# *1 Evans v Betesh Partnership

No Substantial Judicial Treatment

**Court**
Court of Appeal (Civil Division)

**Judgment Date**
30 July 2021

**Report Citation**
[2021] EWCA Civ 1194
[2022] R.T.R. 1

Court of Appeal (Civil Division)

Sir Geoffrey Vos MR , Peter Jackson , Nicola Davies LJJ

30 July 2021

Capacity; Costs; Part 36 offers; Professional negligence; Road traffic accidents; Settlement; Stay of proceedings; Striking out;

**H1 NEGLIGENCE**

H1. **Solicitor**
*Claimant sustaining traumatic brain injury in road traffic accident—Solicitors and counsel instructed in claim against driver—Claimant accepting Pt 36 offer—Medical consultation six years later revealing inadequacy of amount accepted—Consultant doubting claimant's capacity to assess offer—Claimant bringing professional negligence claim against solicitors and counsel—Whether possibility of re-opening personal injury settlement precluding claim.*

H2. The claimant suffered a traumatic brain injury in a road traffic accident in July 2009, when the car in which she was a passenger left the road and hit a tree. In March 2010, she instructed the defendant solicitors firm and the defendant barrister to make a personal injury claim against the driver of the car. In November 2011, when she had an appointment pending to see a consultant neuropsychologist, she instructed the defendant firm to accept a Pt 36 offer of £100,000 in settlement of her personal injury claim, and the appointment was cancelled. In December 2017 the claimant did see the consultant, and the prognosis was such that it was clear that the sum she had accepted in 2011 was inadequate. The consultant also expressed the view that the claimant probably did not have capacity in 2011 to make an informed decision on a financial award. Requests by the claimant for an indemnity against the costs of attempting to re-open the settlement of her personal injury claim were declined by the defendants, and she brought proceedings in negligence against them, contending that they had under settled her personal injury claim and ought to have investigated her capacity before allowing her to settle. The district judge rejected the defendants' application for summary judgment or to strike out the claim, made on the basis that, as the claimant had probably lacked capacity, limitation would not have expired and she could re-open the settlement, holding that there was no evidence that the claimant's original conditional fee agreement could be novated, or that her after-the-event insurance would be reinstated and that she would therefore be prejudiced if her claim was stayed or struck out. An appeal by the defendants was allowed and the claim struck out.

H3. On appeal by the claimant: *2

H4. **Held** , allowing the appeal, that the case was at a very early stage, and the single question before the court was whether the judge had been right to strike out the claim ([8], [30]); that the judge's essential reason for striking out the claim was that he thought that the pleading that the claimant had lost the opportunity of recovering appropriate damages from the driver

 

was unsustainable in a situation in which she did not have capacity, since she could still do so, but that approach was too binary; that the claimant had lost, even if she had no capacity, the opportunity of recovering more than £100,000 damages in 2011, and, instead, as a direct result of the breaches of duty alleged against the defendants (if proved) she had been party to a settlement that might be difficult and costly to re-open ([39]); that, accordingly, the particulars of claim revealed a genuine and serious dispute as to whether the claimant had suffered economic loss due to the defendants' alleged negligence, and the claim would be reinstated; but that, on the defendants agreeing to indemnify the claimant against the costs of her attempting to re-open the settlement on account of incapacity, the proceedings would be stayed ([6], [44]).

**H5 Cases referred to in the judgment:**

*Bailey v Warren [2006] EWCA Civ 51; [2006] C.P.Rep. 26*
*Dunhill v Burgin (Nos 1& 2) [2014] UKSC 18; [2014] R.T.R. 16; [2014] 1 W.L.R. 933; [2014] 2 All E.R. 364*
*Dunhill v W Brooks & Co [2016] EWHC 165 (QB); [2018] EWCA Civ 505*

**Appeal from Marcus Smith J sitting in the District Registry at Cardiff**

H6. On 7 November 2019 the claimant, Hannah Evans, brought proceedings against the defendants, Betesh Partnership, Harry Lipson, Sefton Kwasnik, Jairam Ramsahoye, the estate of Lee Lipson and Robert McGinty, for professional negligence in relation to her acceptance of a Pt 36 offer in settlement of her personal injury claim against the driver of a car in which she was a passenger when it left the road and hit a tree on 11 July 2009.

H7. In April 2019 District Judge Morgan refused applications by the defendants for summary judgment, alternatively to strike out the claim, made on the basis that, as the claimant probably did not have capacity to litigate in 2011, the limitation period would not have expired and she could re-open the settlement. Marcus Smith J allowed an appeal by the defendants and struck out the claim. The claimant appealed, contending that the judge had been wrong to strike out her claim, because (1) she had nowhere pleaded positively that she did not have the capacity to litigate in November 2011; and (2) the claim for the difference between what she had settled for and what she ought to have recovered had she been properly advised was not dependent on the contention that she did not have capacity to settle.

H8. The facts are stated in the judgment at [8]–[13].

**H9 Representation**

Robert Weir QC for the claimant.
Howard Elgot for the first to sixth defendants.
Julian Picton QC for the seventh defendant.

**H10 Representation**

Solicitors for the claimant: Hugh James.
Solicitors for the first to sixth defendants: BPS Law LLP.
Solicitors for the seventh defendant: Clyde & Co LLP. ***3**

**H11 Representation**

The appeal was argued on 20 and 21 July 2021.

 

*Cur. adv. vult.*

**Judgment**

Sir Geoffrey Vos MR:

**Introduction**

1. Ms Evans was the front seat passenger in a vehicle driven by Mr Gregory Clancy (the driver) when it left the road and hit a tree on 11 July 2009. Ms Evans sustained a traumatic brain injury, although the ramifications of that injury were not immediately evaluated. In March 2010, Ms Evans instructed the solicitor defendants (together "the firm") and the seventh defendant counsel (the barrister) to make personal injury claims against the driver. In early November 2011, Ms Evans instructed the firm to accept a CPR Pt 36 offer of some £100,000 in damages to settle her claim (the settlement). An appointment that had already been booked for her to see Professor Rodger Wood, a consultant neuropsychologist, on 15 November 2011 was cancelled. Had Ms Evans seen him, her prognosis would have been better evaluated and it would, at least on Ms Evans's case, have become clear that the sum she had been offered was inadequate. Her pleaded case is that, if that had happened, she would not have accepted the offer. In short, Ms Evans claims that her lawyers negligently under-settled her personal injury claim. In the events which actually occurred, it was not until 7 December 2017 that Ms Evans saw Professor Wood, and on 7 November 2019 she initiated these proceedings against the firm and the barrister for professional negligence.

2. In April 2019, the barrister and then the firm applied for summary judgment alternatively to strike out the claim. The defendants' argument before District Judge Morgan was that "because [Ms Evans] does not have the capacity to litigate and probably did not at the time of the accident in 2011", the limitation period had not expired under s.28 of the Limitation Act 1980 , and she could re-open the settlement which was, on that analysis, void. Accordingly, she had not, at least yet, suffered any loss. The district judge rejected that argument on the basis that there was no evidence that Ms Evans's original conditional fee agreement could be novated, nor that her after the event insurance would be reinstated, and, on that basis, Ms Evans would be prejudiced if her claim were struck out or stayed. He held that there was a genuine and serious dispute as to whether she had suffered economic loss due to the defendants' negligence.

3. Marcus Smith J (the judge) allowed the barrister's and the firm's appeals and struck out Ms Evans's professional negligence claims. He held that Ms Evans's claim contained within it unequivocal but inconsistent averments regarding the status of the settlement of the personal injury proceedings. There was, the judge said, "an uncertainty at the very heart of the particulars of claim that [rendered] it embarrassing in the technical sense of that term". He held that the particulars of negligence implicitly asserted that she had no capacity when she settled the case, whilst the particulars of loss implicitly asserted that she had such capacity because she had been deprived of the opportunity to claim greater damages from the driver. Accordingly, having given Ms Evans an opportunity either to accept a stay of the **4* proceedings or to cure the defect, which she declined, he struck out her claim in its entirety.

4. Ms Evans challenged these conclusions. She submitted that she had nowhere pleaded that she did not have capacity in 2011, merely that the firm and the barrister ought to have investigated her capacity before allowing her to settle. Whilst she did rely on Professor Wood's opinion (dated 1 March 2018) that she probably would not have had capacity in 2011, and, for that reason, would not plead affirmatively that she did then have capacity, that did not undermine the sustainability of her claim. It was unjust and inappropriate for Ms Evans to be forced to engage in hotly contested and perhaps costly litigation with the driver to seek to re-open the settlement, when the firm and the barrister had caused the difficulties she faced. Ms Evans noted that both the firm and the barrister had declined her offer, in pre-action correspondence, to seek to re-open the settlement if she were indemnified by them against the costs of so doing.

5. Before us, the barrister and the firm supported the judge's reasoning, and argued that there was simply no sustainable pleaded claim. Ms Evans had not suffered any loss of the chance that she might have recovered more damages from the driver,

 

because it was still open to her, on her own case, to do so. We were told that this would be the first case of which counsel for the defendants were aware in which a professional negligence claim had been allowed to proceed in such circumstances. The "normal practice" was for the professional negligence claim to be stayed whilst the application to re-open the personal injury settlement took place, as had happened in *Dunhill v W Brooks & Co [2016] EWHC 165 (QB); [2018] EWCA Civ 505* and *Dunhill v Burgin [2014] R.T.R. 16* . Indeed, the firm pointed to the unsatisfactory possibility that, whatever the outcome of these proceedings, Ms Evans would still, in theory, be able to seek to re-open the settlement at any stage in the future, since no limitation period applies to such an application. That possibility made it all the more crucial for the question of Ms Evans's capacity as at November 2011 to be decided before these proceedings were concluded.

6. Towards the end of these submissions from Mr Howard Elgot, counsel for the firm, the court suggested that the logic of his argument pointed towards the need for these proceedings to be stayed so that Ms Evans could attempt to re-open the settlement with the driver on account of her incapacity; the only way that could happen would be if the defendants indemnified her against the costs of so doing. After a brief adjournment, both the firm and the barrister made Ms Evans an open offer to do so on certain terms that are not material to this judgment (the indemnity). Mr Robert Weir QC, counsel for Ms Evans, responded by saying that she could only accept that offer if the court gave judgment allowing the appeal (so that the proceedings were reinstated) and if the defendants agreed to pay or the court determined the costs of the strike out hearing and appeals. Thereafter, Mr Elgot completed his oral submissions. The court then announced that: (i) it did not need to hear Mr Weir in reply, (ii) the appeal would be allowed for reasons to be given in writing in due course, (iii) the parties were to file written submissions on the costs of the strike out hearing and appeals in writing by 16.00 Friday 23 July 2021, (iv) the parties were to agree the terms of the indemnity and submit it to the court in the same timescale, and (v) the court would determine the costs of the strike out and of the appeals at the same time as it gave judgment. The parties duly complied with these directions, save that the terms of the indemnity were not agreed until Thursday 29 July 2021. ***5**

7. Against that background, I will now summarise the essential factual background, the main features of the particulars of claim and the judge's reasons before turning to deal with Ms Evans's appeal and the respondent's notices, which make the point that Ms Evans has simply not yet sustained any loss of the chance of recovering additional damages.

**Essential factual background**

8. I emphasise first that this case is at a very early stage. The defendants have not even pleaded their cases. Moreover, it seems likely that many of the facts will be disputed. Nothing that I say in this judgment should, therefore, be taken as foreclosing any factual argument at a later stage. The judge held that he should assume the correctness of the factual assertions in Ms Evans's particulars of claim for the purpose of the application. That approach has been contested insofar as it affects the position between Ms Evans and the driver, but is otherwise obviously right.

9. As I have said, the accident occurred on 11 July 2009, and in March 2010, Ms Evans instructed the firm. On 25 March 2011, the driver's solicitors made their first Pt 36 offer to settle the personal injury litigation. On 12 April 2011, the barrister advised the firm and Ms Evans (who attended with her mother) to reject that Pt 36 offer, which the firm did on her behalf on 24 May 2011. On 20 October 2011, the driver's solicitors made their second Pt 36 offer. On 2 November 2011, the barrister advised the firm and Ms Evans (who attended with her boyfriend) that he could not really assess the second Pt 36 offer at that stage, but that Ms Evans was "at risk", and Ms Evans should see Professor Wood. On 3 November 2011, Ms Evans informed the firm that she was thinking about accepting the Pt 36 offer but that she was undecided. She was intending to see a psychologist, who was a friend of her mother. On 8 November 2011, Ms Evans informed the firm that she wished to accept the Pt 36 offer, and the firm agreed to cancel the appointment with Professor Wood. Thereafter, the Pt 36 offer was accepted and the conditional fee agreement with the firm was terminated.

10. As I have already said, on 1 March 2018, Ms Evans received Professor Wood's report. It explained the effects of what he described as a traumatic brain injury in detail. It is sufficient to say that Professor Wood expressed the view that Ms Evans did

 

not then have capacity to instruct a solicitor in relation to litigation, he could not make a decision on her current capacity to manage her finances. Based on the nature of Ms Evans's injury and a report from Dr Sawhney in June 2011, it was Professor Wood's opinion that Ms Evans probably lacked capacity in 2011 to instruct a solicitor in respect of litigation or to make an informed decision on a financial award.

11. On 16 March 2018, Ms Evans's current solicitors sent detailed letters of claim to the firm and to solicitors acting for the barrister. Each letter sought, after setting out Ms Evans's claims for professional negligence, an indemnity against the costs of re-opening the settlement of the personal injury claim against the driver, on the basis that it was "likely" that Ms Evans had no capacity to enter into that settlement.

12. In early December 2018, solicitors acting for the barrister and then the firm responded in detail to Ms Evans's letters of claim. The responses made extensive allegations of facts suggesting that Ms Evans did have capacity in 2011 and, thereafter, rejected her claims and declined to provide the indemnity sought. ***6**

13. These proceedings were commenced, as I have said, on 7 November 2018, and the particulars of claim were served on 19 February 2019.

**The particulars of claim**

14. Paragraph 1 of the particulars of claim plead that Ms Evans lacks capacity to conduct the proceedings and is a protected party within CPR r.21.2(d) .

15. The particulars of claim then plead in detail the medical opinions obtained about Ms Evans's condition before the settlement and the advice given by the firm and the barrister. The thrust of the claim was that neither the firm nor the barrister considered or took into account that Ms Evans was suffering from a traumatic brain injury, and from sequelae that were consistent with that injury. These symptoms were not improving and were attributable to organic brain damage. It was alleged that the defendants demonstrated that they were inexperienced in conducting brain injury claims and proceeded on the basis that Ms Evans was suffering psychologically or from chronic fatigue syndrome.

16. The essential allegations of negligence and breach of contract against the firm were as follows:

> 31.1 Failed to realise or understand that the claimant was suffering from a traumatic brain injury with significant adverse sequelae.
>
> 31.2 Failed to investigate whether the claimant had the capacity to conduct the litigation and, in particular, to compromise her claim in the sum offered and failed to investigate whether the claimant had capacity to manage her property and affairs.
>
> 31.3 Failed to advise the claimant not to compromise her claim until she had been seen and reported upon by Professor Wood because it was not until that stage that a proper evaluation of the potential value of the claim could be made. This should have been done at the conference and in the subsequent telephone conversations. …
>
> 31.4 Failed to advise the claimant not to compromise her claim until she had seen Professor Wood because a proper evaluation of the potential value of her claim could not be made but because she

 

was suffering from cognitive deficits which were preventing a return to work, that the potential value was in excess of and significantly in excess of the sum offered. Further, the potential excess value could be well in excess of a million pounds. …

31.5 Failed to advise the claimant that there was no risk or a very small risk of there being any adverse cost consequences if the Pt 36 offer was accepted out of time because she was due to see Professor Wood very shortly and a decision could then be made on the merits of the offer and even if there were consequences, the level of costs were likely to be very modest, particularly in the context of the size of the sum offered. …

17. The essential allegations of negligence against the barrister were as follows:

32.1 Failed to pay any or any proper regard to the fact that the claimant had sustained a traumatic injury to her brain and that by reason thereof she was suffering from and continued to suffer from adverse cognitive, neuropsychological and neuropsychiatric deficits and which deficits were preventing her from working and were severely impacting on her life generally. *7

32.1.1 Failed to advise the claimant that the medical evidence in her claim was incomplete, that a proper assessment of damages could not be made on the evidence available and that she should undergo the examination by Professor Wood, consultant neuropsychologist, which had already been arranged and was due to take place 13 days later on 15 November 2011 in any event.

32.1.2 Failed to advise the claimant that by reason of having suffered a traumatic injury to her brain and/or by reason of the cognitive, neuropsychological and neuropsychiatric deficits being experienced by her and continued to be experienced by her for a period of in excess of two years and by reason of her young age that the offer was very likely to be too low and significantly too low.

32.1.3 Wrongly advised that acceptance of the Pt 36 offer could not be recommended but that the claimant was at risk of not beating the offer. …

32.1.4 Failed to investigate whether the claimant had capacity to conduct the litigation and whether she had capacity to manage her property and affairs.

18. The essential allegations of loss against the firm and the barrister were as follows:

 

The claimant has 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.

It is the claimant's case that if she had been advised correctly then she would not have accepted the offer and she would have been examined by Professor Wood who would have advised:

• the claimant was suffering from a serious traumatic brain injury;

• the brain injury was affecting information processing, attention capacity, working memory, comprehension, executive function and causing a language disorder;

• the claimant was suffering from general anxiety, depressed and unstable mood, adjustment issues, lack of drive and motivation, poor decision making;

• the claimant was unable to work in a remunerative capacity;

• the claimant underwent psychiatric and psychological treatment and speech and language therapy, underwent a care needs assessment, had the support and benefit of a case manager and participated in a sheltered work placement;

• the claimant lacked capacity to conduct the litigation and make the decision whether to compromise her claim.

The claimant had a reasonable prospect of recovering damages for:

33.1 a traumatic brain injury with adverse cognitive, neuropsychiatric and neuropsychological sequelae;

33.2 urological frequency and urgency and an impact on vision and which conditions had not been investigated at the time of settlement;

33.3 past and future loss of earnings; ***8**

33.4 future treatments: psychiatric, psychological and speech and language therapy;

33.5 past care and assistance and future case and assistance and case management;

 

> 33.5.1 the loss of not being able to receive damages for future care and assistance and case management pursuant to a periodical payment order;
>
> 33.5.2 further, it is likely that the claimant does not have capacity to manage her finances and, therefore, damages for Court of Protection costs and the costs of running a professional deputyship.

**The judge's judgment**

19. At [12], the judge set out the structure of his judgment. In my judgment, the structure he adopted was important, because it focused almost entirely on the question of capacity.

20. The judge said that he proposed to consider:

(i) (a) whether it was a part of Ms Evans's pleaded case that she was a protected person, by looking at the CPR and the Mental Capacity Act 2005 , (b) the consequences in law if Ms Evans were to be a protected person, and (c) the terms of the particulars of claim.
(ii) the implications and consequences of his findings at (i) above, and in particular, whether the particulars of claim "fall to be struck out by reason of the conclusions that I have reached" above.
(iii) how the appeal was to be disposed of in light of the conclusions above.

21. At [13]–[20], the judge dealt with the law on capacity concluding that the Supreme Court had held in *Dunhill v Burgin* at [32]–[33] that the effect of CPR r.21.10 was to make any unapproved settlement on behalf of a protected person void. Such a settlement could be retrospectively validated by the court, which has a very wide discretion to deal with the matter justly and proportionately (see *Bailey v Warren [2006] EWCA Civ 51 at [94]* ).

22. At [21]–[26], the judge dealt with the particulars of claim on capacity, concluding that they contained "mutually inconsistent averments as to the status of the [settlement]". He thought that "[a]t one and the same time, it is averred that the [settlement] was void and was not void". This conclusion is said to be "taking opportunity of the fact that Ms Evans's capacity to conclude the settlement agreement is an open question, as yet undetermined by a court", so as to "assert at one and the same time an entitlement to damages presuming Ms Evans's *incapacity* and a loss of opportunity predicated upon her *capacity* ".

 

23. The judge identified that "the question before me is whether the pleadings contain an averment, which for present purposes I must accept to be true, that Ms Evans lacked capacity at the time of the [settlement] so as to render her a protected party". He rejected Mr Weir's contention that Ms Evans's capacity was irrelevant to the negligence claim alleged, because of the inconsistency he identified between (a) the allegation that there was a negligent failure to investigate whether Ms Evans had capacity to settle the personal injury proceedings, and (b) the "unequivocal averment" that Ms Evans has lost the opportunity of recovering from the driver, ***9** which "without more, implies that the [settlement] cannot be re-opened", and so that Ms Evans had capacity to settle.

24. The judge rejected Ms Evans's argument at para.33.5.2, which pleaded that it was likely that she did not have capacity to manage her financial affairs, was different from a lack of capacity to litigate since s.2(1) of the Mental Capacity Act 2005 provides that a lack of capacity exists in relation to a specific matter. He said that that was "at best a semantic distinction": "whilst Ms Evans may not *wish* to aver that she lacked capacity when concluding the [settlement]—that is an inevitable consequence of the averment she *does* make, namely that she cannot manage her own finances". It is worth commenting at once that this is a *non sequitur* , since the lack of capacity to manage finances is alleged at a time long after the settlement —and Professor Wood specifically declined to opine, even in 2018, on whether she lacked that capacity at the time of the settlement. In any event, capacity to litigate and capacity to manage one's financial affairs are conceptually different, and in practice one may be present and the other absent. In this regard, the judge also concluded that the meaning of the allegations that the defendants had failed to investigate Ms Evans's capacity included an allegation that she did not have such capacity because of what followed on loss.

25. It may be noted that the judge cited paras 31.2 and 32.1.4 of the particulars of claim relating to the alleged failure to investigate capacity, as I have said, but none of the other particulars of breach of duty.

26. The judge then dealt with the substance of the defendants' applications at [27]–[40]. He began by stating that a pleading may not approbate and disapprobate on the same issue, which he explained as meaning that it cannot adopt inconsistent positions in relation to the same point, as opposed to pleading alternative positions. The particulars of claim adopted no consistent position in relation to the status of the settlement, putting "uncertainty at [its] very heart". That made it embarrassing, because if the settlement could not be impugned, "the averments alleging a negligent failure to investigate her capacity cannot be made in their present form" because they cannot be causative of loss. The loss claimed could not stand insofar as it turned on a lack of capacity, because if she had no capacity, she has not lost the opportunity to re-open the settlement and claim more. The failure to re-open the settlement was not merely a failure to mitigate her loss.

27. The judge held that, conscious of the limitation issues, Ms Evans should be given an opportunity to amend to plead that she had capacity to settle. But if her claim was that she had no capacity, then her "claims in tort are unarguable and must be struck out". It was trite law that actionable damage was required for an arguable cause of action in tort. In these circumstances, the judge considered that the contract claim for nominal damages alone was an abuse of process as not being worth the candle and should also be struck out.

28. The judge regarded the issue before him as one of pure law, but mentioned that the district judge had said that it would be very difficult for Ms Evans to re-commence proceedings against the driver, because conditional fee arrangements had changed to the disadvantage of claimants like Ms Evans. The judge thought considerations of this kind were "entirely irrelevant" to what he had to decide.

29. Finally, the judge stayed the case for six weeks to allow Ms Evans to "put her house in order". If she did not apply to do so, he would strike the claim out without more. That is what eventually happened. ***10**

 

**Discussion**

30. The single question before the court, as it seems to me, is whether the judge was right to strike out the claim. Ms Evans argued, in effect, that he was wrong because (a) she had nowhere pleaded positively that she did not have capacity to litigate in November 2011, and (b) the claim for the difference between what she settled for with the driver and what she ought to have recovered had she been properly advised was not dependent on the contention that she did have capacity to settle.

31. There was a disconnect between the arguments for the defendants and those for Ms Evans.

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. 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.

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.

35. Be that as it may, the court still has to decide whether the judge was right. In my judgment he was not for essentially three cumulative reasons.

36. First, the judge's judgment focused entirely on the single allegation of breach relating to the advice that allegedly should have been given to investigate Ms Evans's capacity. The other allegations of negligence were not mentioned. In fact, however, Mr Julian Picton QC, counsel for the barrister, accepted in argument that, if the allegation as to investigating capacity were deleted, the pleading would be a perfectly sustainable one. That concession demonstrated, in my judgment, that the particulars of claim pleaded a valid claim for loss based on the remaining particulars of negligence, even if the defendants were right that no sustainable claim for loss is pleaded flowing from the alleged failure to investigate her capacity, if, but only if, Ms Evans had no capacity in 2011.

37. Secondly, I do not accept that Ms Evans was obliged to decide whether or not she had capacity in 2011 in order to be permitted to make a valid claim against the firm and the barrister for negligently under-settling her claim. The question of her capacity may be a difficult one. It is notable that the defendants' responses to the letters of claim promulgated factual evidence apparently intended to suggest that Ms Evans did have capacity at the time of the settlement and in the period immediately thereafter. I emphasise that I am not making this point in order to suggest an answer to the capacity question. That will be for a different court to decide on all the available evidence, none of which has been provided to us. I make the point purely to show why it would have been so unfair (in the absence of an ***11** indemnity against her costs of re-opening the settlement) to require Ms Evans herself to decide to allege capacity or incapacity. In my judgment, she (or rather her next

 

friend) was entitled to say as they did, in effect, in their pleading: We do not know if Ms Evans had capacity in 2011, but you (the defendants) knew enough in 2011 to oblige you to advise Ms Evans to have the question investigated before entering into a settlement that might later be shown to be void.

38. Thirdly, I do not agree with the judge that no possible loss could be established if it were eventually demonstrated that Ms Evans did not have capacity to settle in 2011. I accept that the loss of a chance of a higher settlement in 2011 would be less valuable if she had no capacity, because she was always able, in theory, to re-open the settlement and ask for more. But the uncertainty as to capacity does not wipe out the other allegations of negligence. Had the defendants realised the ramifications of the diagnosis of a traumatic brain injury, they would not have advised her (on Ms Evans's case) to take as little as £100,000 whether or not she had capacity. In theory, had the defendants not been negligent in the ways alleged (apart from the investigation of capacity) she would or might have had a larger settlement back in 2011. She would be in the same position as she is now, but with a larger original settlement in her pocket. There may be other heads of loss that are not specifically pleaded, like the costs of re-opening the settlement and the delay in getting the extra money. But I do not need to take these into account.

39. The judge's essential reasons for striking out was that he thought that the pleading that Ms Evans had "lost the opportunity of recovering an appropriate sum of damages" from the driver was simply unsustainable in a situation in which she did not have capacity. She had not lost such an opportunity. She could still do so. But this approach is, in my judgment, too binary. 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. That settlement has not been re-opened thus far, and could not have been on her state of knowledge up to the time that she was eventually examined by Professor Wood in 2017. She was not examined by Professor Wood in 2011, and so was ignorant of her lack of capacity (if she in fact lacked it in 2011) for the six years between 2011 and 2017, as a direct result of the alleged breaches of duty.

40. In essence, I agree with the determination of the district judge that the particulars of claim revealed a genuine and serious dispute as to whether Ms Evans had suffered economic loss due to the defendants' negligence. I would, therefore, restore his decision dismissing the defendants' applications.

**Costs**

41. Each of the firm and the barrister have submitted that there should be no order as to the costs of this appeal, and the application before the district judge and the appeal before the judge. They contend that the problem has been caused by Ms Evans's unclear particulars of claim, and that she has unreasonably refused repeated offers to stay these proceedings whilst she applied to re-open the settlement. I disagree. In my judgment, Ms Evans was entitled to plead and pursue the particulars of claim as they were drafted for the reasons I have given. It was not until the second day of the hearing before us that the defendants offered to indemnify ***12** Ms Evans against the costs of attempting to re-open the settlement. Until that time, she was, as I have also said, entitled to say that she did not know if she had capacity in 2011, but that the defendants knew enough in 2011 to oblige them to advise her to have that question investigated before entering into a settlement that might later be shown to be void. If the defendants had wanted the settlement re-opened (which may be to their significant advantage) in circumstances that may occasion both costs and litigation risk, it was always open to them to offer to indemnify Ms Evans against those risks. Until that time, which only occurred under encouragement from this court, Ms Evans was entitled to pursue these proceedings and her appeal.

42. It will be apparent from what I have said, that, in my judgment, the defendants should jointly and severally pay Ms Evans's costs of the appeals before the judge and before this court.

 

**Disposal**

43. For the reasons I have given, I would allow these appeals and reinstate [1]–[4] of the order of District Judge Morgan. The defendants will jointly and severally pay Ms Evans's costs of the appeals before the judge and before this court.

44. The proceedings will now be stayed on the terms agreed between the parties pending the outcome of Ms Evans's application to re-open the settlement agreed with the driver in November 2011.

Peter Jackson LJ:

45. I agree.

Nicola Davies LJ:

46. I also agree.

Reported by Clare Noon, Barrister. ***13**

*Appeal allowed with costs.*

 