Court of Appeal reaffirms the accepted position on breach of duty (Dunhill v W Brook and Co)

05/04/2018

Personal Injury analysis: Discussing the judgment in Dunhill v W Brook and Co, Carlo Taczalski, a barrister at Crown Office Chambers, says the case illustrates that decisions by barristers and solicitors made at court, in necessarily fluid circumstances, are particularly difficult to impugn, and a judicial finding about such a fact will be even more difficult to appeal.

Dunhill (by her Litigation friend Tasker) v W Brook and Co (A Firm) and another [2018] EWCA 505

What are the practical implications of this case?

This case affirms the well-established approach to assessing breach of duty in professional negligence matters. The decision reached by the professional must not merely be capable of being disagreed with by another member of the profession, it must be a decision which no other reasonably well informed and competent member of the profession could have reached. The facts of this case illustrate the practical difficulties of meeting that threshold in the context of an advocate dealing with a situation which has arisen at court, and the deference which any appeal court is likely to afford the trial judge making findings about whether the threshold has been reached.

The facts of this case also provide a salutary guidance to practitioners, particularly in the field of personal injury work, of the need to have considered capacity and the nature of the injury—even if the trial is to be of liability only. Of broader application, are the Court of Appeal's comments about the need for there to be a suitable solicitor contactable where counsel is sent to court with a trainee (and especially, one would assume, where counsel is sent on his or her own, as routinely happens in low value personal injury work).

What was the background?

On 25 June 1999, Ms Dunhill was crossing the road with her son and his girlfriend, when a motorbike crashed into her.

Her son saw the motorcyclist coming and had managed to pull his girlfriend out of the way, but not his mother.

Ms Dunhill was unable to recollect the accident at all, on account of her post-accident amnesia. The evidence of others was therefore always going to take centre stage. At the time, the motorcyclist said to police that the pedestrians just appeared from between two stationary vehicles, one of which might have been a van. He emphasised that he could have stopped for traffic at the roundabout he was approaching—but given the fact of the accident, he clearly wasn't able to stop for the pedestrians, perhaps because he wasn't watching for them as he passed the stationary queue of traffic (which would have been a breach of the Highway Code). Initially, Ms Dunhill's son said that he could see 150 yards up the road, and that the motorbike came at them at speed out of nowhere. Elsewhere he said that this was 15 yards. But there clearly was a line of sight to the bike, as he had reacted to it by pulling his girlfriend back. Other witnesses made contemporaneous statements suggesting that the three pedestrians were not watching where they were going, and suggesting that they, not the motorcyclist, were to blame for the accident. Two of the drivers in the stationary line of traffic later served statements in the proceedings in support of the motorcyclist, to the effect that the pedestrians were 'full of the joys of spring…oblivious to what was going on'.

Pre-proceedings, Ms Dunhill was seen in conference by a barrister, who also had the benefit of a report from an accident reconstruction engineer. The barrister was of the view that primary liability was likely to be established, but subject to a significant finding for contributory negligence of something like 66% to 75%, depending on whether or not she was found to have been drinking alcohol which had been suggested.

Ms Dunhill's injuries included a closed head injury and soft tissue injuries, but her situation was complicated by the fact that she had pre-existing psychological issues. The early expert evidence said that she was 'fine' physically, self-caring and independent, but that she had permanently lost her sense of smell and taste and had a risk of epilepsy which had diminished to less than 1%. Ms Dunhill was also suffering from certain personality changes, and had been referred to rehabilitation. The barrister's preliminary view of quantum was that it would be in the region of £40,000, subject to review depending on the rehabilitation.

Proceedings were then issued, towards the end of the limitation period in the county court, with quantum said to be limited to £50,000. At the time, just over £2,000 was said to be for special damages for care and travel expenses. A split trial was sought and ordered, but permission was in due course refused for the accident reconstruction expert evidence.

By the time of trial, the barrister who initially advised was unavailable, and Mr Crossley stepped in.

His instructions initially informed him:

- Ms Dunhill's son could not be contacted and may be in prison
- Ms Dunhill was herself a very reluctant witness who did not want the trial to proceed and wanted it settled without the need for her to give evidence
- Ms Dunhill was being supported by a mental health advocate, and a further neuropsychologist's report might exist, which the solicitors were trying to obtain
- solicitors had tried to settle at 50/50, but that offer had been rejected

It does not appear that he was initially told about the lack of permission for the accident reconstruction expert to give evidence.

Mr Crossley's initial view was that the case had reasonable prospects of success. However, he wanted to see the additional neuropsychologist's report as it might be relevant to Ms Dunhill's fear of attending trial. That was obtained by solicitors the day before trial, but not read, and not sent through to Mr Crossley. Had it been read, it would have disclosed the view that Ms Dunhill needed 12 months' residential rehabilitation (which Mr Crossley knew about) but also that she was currently leading a very limited life. It painted a serious picture of her injuries, not the picture presented by the other reports which suggested the loss of the sense of taste and smell were the most serious ongoing aspects.

By the time of trial, Mr Crossley had been told of the lack of permission for the expert.

On the day of trial, Ms Dunhill's son did not attend (despite apparently having been found and being expected to attend). Mr Crossley thought that that change in circumstances brought prospects below 50%, and advised Ms Dunhill as much. He also advised that an adjournment application was unlikely to succeed, and that one alternative was to seek to settle on a full and final basis. Ms Dunhill authorised negotiations. £10,000 was negotiated up to £12,500 plus costs which was accepted on Mr Crossley's advice, which he provided after cross-checking it against the previous barrister's advice (provisionally something in the region of £40,000 on a full liability basis).

While you might think that was the end of the road, it was not. The story goes on.

Within a week, Ms Dunhill was expressing dissatisfaction with the settlement, and consulted other solicitors.

That led to an attempt to set aside the settlement on the basis that she did not have capacity. Silber J found that the presumption of capacity had not been successfully rebutted, but that decision was successfully appealed.

Following a further appeal to the Supreme Court (and an intermediate hearing before Bean J on a question remitted by the Court of Appeal), the position was that the settlement was void for Ms Dunhill's lack of capacity.

Liability was eventually compromised at 55/45 in her favour, and quantum settled and approved in a sum which remains confidential but is likely to be very much higher than £12,500.

The claim against Mr Crossley and the solicitors instructing him (commenced at the same time as the set aside proceedings but stayed while they were in train) were continued to recover only:

- irrecoverable earlier costs
- the loss of opportunity to obtain earlier treatment for her injuries

What did the court decide?

The action against Mr Crossley and his solicitors was tried by Elisabeth Laing J. She dismissed the claims against both Counsel and the solicitors. Specifically, she found that Mr Crossley was not negligent for considering that prospects of success had been diminished by the absence of Ms Dunhill's son, and nor was he negligent for not applying for an adjournment to try and secure the attendance of the son, as there was no real likelihood of obtaining one. She also went on to find that Mr Crossley was not negligent for trying to do his best to assess quantum on the documentation that he had in the circumstances, and specifically he was not negligent in not trying to get an adjournment to obtain more medical evidence as, again, it was unrealistic. The solicitors' liability was considered parasitic on Mr Crossley's—they needed to be able to detect any blatant error made by counsel, and the trainee who had been sent would not have been able to do that. But because Mr Crossley had not been negligent, neither had the solicitors been. The claim failed entirely.

The Court of Appeal upheld her decision.

In doing so, they reaffirmed the accepted position on breach of duty: whether the trial judge considered there to be an error is a different question to whether there was negligence. Even if there had been an error with the benefit of hindsight, there was no liability unless the error was an error that no reasonable well-informed and competent member of the profession could have made.

The case illustrates that decisions by barristers and solicitors made at court, in necessarily fluid circumstances, are particularly difficult to impugn, and a judicial finding about such a fact will be even more difficult to appeal. By way of example Sir Brian Leveson in fact disagreed with Mr Crossley's conclusion that there had been a change in circumstance which took prospects of success below 50%. Nevertheless, he was not prepared to say that the trial judge was not entitled to take the view, which she did, that Mr Crossley was entitled to fear a reduction in prospects on account of the absence of Ms Dunhill's son.

The one element of Mr Crossley's actions which the Court of Appeal was critical of was his failure, given the fact that only a trainee was present with him at trial, to telephone the office and talk to the partner with conduct of the case before advising the settlement should be accepted. That might have resulted in the provision of the further medical evidence with which he had not previously been provided, and might have resulted in a higher settlement being negotiated, though it was thought unlikely to result in a complete change of approach given the views formed about liability. By the

same token, it was not negligent of the firm to send a trainee, but they needed to make sure that a suitably experienced solicitor was available if needed.

Carlo Taczalski specialises in commercial, construction, insurance, and professional negligence matters. His present and recent case-load include acting for one of the lead defendants in the Ingenious litigation, defending an allegedly valuable professional negligence claim against accountants relating to the conduct of a COP9 / fraud enquiry by HMRC, and acting as sole counsel for two of the defendants in a $26m claim concerning alleged negligence of Spanish and English lawyers said to have been (negligently) involved in an arbitration in the US.

Interviewed by Kate Beaumont.

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