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Professional negligence: the same negligent advice given twice

Sciortino v Beaumont (2021) EWCA Civ 786

The primary issue raised by this second appeal concerned the date when a cause of action in negligence accrued against a barrister who had advised on two separate occasions about the same or similar issues. Was there one single cause of action which accrued when the first negligent advice was given and acted upon (in which case, on the facts of this case, the claim would be statute-barred), or did a separate cause of action – albeit for lesser loss and damage - accrue when the second advice was given and acted upon (in which case the lesser claim here, based on that second advice, would not be statute-barred)? Both a Master and a Circuit Judge concluded that the answer was the former, not the latter, and that therefore all relevant parts of the claim were statute-barred.

Allowing the claimant's appeal, the Court of Appeal held that the general principle must be that a claim based on negligent advice, given to and relied on by a claimant during the relevant limitation period, gave rise to a valid claim. That could be tested in this way. Assume that a barrister gave negligent advice on the merits at the outset of the litigation. Instead of advising that the underlying claim would fail, he advised that it had a good prospect of success. In consequence, costs of £200,000 were incurred up to the pre-trial review. Immediately before the pre-trial review the barrister was asked to advise on the merits again. Obviously, there was considerably more material available at that stage. It gave the barrister the opportunity to say, "No, I was

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The Court of Appeal held that where a barrister gave the same advice, on the same issue on two occasions, there were two separate breaches of duty, and there was no general principle of logic or common sense which required any sort of 'relation back', such as to say that the limitation period was triggered by the first occasion on which the negligent advice was given, regardless of any subsequent breaches of duty.

wrong, this claim will fail". But he did not take that opportunity, and instead advised that there is a strong chance of success. In consequence, another £100,000 was incurred by the client, and the claim failed.

Those additional costs of £100,000 were attributable to the negligent advice given on the eve of the pre-trial review. If there was a limitation issue in respect of the original advice, but no limitation issue in respect of the advice given before the pre-trial review, there was no reason in principle why the barrister would not be liable in damages for the £100,000.

In short, in a case where there were two (or more) allegedly negligent advices, and therefore two separate breaches of duty, there was no general principle of logic or common sense which required any sort of 'relation back', such as to say that the limitation period was triggered by the first occasion on which the negligent advice was given, regardless of any subsequent breaches of duty.

This general principle might be subject to the facts of the individual case. If, for example, the claimant was irretrievably committed to a course of action as a result of the first negligent advice, then it might be that the second negligent advice would not have caused any further loss.

However, a consideration of the facts of this case, also led to the conclusion that the claim in respect of the 26 October advice was not statute-barred.

Any alleged negligence in October 2011 was different in nature and extent to any prior negligence in April/May. The respondent was being asked to give different and more comprehensive advice (in writing), in very different circumstances. There were also significant differences in the nature and scope of the advices provided and the material available for consideration on each occasion. The advice of 26 October was not merely confirming the earlier advice that had been given by the respondent outside the limitation period.

The court considered the authorities and held that there was no authority to support the proposition that, if there were two advices, the cause of action accrued at the time of the first and the second was irrelevant. Here, there were also two separate sets of instructions: the original instructions to advise in conference in April; and the later instructions in September and repeated in October for a written advice on the merits of the forthcoming appeal hearing.

The Master applied the wrong test in his judgment. This was not a case where Chadwick LJ's comment in *Khan (2002)* about "a new or supervening act or omission" was relevant. That approach might be applicable in cases of a single breach which caused damage outside and then later inside the limitation period, not cases where there were two separate breaches of duty, the second of which was within the limitation period, and gave rise to a distinct head of loss which would not have been suffered if the second breach had not occurred.

Further and in any event, even if that was a proper approach in a case like this, the circumstances in October 2011 which prompted the second advice were new and different, and that advice caused definable, separate damage. It was therefore a separate cause of action which, on any view, comprised a supervening event.

The judgment is available at: Sciortino v Beaumont [2021] EWCA Civ 786 (23 May 2021) (bailii.org)

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