question for the court is one which turns upon the assessment of a lost chance, rather than upon proof upon the balance of probabilities, it is generally inappropriate to conduct a trial within a trial.

32. Taking the cases in chronological order, the earliest relevant decision is the *Kitchen* case already mentioned. There, the plaintiff's husband had been killed by electrocution and the claim which the solicitor's negligence disabled her from making was against the electricity company. It was never suggested that, if properly advised, she could not have made an honest claim. It was clearly more than a nuisance value claim. The precise circumstances which led to the husband's electrocution were, as the Court of Appeal said, shrouded in mystery, and were not within the plaintiff's knowledge. Accordingly, the well-known advice of the Court of Appeal, that in those circumstances the court should focus upon the chose in action constituted by the lost claim and determine its value as best it can, without necessarily conducting a trial within a trial, was not directed to the question whether the plaintiff would have brought a claim. Nor indeed had it by then been established, in the *Allied Maples* case, that such a question required proof on the balance of probabilities.

33. *Mount v Barker Austin* [1998] PNLR 493 is the first of a series of cases in which the Court of Appeal sought to extract from the *Kitchen* and *Allied Maples* cases principles applicable to the determination of negligence claims against solicitors who had through their negligence allowed their client's pending claim to be struck out, either for failure to comply in time with a procedural step, or more generally for want of prosecution. They may all be distinguished from the present case because, by the time when the negligent conduct occurred, the client already had a pending claim which could be treated as something of potential value, thereafter lost because of the solicitors' negligence. By contrast with the *Allied Maples* case and indeed this case, there was nothing which the client had to prove, on the balance of probabilities, that he would have done, had his solicitors acted competently, to bring such a pending claim into existence.

34. Simon Brown LJ sought to lay out the relevant principles at pp 510-511, in four propositions which have been frequently followed and applied. In summary, they require the claimant only to prove that the lost claim had a real and substantial, rather than merely negligible, prospect of success, following which the court was obliged to conduct an evaluation of the prospect of success, rather than a trial within a trial of the underlying claim. But those principles all fall on that side of the dividing line established in the *Allied Maples* case in which the court is concerned to value the loss of a chance, rather than to enquire whether the client has proved, on the balance of probabilities, that he would have done something relevant to the existence of a chain of causation between the solicitors' negligence and the client's loss.

35. The Court of Appeal, and counsel for Mr Perry in his submissions to this court, placed *Hanif v Middleweeks* (supra) squarely in the forefront of their criticism of the judge in conducting what they described as a trial within a trial. It was a professional negligence action in which the client was the co-owner of a nightclub which had been destroyed by fire. The insurers had issued proceedings for a declaration of non-liability, on the ground (among others) that the fire had been started deliberately by Mr Hanif's co-owner. Mr Hanif counterclaimed for an indemnity under the insurance policy, but his counterclaim was struck out for want of prosecution because of the negligence of the defendant solicitors. The trial judge had assessed the prospects of Mr Hanif resisting the insurers' allegation of arson by his co-owner at 25% and the Court of Appeal, applying both the *Allied Maples* and *Kitchen* cases, held that he had been right to adopt a loss of chance approach, rather than to decide, in a trial within a trial, whether or not the fire had been started deliberately. A submission that, in the light of the 25% finding, the fire probably had been deliberate, so that the claim should have been dismissed as being contrary to public policy was rejected, not least because it had been neither pleaded nor argued in the court below.

36. The *Hanif* case did not, therefore, involve any question about what the client would have done had he obtained competent advice. He had already given instructions for the making of the counterclaim, and it would have gone to trial but for the solicitors' negligence in allowing it to be struck out for want of prosecution. There was, therefore, nothing which Mr Hanif had to prove, on the balance of probabilities, that he would have done in order to have benefitted from a competent discharge by the solicitors of their duty of care. The questions relevant to the lost counterclaim therefore fell squarely within the category identified in the *Allied Maples* case as calling for an evaluation of a lost chance, rather than proof upon the balance of probabilities. Furthermore, there was no suggestion, at trial or in the Court of Appeal, that Mr Hanif could not honestly have brought or pursued his counterclaim, even though the judge found that he had only a 25% prospect of resisting the allegation of arson by his co-owner. In sharp contrast with Mr Perry's knowledge of his own manual grip and dexterity, it was not suggested that Mr Hanif

had personal knowledge of the facts relevant to the question whether the fire had been started deliberately.

37. The case is therefore a conventional example of the correct application of the dividing line established in the *Allied Maples* case between those matters to be proved by the client on the balance of probabilities, and those to be addressed by reference to the assessment of the value of the lost opportunity. But it does not begin to establish some principle that it is always wrong for the court to try an issue relevant to causation in a professional negligence case, merely because that same issue would have fallen for determination in the trial of the underlying claim, lost due to the solicitors' negligence. The question whether any given issue should or should not be tried in the negligence proceedings depends upon whether it is one upon which the client must prove his case on the balance of probabilities, or only one which should be subjected to the valuation of a lost chance. Treating the question as determined by asking whether the same issue would fall to be tried in the lost claim puts the cart before the horse.

38. *Sharif v Garrett & Co* [2001] EWCA Civ 1269; [2002] 1 WLR 3118 is another case in which the negligence in question consisted of solicitors allowing a pending claim to be struck out for want of prosecution. The underlying claim (which had been struck out) was a negligence claim against insurance brokers, following the destruction of the claimant's business premises by fire. There was no suggestion that it was a dishonest claim, or indeed a hopeless claim, although there was a wide disagreement about its value. It was also a case in which the reason why the underlying claim had been struck out for want of prosecution was that, because of the inordinate delay, it could no longer be fairly tried. The criticism of the trial judge's approach which prevailed in the Court of Appeal was that he should not have conducted a trial of issues which would have arisen in the underlying claim in circumstances where the court had already concluded that no fair trial of that claim was possible, as a result of the solicitors' negligence in its prosecution. But the case is, like the *Hanif* case, another conventional application of the dividing line established in the *Allied Maples* case. The client had started his claim and needed to prove nothing about what he would have done, on the balance of probabilities, in order to have benefited from his solicitors' careful conduct of the proceedings.

39. In *Dixon v Clement Jones* [2005] PNLR 6, the underlying claim was a negligence action against accountants for failing to advise the claimant against what turned out to be a disastrous transaction, which her solicitors allowed to be struck out for failure to serve Particulars of Claim in time. The solicitors alleged that, even if their client had received competent advice from the accountants, she would still have entered into the disastrous transaction so that she would, applying principles from the *Allied Maples* case, have failed to prove a necessary element in her case on causation, on the balance of probabilities. The question for the Court of Appeal was whether, in those circumstances, the client was obliged in the negligence claim

against the solicitors also to prove, on the balance of probabilities, that aspect of her case on causation in the underlying claim. In agreement with the trial judge, they concluded that she did not, because causation issues in the underlying claim fell to be evaluated on a loss of chance basis in the same way as all other issues in the underlying claim, when considering the value of that claim which had been lost by reason of the solicitors' negligence.

40. It is unnecessary to express a concluded view about that analysis. A rigid application of the *Allied Maples* test, namely whether the fact in issue was something that the claimant rather than a third party would have done, might lead to the opposite conclusion. But the client had already given instructions for the bringing of the underlying claim, so there was nothing which she needed to prove that she would have done, had the solicitors acted competently and served the Particulars of Claim in time, in order to bring into existence a chose in action which the court could value. Nor, unsurprisingly, was it suggested that the underlying claim had not itself been honestly brought. It is sufficient to say that it does not address the question for decision in the present case, namely whether the client must prove, on the balance of probabilities that, competently advised, he would have brought an honest claim so as to establish causation between the solicitors' negligence and his alleged loss.

The Judge's Approach to the Law

41. It was not, therefore, wrong in law or in principle for Judge Saffman to have conducted a trial of the question whether Mr Perry would (or indeed could) have brought an honest claim for a Services Award, if given competent advice by Raleys. That was something which Mr Perry had to prove on the balance of probabilities, and which Raleys were entitled to test with all the forensic tools available at an ordinary civil trial, and by proof or challenge of alleged facts relevant to that question, even if the same facts would have formed part of the matters in issue, either at a trial of the underlying claim, or upon its adjudication or settlement pursuant to the Scheme.

42. But the Court of Appeal's criticism of the judge's approach to the issue of causation went further. They held that his reserved judgment disclosed that he wrongly imposed upon Mr Perry the burden of proving not merely that he would, properly advised, have brought an honest claim, but also a successful claim.

43. Viewed across the generality of claims that may never be pursued because of a solicitor's negligent advice, it may well be that the burden of proving that the claim would have succeeded is higher than the burden of proving that it could or would have been honestly made. That is because, in the ordinary case, success will depend upon a raft of factual and legal matters, all of which are liable to be subjected to full

adversarial examination at a trial, or at least to the disclosure and examination by an opponent of the claimant's documents before an attempt at settlement. By contrast, claims for Services Awards under the Scheme by persons already in possession of a medical opinion that they suffered from VWF, at a level sufficient to entitle them to general damages, would not under the claims handling processes provided for by the CHA be subject to any such adversarial procedures. As already described, the claimant miner would only have to complete a questionnaire, identify his alleged assistants, and have one or more of them subjected to a short, non-adversarial interview on the telephone by a claims handler, and undergo medical examination limited to the question of co-morbidity, before his claim would be assessed and, in all probability, made the subject of an offer of an amount sufficient for the claim to be treated as having been successful. As an experienced judge in this specialised field, Judge Saffman may be assumed to have been well aware of this, and the expression in his reserved judgment of the burden which Mr Perry needed to surmount for the purposes of establishing causation needs to the read in that light, in the context of a long and careful reserved judgment, considered as a whole.

44. There are four occasions in the judge's judgment where he directly addressed the causation hurdle facing Mr Perry. First, when dealing with the issues for trial, he said, at para 15:

> "In short therefore the issues for determination are;
>
> a. Whether the claim is statute barred,
>
> b. If not, whether the admitted breach of duty caused or materially contributed to the claimant's alleged loss. In the context of this case did the breach cause the claimant to settle his claim at an undervalue because, on balance, if properly advised, and on the assumption that he acted honestly, he would have made a claim for a Services Award? ...
>
> c. Has the claimant lost something of value in the sense that his prospects of success in a claim for a Services Award were more than negligible?
>
> d. If the claimant has lost a claim with more than a negligible prospect of success what is a realistic assessment of what the prospects of success were?

> e. What is an appropriate assessment of the likely value of the claim having taken account of the prospects of success?"

Then, at para 88, under the heading "*Causation*": he continued:

> "The onus is on the claimant to establish causation on the balance of probabilities. The claimant therefore must establish on balance that he would have acted differently if properly advised and a lack of opportunity to do so has caused him loss. In other words the claimant must establish that the breach of duty actually caused him loss."

Under the heading "Other aspects of Causation" he continued at para 114:

> "I therefore now turn to the issue of whether the breach caused the claimant to settle his claim at an undervalue because, on balance, if properly advised and on the assumption that he was acting honestly he would have acted differently and made a successful claim for a Services Award."

45. At para 119 the judge said:

> "That is a question of credibility. Am I satisfied that the claimant originally undertook the services but could no longer do so without assistance? As Mr Quiney put it, has the claimant succeeded in persuading the court that he actually suffered sufficient disability that he could honestly say 'I cannot carry out these services?'"

46. Finally, he expressed his conclusion at para 133, as follows:

> "I am not satisfied that the evidence of Mrs Perry or Scott Perry is sufficiently cogent to dissuade me from my conclusion that the claimant has not established that he honestly met the factual matrix by reason of his VWF either in respect of what tasks he used to do and those which he could not do without assistance at the time of settlement of his original claim. Indeed I go further, I am satisfied that in so far as the burden is on the

> defendant to establish its assertion that the claimant did not meet the matrix, it has discharged that burden."

The judge was using the phrase "the factual matrix" in the way described above, namely having a sufficient disability in his hands, caused by VWF, that he could no longer carry out, without assistance, tasks that he had previously carried out on his own.

47. While it is true that, at para 114, the judge did use language which, read on its own, might appear to suggest that he imposed upon Mr Perry the additional burden, beyond proving that he would have made an honest claim, that it would have been successful, his analysis of causation, derived from all the passages quoted above, taken together, and in the context of the judgment as a whole, makes it clear that he was not thereby imposing some additional burden upon Mr Perry, beyond proof, on the balance of probabilities, that he would have brought an honest claim. His reference to a "successful" claim may have been no more than shorthand for his earlier reference to the requirement upon Mr Perry to show that his claim had a more than negligible prospect of success.

48. Accordingly, and contrary to the view of the Court of Appeal, the judge's determination of the case was not vitiated by any error of law.

The Judge's Determination of the Facts

49. It is necessary therefore also to address the question whether the Court of Appeal was right to conclude that, quite separately from supposed errors of law, the judge went sufficiently wrong in his determination of the facts to enable an appellate court to intervene. The Court of Appeal expressed its positive conclusion on that issue under two headings, at para 26, namely:

> "iii) he demonstrably failed to consider, or misunderstood, relevant evidence, and
>
> iv) his decision (that Mr Perry could not honestly have claimed in 1999 and thereafter that he was unable to perform the relevant tasks without assistance) cannot reasonably be explained or justified."

Those are strong conclusions about a fact-finding exercise at trial by an experienced judge, but the Court of Appeal made them after reminding themselves of the very

real constraints facing an appellate court when invited to overturn a judge's findings of fact at trial. For that purpose they referred to *Grizzly Business Ltd v Stena Drilling Ltd* [2017] EWCA Civ 94, *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 WLR 2600 and *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477. In the *Henderson* case the Supreme Court had said, at para 62:

> "It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached."

50. In the *McGraddie* case Lord Reed said this, at paras 3-4:

> "3. The reasons justifying that approach are not limited to the fact, emphasised in *Clarke's* case and *Thomas v Thomas*, that the trial judge is in a privileged position to assess the credibility of witnesses' evidence. Other relevant considerations were explained by the United States Supreme Court in *Anderson v City of Bessemer* (1985) 470 US 564 (1985), 574-575:
>
> > 'The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one: requiring them to persuade three more judges at the appellate level is requiring too much. As the court has stated in a different context, the trial on the merits should be 'the 'main event' … rather than a 'try out on the road'.' … For these reasons, review of factual findings under the clearly erroneous standard - with its deference to the trier of fact - is the rule, not the exception.'"

Similar observations were made by Lord Wilson in *In re B (a Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 WLR 1911, para 53.

> "4. Furthermore, as was stated in observations adopted by the majority of the Canadian Supreme Court in *Housen v Nikolaisen* [2002] 2 SCR 235, para 14:
>
> > 'The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged.'"

51. The Court of Appeal, at para 24, also reminded themselves of the following dicta of Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5:

> "(iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
>
> (v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
>
> (vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

52. The question in the present case is not whether the Court of Appeal misstated those constraints. They may be summarised as requiring a conclusion either that there was no evidence to support a challenged finding of fact, or that the trial judge's finding was one that no reasonable judge could have reached. Rather, the question is whether the Court of Appeal were correct in concluding, as they did, that there were errors in the judge's factual determination which satisfied those very stringent requirements. For that purpose it is necessary to address each of the Court of Appeal's criticisms in turn, but with the caveat that it is not possible entirely to disentangle some of them from what, for reasons already given, was the Court of

Appeal's incorrect approach to the burden imposed by the common law upon Mr Perry to prove causation.

53. The Court of Appeal's first conclusion was that the judge had failed to appreciate that, on the question whether Mr Perry could have made an honest claim for a Services Award, the burden of proof in relation to any question of dishonesty lay squarely upon Raleys. More importantly, the Court of Appeal concluded that it had not been fairly put to Mr Perry in cross-examination at trial that, for him to have instructed Raleys to pursue a claim for a Services Award would have involved dishonesty on his part, in suggesting that he suffered from the requisite underlying manual disability. As to that, for the reasons already given, the burden lay on Mr Perry to prove that he would have made an honest claim. Since his written evidence was that he would indeed have made a claim for a Services Award, it was incumbent upon counsel for Raleys to bring home to Mr Perry in cross-examination and by any other relevant means that his honesty in making that assertion was being challenged, and to do so in a way which took properly into account Mr Perry's relative lack of sophistication.

54. The judge reminded himself at some length of the need to take account of Mr Perry's relatively unsophisticated background, at paras 16-18 and 136 of his judgment. He satisfied himself, at paras 74-75, that Mr Perry and his advisors were in no doubt that Raleys were alleging that he was "promoting a dishonest claim". At para 133 the judge made it clear that his conclusion that, in asserting that he suffered from the requisite manual disability in carrying out the relevant tasks unaided, Mr Perry was not telling the truth was one which he reached regardless of the incidence of a burden of proof.

55. The question whether it had been sufficiently brought home to Mr Perry, by cross-examination or otherwise, that the court was being invited to conclude that he was lying in his evidence about his inability to carry out the domestic tasks without assistance was pre-eminently a matter for the trial judge, and it is clear, as noted above, that he concluded, after hearing submissions from counsel on the point, that it had been. The question for an appellate court is therefore whether there was material upon which the judge could reasonably reached that affirmative conclusion. Having read those parts of the cross-examination to which this court was directed by counsel, there clearly was such material. It consisted, in the main, of counsel for Raleys putting in considerable detail to Mr Perry aspects of his documented medical history, and evidence (including photographic evidence) of fishing and gardening activities after his retirement as a miner which were, as the judge held, wholly inconsistent with his evidence about his disability in carrying out the relevant tasks. The judge was entitled to conclude that this sufficiently brought home to Mr Perry that he was being accused of lying about it. The fact that an appellate judge might, if trying the case at first instance, have preferred or required the matter to be put to Mr Perry differently or more directly, is, with respect, neither here nor there.

56. Linked to this criticism was the conclusion, at para 46 of the judgment of Gloster LJ, that "the judge placed far too much weight on the detail of the inadequate answers which were given by the appellant in this respect …". But again, the weight to be given to evidential material in forming a conclusion whether Mr Perry's evidence lacked all credibility (as the judge found) was a matter for the trial judge.

57. The second and main criticism by the Court of Appeal was that the judge had disregarded, without giving proper reasons, the evidence, broadly supportive of Mr Perry's case, from Professor Kester and from the single joint expert Mr Tennant, in particular because the latter was not called to be cross-examined. Professor Kester's task, under the Scheme, was to advise whether, and with what degree of severity, Mr Perry suffered from VWF. He noted that Mr Perry reported a loss of manual dexterity and clumsiness of an intermittent nature, but his detailed examination of Mr Perry was directed to the presence or absence of the VWF in his hands rather than to their grip or dexterity.

58. By contrast, Mr Tennant's opinion was directed towards Mr Perry's ability to carry out the relevant domestic tasks unaided. Again however, much of his reasoning was based upon information provided to him by Mr Perry during interview, in particular in relation to each of the six relevant tasks, although Mr Tennant appears to have carried out a grip strength test and some simple tests of manual dexterity.

59. The judge did, at paras 116-118 and 122-123 of his judgment, remind himself of the opinions of Professor Kester and Mr Tennant, of their findings as to the severity of Mr Perry's VWF, of the presumption thereby arising in favour of a Services Award, and accepted that Mr Perry suffered from VWF "to a high degree". At para 118, he said:

> "I acknowledge that the staging of two doctors supports the view that he has a significant loss of function, but I repeat that the question is whether the claimant has established that in reality any loss of function manifested itself in an inability to carry out the tasks."

This was what, in the passage already quoted above, the judge described as "a question of credibility".

60. The trial judge was not merely entitled but obliged to weigh in the evidential balance his perception that Mr Perry was lying about his ability to perform, unaided, the relevant tasks against the opinion, in particular of Mr Tennant, that he suffered

from shortcomings in manual dexterity which made it likely that he suffered from such a disability. Corroborative expert evidence not infrequently transforms testimony which on its own appears most unlikely into something credible. The judge's conclusion that Mr Tennant's opinion did not prevail over Mr Perry's thoroughgoing lack of credibility cannot be described as either lacking in reasoning or trespassing beyond the range of reasonable conclusions available to a trial judge. While it might have been better if Mr Tennant had been called for cross-examination, the judge was not obliged to prefer the expert's opinion, based as it was to a significant extent upon what Mr Perry had told him, to that which the judge was entitled to form, on the basis of the evidence as a whole, about whether Mr Perry was telling the truth about his supposed disability. In the end, the Court of Appeal's criticism amounted to a supposed failure to give sufficient weight to the medical evidence: see per Gloster LJ at para 52. But questions as to the weight of competing evidence are pre-eminently a matter for the trial judge.

61. The next criticism was that the judge had misunderstood, or failed to apply, a principle fundamental to the Scheme, namely that a claimant did not have to be disabled entirely from carrying out a task in order to be entitled to a Services Award: see per Gloster LJ at para 54. She said that "the impression given by the judge was that he wrongly considered that unless Mr Perry could not carry out any aspects of a task without assistance, he was not entitled to claim in respect of that task".

62. No such error appears from perusal of the judge's careful judgment. In particular, at para 132, he acknowledged that "inability or reduced ability to carry out the services tasks" would be sufficient to support a claim to a Services Award.

63. The final criticism made by the Court of Appeal was that the judge "could not rationally have reached the conclusion that Mr Perry, his wife and two sons had all given false evidence": see per Gloster LJ at para 55. It is a very strong thing for an appellate court to say, from a review of the paper records of a trial , that the trial judge was irrational in concluding that witnesses were not telling the truth, all the more so when the trial judge gives detailed reasons for that conclusion in a lengthy reserved judgment, and those reasons do not disclose any failure by him to consider relevant materials, or any disabling failure properly to understand them. The credibility (including honesty) of oral testimony is, of all things, a matter for the trial judge.

64. It is unnecessary to address in detail the reasons given by Gloster LJ for that finding of irrationality against the judge. It is sufficient to say that, while they constitute persuasive and forcefully expressed views about why she and her colleagues in the Court of Appeal, faced with the same materials, would have come to a different conclusion, they do not, separately or in conjunction, support a conclusion of irrationality as the only explanation for the judge's contrary view. As

the judge said, the question whether Mr Perry needed assistance in the performance of the relevant tasks following his retirement from mining was pre-eminently a matter to be proved, or not proved, by his oral evidence, with such support as he could muster from the oral evidence of his wife and two sons. It was, as the judge put it, a question of credibility. While there undoubtedly are cases where surviving documents point so clearly to the correct answer to issues of fact that the oral testimony of relevant witnesses is of subordinate importance, this is not one of them. Furthermore the surviving documents were, as was demonstrated during cross examination, generally hostile to Mr Perry's case.

65. Mr Watt-Pringle sought to support the Court of Appeal's criticisms of the judge's findings with specific submissions about aspects of the detail. They did not, separately or together, amount to a case sufficient to support either a conclusion that there was no evidence to support the judge's adverse findings about credibility or a conclusion that no reasonable judge could have decided as he did. In particular Mr Watt-Pringle pointed to the relative brevity of the cross-examination of Mr Perry's wife and two sons, being, he submitted, insufficient to justify the conclusion that any of them was lying. But it is impossible to tell, without having been present at the trial, whether a short or a long cross-examination of a witness was necessary in order to undermine his or her credibility.

66. Mr Watt-Pringle also pointed to the fact that the central thrust of Raleys' case at trial was not so much that Mr Perry suffered from no disability in performing the relevant tasks unaided, (although that was part of Raleys' case) but rather that his back problem was the only significant cause of such disability as in fact affected him. He pointed to the fact that, in the concluding part of his judgment, the judge rejected Raleys' case that Mr Perry's back problems were of that degree of significance, preferring in that respect the evidence to the contrary of Mr Tennant. But he did so expressly on the conditional basis that he might be wrong in his primary conclusion that Mr Perry was lying about having any relevant inability to perform those tasks unaided: see para 137 of his judgment.

67. In conclusion therefore, none of the grounds upon which the Court of Appeal considered that this was one of those rare cases where it was appropriate to reverse the trial judge's findings on issues of fact is established, to the requisite high degree. Accordingly, this appeal should be allowed, and the judge's order restored.