"An Otherwise Intractable Situation" -

The Conundrum of Incapacity in Solicitors' Negligence Claims

Howard Elgot – Parklane Plowden Chambers

"34. It was this dichotomy that led the court to suggest the indemnity that has now been agreed, and the stay that has now been agreed. This approach is, and always was, the obviously pragmatic solution to an otherwise intractable situation—as the judge also effectively recognised."
Sir Geoffrey Vos MR in Evans v Betesh Partnership 2022 RTR 1

The Facts

1. The facts of Evans v Betesh Partnership could not be much simpler. Hannah Evans was injured in a road traffic accident on 11th July 2009 while a passenger in a car driven by a Mr Clancy. Mr Clancy pleaded guilty to causing death by dangerous driving in respect of his driving at the time of the accident.

2. Ms Evans instructed the Betesh Partnership to act for her in her claim against Mr Clancy. She was further advised by a barrister instructed on her behalf by the Betesh Partnership.

3. Ms Evans subsequently accepted a Part 36 offer of £100,000 made on behalf of Mr Clancy's insurers following a conversation between herself and her solicitors on 8th November 2011. Neither her solicitors nor her barrister had advised her to accept the offer, but she gave instructions to her solicitors to accept the offer and the offer was duly accepted.

4. Some years later Ms Evans consulted new solicitors. The new solicitors sought new medical evidence. The new medical evidence from a consultant neuropsychiatrist and from a consultant neuropsychologist was to the effect that Ms Evans had suffered a traumatic brain injury in the accident and probably did not have litigation capacity at any time following the accident. Importantly she probably did not have litigation capacity as at the date of acceptance of the Defendant's Part 36 offer.

5. It was alleged that the claim was very substantially under settled. The new solicitors, acting through a litigation friend, issued proceedings in professional negligence against the Betesh Partnership (the first and third to sixth Defendants) and against the barrister (the seventh Defendant).

The Requirement of Approval

6. If Ms Evans did not have litigation capacity at the time of the acceptance of the Part 36 offer, any purported settlement of Ms Evans' claim, or any acceptance of the Part 36 offer, was void ab initio for want of approval by the court.

7. CPR 21.10 states:-

"(1) Where a claim is made—
(a) by or on behalf of a child or protected party; or
(b) against a child or protected party,
no settlement, compromise or payment (including any voluntary interim payment) and no acceptance of money paid into court shall be valid, so far as it relates to the claim by, on behalf of or against the child or protected party, without the approval of the court."

CPR Part 36.14 (4) which states:-

" If the approval of the court is required before a settlement can be binding, any stay which would otherwise arise on the acceptance of a Part 36 offer will take effect only when that approval has been given."

No approval had been asked for or given. Ms Evans and her advisors did not want to apply for an approval; Mr Clancy and his insurers would not be able to obtain an ex post facto approval if Ms Evans had been injured so severely in the accident as to lose litigation capacity. (For when an insurer might obtain an ex post facto approval, see the decision of the Court of Appeal in Bailey v Warren 2006 C P Rep 26.)

8. White Book 21.10 .3

"If a settlement has been approved, an effect of that approval is that no claim

can be brought by the child or protected party against the solicitors for negligent under (or over) settlement. Where a settlement has been reached without approval and where it is alleged the legal advisors were negligent in under or over settling, it may still be possible to bring an action against the legal advisors. The claimant is likely to in any event seek an indemnity against the advisers for any adverse costs in seeking to re-open the original claim (see Evans v Betesh Partnership (A Firm) [2021] EWCA Civ 1194). It is therefore wise, where there is any doubt about capacity, to seek approval."

9. Unfortunately the first sentence of the above White Book commentary (highlighted above) is wrong. Approval by the court emphatically does not have the effect of protecting the legal advisors who seek the approval. This was one of the issues upon the Court of Appeal were unanimous in Bailey v Warren, and for good reason. The court can only approve a settlement on the evidence put before it.

Limitation

10. Furthermore If Ms Evans did not have litigation capacity as at the date of settlement, there is no limitation reason why her claim against Mr Clancy would fail (s. 28 (1) Limitation Act 1980). The new solicitors were therefore at liberty to bring proceedings on behalf of Ms Evans against Mr Clancy and/or his RTA insurers notwithstanding the acceptance of the Part 36 offer and the effluxion of time.

Standard Practice

11. The Defendants argued that standard practice in these claims is for a claimant to pursue the original tortfeasor first, as was done, for instance, in Bailey v Warren [2006] CP Rep 26 (see para. 98,) and in Dunhill v Burgin [2014] 1 W.L.R. 933 (see the Order of Hickinbottom J).

12. Indeed it was accepted in the Court of Appeal in Evans that there was no previous case, reported or otherwise, known to any of the parties, where a claimant who alleged that he/she did not have litigation capacity as at the date of a settlement had chosen to issue proceedings against his/her legal advisers to the exclusion of the original tortfeasor.

The Pleadings

13. In the High Court Marcus Smith J struck out the Particulars of Claim against the Defendants on the basis that:-

"The essence of Ms Evans' claim – as pleaded in paragraph 33 of the Particulars of Claim – is that she had 'lost the opportunity of recovering an appropriate sum of damages and thereby damages in addition to those already recovered and in respect of which she had a reasonable prospect of recovering" (para. 5)

This was held to be inconsistent with the allegation that Ms Evans did not have litigation capacity. If she did not have litigation capacity she suffered no loss of opportunity.

The Appeal and the Intractable Nature of the Problem

14. The appeal from the decision of Marcus Smith J was heard by the Court of Appeal in July 2021, and was compromised on the second day of the appeal after encouragement from the bench that the Defendants should indemnify the Claimant in relation to her costs of pursuit of Mr Clancy and/or his insurers. Notwithstanding the settlement of the appeal, the Court of Appeal invited the Defendants to complete their submissions and thereafter reserved judgment.

15. Why is the problem "intractable? Sir Geoffrey Vos MR explained:-

"32. It might have suited Ms Evans to argue that she did have capacity in 2011, had it not been for the views expressed by Professor Wood [consultant neuropsychologist] . Had she done so, the judge would not have struck out the claim and the defendants would have accepted that she had pleaded a reasonable claim for substantive loss, even if they might have quarrelled with the allegation that the defendants ought to have investigated whether she had capacity. As it seems to me, however, that allegation by itself would be unlikely to lead to substantial damages.

33. Conversely, as appeared in the course of Mr Elgot's submissions for the firm, it looked likely that the defendants would ultimately argue, if there were a trial of these proceedings before any application to re-open the settlement, that Ms Evans did not have capacity. In that way, it could submit, as it has done before us, that Ms Evans

had either suffered no loss because she could have re-opened the settlement or, at best, suffered very little loss for that reason."

16. Sir Geoffrey Vos MR considered that the court below had been wrong to strike out the claims, holding that the approach of Marcus Smith J had been "too binary" (para. 39). He continued that:-

"She has lost, even if she had no capacity, the opportunity of recovering more than £100,000 in damages in 2011 and before entering into a settlement. Instead, as a direct result of the breaches of duty alleged against the firm and the barrister (if proved), she has been party to a settlement that may be difficult and costly to re-open."

17. It is true that Ms Evans would probably have some extra expenses if she wished to resurrect the claim against Mr Clancy, but in fact she had not pleaded the type of extra expenses canvassed in the Dunhill litigation, and never sought permission to amend.

Joinder

18. Unless Ms Evans joined Mr Clancy into the proceedings, any finding by the court in the lawyers' negligence claims would not bind Mr Clancy. Ms Evans refused to join him into the claim against her lawyers as a further defendant, and the defendant lawyers could not bring third party proceedings against him because of the wording of the Civil Liability (Contribution) Act 1978 – see Royal Brompton Hospital v Hammond [2002] 1 W.L.R. 1397.

Quantification of the Claim Absent the Pursuit of Mr Clancy

19. Absent pursuit of Mr Clancy and/or his insurers, how might a court quantify the claim against the solicitor or barrister defendants, if Ms Evans did not have litigation capacity at the date of settlement?

20. It is worth noting that damages in the solicitors'/barristers' negligence claims could not be assessed on the basis of the chance of a court finding that Ms Evans did not have capacity at the relevant time. The issue is truly binary. Ms Evans either had

litigation capacity or she did not have it..

21. If Ms Evans did not have litigation capacity in 2011, but had settled her claim at full value and obtained an approval, the value of her entire damages award (on a lump sum basis) would have been about half the award that she would have been entitled to in 2021/22. This unusual benefit of delay is caused by the changes in discount rate from +2.50% in 2017 to the current discount rate of -0.25%.

22. Ms Evans is now aged about 30. At the current - 0.25% discount rate her lifetime care and case management/OT/aids and appliances/ Court of Protection etc multiplier for future loss is about 63.

23. If her claim had settled say 6 years ago, the discount rate would have been 2.5% and her lifetime care and case management/OT/ aids and appliances/ Court of Protection etc multiplier would have been about 31. Her future loss of earnings multiplier now will also be about double the multiplier of 6 years ago.

24. Please consider two decisions of the Court of Appeal, namely Kennedy v. Van Emden 1996 PNLR 409 and Bacciottini v. Gotelee and Goldsmith 2016 4 WLR 98, where the causes of action against the negligent solicitors had accrued, because there were breaches of duty and compensable losses, but thereafter the causes of action were lost because there were no longer any compensable losses as at the date of trial.

25. And so, if Ms Evans' claims against her lawyers were not stayed, and if Ms Evans did not have litigation capacity when the Part 36 offer was "accepted", how might a court approach the quantification of her professional negligence claims?

26. Is it an "intractable situation"?

HOWARD ELGOT

Parklane Plowden Chambers