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Loss of Chance: The Ifs, Buts and Maybes of the underlying claim

In claims brought against solicitors for "lost litigation", the Claimant will allege that it lost the opportunity to pursue an otherwise "good" claim. The Insured (and its professional indemnity insurers) will want to test that claim, minimise quantum and run any available 'complete causation' defences.

The facts and merits of the underlying claim will impact on the causation and loss arguments available to the Insured, but will the Court examine the ifs, buts and maybes of the underlying claim to determine what the Claimant would have done (if properly advised), and therefore the extent and value of the 'loss of chance'?

The recent judgment of the Supreme Court in *Perry v Raleys [2019] UKSC 5*, considered the extent to which this level of examination is permitted. In essence, the Supreme Court held that there are two separate elements to (i) establishing causation and (ii) the appropriate percentage loss of chance:

Stage 1. Would the Claimant, on a balance of probabilities, have pursued the claim at all?

The Supreme Court has clarified that professional negligence lawyers and the Courts *are* permitted to examine the facts and detail of the underlying claim to answer this question. That will not constitute a 'trial within a trial', but rather it is necessary and appropriate to assess 'with full forensic rigour' what the proper advice would have been. Why is that relevant? Well, because the correct advice regarding the claim's prospects of success must dictate (or at least have a significant bearing upon) whether or not the Claimant would have actually pursued the claim.

If the Claimant cannot persuade a Court that, on a balance of probabilities, the proper advice would have been favourable, such that he would have pursued the claim, the Claimant's claim will fail. The Claimant's claim will also fail even if he can show that he would have brought the claim, but it can be proven that the claim would have been dishonest. That is reassuring clarification.

In such cases, the Court would not then need to consider 'loss of chance' further.

Stage 2. What is the loss of chance?

It is only once the Court is satisfied that, if properly advised, the Claimant *would* have pursued the claim (i.e., the Claimant succeeds at Stage 1), that the Courts will need to determine the percentage 'loss of chance' discount and the value to the Claimant, *if* that claim had been brought. The Supreme Court has clarified the existing position that it is not appropriate to conduct a 'trial within a trial' at this second stage.

Comment

The reality is that many of the facts and details analysed to determine the answer to Stage 1, will also be relevant to Stage 2. The Supreme Court has confirmed that will not prevent those issues from being explored at Stage 1. This is welcome clarification that the Insured (and its professional indemnity insurers) are able to properly explore all causation defences available to it, in the defence of the claim and where possible, to prevent the Claimant from clearing what we have called the "Stage 1" hurdle.

The Claimant's attitude to advice, risk generally and the instructions that the Claimant gave throughout the underlying claim, are therefore highly relevant subjective factors and should be carefully considered in the defence of any claim.

Contact

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