

## **Professional Negligence Bar Association: Peter Taylor Lecture 2014**

### **Professional Negligence – a panacea for the law’s injustices?**

**Lady Hale**

**20 May 2014**

I confess to having had mixed views when invited to deliver this lecture. On the one hand, I cannot claim that professional negligence is one of my specialist subjects. On the other hand, like many others, I hold the memory of Lord Taylor in the deepest affection and respect and so am delighted to be able to honour it in some modest way. Like me, he was a product of the grammar school system in the north east of England. His family came from Leeds, as did my mother’s family, and I was born there. He grew up in Newcastle, which to those of us from the rural north of Yorkshire is closer even than Leeds. And he practised on the North Eastern circuit. So he embodied many of the features of diversity in the higher judiciary for which I continue to campaign.

He would, of course, be disappointed that it is still necessary to wage that campaign. In his Dimbleby lecture in 1992 he expressed the view that the gender imbalance on the bench would soon be redressed, given the large numbers of young women now coming into the law. He was wrong in that prediction but his heart was definitely in the right place. He was Lord Chief Justice when I was first appointed to the High Court bench and I well remember the first Judges’ meeting which I attended. On the agenda was the thorny issue of what the women judges

should be called, as those of us who used our maiden names did not want to be obliged to call ourselves 'Mrs' Justice. Of course, the men all decided that we should continue to do as they told us, but I shall always be grateful to Lord Taylor for the sympathetic hearing we were allowed to have. His untimely death was a great loss to us all. It is wonderful to see his daughter, Her Honour Judge Taylor, here today.

But now to my subject, which (as is usual for lawyers) I shall address through a series of stories, beginning with Mr and Mrs Grainger. They contracted to buy a flat from Mrs Burnett for £45,000 (this was in 1990, albeit in Aberdeen). She executed a disposition of the property, which was duly delivered to them in exchange for the purchase price. They moved in the next day. But their agent did not record the disposition in the register. Some months later, a final order in bankruptcy having been made against her, the whole of Mrs Burnett's estate vested in her trustee. The trustee knew about the sale and that the Graingers intended to record their title. But before they did so, he recorded his own title to the flat. The House of Lords held that he was entitled to the flat and had no obligation to refund the purchase price which the Graingers had paid. It was not even clear whether they could prove their claim to have the money back as a debt in Mrs Burnett's bankruptcy (*Burnett's Trustee v Grainger* [2004] UKHL 8, 2004 SLT 513).

I was not a party to this decision. Judgment was given after I became a Law Lord, but the case may well have been argued before that. But I do wonder what I would have done had I been on the panel. The late and much lamented Lord Rodger, who gave the leading opinion, confessed at the outset that the decision shocked. A purchaser who knew of a previous unrecorded disposition would not gain a good title, because he would not be regarded as being in good faith; but a trustee in bankruptcy who does the same thing is not regarded as being in bad faith because he is only doing his job in maximising the assets for the creditors. What Lord Rodger termed the ‘offside rule’, which would have applied to a subsequent purchaser, did not apply to him. The other Scottish Law Lord, Lord Hope, agreed that this was indeed the law in Scotland. The English Law Lords did not dare to disagree, although both Lord Hoffmann and Lord Hobhouse expressed their reservations.

Counsel for the Trustee is now a Law Lord (strictly, a Justice of The Supreme Court) himself. His view is that, although they did not say so, the Law Lords comforted themselves with the thought that Mr and Mrs Grainger must surely have had a cast iron claim in negligence against their agent, although this could never have given them their home back or undone the years of stress and expense which the litigation had caused. But long and learned though the Scottish opinions are, many might think that no amount of learning can justify such an obviously unjust result. Why should Mrs Burnett’s creditors get the benefit both of the flat

and of the money paid for it? Why should the Graingers lose both the flat and the money?

Of course, that was a case in which to hold otherwise would (my colleague assures me) have offended against some fundamental principles of Scottish insolvency and conveyancing law. In such a case it may be justifiable to comfort oneself with the prospect of the solicitors' professional negligence insurers picking up the bill. But what about those cases which do not raise such fundamental principles of law and where there is still a choice to be made about who is to pick up the tab? It is rare, in our court at least, for counsel explicitly to argue that it is better in principle and policy terms for the professional negligence insurers to foot the bill than for the parties to the primary dispute to do so. But we have had a recent example of this, in *Dunhill v Burgin* [2014] UKSC 18, [2014] 1 WLR 933.

Mrs Dunhill suffered a severe closed head injury in a road traffic accident in 1999. She brought a claim in the county court in 2002. Her particulars of injury listed a complete loss of taste and smell, some hearing loss, forgetfulness, headaches, personality change, low mood and tearfulness, anxiety, mood swings, occasional suicidal thoughts and self-mutilation. Nevertheless she claimed only special damages of some £2,200, for travelling expenses and 10 hours' care a day for six months followed by one hour a day for two years, plus general damages, the whole

being limited to £50,000. The defendant, Mr Burgin, denied liability and alternatively alleged a high degree of contributory negligence. When the case came on for trial, Mrs Dunhill's eye witness was not there. Negotiations took place, the claim was settled for £12,500 plus costs and a consent order made to that effect. Everyone agrees that this was a gross undervalue of her claim, which her current legal advisers put at over two million pounds on a full liability basis and even the defendant's would put at around £800,000.

Some time later, Mrs Dunhill consulted new solicitors and they instituted two claims: one was against her original legal advisers; the other was to re-open the original action, and set aside the consent order, on the ground that she did not have capacity at the time, so she ought to have had a litigation friend, and the settlement ought to have been approved by the court. The first claim was stayed until the second was resolved. The issues in the second claim were not without difficulty: what was the test of capacity to be applied – was it the capacity to conduct the proceedings which had actually been brought or was it to conduct the proceedings which ought to have been brought? And even it was the latter, did it follow that the settlement should be set aside, given that the normal rule is that contracts made by people who lack the capacity to make them are voidable only if the other party knew or ought to have known of the incapacity?

Counsel for Mr Burgin (or rather, of course, for his motor insurers) argued that this was a case in which Mrs Dunhill's original legal advisers should bear the burden of the mistakes they had made. His side had entered the settlement negotiations in good faith and it had never been suggested that they should have realised that there was a risk that Mrs Dunhill lacked capacity (this is so, although some might think that the particulars of injury might have raised an eye-brow). They were entitled to regard the matter as done and dusted. He could point to a number of quotations suggesting the relevance of legal advice to both of the issues in the case.

Thus, on issue one, in *White v Fell* (1987, unreported), Boreham J had referred to the litigant's capacity to seek an appropriate adviser, to instruct him with sufficient clarity to enable him to understand the problem and to advise her appropriately, and to understand and give effect to his advice. This was cited with approval by Kennedy LJ in *Masterman-Lister v Brutton & Co* [2003] EWCA Civ 1889, [2003] 1 WLR 1511, the case which recognised the jurisdiction to set aside these settlements. Chadwick LJ in the same case had referred to the capacity to understand 'with the assistance of such proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary' (para 75). Thus, it was argued, just as the test for capacity to consent to medical treatment assumes that proper medical advice has been given, the test of capacity to litigate assumes that the litigant is being

given proper legal advice. It should focus on the case which was actually being run and not on the case which might have been run. It would open Pandora's box to bring into the mix the possibility that she might have been given different legal advice. If there is merit in the complaint that the original advice was wrong, the lawyers should pay.

On issue two, it was argued that those 19<sup>th</sup> century cases, in particular *Fry v Lane* (1888) 40 Ch D 312, which were kindest to persons who lacked capacity and made unfair bargains had stressed the absence of legal advice as a reason for setting the bargain aside. Shortly after that, the rule was established in *Imperial Loan Company v Stone* [1892] 1 QB 599 that contracts made by persons who lacked the capacity to make them were not void, but voidable only if the other party knew (or ought to have known) of the incapacity. In *Hart v O'Connor* [1985] AC 1000, the Judicial Committee of the Privy Council affirmed the principle that, apart from such cases, contracts made by people who lacked capacity were to be judged by the same standards as those made by people who did have capacity. Thus they could only be set aside for equitable fraud, that is, taking an unfair advantage of the other side, including an unconscionable bargain. 'An unconscionable bargain in this context would be a bargain of an improvident character made by a poor or ignorant person acting without independent advice which cannot be shown to be a fair and reasonable transaction' (p 1024). Once again, therefore, legal advice could turn what might have been an unconscionable bargain into a conscionable one.

There was much more to the defendant's arguments than this, and they were made with conspicuous learning and skill. It was certainly not counsel's fault that we rejected them. His point was that where, as here, a litigant did have legal advice, then if it turned out that the legal advice was wrong, the lawyers should bear the burden rather than the poor unfortunate defendant. We rejected that, mainly because the test for capacity to conduct litigation cannot differ according to whether the litigant has good legal advice, bad legal advice or, increasingly, no legal advice at all. And the consequences of a lack of capacity were clearly spelled out in the Civil Procedure Rules, which had modified the rule in *Imperial Loan Company v Stone* to that extent.

I have spent so much time on this case, not because it was a fascinating case with many subtleties, although it was, but because it is the only one which I can recall in which the possibility of a professional negligence claim against the claimant's lawyers was put at the forefront of counsel's arguments about what the law should be. It did not, of course, have the desired effect. So this cannot be characterised as a case where the court salved its conscience with the thought of a professional negligence claim, as may have been the case in *Burnett's Trustee v Grainger*.

But professional negligence was also rather more than a background feature in *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108, because this was a case about the extent of the court's powers to set aside transactions which would not have been entered into had those making them been properly advised as to the tax consequences. The Revenue was claiming that the transactions should stand, leaving the parties to whatever remedy they might have against their advisers. The claimants were asking the court's help to avoid the consequences of the advice they had received. Mrs Pitt, for example, had been appointed receiver for her husband after he suffered catastrophic injuries in an accident and had made a settlement of his compensation money (albeit approved by the Court of Protection) which had disastrous (and immediate) inheritance tax consequences although it could easily have been made in a way which avoided these. We were not deterred by the prospect of a claim against her advisers from holding that the conditions existed for the settlement to be set aside for mistake. As with *Dunhill v Burgin*, therefore, this was a case in which the court did what it thought was just, despite the existence of a professional negligence claim in the background.

Mrs Pitt had also claimed relief under the so-called rule in *Hastings-Bass* but we refused it on that ground both to her and to the claimants in the linked case of *Futter v Futter*. A decision taken by trustees within the scope of their powers was voidable under the rule only if they were in breach of their duty to take all relevant considerations into account and if they had taken and acted upon apparently

competent professional advice they were not in breach of duty merely because the advice turned out to be wrong. I do not think that our decision on this point was motivated by the possibility of a negligence claim against the trustees' advisers (although Lord Walker did refer in parenthesis to this possibility in para 41). The rule in *Hastings-Bass* was controversial enough for us to have wanted to keep it within strictly limited bounds: as Park J had said in *Breadner v Granville-Grossman* [2001] Ch 523, 'It cannot be right that whenever trustees do something which they later regret and think they ought not to have done, they can say that they never did it in the first place' (para 61). Nevertheless, the presence of legal advice was pivotal to our rejection of the claim, so the possibility of a professional negligence claim cannot have been wholly irrelevant.

But there is a large category of case in which the possibility of a negligence claim against legal advisers may be the only way of avoiding an injustice to one or other of the parties – these are the cases where something has gone wrong in the conduct of the litigation itself.

Back in the bad old days before the CPR, when cases were managed by litigants and not by judges, the only real discipline was that contained in the power to strike out a case for want of prosecution. The principles were established by the Court of Appeal in *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 and approved by

the House of Lords in *Birkett v James* [1978] AC 297. The power should be exercised in only two circumstances (i) where there had been intentional and contumelious default such as disobedience to a peremptory order of the court or an abuse of process; or (ii) where there had been inordinate and inexcusable delay on the part of the plaintiff or his lawyers and this gave rise to a substantial risk that it would not be possible to have a fair trial of the action or was likely to cause serious prejudice to the defendant. Only in wholly exceptional circumstances should a case be struck out before the limitation period had expired, because the plaintiff could always issue a fresh writ; and actions begun during the limitation period and properly pursued thereafter should not be struck out even if delay in bringing them had caused prejudice to the defendant.

In *Allen v McAlpine*, Diplock LJ, as he then was, had thought that the existence of a claim against the plaintiff's solicitor might be a relevant factor, but in *Birkett v James*, Lord Diplock, as he had by then become, recanted because of the difficulties which would be caused by taking it into account: whether the fault lay with the plaintiff or her advisers or both did not affect the prejudice suffered by the defendant and it was impracticable for the court dealing with the application to strike out in effect to try an action between different parties. So the possibility of a professional negligence claim became an irrelevant consideration: the courts were not to feel encouraged by that prospect to strike out claims for want of prosecution if it was otherwise contrary to the justice of the case.

The House of Lords was invited to revisit these principles in *Department of Transport v Chris Smaller Ltd* [1989] 1 AC 1197, in view of the continuing judicial frustration at the law's delays, but declined to do so. As Lord Griffith said, 'To extend the principle purely to punish the plaintiff in the illusory hope of transforming the habits of other plaintiff solicitors would, in my view, be an unjustified way of attacking a very intractable problem' (p 1207). The remedy lay in 'a radical overhaul of the whole civil procedural process and the introduction of court-controlled case management techniques designed to ensure that once a litigant has entered the litigation process his case proceeds in accordance with a timetable prescribed by Rules of Court or as modified by a judge'. Those words were quoted by Lord Woolf in *Grovit v Doctor* [1997] 1 WLR 640, when declining to make significant inroads into the *Birkett v James* principles: but he did emphasise that courts should more readily make 'unless' orders which would lead to strikeout if disobeyed; and also that the abuse ground for striking out was independent of delay or prejudice to the defendant.

By then, of course, the brave new world of the CPR was imminent. Rule 3.4(2)(c) introduced a new power to strike out the statement of case of either side on the ground of failure to comply with a rule, practice direction or order. As the Court of Appeal held in *Biguzzi v Rank Leisure Ltd* [1999] 1 WLR 1926, this meant that all

the old learning in *Birkett v James* no longer applied. But, as Lord Woolf also pointed out, there were other means available of keeping the case on track than the draconian step of striking it out. These included, not only the brand new case management and timetabling regime, but also costs and interest sanctions against defaulters. So this, of course, increased the penalties to which litigants might be exposed by the negligence of their litigation advisers.

These cases heralded a more profound culture shift. The objectives were no longer limited to justice as between the individual parties. As Lord Woolf said in *Biguzzi*, the courts 'have to take account of what has happened on the administration of justice generally. That involves taking into account the effect of [on?] the court's ability to hear other cases if such defaults are allowed to occur. It will also involve taking into account the need for the courts to show by their conduct that they will not tolerate the parties not complying with dates . . .' (p 1933).

The years since then have done nothing to diminish the courts' insistence on public interest factors, rather than private justice factors, when deciding on the consequences of failing to stick strictly to the procedural rules. Any resulting injustice to the individual parties must have been thought justified by the greater good. The courts may also have comforted themselves with the prospect of professional negligence claims. But at least the factors which had to be taken into

account in deciding whether to grant ‘relief from sanctions’ under the old CPR rule 3.9 included (f) the fact that non-compliance with the court’s orders was not due to the personal fault of the defaulting party, and (i) the effect which granting – or not granting – relief would have on either party. And in *Woodhouse v Consignia* [2002] EWCA Civ 275, the Court of Appeal emphasised that there was no substitute for considering each of the relevant factors, including the fact that the defendant would receive an unsolicited windfall if the case were struck out and that the effect upon the claimant might be catastrophic.

The prospect of professional negligence claims might also mitigate the effect of the new stricter approach. *Hayden v Charlton* [2011] EWCA Civ 791, was a libel action brought by an engineering company and its managing director against a neighbour who objected to what they were doing with a patch of land which they said they owned. The defendant was acting in person while the claimants had a solicitor. Nevertheless, the defendant complied with all the court’s case management directions while the claimants did not. Numerous court orders were simply ignored. There was, as the judge put it, ‘complete radio silence’. She concluded that the claimants were no longer interested in pursuing the case and struck it out. In fact, they had not lost interest, but had had just as much difficulty getting information and action from their solicitor as everyone else. So the default could not be laid personally at their door. But taking into account the fact that people are

expected to get on with their libel claims and the burdens placed on the defendant who was acting in person, the appeal against striking out was dismissed.

Toulson LJ expressly took into account that if the case was struck out, the claimants would have the opportunity of some redress against their former solicitor. He recognised that this was far from perfect, because it was not the same as a judgment declaring that the defamatory statements made about them were false, but it was at least some remedy; whereas if the case were allowed to proceed, the defendants would have suffered the burden and strain of conducting the litigation and the prolonged uncertainty in a matter affecting their freedom of speech. But they would have no right to claim compensation from the claimant's former solicitor, nor could they be adequately compensated by an award of costs (para 42).

Now, of course, we are into a world of even tougher enforcement of the court's procedural expectations. CPR rule 3.9 has been tightened up, as recommended by Sir Rupert Jackson (*Review of Civil Litigation Costs: Final Report*, January 2010, ch 39). When considering relief from sanctions, the court still has to take into account all the circumstances of the case so as to enable it to deal justly with the application, but the only two factors which are now expressly listed are: (a) the need for litigation to be conducted efficiently and at proportionate cost and (b) the need to

enforce compliance with rules, practice directions and orders. Neither of these has any necessary connection with doing justice between the parties. Indeed, the overriding objective in CPR rule 1.1 of dealing with cases ‘justly’ now includes ‘and at proportionate cost’.

The full force of this change was felt by Mr Andrew Mitchell MP, in his libel action against News Group Newspapers (*Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, [2014] 1 WLR 795). Both sides had been ordered to lodge their costs budgets seven days before a hearing listed for 18 June. The claimant did not file his until 17 June. The Master ordered that he was to be treated as having no costs apart from the court fees and refused his application for relief from sanctions. Both parties’ costs budgets were over £500,000. But the claimant would recover only his court fees if he won, whereas if he lost he would be at risk of having to pay the whole of the defendant’s costs.

This result has been described as ‘astonishingly harsh on the facts’ (Winston Jacob, [www.lambchambers.co.uk/news-learning](http://www.lambchambers.co.uk/news-learning)). Nevertheless, the appeal was dismissed.

The specified considerations should now be regarded as of paramount importance and be given great weight, more weight than the other circumstances (para 37).

Lord Dyson MR, giving the judgment of the court, cited his own 18th lecture on the implementation of the Jackson reforms in March 2013, saying that ‘there was

now to be a shift away from exclusively focussing in doing justice in the individual case' (para 38). Two further comments were that good reasons for a failure to observe the rules 'are likely to arise from circumstances outside the control of the party in default' (para 43) and that 'well-intentioned incompetence, for which there is no good reason, should not usually attract relief from a sanction unless the default is trivial' (para 48).

I am not here concerned with whether this new approach (which goes rather further than Jackson recommended) is right or wrong, whether it is in fact apt to meet the stated goals, and whether those goals are sufficiently weighty to justify the denial of individual justice which will inevitably result. Underlying it must, however, be an assumption that it is more just to relegate the defaulting party to whatever remedy he may have against his lawyers than it is to allow him to pursue or to defend the main action. That brings me back to the limitations of professional negligence claims as a cure for injustices in the law or the legal system.

The first and most important limitation is that you may not be able to show that your lawyer was negligent. Some cases, like *Heydon v Charlton*, are pretty obvious but others are not. We can all think of the issues which might arise. The scope of the solicitor's duty may be in doubt, especially if the fault has nothing to do with litigation. It may not be crystal clear whether the cause of the problem lay with the

lawyer or with the client. Why didn't the agent register the transfer in *Burnett's Trustee v Grainger*? Why wasn't Mrs Dunhill sent to a proper neurologist rather than to an accident and emergency surgeon? In the case of procedural errors or omissions, the mistakes may have been made some time ago when it was not necessarily foreseeable that the consequences would be so severe.

The second limitation is that you don't get the same range of remedies out of your solicitor. Mr Heydon wanted to vindicate his reputation, and that of his company, and to get Mrs Charlton to take the offensive remarks off her website and not to repeat them. He would not get that out of his solicitor. Mr and Mrs Grainger no doubt wanted to keep their home. Mrs Dunhill wanted the possibility of the full range of remedies available in a large personal injury claim, including provisional damages, a periodical payments order, or other forms of structured settlement. It was no answer to her to say that most claimants are content with lump sum damages, because then they can cut their coat according to their cloth. She would have been deprived of the possibility of choosing the remedy which suited her best.

The third limitation is that there is almost always going to be a discount for the chance that something would go wrong with the principal claim. Damages for the loss of a chance of bringing a successful claim are not the same as damages for

bringing a successful claim. Counsel for the defendant in *Dunhill v Burgin* made some interesting points about this. He suggested that a very high percentage of high value personal injury claims are settled anyway and settled on the same sort of basis as a loss of a chance award, that is, with a discount for contingencies and chances. This was, in his view, particularly risky litigation. Mrs Dunhill had been struck by a motor cycle when emerging from between parked cars to cross a dual carriageway. The defendant was denying liability altogether or alleging 50 to 75% contributory negligence. She might have come away with nothing from her original claim had it gone to trial, whereas she would be bound to get something out of her lawyers for the loss of the chance of pursuing it. (Of course we do not yet know the outcome of the case which now has to proceed. It will be interesting to see which of his predictions comes true.) Now that the defendant may also be the object of sanctions, the loss of the chance of successfully defending the action will also bring significant uncertainties with it.

Of course I don't have to tell you any of this. You will know it all far better than I. My guess is that another disadvantage is that professional negligence litigation which is the result of problems with the law or the legal system is even more stressful on all sides than the original case.

The other problem, to which counsel for Mrs Dunhill drew our attention, was with litigants in person, who would not have a lawyer to sue if things went wrong. If the courts are going to comfort themselves that a professional negligence claim will rectify what would otherwise be an unjust result between the parties, and it seems to me that they must sometimes do so, what are they going to do about litigants in person? In principle, the result of any case should not depend upon whether or not the parties have legal representation. Would the result in *Burnett's Trustee v Grainger* have been any different if the Graingers had been doing their own conveyancing or relied upon the voluntary services of a friend? Possibly not, but I think that the English judges would have been even more unhappy at the result. Should the courts adopt a different approach to sanctions where one or both of the parties are litigants in person? The public interest factors, which are now said to be paramount, are just as strong, but somehow the justice factors may seem a little different. This is only one of the many dilemmas which the increase in litigants in person in civil and family cases is likely to bring.

I do not, of course, have any answers to the questions I have raised. But in principle I think it is the job of the law to be just – in other words, to lay down rules and principles which are capable of doing justice in individual cases. We can all debate what these should be and we all know that hard cases can make bad law. But we should not put up with principles of law which are fundamentally unjust, which fail to strike the right balance between the competing interests at stake, as at

least arguably was the case in *Burnett's Trustee v Grainger* and might have been the case in *Pitt v Holt*. And I also think that it is the principal job of the justice system to justice between the parties to the case, so the extent to which it should take other factors into account is perhaps problematic. The one thing we can be sure of is that a professional negligence claim against the lawyers is not a universal panacea, although it may salve our consciences in a few cases.