HOUSE OF LORDS SESSION 2004–05
[2005] UKHL 7

on appeal from: [2002] EWCA Civ 875

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Moy
v.
Pettmann Smith (a firm) (Original Respondents and Cross-appellants) and another (Original Appellant and Cross-respondent)

ON
THURSDAY 3 FEBRUARY 2005

The Appellate Committee comprised:

Lord Nicholls of Birkenhead
Lord Hope of Craighead
Baroness Hale of Richmond
Lord Carswell
Lord Brown of Eaton-under-Heywood

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LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Hope of Craighead, Baroness Hale of Richmond and Lord Carswell. For the reasons they give, with which I agree, I would allow this appeal.

LORD HOPE OF CRAIGHEAD

My Lords,

2. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Carswell. I agree with it and for the reasons that he has given I too would allow the appeal. I should like to add these comments.

Competency of the appeal

3. Section 1(5) of the Civil Liability (Contribution) Act 1978 refers to a judgment in any part of the United Kingdom. The phrase "in any part of the United Kingdom" did not appear in clause 3(7) of the draft Civil Liability Contribution Bill which was annexed to the Law Commission's report, *Law of Contract, Report on Contribution* (9 March 1977, No. 79). The Law Commission concentrated on the

position in England and Wales. It recommended that, for the purposes of contribution proceedings in this jurisdiction, neither party should be allowed to challenge a finding of non-liability made in favour of the other in an action brought against the other by the plaintiff, provided that the finding was made after a trial on the merits: para 81(g). It did not discuss the possibility that the finding which was not to be challenged was one that had been obtained from a court in another part of the United Kingdom. But reference is made in para 65, footnote 89, to another matter drawn to its attention by a working party of the Scottish Law Commission which was not unrelated to this issue. This indicates that, in accordance with normal practice and as was to be expected, the two Law Commissions were in touch with each other during the preparation of this report.

4. We do not know what led to the change of wording which led to the formula that now appears in section 1(5) of the 1978 Act. But the intention appears to have been to remove the possibility of any doubt on this point by providing expressly that no distinction was to be drawn for its purposes between judgments obtained under any of the United Kingdom's legal systems. The way in which this was done indicates that it was assumed that there were no material differences between these legal systems as to the stage at which it would be right to regard a finding after trial as conclusive in favour of the person from whom the contribution was sought. It may be helpful therefore, as a footnote to what Lord Carswell has said, to look briefly at the circumstances in which a judgment which has been pronounced in Scotland will be regarded in that jurisdiction as having determined the issue in that person's favour.

5. Section 1(5) of the 1978 Act does not form part of the Scottish legislation that regulates proceedings for contribution between joint wrongdoers. This is to be found in section 3(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940. That subsection was modelled on section 6(1) of the Law Reform (Married Women and Tortfeasors) Act 1935, which formerly applied to England and Wales but was repealed by section 9(2) of and Schedule 2 to the 1978 Act. Section 3(1) of the 1940 Act enables the court to determine the proportions in which two or more parties are found jointly and severally liable in damages or expenses are to be liable *inter se* to contribute to that award. It remains in force in the form in which it was originally enacted.

6. Section 3(2) of the 1940 Act deals with the situation where a party who has been found liable wishes to recover from another party who, if sued, might also have been found liable. It provides:

> "Where any person has paid any damages or expenses in which he has been found liable in any such action as aforesaid, he shall be entitled to recover from any other person who, if sued, might also have been held liable in respect of the loss or damage on which the action was founded, such contribution, if any, as the court may deem just."

The words "who, if sued, might also have been held liable" preclude the raising of proceedings against a party who has already been sued and found not to be liable.

7. Chapter 26 of the Rules of the Court of Session 1994, which is headed *Third Party Procedure*, enables questions arising out of claims by a defender against a third party for contribution, relief or indemnity and liability to be disposed of in the same action as that in which the defender is himself being sued: *Beedie v Norrie*, 1966 SC 207, 210, per Lord President Clyde. It is the counterpart of Part 20 of the Civil Procedure Rules. Chapter 26 is a re-enactment of a rule which was first introduced as rule 85 of the Rules of the Court of Session 1965. Where a third party is brought into the action in this way the pursuer has the option of amending his pleadings so as to adopt the case which the defender has made against the third party or of leaving it to the defender to make that case. The decision as to which course to adopt will usually depend on the pursuer's prospects of success in establishing that the defender is liable at least in part for the loss for which he seeks damages.

8. Whether or not the pursuer does adopt the defender's case, the third party is regarded as being a party to the pursuer's action. This is because the purpose of the third party notice procedure is to make good the defender's claim that the third party is liable with the defender to the pursuer in the subject matter of that action: *Buchan and Others v Thomson*, 1976 SLT 42, 45 per Lord Fraser.

9. In *Barton v William Low & Co Ltd*, 1968 SLT (Notes) 27, the question was raised as to whether it was competent for a party who had

been brought into the action under the third party procedure to challenge the relevancy of averments which the pursuer, who made no case against the third party, was seeking to incorporate in her pleadings as part of her case against the defenders. Lord Stott said, at p 28:

> "The third parties have been convened into the process by the defenders, and the pursuer makes no case against them. The defenders, however, have set out in their pleadings what is, in effect, a right of relief against the third parties. The third parties have therefore a clear interest in the success or failure of the pursuer's case against the defenders, and one of the objects of third party procedure, as I see it, is to enable the third parties to be heard on any matter in which they have a relevant interest in relation to the case between pursuer and defender. The question of whether the pursuer has made a competent or relevant case against the defenders is such a matter, and in my opinion the third parties are entitled to take a plea to the relevancy of the pursuer's pleadings and to be heard upon that plea."

10. There is one further point. An interlocutor which has been pronounced in the Outer House of the Court of Session does not become a final interlocutor until the expiry of the reclaiming days – that is to say, the number of days prescribed by rule 38.3 of the Rules of the Court of Session within which a reclaiming motion may be marked to bring that interlocutor under review in the Inner House: see Court of Session Act 1988, section 28. When an interlocutor is reclaimed against, the effect from the time the reclaiming motion is marked is to sist, or stay, all execution on the decree which has been pronounced in the Outer House until the reclaiming motion has been determined: rule 38.8; *Macleay v Macdonald* 1928 SC 776, 782-3, per Lord Anderson.

11. Where the pursuer, having amended his pleadings so as to make a case against the third party, is wholly unsuccessful against the defender and wholly successful against the third party, the third party may appeal against the decision that the defender is not liable by reclaiming against that interlocutor. His position is unaffected by the pursuer's decision as to whether or not he should appeal. The third party's interest in reversing the decision that the defender is not liable to the pursuer is regarded in itself as giving him a sufficient interest to enable him to take the matter to appeal in that action.

12. There are, of course, differences of procedure between the two jurisdictions as to the way these matters are to be dealt with. But a judgment given in any action in which the third party procedure has been used in the Court of Session in Scotland will not be a final judgment which determines the issue between the parties in that jurisdiction until the days for reclaiming against it have expired or until any competent appeal against that judgment has been disposed of, irrespective of the party by whom the appeal was brought. If it is not a final judgment in that jurisdiction, it must follow that it is not to be regarded as a final judgment in England and Wales for the purposes of section 1(5) of the 1978 Act.

13. I consider, for these reasons, that the challenge which has been made to the competency of the appeal in this case would not have succeeded if the judgment which was said to be conclusive was a Scottish judgment that had been reclaimed against and was still under appeal. This supports Lord Carswell's conclusion, with which I respectfully agree, that the solicitor's right of appeal was not barred in this case.

The barrister's negligence

14. A claimant who is seeking an award of damages needs to know two things when the defendant pays a sum into court before trial. The first is whether he is likely to obtain more than that sum if he leaves it to the judge to assess damages. The second is that he will be liable in costs from the date when the sum was paid in if he fails to obtain more than that sum from the trial judge. Every reasonably competent barrister knows that the claimant needs to be given this advice if he is to make an informed judgment as to whether he should accept the sum that has been paid in. But the situation with which Miss Perry was faced at the door of the court on 6 April 1998 was unusual. The matters on which advice was needed were complicated by the difficulty that had arisen about introducing the necessary evidence.

15. The case against Miss Perry has narrowed since the original allegations against her were made. The only breach of duty that is now alleged is that she failed to give proper advice to Mr Moy on 6 April 1998 on his prospects of beating the offer of £150,000 with costs which, as she had been told, was still open but would be withdrawn as soon as the judge came into court. It is not now being suggested that Miss Perry failed to advise him what he could expect to be awarded if all the

necessary evidence as to causation and prognosis was before the trial judge, or that he had not been warned about his liability in costs if he failed to beat the payment in. The breach of duty relates to the problem which had arisen about introducing the necessary evidence.

16. This problem was, of course, not of Miss Perry's making. Nevertheless it was her duty to assess the prospects of persuading the judge to admit the evidence and then to advise Mr Moy about those prospects. Her evidence was that her assessment was that the prospects were fifty/fifty, adding that they were "probably slightly higher in favour of the matter going on, or the evidence being allowed in." She accepts that she did not frame her advice to Mr Moy in these terms. She said that she told him that she was hopeful that the evidence would be allowed in. Mr Moy accepted in cross examination that it was explained to him that he could still have the £150,000 if he wanted it. He also accepted that Miss Perry told him that she thought that he would do better if the case were to go on, but that it was a matter for him whether the offer should be accepted.

17. The judge, HHJ Geddes, asked himself whether this advice lay outside the range of possible advice which counsel of her seniority and purported experience could be expected to give and concluded that it was not. The judges in the Court of Appeal accepted that Miss Perry's assessment of the prospects of persuading the trial judge to admit the necessary evidence was not negligent. The question then, as Latham LJ put in para 42 of his judgment, was:

> "did the advice that she gave, and the way that she gave it, measure up to the standard required of reasonably competent counsel."

18. In *Arthur J S Hall v Simons* [2002] 1 AC 615, 737G-H Lord Hobhouse of Woodborough said that one of the protections of the advocate was that the standard of care to be applied in any negligence action was the same as that applicable to any other skilled professional who has to work in an environment where decisions and exercises of judgment have to be made in often difficult and time constraining circumstances. In the same case at p 726D-G I said that the measure of the advocate's duty to his client is that which applies in every case where a departure from ordinary professional practice is alleged, and that it could not be stressed too strongly that a mere error of judgment on his part will not expose him to liability for negligence.

19. Where a claim is brought for professional negligence the court will usually expect to be provided with some evidence to enable it to assess whether the relevant standard of care has been departed from. No such evidence was adduced in this case. Judges, recalling how things were when they were in practice, no doubt feel confident that they can do this for themselves without evidence. But judges need to be careful lest the decision in the case depends on the standard they would set for themselves. If this were to happen, it would vary from judge to judge and become arbitrary. Considerable weight should therefore be given to the decision of the judge at first instance who heard all the evidence. In this case the judges in the Court of Appeal were right to defer to the judge's decision that Miss Perry was not negligent in her assessment. But in my opinion they did not give sufficient reasons for departing from his decision to reject the argument that she was negligent as to the way in which she advised Mr Moy in the light of that assessment.

20. The question whether her advice was negligent has to be judged in the light of the choices that were available in the light of that assessment. It was clear from previous discussions with him that Mr Moy was dissatisfied with the £150,000 that was on offer. His own view was that his claim was worth about £200,000. Miss Perry was entitled to take this fact into account when she was considering whether she should advise him to accept the offer. As against the risk of losing the benefit of the offer, there was the prospect of recovering substantially more than that if the judge decided to admit the necessary evidence. There was an obvious advantage in achieving a full recovery in that action rather than having to fall back on an action against the solicitors to make up the shortfall.

21. How then was the advice to be conveyed to Mr Moy? She did not tell him that her assessment of the chances of getting the evidence in was 50/50. That, for Latham LJ in para 43 and Brooke LJ in para 53, was the only proper advice that she could have given him. So the advice she gave him was wrong and it was negligently wrong. But the question whether the advice was wrong and negligently wrong has to be tested in the light of the facts that were known when the advice was given. It is difficult to see why the advice can be said to have been negligently wrong if the assessment on which it was based was not negligent. Moreover it is the substance of the advice, not the precise wording used to convey it, that needs to be examined in order to judge whether it was negligent. The significance of Miss Perry's failure to tell Mr Moy that the prospects of getting the evidence in were 50/50 has to be measured against what she did tell him, which was that she was hopeful that the judge would admit the evidence.

22. I am reluctant to differ from the views expressed by the judges in the Court of Appeal. But it does seem to me, with great respect, that they judged her actions too harshly when account is taken of all the circumstances. Their decision might have been supportable if it had been based on some reliable evidence to the effect that the advice which she gave was of a kind which no barrister of her standing and experience would have given in the circumstances. But, for reasons that are not difficult to understand, there was no such evidence. In my opinion the decision of the trial judge ought not to have been departed from in these circumstances.

BARONESS HALE OF RICHMOND

My Lords,

23. My noble and learned friend Lord Carswell has written the leading opinion in this case. I agree with it, and also with the opinion of my noble and learned friend Lord Hope of Craighead. What follow are merely footnotes to what they have said.

The Civil Liability (Contribution) Act 1978

24. The position in England and Wales differs slightly from that in Scotland, in that a notice of appeal does not operate as an automatic stay on the judgment of the court at first instance: see Civil Procedure Rules, 52.7. Indeed, the usual practice is that an unsuccessful defendant must satisfy the judgment under appeal unless the parties agree otherwise or he is granted a stay. Permission to appeal may be made conditional on some or all of the judgment sums being paid. But a stay will be granted if there is good reason to do so, for example if there is reason to doubt that the money will be recoverable if the appeal is allowed. This does not, however, undermine the conclusion reached by Lord Carswell on the interpretation of section 1(5) of the 1978 Act. Indeed, it strengthens it, in that the position cannot be different depending upon whether this would or would not be an appropriate case in which to grant a stay of execution. Thus, it should make no difference if (contrary to the facts of this case) the unsuccessful defendant wished to appeal the decision, not only as against the successful Part 20 defendant, but also as against the claimant, and consequently were able to obtain a stay of execution.

Section 1(5) cannot apply while the judgment in question is still liable to be set aside on appeal.

The negligence claim

25. This House, in *Arthur JS Hall & Co v Simons* [2002] 1 AC 615, abolished the advocate's remaining immunity from claims for negligence because their Lordships could see no good reason why advocates should be treated any differently from other professional persons. They should be in no better, but also no worse, position than others. Lord Hobhouse of Woodborough put that position in this way (at p 737G):

> "The standard of care to be applied in negligence actions against an advocate is the same as that applicable to any other skilled professional who has to work in an environment where decisions and exercises of judgment have to be made in often difficult and time constrained circumstances. It requires a plaintiff to show that the error was one which no reasonably competent member of the relevant profession would have made."

26. In claims against members of other professions, the court will have expert evidence on whether their conduct has fallen short of this standard. In cases against advocates, however, the court assumes that it can rely upon its own knowledge and experience of advocacy to make that judgment. This brings, as Lord Hope has pointed out, an obvious risk that a judge will ask himself what he would have done in the particular circumstances of the case. But that is not the test. The doctor giving expert evidence in a medical negligence claim is not asked what he himself would have done, but what a reasonable doctor might have done.

27. Ms Perry had two decisions to take at the door of the court: what advice to give her client and how full an explanation to give him. Neither the judge nor the majority of the Court of Appeal thought that her advice to reject the offer was negligent. It is hard to see how it can have been so. It was a judgment which turned out badly in the short term but was just as likely in the long term to lead to the client getting everything to which he was entitled. In her view the claim was worth much more than the offer. If the application to admit further medical

evidence was granted, the claimant would get what the claim was worth from the Health Authority, which was properly liable for it; this was much better for him than trying to make up the shortfall from the lawyers whose negligence had led to the current dilemma. There was, in April 1998, a reasonable prospect of persuading the judge that justice required that the evidence be admitted. Had Ms Perry advised the claimant to take the offer and sue the solicitors, the solicitors could have mounted a respectable argument that she should have given him exactly the advice that she did. Unless and until an application to admit the further evidence was made to the trial judge, it could not be said that the claimant had been unable to obtain his full entitlement from the Health Authority.

28. How much of this thinking did she have to explain to the client? It took the law of medical negligence some time to work out the principles governing what the patient is entitled to be told before deciding whether or not to agree to intrusive medical treatment: see *Sidaway v Board of Governors of the Bethlem Royal Hospital* [1985] AC 871. These principles are now relatively well understood. In *Chester v Afshar* [2004] UKHL 41; [2004] 3 WLR 927, for example, the doctor agreed that he should have explained the particular risk to the patient. We have not yet developed a clear set of principles governing the terms in which an advocate's advice should be given. As Lord Hope has pointed out, there is a minimum which any client considering whether to accept a payment into court must know, but that advice had already been given. The situation at the court door was different. We have been shown no evidence or authority to support the view that no reasonable barrister would have given her advice in the way that Ms Perry did in this case. It may well be that such principles will develop in future. But there is still a respectable body of professional opinion that the client pays for the advocate's opinion not her doubts. I agree that the Court of Appeal should not have disturbed the judgment of the trial judge in this case.

LORD CARSWELL

My Lords,

29. The claimant in this action David Leslie Moy could not be blamed if he felt that he had been poorly served by the medical and legal professions. On 13 September 1992, then aged 27 years, he sustained

fractures of the left leg when playing football. The surgical treatment of the injury in Maidstone Hospital was negligently carried out, leaving him with continuing pain and disability. Despite remedial surgery in 1995, he has been left with a degree of disability and has sustained and will sustain loss of earnings. He commenced a claim for damages against the hospital authority, and it is not in dispute that as time went on it became clear that he was entitled to substantial damages, in excess of £200,000. As the result of a chapter of accidents, which I shall recount, when his action came to trial he was left in a position in which he was advised to settle at a very considerable undervalue.

30. He issued proceedings against the solicitors who had acted for him in his claim against the hospital authority, the respondent firm Pettman Smith ("the solicitors"), and in July 2001 the High Court gave judgment in his favour against the solicitors for the sum of £210,000. The appellant Miss Jacqueline Perry, the barrister who had appeared for Mr Moy in his medical negligence claim, was joined as a Part 20 defendant and subsequently as a co-defendant to Mr Moy's claim against the solicitors. Miss Perry, who was called to the Bar in 1975, is experienced in personal injury and medical negligence litigation. It is alleged against her in the present action that she had been negligent in giving the claimant advice relating to the conduct of his claim. The judge held that the appellant was not negligent and made the award of damages solely against the solicitors. They paid Mr Moy the damages due to him, but appealed to the Court of Appeal, who held that Miss Perry was partly to blame for the claimant's loss and should bear a proportion of the damages paid to him. Miss Perry appealed to your Lordships' House against the decision of the Court of Appeal. Your Lordships accordingly have to consider the question whether the appellant was negligent in the discharge of her duty of care to her client the claimant. As a result of these convoluted proceedings the claimant did eventually recover the damages due to him, but only after years of delay and, no doubt, much anxiety and distress.

31. The facts have been fully and carefully set out in the judgments of the trial judge and the Court of Appeal, but it is necessary to rehearse in a little detail the course of events leading up to the giving of the advice which was held to be negligent. The fractures of the tibia and fibula sustained by the claimant in the accident in September 1992 were originally treated by manipulation, but as this was not successful a surgeon in the hospital performed an operation in October 1992, involving rotation and internal fixation of the bones by means of a metal plate. This operation was negligently carried out, as was subsequently admitted by the hospital authority, leaving the claimant with an

unacceptable degree of rotational error. In March 1995 a remedial operation was carried out by Mr (later Professor) M Saleh, a consultant orthopaedic surgeon, which improved his condition materially and appeared at first to have effected a nearly complete recovery. Mr Saleh concluded a report to the solicitors dated 9 July 1996 by stating:

> "I doubt that he will require significant further physiotherapy in-put and, overall, I believe he will make a 90 to 95% functional recovery with no serious sequelae anticipated in the short, medium or long term.
>
> I do not, at this stage, anticipate any need for further surgery and functional improvement may be expected to continue over a period of 18 months."

32. The solicitors had meanwhile commenced proceedings on Mr Moy's behalf in July 1994, claiming damages for negligence against the hospital authority. The authority initially denied liability, but in March 1995 it admitted liability and submitted to interlocutory judgment in favour of the claimant. It did, however, maintain the plea made in its defence served on 18 August 1994 that the defendant's negligence did not cause or contribute to any injury, loss or damage sustained by the claimant and that such continuing disability as he might have was the natural consequence of the fractures which he had sustained.

33. The claimant did not make as good a recovery as had been hoped, and by late 1996 he was having increasing pain and difficulty. Another surgeon Mr King was instructed in January 1997 on the appellant's advice to deal with this, but he was not prepared to attribute the claimant's increasing pain and difficulty to the negligent surgery. Notwithstanding this adverse opinion, the solicitors consented to an order made on 13 February 1997, whereby they were to furnish a schedule of special damages within 28 days and the parties were to be limited to one medical expert per side and were to exchange medical reports within three months. In April 1997 the time for serving the schedule was extended by consent to 8 May and for exchange of medical reports to 8 July 1997. No medical report was served by 8 July, but the solicitors had explained their difficulties over medical advice to the district judge and expected to be able to obtain an extension of time.

34. On 18 July 1997 (the last date permitted by an "unless" order made on 20 June 1997) the solicitors served a schedule of damages, in which substantial future loss was claimed, amounting to £169,408 at 16

years' purchase of a continuing loss of £10,588 per annum. There was also a claim for £25,000 for handicap in the labour market. The grand total of the past and future loss specified in this document amounted to £276,457.27, but no medical opinion had yet been obtained to support the claimant's continuing disability and the schedule was based on the claimant's own evidence about his difficulties at work. The defendant authority served a counter-schedule on 19 December 1997, in which the question of causation of the loss was squarely raised, the thesis being that irrespective of the surgeon's negligence the claimant would have incurred much of the loss and damage claimed. The total accepted in this schedule was £55,067.72.

35. In July 1997 the appellant advised the solicitors to obtain Professor Saleh's opinion on the causation of his pain and disability and on the prognosis and asked them to arrange a conference with him. The solicitors wrote several letters to Professor Saleh, but regrettably he failed to reply and equally regrettably the solicitors failed to pursue the matter with him.

36. A pre-trial review was held by a district judge on 27 November 1997, at which it was ordered that each party should have leave to rely upon the evidence of "a medical expert", whose report was to be disclosed by 9 January 1998, and "in default no evidence not so disclosed shall be admissible save with leave of the court". It was then expected that the date of trial would be in February 1998.

37. Although they had not obtained the further medical evidence which was vital for supporting the future loss claim, the solicitors did not seek an extension of time, but continued to write to Professor Saleh, while they also made unsuccessful attempts to contact him by telephone. On 8 January 1998 Professor Saleh at last replied to the solicitors, stating that he would have to examine the claimant again before he could give an opinion on his medical situation. An appointment was made for 22 January 1998.

38. On 9 January 1998 the solicitors issued a notice of application for leave to adduce further medical and other evidence before trial. Professor Saleh duly examined the claimant on 22 January 1998, and his report, although bearing that date, was sent to the solicitors under cover of a letter dated 12 February, which apparently was received on or about 20 February 1998. In his report Professor Saleh set out his opinion and prognosis:

> "Mr Moy sustained a fracture of the lower left tibia which required corrective osteotomy. He is working full time in a demanding physical occupation and remains physically limited as a result of the problems with his left lower leg and ankle. There is some evidence of instability of the ankle and degenerative change within the foot.
>
> If Mr Moy continues in the building trade in his present work I believe that he will continue to be symptomatic on a daily basis. It is possible that a further corrective osteotomy to redress the residual deformity might improve things marginally. However I believe that he has residual problems at the level of the ankle and foot which will always limit his overall function.
>
> Overall therefore I do not believe surgery is indicated and believe that, were he to change to a lighter job, for example a Quantity Surveyor, it seems likely that he would continue to work up to retirement age.
>
> It was interesting to note that, on a recent holiday, he was asymptomatic.
>
> If, however, Mr Moy continues to work in his present occupation I believe that, in the short-term, he will cope as he does currently. In the medium term he will take further time off work and, in the long-term, I believe he will have difficulty managing. I believe that suitable retraining would be the most appropriate route for Mr Moy to take in order to preserve his current health status."

In his covering letter Professor Saleh said roundly "If he decides to carry on in his current capacity I believe that his symptoms will get worse."

39. The appellant appreciated that the value of the case would have to be revised in the light of this report and advised that in addition to the application for leave to adduce further evidence an application should be made to adjourn the trial, which was now listed for 6 April 1998.

40. On 24 February 1998 the health authority made a payment of £120,000 into court.

41. The applications, which were vigorously opposed by the health authority, were heard on 26 February 1998 by Deputy District Judge Stary. She dismissed both applications and confirmed that the trial date was to stand at 6 April 1998. The Deputy District Judge was very critical, not to say censorious, concerning the preparation of the case and the obtaining of medical evidence. As the trial Judge, His Honour Judge Geddes, subsequently pointed out, however:

> "The Deputy District Judge appears to have misunderstood the facts in a number of important respects. In particular she seems to have thought Mr Moy's problems were apparent in July 1996 and that 'this was not picked up as a point of serious implication until 18 months later'. She further found that 'there really is not any serious change in the Plaintiff's medical condition [since Professor Saleh's report of July 1996]'."

The thrust of the Deputy District Judge's decision was that the delay was the fault of the claimant and his solicitors and that leave should therefore not be given for the further evidence to be adduced, nor should the trial date be vacated. The last portion of the note of her reasons reads as follows:

> "It would seem that the plaintiff's solicitors are looking for a reason to use the Plaintiff's days off work as a lever to show a change in the Plaintiff's medical condition with a view to starting all over again the medical evidence which had been restricted by District Judge Wigfield. I am very concerned about this.
>
> I am not satisfied that there has been so significant a change from last year to now or over the last six months as to justify the Plaintiff saying to me that they want to abandon the trial date in April and start all over again. I am not going to accede to the Plaintiff's application."

The appellant pointed out, perhaps with more force than diplomacy, that the ruling meant that she would have to call Professor Saleh to give evidence but instruct him not to give evidence about the claimant's condition and prognosis, but the judge was unmoved and made the order dismissing the applications to adduce further medical evidence and vacate the trial date.

42. It must no doubt be frustrating for district judges who have charge of case management of actions before trial to be faced constantly with delays which result from inefficiency, incompetence or downright neglect on the part of the practitioners whose duty it is to prepare them. One is left with the very clear impression, however, that Deputy District Judge Stary either was over-influenced by the defects on the part of the solicitors in preparing the case and by the imperative of efficiency in managing a stream of actions for trial, or else she failed to appreciate how considerable an effect on the value of the claim the new medical evidence would have. She did not at any stage go into the question of the degree of prejudice which would be sustained by the health authority, which could readily be met by an order for costs. She either failed to carry out any balancing exercise or misunderstood the profound effect of the medical evidence which the claimant wished to adduce. Whatever the reason, the result of her decision was a drastic reduction in the amount which the claimant was likely to recover at trial, which the claimant and his advisers may justifiably have regarded as a serious injustice.

43. An appeal was brought to the Central London County Court, but on 6 March 1998 the appeal was dismissed by His Honour Judge Previte QC. No note is available of his reasons, but Judge Geddes recorded that the appellant said that the decision "was largely based not on the merits but on a particular recent authority". The authority was not named, but it appears from the judgment of the Court of Appeal in the present case that it may have been *Lownes v Babcock Power Ltd* [1998] PIQR 253, decided on 11 February 1998. In that case the Court of Appeal upheld decisions refusing an extension of time to deliver a schedule of damages, which had very considerable adverse consequences for the plaintiff. It should be borne in mind, however, that the delay in that case and the gross nature of the solicitors' dereliction of duty substantially exceeded those in the present case. The letter of 10 March 1998 from the solicitors to the claimant sets out in rather more detail the criticisms which the judge made both of Professor Saleh and the solicitors. It does not appear from any source to what extent, if at all, the judge took account of the degree of injustice which would be suffered by the claimant if the further evidence from Professor Saleh were not adduced or of the extent of any prejudice which might be caused to the health authority.

44. On 12 March 1998 the health authority increased its payment into court to £150,000. By a letter of the same date its solicitors stated that provided the offer was accepted by 4 pm on 19 March it would waive its

right to enforce the order for costs made at the appeal on 6 March, leaving each party to bear its own costs of that appeal.

45. The appellant advised the claimant in conference on 23 March 1998. She explained the difficulties of obtaining leave to have Professor Saleh's third report admitted in evidence. She advised that the figure propounded on behalf of the claimant for the value of the claim was about £300,000, while the "floor" of the claim was £200,000 net. It was her advice that the payment into court of £150,000 should not be accepted, advice which the claimant accepted. The solicitors offered by letter of 26 March to accept £200,000 net of deductions, but the offer was rejected.

46. On 1 April 1998 the solicitors for the health authority wrote saying that Professor Saleh's earlier reports were agreed and that they would object to his being called to give oral evidence. The appellant directed, however, that Professor Saleh be asked to attend court so that he would be available to give evidence.

47. On 3 April 1998 the appellant received the defendant's skeleton argument, which now made it quite clear (paragraphs 4.3 and 14.1) that the question of causation of the claimant's residual pain and disability and his claim for consequential future loss were in issue. As Judge Geddes stated at paragraph 57 of his judgment, the appellant had been lulled by the counter-schedule of damages into a false belief that causation was no longer a significant issue in relation to the claimant's residual pain (cf paragraph 28 of Latham LJ's judgment in the Court of Appeal). It was therefore going to be necessary to obtain leave to adduce evidence to close this gap, as well as to establish the existence of the claimant's continuing pain and disability.

48. At the door of the court on 6 April 1998 the appellant was told by counsel for the health authority that the offer of £150,000 was still open for acceptance before the judge came into court, the authority being willing to waive payment of the costs of the hearings of 26 February and 6 March. The appellant discussed the matter further with the claimant and advised him that he would be better to proceed with the action. She was conscious that she still faced the hurdle of obtaining the judge's leave to adduce the medical evidence contained in Professor Saleh's third report, but took the view, based on her professional experience, that there was a better than 50:50 chance of succeeding in doing so. She reckoned that if she was not successful in the application and the

claimant was awarded a sum which did not reflect the claim for continuing disability and future loss, he would have the security of a cause of action against the solicitors for negligence in preparation of the case. He would also have that prospect open to him if he took the offer of £150,000, but she was of opinion that to rely on it contained difficulties and risks and was bound to involve long delays and much stress and worry for the claimant and his wife, so that it should be a course of last resort. It is not necessary for present purposes to explore the problems which would have been inherent in resorting to a negligence claim against the solicitors, but one obvious risk was that the solicitors would then have pleaded that the claimant should not have agreed to take the offer, but should have proceeded with the action, an issue whose resolution could have been a rather uncertain matter. The appellant accordingly concluded that it was in the claimant's best interests to press on with the application. She advised him that in her judgment he should beat the payment into court, though she told him that he could take the offer and avoid the risks if he so decided. The claimant decided to proceed and the parties went into court.

49. What appears clearly from the evidence given by the appellant in the present action is that although she bore in mind the possibility of his accepting the offer and claiming the balance of the value of the claim from the solicitors in a negligence action, she did not discuss this possibility with the claimant. She stated in evidence that the time to advise the client of this was if the action went wrong, ie if he was prevented from recovering the true value of his claim. This was the point on which the decision of the Court of Appeal turned.

50. When the preliminary discussion took place in court it became apparent after some little time that the appellant was unlikely to succeed in her application to adduce the further evidence of Professor Saleh. The judge rose for a time to read the papers, during which time discussion took place between counsel. The health authority was no longer willing to pay the sum previously offered of £150,000, but would only go to £120,000, less the costs incurred from the date of payment into court of that sum of £120,000. The shortfall involved in accepting this payment was considerable, subsequently estimated at £69,000, being the difference between the sum of £150,000 and the net sum eventually received by the claimant from the health authority. The immediate difficulty facing him and his counsel was that if he went ahead on the limited evidence which the court was willing to receive, the measure of damages would probably have been below £100,000, so leaving the claimant with an even lower net sum after payment of the heavy trial costs which would fall on him. The appellant accordingly

advised the claimant that he would have to take the best terms available and that he should accept the reduced offer. The claimant did so and the case against the health authority was settled on these terms.

51. The claimant commenced the present proceedings on 19 April 1999, and the action came on for trial before His Honour Judge Geddes, sitting as a High Court judge, who gave a written judgment on 4 July 2001. After reviewing the evidence in detail he held at paragraph 61 that the solicitors had been guilty of negligence in the conduct of the claim. This finding has not been the subject of challenge on appeal. He then considered the position of the appellant in paragraphs 63 to 65 of his judgment:

> "63. It was further argued that Ms Perry was negligent in not advising Mr Moy to accept the Health Authority's offer before trial of £150,000 and that had it not been for that negligence Mr Moy's losses would have been considerably less.
>
> 64. In deciding that issue I have to try and put myself into the position of Ms Perry at the time, and decide whether her advice fell outside the range of possible advice which reasonably competent counsel of her seniority and purported expertise could be expected to make. In my judgment it did not. Although others might have taken a different view of the likelihood of the success of her application, I do not think that it was wholly unrealistic for her to believe that the judge might have some sympathy for the plight in which Mr Moy had been placed by the failure of his legal advisers, and give leave for further evidence to be served (including that of causation) while adjourning the trial for this to be done. In reaching that conclusion I do not overlook the fact that there had been two previous unsuccessful applications to adduce further evidence and to adjourn the trial for that purpose. However it seems to me that the court on those occasions had not properly adjudicated on the merits and that there was therefore some ground for believing that the trial judge might come to a different conclusion. I accept Ms Perry's evidence that she had known courts to take an indulgent view in such circumstances, at least before the reforms to the Civil Procedure Rules. No prejudice to the Health Authority would apparently have been caused by such an

adjournment apart from costs, and they would no doubt have been ordered to be paid by the Claimant or his solicitors.

65. The advantages of success would have been considerable. Although Ms Perry could only take an educated guess at the value of the claim in the absence of the necessary evidence, there was no dispute that that value would almost certainly have exceeded £200,000 and that therefore settlement at the sum suggested would have resulted in a considerable loss to Mr Moy. The alternative was for Mr Moy to accept the sum on offer and then to sue his solicitors for the shortfall. Ms Perry considered that such a course should in the interests of her client be avoided if at all possible. On the other hand Ms Perry was aware that failure would not necessarily be fatal as Mr Moy would still be able to sue his legal advisers, albeit in those circumstances for a greater sum, as he has done by bringing this action.

Support for the view that Ms Perry appeared to those present at the time to have a reasonable chance of success in her application is provided by the fact that the Health Authority were prepared to continue with their offer of £150,000 (which exceeded the value of the Claimant's claim as it stood without the missing evidence) but reduced this to £120,000 when it was clear that the application was going to be unsuccessful."

52. The solicitors appealed to the Court of Appeal against that part of the judge's order by which he dismissed the claimant's claim against Miss Perry and the Part 20 claim against her. By a respondent's notice reliance was placed upon section 1(5) of the Civil Liability (Contribution) Act 1978 as barring the claim against Miss Perry.

53. The Court of Appeal (Brooke and Latham LJJ and Hart J) allowed the solicitors' appeal and held the appellant to have been negligent and liable for a proportion of the agreed damages payable to the claimant. The leading judgment was given by Latham LJ, who dismissed the argument based on the 1978 Act briefly, on grounds to which I shall return.

54. He examined the facts of the case in some detail and approved the test applied by the judge, whether or not the appellant's assessment

fell outside the range which reasonably competent counsel of her seniority and purported experience could be expected to have made. He concluded, after considering previous cases on extensions of time, that although the appellant's assessment of the chances of having Professor Saleh's further evidence "could be charitably described as sanguine", it was difficult for the Court of Appeal to say that the judge was wrong in holding that the assessment was not negligent.

55. Having so held, however, Latham LJ went on to hold that the appellant had been negligent in failing to give the claimant more detailed advice, related in particular to the prospects of getting in the essential further evidence. He said in paragraph 43 of his judgment that when the offer of £150,000 was made, the claimant

> "was entitled to a proper assessment of the prospects of obtaining more were the trial to proceed. The only proper advice that [the appellant] could have given in the light of her own assessment of the chances of persuading the court to give leave to adduce further evidence was that the chances were 50/50. He was not given that advice."

On this ground he held that the appellant had been in breach of her duty to the claimant, and followed up this conclusion by inferring that if he had been advised that the chances of getting in the evidence were 50/50 he would have decided to take the offer of £150,000.

56. Brooke LJ agreed with the reasons and conclusion of Latham LJ and added a discussion of several decided cases on failure to observe the rules in the CPR and to comply with "unless" orders. He specifically agreed at paragraph 65 with Latham LJ that it would be wrong to interfere with the judge's finding as to the quality of the appellant's assessment of the likelihood of being allowed to adduce the evidence at the trial. He nevertheless went on to say at paragraph 67, in a passage which is difficult to reconcile with his conclusion on liability:

> "It would be a disaster to the conduct of litigation in this country if an effect of the decision of the House of Lords in *Hall v Simons* is that advocates believe that they have to hedge their opinions about with 'ifs' and 'buts' in order to avoid an adverse finding of professional negligence. They are being paid to express their opinion, and if they assess

> their clients' prospects at 25 per cent, or 50-50, or 'strong', then that advice will usually suffice unless they are expressly invited to explain it. However, if they have fallen below the standard of care reasonably to be expected of them when formulating their opinion, whether their negligence relates to questions of fact or questions of law (including procedural law), they will now be as vulnerable to a finding of professional negligence as any other professional man or woman."

57. Hart J concurred in the result, but on the basis that he considered that the advice not to accept the offer of £150,000 was wrong and negligent.

58. Sir Sydney Kentridge QC for the appellant argued that the approach of the Court of Appeal was incorrect. If the appellant's assessment of the risk was not negligent, he submitted that it is difficult to understand how the advice based on it could be negligent. Both Latham LJ (paragraph 42) and Brooke LJ (paragraph 67) recognised that a client is entitled to have advice clearly stated rather than a dissertation on the respective advantages and disadvantages of different decisions. Latham LJ had also concluded in paragraph 42 that it was

> "preferable, if at all possible, to obtain full compensation from the Health Authority rather than to accept a lesser sum, on the basis that an action for negligence against [the solicitors] might make up the shortfall."

These factors logically led to the conclusion that since the appellant had correctly formed her assessment of the chances and given the claimant advice, based on that assessment, how to proceed, it could not be said that she was negligent in giving that advice. Moreover, Sir Sydney challenged the inference drawn by the Court of Appeal that the claimant would have decided to accept the £150,000 if more fully advised of the problems involved in getting the evidence in and the prospects of doing so. He drew attention to the statement at paragraph 42 of the skeleton argument in the Court of Appeal of counsel for the solicitors that "there is no dispute that the Claimant would have taken any advice given to him as to accepting the payment into Court."

59. In my opinion there is considerable force in the arguments advanced on behalf of the appellant. Your Lordships have held in *Arthur JS Hall & Co v Simons* [2002] 1 AC 615 that the public interest does not require advocates to be held immune from suit for the consequences of their negligence. But that interest does require that the application of the principle should not stifle advocates' independence of mind and action in the manner in which they conduct litigation and advise their clients. That also accords with common justice in a case such as the present. Latham LJ cited an apt passage from the speech of Lord Salmon in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at 231:

> "Lawyers are often faced with finely balanced problems. Diametrically opposed views may [be] and not infrequently are taken by barristers and indeed by judges, each of whom has exercised reasonable, and sometimes far more than reasonable, care and competence. The fact that one of them turns out to be wrong certainly does not mean that he had been negligent."

The same thought has been expressed in the Ontario High Court by Anderson J in *Karpenko v Paroian, Courey, Cohen & Houston* (1981) 117 DLR (3d) 383 at 397-8 in a passage which *mutatis mutandis* is material to the present issues:

> "What is relevant and material to the public interest is that an industrious and competent practitioner should not be unduly inhibited in making a decision to settle a case by the apprehension that some Judge, viewing the matter subsequently, with all the acuity of vision given by hindsight, and from the calm security of the Bench, may tell him that he should have done otherwise. To the decision to settle a lawyer brings all his talents and experience both recollected and existing somewhere below the level of the conscious mind, all his knowledge of the law and its processes. Not least he brings to it his hard-earned knowledge that the trial of a law-suit is costly, time-consuming and taxing for everyone involved and attended by a host of contingencies, foreseen and unforeseen. Upon all of this he must decide whether he should take what is available by way of settlement, or press on. I can think of few areas where the difficult question of what constitutes negligence, which gives rise to liability, and what at worst constitutes an error of

> judgment, which does not, is harder to answer. In my view it would be only in the case of some egregious error … that negligence would be found."

60. As Latham LJ acknowledged, the difficulties faced by an advocate who is advising on acceptance or rejection of a settlement are manifold and the pressures, especially if the advice has to be given at the door of the court, can be heavy. In such circumstances it would be surprising if every such piece of advice were reasoned with as much comprehensive precision as may be applied in hindsight by an appellate tribunal which has had the benefit of extensive argument and leisurely reflection. Since the decision in *Arthur JS Hall & Co v Simons* advocates have been liable to their clients for negligence in the same way as other professional persons. It would not be in the interests of those clients if they were compelled by the effect of over-prescriptive decisions to adopt a practice of defensive advocacy in the conduct of litigation or advising litigants about the course to be taken. I would endorse the view expressed by Brooke LJ in the Court of Appeal, to which I have already referred, that it would be unfortunate if they felt that they had to hedge their opinions about with qualifications. It would be equally unfortunate if another effect of the same syndrome were to be an abdication of responsibility for decisions relating to the conduct of litigation and a reluctance to give clients the advice which they require in their own best interests. Nor do I consider that to give clients a catalogue of every factor which might affect the course of action to be adopted, on the lines of that suggested in argument by Mr Livesey QC for the solicitors, would be a productive discharge of advocates' duty to give them proper advice.

61. The appellant was faced on the morning of trial on 6 April 1998 with a very difficult situation, not of her own making or that of the claimant. The decisions of the deputy district judge and circuit judge appear to have been largely driven by listing necessities and the need for enforcing a greater degree of efficiency and promptness on the part of practitioners. In the process the imperative of doing justice to the parties was subordinated, and the appellant may not unreasonably have felt that the trial judge would pay rather more regard to that imperative and be receptive to her application to be allowed to adduce the vital further evidence of Professor Saleh. The majority of the Court of Appeal recognised this in declining to interfere with Judge Geddes' assessment that the appellant was not to be held negligent in making her assessment of the prospects of success in the application. It must in my opinion follow by clear implication that, although they did not spell it out, they must also have accepted Judge Geddes' further finding that her

decision to advise the claimant to proceed with the action rather than accept the offer of £150,000 was not negligent.

62. I would for my part agree with Judge Geddes on both points. They cannot really be decided in isolation from each other, as the whole process was one of deciding whether or not to advise acceptance of the offer. The assessment of the prospects of success of the application was the key factor in reaching a conclusion, for if the claimant could be assured of that his course was obvious and the choice was easy. When the prospects of succeeding in the application had been determined – bearing in mind always that at this point the appellant still did not know how the trial judge would react to the application – she then had to pay regard to other possibilities and uncertainties. She was aware that the claimant would have a cause of action in negligence against the solicitors if he ended up with materially less than the proper value of his claim. This was his safety net if he went ahead with the action but the judge refused the application and he ended with a low award for lack of evidence supporting his claim for future loss. It would also have been possible to rely on bringing such a claim if he settled for £150,000, which was a significant undervalue. In both circumstances he would have been faced with the burden of proving that he would have succeeded in establishing his entitlement to the larger measure of damages if the solicitors had not been negligent in their handling of the action. It is not unlikely that if he had settled for the offer of £150,000, the wisdom of his taking that course would have been challenged in the subsequent proceedings. Any experienced advocate would know the difficulties of this type involved in a suit for professional negligence and would not lightly encourage a client to rely upon its complete success. One might well say in hindsight that the advice given by the appellant to proceed was a wrong decision, but I am not myself convinced that it was as mistaken a decision in all the circumstances as has been represented. The claimant had much to gain if the application succeeded, and the action would then have been relatively straightforward. He had the "safety net" if it failed, even though allowance had to be made for the inherent difficulties in a professional negligence action. Above all, there was a strong case to be made that it would be artificial and unjust, despite all the errors of omission, to deprive the claimant of the opportunity to adduce evidence which would make such a profound difference to the value of his claim. I therefore am in agreement with the conclusion reached by Judge Geddes that the advice fell within the range of that to be expected of reasonably competent counsel of the appellant's seniority and purported experience.

63. The majority of the Court of Appeal, having accepted Judge Geddes' finding that the appellant's assessment of the prospects of success of the application was not negligent, nevertheless went on to hold that she had been guilty of negligence in that she failed to give the claimant sufficiently detailed advice. Latham LJ, who dealt with this point at paragraph 43 of his judgment, expressed the view that the claimant should have been advised specifically that there was a problem about the admission of medical evidence to prove future loss and close any gap in proving causation, and the chances of success in obtaining leave to adduce that evidence. Brooke LJ agreed with the reasons given by Latham LJ, while Hart J, though concluding that the advice to proceed with the action was wrong and negligent, appears to have been of a similar view. I have great difficulty in accepting that if the appellant was not at fault in deciding to advise the claimant to proceed with the action, she was negligent in failing to spell out the considerations which led her to give that advice. It involves the proposition that the claimant would, if he had been apprised of those considerations, have decided to accept the offer of £150,000, rejecting the advice which ex hypothesi was properly given. It also involves accepting the inference that he would, as he now avers, have so decided once he knew of the difficulties.

64. The latter issue is analogous with those which arise in cases where it is claimed that medical practitioners have failed to give sufficient warning to patients of the consequences of treatment, which was itself carried out properly and without any negligence. In such cases the onus is upon the patients to prove that they would if properly warned have declined to undergo the treatment, one proposition which was accepted by all members of the Appellate Committee in the recent case of *Chester v Afshar* [2004] UKHL 41; [2004] 3 WLR 927. Such claims not infrequently founder upon this point, for although the claimants regularly assert that they would have refused the treatment if fully advised, those assertions are not always accepted. In the present case the solicitors would have to establish on the balance of probabilities that the claimant would have refused the offer if given more detailed information. The appellant's advice as to the claimant's recommended course of action would have been the same, whether or not she gave a fuller explanation of the underlying factors, and it seems to me more than a little questionable whether he would then have rejected the advice. The submissions to the Court of Appeal and the cross-examination of the appellant tend to support the suggestion that the claimant was very dependent on the appellant for advice and make it unlikely that he would have rejected it. If the appeal turned on this issue I should therefore be somewhat hesitant about agreeing that the claimant would have accepted the offer.

65. The appeal does not in my view turn upon this point, for I consider that it was not incumbent upon the appellant to spell out all her reasoning, so she was not in breach of her duty of care to the claimant in the advice which she gave. Brooke LJ adverted in paragraph 67 of his judgment, which I have quoted, to the unfortunate results which would follow if advocates felt compelled always to hedge their opinions. They are, as he stated, paid to express their opinions, but not necessarily their full reasons. Naturally one cannot lay down a hard and fast rule, for circumstances will vary infinitely, but I should be slow to hold advocates to blame in cases such as the present if they concentrated on giving clear and readily understood advice to their clients about the course of action they recommended. Specifically, in the circumstances in which the claimant and the appellant found themselves at the door of the court on 6 April 1998 I do not consider that the appellant was guilty of any negligence of commission or omission in the advice which she gave to the claimant.

66. This conclusion is sufficient to determine the appeal and makes it unnecessary to decide the issues of apportionment and the Court of Appeal's order as to costs. It is also strictly unnecessary to decide the issue of the applicability of section 1(5) of the Civil Liability (Contribution) Act 1978, but as it was fully argued before the House and the point may be raised in future cases I shall express my opinion shortly on it.

67. Section 1(5) provides as follows:

> "A judgment given in any action brought in any part of the United Kingdom by or on behalf of the person who suffered the damage in question against any person from whom contribution is sought under this section shall be conclusive in the proceedings for contribution as to any issue determined by that judgment in favour of the person from whom the contribution is sought."

It was argued on behalf of the appellant that the judgment given by Judge Geddes in her favour was by this provision made conclusive, so that it could not be challenged either in subsequent proceedings for contribution or by appeal in the action in which the judgment was given. I agree with the view expressed by Latham LJ in paragraph 10 of his judgment:

> "The purpose of the statutory provision is obvious. It is designed to ensure that a person is not exposed to the risks of further litigation after the issues have prima facie been resolved."

He went on to say that the same considerations do not apply where all the relevant parties were present at and took a full part in the trial of those issues. The appellant's counsel took issue with this last statement, contending that the provision was designed to make the judgment of the trial court final as far as the successful defendant was concerned and to remove the risk, not only of a subsequent contribution being brought against him, but of an appeal being brought against the judgment in his favour. He pointed out that until the enactment of the Law Reform (Married Women and Tortfeasors) Act 1935 there was no right of contribution between concurrent tortfeasors, and in granting such a right Parliament placed limits upon it in the interests of finality. The Civil Liability (Contribution) Act 1978 extended the right of contribution to some extent, but it remained limited, and section 1(5) was intended to set one of those limits. The judge had held that the appellant was not liable to the claimant and the solicitors, the co-defendants, had discharged in full the award made in the claimant's favour. That had brought about finality which should not be disturbed and section 1(5) should be given its natural meaning, that the judgment in the High Court was conclusive.

68. If the appellant's contention were correct, it would give rise to somewhat surprising results, which tend to support the proposition that this was not the meaning intended by Parliament in enacting section 1(5). In the first place, it would mean that in this situation the ordinary right of a litigant in the High Court to appeal to the Court of Appeal against an adverse decision would be barred, which one would not expect to find without very clear statutory provision. So long as the claimant is able to recover against the co-defendant found wholly to blame, he has no interest in bringing an appeal, so the co-defendant would be left with no redress if he was aggrieved by the judgment. Secondly, if the appellant had only been joined by the solicitors as a Part 20 defendant, but the plaintiff had not added her as a co-defendant, section 1(5) would not apply, since it was not an action "brought … by … the person who suffered the damage in question against any person from whom contribution is sought". The subsection would only apply if the latter is joined as a co-defendant, which would be a strange anomaly. Thirdly, the categorical statement of Goddard LJ in *Hanson v Wearmouth Coal Co Ltd* [1939] 3 All ER 47 at 55 has remained unchallenged until now and it is to be assumed that when the 1978 Act

was enacted Parliament was aware of the state of the law. In that case the trial judge found in favour of the first defendant, a coal company, and held the second defendant, a gas company, wholly to blame for the loss incurred by the plaintiff as the result of an explosion caused by a leakage of gas. The second defendant appealed, but the Court of Appeal upheld the judge's decision that the first defendant was wholly to blame. Goddard LJ said, however, at page 55:

> "It remains only to notice the argument of counsel for the coal company that, as the plaintiff did not appeal against the judgment entered for the coal company, the appeal of the gas company, in so far as it seeks to have them held liable for contribution, is incompetent. We cannot agree. The gas company were entitled at the trial, by reason of the provisions of the Law Reform (Married Women and Tortfeasors) Act, 1935, to show, if they could, that the coal company were liable in whole or in part for the accident so as to obtain the benefit of indemnity or contribution given by the Act. The duty of the court below was to decide on the rights of the parties at the date of the writ. The Court of Appeal must rehear the case and give the judgment which ought to have been given below, and, if the judgment below should have been that both defendants were liable, so that a right of contribution would arise, this court has power to enter judgment accordingly, even though the plaintiff be content with judgment against one defendant."

It would be surprising if Parliament intended to restrict this right of appeal, and no indication of such an intention is anywhere apparent, which tends to support the conclusion that section 1(5) of the 1978 Act was not intended to create a restriction of that nature.

69. In my opinion Goddard LJ's statement was good law at the time it was made, and there is every reason to interpret the 1978 Act in a way which brings one to the same conclusion. I note also that support for the solicitors' case on this issue may be found in some Australian and Hong Kong authorities, but I do not find it necessary to discuss these decisions, save to say that they all appear to be correct statements of the law applicable in the respective jurisdictions. I therefore conclude that section 1(5) of the 1978 Act should be so construed as not to bar an appeal in a case such as the present. This could be done in either or both of two ways. One could construe the word "judgment" as referring to a

final judgment after any appeals have been determined, rather than the judgment at first instance of the trial judge; or one could confine the operation of the subsection to actions for contribution subsequently brought, so excluding further proceedings by way of appeal in the original action. Whichever construction one adopts, I consider that the solicitors' right of appeal to the Court of Appeal was not barred by the operation of section 1(5).

70. For the reasons I have earlier given, however, I would allow the appeal from the order of the Court of Appeal and restore the order made by Judge Geddes, with costs to the appellant of the proceedings in the Court of Appeal and before this House.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

71. For the reasons given in the speeches of my noble and learned friends Lord Hope of Craighead, Baroness Hale of Richmond and Lord Carswell I too would allow this appeal and make the order proposed.