

ADVOCATES' ADVICE: MOY V PETTMAN SMITH

The recent decision of the House of Lords in *Moy v Pettman Smith* [2005] UKHL 7 concerns the standard expected of advocates and the level of detail which they must include in their advice to lay clients. The case has arguably raised the threshold at which advocates will be negligent above that established in *Arthur JS Hall v Simons* [2002] 1 AC 615. The case does not lay down any principles on what an advocate must say to have given sufficient advice, leaving guidelines to be worked out in future decisions. This article suggests some potentially relevant factors for future cases.

Summary of the facts

Mr Moy alleged that his barrister had negligently failed to give him sufficiently detailed advice in advising him on settlement. His original action, a claim against a health authority for negligent treatment, was plagued by difficulties in obtaining the appropriate medical evidence, largely due to the negligence of his solicitors, Pettman Smith. As a result, counsel required leave to have the appropriate evidence admitted. An application to adduce additional evidence was made, and failed, as did an appeal. Mr Moy proceeded to trial needing to have these rulings overturned in order to have the vital evidence admitted.

At the door of the court, the health authority advised that a settlement offer of £150,000 made earlier was still open. Counsel had previously advised Mr Moy that his claim was worth £200,000 - £300,000. She advised Mr Moy to continue with the action. She assessed her chances of having the necessary evidence admitted as 50:50, and took into consideration that if the claim failed for want of that evidence, Mr Moy would have the 'safety net' of an action against the solicitors in negligence. She also took into account that Mr Moy might be able to pursue the solicitors even if he accepted the offer of £150,000, but that it could then be argued later by the solicitors that he should have rejected the offer and proceeded with the action. In her judgment, it was better to proceed. Crucially, she did not tell Mr Moy that her advice was based on these considerations. She told him only that she was hopeful of the evidence being admitted, that the sum of £150,000 was still on offer, and that though she thought it would be better to proceed, the decision was his. Mr Moy accepted her advice to proceed. It soon became obvious that the evidence would not be admitted, and Mr Moy was forced to accept a reduced settlement offer of £120,000 less costs. He then sued the solicitors in negligence, and counsel was joined as a defendant.

The primary issue for the House of Lords was whether counsel was negligent in failing to advise Mr Moy of the considerations underpinning her advice given at the door of the court. Their Lordships therefore considered the standard expected of advocates (that is, those performing the functions of advocacy whether barristers or solicitors) in their conduct of cases.

Standard expected of advocates

The decision is notable as it illustrates that despite the abolition of immunity in *Hall v Simons*, cases in which advocates are sued successfully for their conduct of cases are likely to be rare, at least where the error is one of misjudgment rather than simple mistake. Most of an advocate's functions at trial can be characterised as an exercise of judgment.

Hall v Simons established that an advocate's duty is to exercise the skill and care of a reasonably competent member of the profession. Thus it was said that a mere error of judgment will not result in liability for negligence, and that a plaintiff will have to show that the error complained of was one which no reasonably competent member of the profession would have made. These statements were reiterated in *Moy* by Lord Hope of Craighead and Baroness Hale respectively. Lord Carswell cited *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 to the effect that because an advocate's view is wrong does not mean it is negligent.

Lord Carswell also cited, with apparent approval, a passage from *Karpenko v Paroian, Courey, Cohen & Houston* (1981) 117 DLR (3d) 383 at 397-8, a decision of the Ontario High Court. Referring to decisions to settle, Anderson J said:

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.

This arguably represents an increase in the threshold for negligence, as the standard of "egregious" error is higher than that established in *Hall v Simons*. Why this raising of the bar? The answer may lie in Lord Carswell's concern about the risk of defensive advocacy in a civil case, to which less weight was given in *Hall v Simons* (though of course a multiplicity of other factors also underlay that decision).

In *Moy*, Lord Carswell made it clear that it would not be in the interests of clients if advocates felt compelled to adopt a practice of defensive advocacy in conducting or advising about litigation. Thus he considered that it would be unfortunate if they felt they had to hedge their opinions about with qualifications, or abdicated their responsibility to give clients the advice they required in their best interests. Nor did His Lordship wish to encourage the giving of a catalogue of every factor influencing an advocate's advice.

However, in *Hall v Simons* Lord Steyn considered that the fear that unfounded actions for negligence would have a negative effect on advocates' conduct was "most flimsy" and "unsupported by empirical evidence". Lord Hoffman considered simply that the danger of defensive advocacy was that it would lead to prolixity, which the court could control by expressions of judicial disapprobation, exercise of powers in the Civil Procedure Rules and the sanction of wasted costs orders. Although Lord Hope of Craighead felt the risk of defensive advocacy to be real, his conclusions in this regard were confined to criminal trials.

The lesser weight given to the fear of defensive advocacy in *Hall v Simons* is consistent with the threshold established in that case for advocates' liability in negligence (more than "mere" error, an error which no reasonably competent advocate would make). It is not surprising that where concern about the effect of potential liability is greater, the threshold is set higher ("egregious" error). It is therefore possible that in subsequent cases, liability may depend on the level of concern felt about defensive advocacy.

It is also worth noting that the facts of *Moy* were described as "unusual" and "complicated". Perhaps on more straightforward facts the 'more than "mere" error' test would be preferred.

It is also interesting to note that in judging whether an advocate has fallen below the standard expected of reasonably competent counsel, the House of Lords indicated that judges should not simply apply the standard that they expected of themselves when they were at the Bar, as such a standard would vary from judge to judge and would be arbitrary. The implication was that expert evidence of the relevant standards should be provided.

As in medical cases, the reliance on expert evidence of the standards of the profession, rather than on an objective assessment of what the professional standard should be, effectively allows the profession to regulate itself. It has the advantage, however, of flexibility. Professional standards will change as practice changes, without any need for judicial pronouncement to bring a new standard into being.

What should an advocate say?

Their Lordships decided that counsel was not negligent in not explaining all the factors underpinning the advice she gave at the door of the court. It is clear that the decision was based on the heavy pressures of advising on settlement offers at the door of the court. In such circumstances, Lord Carswell declared that he would be slow to hold advocates to blame "if they concentrated on giving clear and readily understood advice to their clients about the cause of action which they recommended."

With the focus on the pressures on counsel, it is clear that where advocates have time for reflection or to take advice, the courts are likely to find negligence more readily. Advocates are frequently under pressure on other occasions, most notably from a heavy workload or difficult clients. However, it is unlikely that a court would consider that such pressures excused advocates from giving advice at a greater level of detail. This conclusion is supported by the standards expected of solicitors, who may also have to operate under heavy workloads and with difficult clients.

It seems likely that only factors closely associated with the pressure and immediacy of court appearances will suffice. In this way something of the old test for the scope of immunity may survive. (That test, taken from *Rees v Sinclair* [1974] 1 NZLR 180, was whether the work in question was conduct of the case in court or work so intimately connected with conduct of the case in court as to amount to a decision as to how it would be conducted at the hearing.) Even then it would be inappropriate if all such factors were taken into account. For example, pressure associated with a trial may be due to an advocate's own defaults in preparation. In addition, a certain amount of pressure is associated with the conduct of trials in general. It is not suggested in *Moy* that the usual stress and strain of a trial would justify giving less than full advice.

In *Moy*, Baroness Hale acknowledged that principles governing how much of their thinking advocates must explain to their clients are not yet developed. Her Ladyship considered that such principles may develop in the future, drawing an analogy with the gradual evolution of principles governing what doctors must explain to their patients. Those doctor-patient principles may provide some guidance in formulating principles for the giving of advocates' advice.

For obvious reasons, principles in cases involving doctors' advice will not be directly applicable to cases involving advocates' advice. Those cases where doctors are permitted to curtail their advice are generally based on a decision that it was in the patient's best interests to do so. There will be little scope for such paternalism in the

advocate-client relationship. In addition, a doctor's primary duty is to his or her patient, whereas an advocate's primary duty to the court may in some cases affect the advice given.

However, it is possible to speculate, on the basis of doctors' advice cases, that in deciding how full an explanation an advocate should give a client, the following principles may develop:

- the remoteness of risks is relevant to whether they should be warned of (*O'Malley-Williams v Board of Governors of the National Hospital for Nervous Diseases* (1985) 1 BMJ 635);
- advice should ordinarily be given of any significant risk which would affect the judgment of a reasonable client in deciding between courses of action (*Pearce v United Bristol Healthcare NHS Trust* [1999] PIQR P53);
- if a client asks about a risk, the advocate's duty is to give an honest answer (*Pearce*);
- the extent to which a client has invited the advocate to make technical or intricate decisions on his or her behalf will be relevant (*Smith v Auckland Hospital Board* [1964] NZLR 241);
- an advocate must take reasonable care to see that advice is adequate in scope, content and presentation and must take steps to see that it is understood (*Lybert v Warrington Health Authority* [1996] 7 Med LR 297).

In addition, Lord Carswell explicitly held that an analogy could be drawn with the medical negligence case *Chester v Afshar* [2004] UKHL 4, so that, where advice is not negligently given, to succeed in establishing negligence by virtue of a failure to give sufficient detail a client will have to show that if more detailed advice had been given, he or she would not have proceeded in accordance with the advice.

Cases involving solicitors' advice may also be relevant, particularly the decision in *Carradine Properties Ltd v DJ Freeman & Co* [1999] Lloyd's Rep PN 483 that the precise scope of the duty to advise depends, inter alia, on the extent to which a client requires advice - an inexperienced client may expect more than one who is experienced. The authors of *Jackson & Powell on Professional Negligence* (2002) state (at paragraph 10-158) that a solicitor has a duty to identify any matters which are or may be important to a client and bring them to his notice. A solicitor may reasonably decide not to burden the client with pure legal technicalities, and provided the gist of the information is explained, that should be sufficient. Thus an advocate may have to give a fuller explanation of advice to an inexperienced client, but may reasonably decide to leave out legal technicalities.

Conclusion

The House of Lords, properly and realistically, emphasised the dangers of hindsight bias when judging whether advice has been negligently given. Baroness Hale noted the existence of "a respectable body of professional opinion that the client pays for the advocate's opinion not her doubts." Lord Carswell considered that the advocate's duty is to give proper, not necessarily comprehensive, advice. Lord Hope of Craighead emphasised the need for the client to be able to make an informed judgment and stated that it will be the substance of the advice, not its precise wording, that will be relevant for a determination of negligence.

It may often be difficult for practitioners to decide what they need to say to give proper advice so that a client can make an informed judgment. But after the

decision in *Moy*, they can make those decisions knowing that their errors of judgment will not be treated too harshly.