

# *Edwards (on behalf of the estate of the late Thomas Arthur Watkins) v Hugh James Ford Simey (A Firm)*



## Supreme Court considers and fails to apply the benefit of hindsight

After February's decision in *Perry v Raleys* [2019] (see our case summary [here](#)), the Supreme Court has handed down a further decision arising out of a former miner's loss of opportunity claim concerning compensation for Vibration White Finger ('VWF'). In the case of *Edwards (on behalf of the estate of the late Thomas Arthur Watkins) v Hugh James Ford Simey (A Firm)* [2019] the Supreme Court considered the admissibility of expert evidence which was not available at the original trial and, on a fact specific basis, disregarded it, thus allowing the claimant a potential windfall. In doing so, the Supreme Court departed from established principles concerning the recoverability of loss.

### 1. Background

The late Mr Watkins developed VWF whilst employed by the National Coal Board. A government scheme was set up to provide tariff-based compensation to miners suffering from VWF (the "Scheme"). Mr Watkins instructed Hugh James Ford Simey Solicitors ("the Solicitors") to act for him in a claim for damages for his VWF under the Scheme.

The purpose of the Scheme was to allow large numbers of similar claims to be presented, examined and resolved, quickly and cost-effectively without the need for conventional litigation. The Scheme contemplated the making of two main types of compensatory award to miners suffering from VWF, which were broadly in line with general and special damages for personal injuries. If a claimant was shown to be suffering from VWF above a certain level, a rebuttable presumption arose that they were entitled to a services award, which formed part of the special damages (the 'Presumption').

Mr Watkins underwent a medical examination in accordance with the Scheme, which established that he was entitled to general damages and fell within the terms of the Presumption. Mr Watkins settled his claim for £9,478. This represented the tariff award for general damages to which Mr Watkins would have been entitled under the Scheme on the basis of his medical examination. However, the offer did not include any allowance for a services award.

## 2. The Professional Negligence Claim

Mr Watkins subsequently brought proceedings against the Solicitors alleging they had failed to give him appropriate advice and as a result he had lost the opportunity to claim a services award. Pursuant to the judge's directions, expert evidence was obtained in the form of a report by a single joint expert. The expert was instructed not to apply the Presumption.

The expert's report concluded that the true assessment of Mr Watkins' staging was such that he would not have succeeded in his services claim and would have received an award of only £1,790 for general damages (the 'New Expert Evidence'). The judge found that the Solicitors had been negligent in failing to properly advise Mr Watkins on settlement and that, had he been properly advised, he would not have accepted the settlement. However, the judge dismissed the claim on the basis that, in light of the New Expert Evidence, Mr Watkins had suffered no loss.

## 3. Court of Appeal Decision

The Court of Appeal reversed the judge's decision. It held that the judge had been wrong to determine these matters on the basis of the New Expert Evidence, as this evidence would not have been available at the time of Mr Watkins' claim under the Scheme.

The Court of Appeal acknowledged that there were some exceptions, such as fraud or a significant supervening event, which may require a departure from the normal principles. However, in its view, such circumstances did not exist in the present case.

## 4. Supreme Court Decision

The Solicitors were given permission to appeal to the Supreme Court on the sole question of whether, in accordance with the principle established in ***Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co [1903]***, the court assessing damages should not speculate about what might have happened when it has knowledge of what actually happened (the 'Bwllfa Principle').

However, the Supreme Court found that the Bwllfa Principle was not relevant to any issue before the court in the professional negligence proceedings. It held that the New Expert Evidence was not relevant to the issue of loss as the professional negligence action had to be decided within the context of the Scheme. The Supreme Court found that Mr Watkins' claim was of more than negligible value and had a chance of success under the provisions of the Scheme. Had the services claim been pursued at the time, there would have been no reassessment of the diagnosis or staging

and no reduction of the general damages award. Mr Watkins would have received a services award due to the way in which the Scheme operated.

As such, it was not considered necessary to express a view on the general admissibility in professional negligence actions of subsequently acquired evidence. The Supreme Court has now remitted the matter back to the first instance court for assessment of the value of the loss of the opportunity to pursue Mr Watkins' services claim.

### CPB comment

On the specific facts of the case, the Supreme Court disregarded the New Expert Evidence and departed from the standard principle which provides that a claimant should be compensated for no more than the true loss caused by the breach of duty.

The fact that the VWF claim proceeded under a statutory compensation scheme rather than standard common law civil litigation significantly influenced the Supreme Court's decision. Had the Solicitors not been negligent, because of the rough and ready manner in which the Scheme intentionally operated, the fact that Mr Watkins was not suffering from sufficiently serious VWF would not have come to light.

The Supreme Court failed to analyse or give examples of the supervening events which, according to the approach advocated by the Court of Appeal, would be deemed sufficiently serious so as to justify reliance upon subsequently acquired evidence. However, it did comment that Mr Watkins' services claim could and would have been pursued honestly under the Scheme. It remains open and important for defendants and their insurers to consider the availability of new evidence to dispute that a claimant could and would have honestly pursued a certain course of action.



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