

Eva Ferguson

Call year: 1999

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Eva specialises in professional negligence and liability (primarily solicitors but with experience of most other professions) and medical negligence work. Her early years in Chambers gave a solid grounding in commercial/civil litigation, especially contractual and commission disputes, employer's liability and personal injury.

As an advisor Eva prides herself on turning papers around promptly and being accessible whether by email, telephone or in conference. She provides a comprehensive and realistic assessment of the case and recognises that the sooner such advice is given, the better the value for money for the client.

Instructions range from major insurers to private individuals, with a 60:40 defendant/claimant split. Eva has been the junior on document heavy, multi-million pound litigation and appreciates the importance of teamwork, especially as regards the professional client.

Eva learnt long ago that the devil is in the detail and that cases are frequently won (or lost) on evidence buried deep within the files, or conspicuous by its absence, or in the seemingly illegible document. Whilst working hard to assimilate those details she does not believe that length of opinion is any substitute for analysis, and considers that factual mastery without legal understanding is akin to trusting MPs with expenses - pointless.

Eva appreciates that cases often end up in court when one party has failed to understand the important issues and the relative merits of their case. She increasingly observes that judicious use of pre-action correspondence and finely crafted pleadings (with offers of settlement where appropriate) can be invaluable in assisting that other party achieve such understanding and considers her role in drafting such paperwork to be of particular importance.

Recognising an area of increasing importance, Eva has recently joined the Chambers Costs Group.

Practice Profile

PROFESSIONAL LIABILITY

Lawyers

Eva has wide experience in all aspects of solicitors' negligence claims. She has advised in numerous **lost and/or mishandled litigation** claims. Whereas the latter provide plenty of scope for argument as to breach of duty and causation, Eva is alive to reducing the quantum of the former (seemingly more hopeless cases) by concentration upon loss of chance issues and on occasion joining in the ex-client's new solicitors for failing to take mitigating steps. Her experience of most forms of **incompetent conveyancing and property related disputes** has given a thorough understanding of quantum-related arguments and the potential for claiming contribution from valuers. At the time of her pupillage, **lenders' claims** cases were prevalent. Eva is now instructed in the second round of such litigation and anticipates that arguments arising from the securitisation process may offer new lines of defence, much as the equitable and fiduciary arguments did previously. A further fertile area of her practice is **wills and trusts** disputes. Eva is increasingly advising in cases requiring consideration of the duties owed, not only by advisors to the testator, but by advisors to the personal representatives and by professional administrators/executors/trustees and the remedies available to the estate and beneficiaries. Although Eva acts predominantly for Defendants she enjoys acting as poacher turned gamekeeper. For examples see below:

Lenders' claims:

- instructed with Paul Mitchell, Spike Charlwood and Mark Simpson QC in an ongoing high value claim. Defending solicitors in over 200 potential claims arising from 'sub prime' buy-to-let mortgage lending. The valuers are co-defendants;

Lost and mishandled litigation claims:

- numerous cases defending firms alleged to have failed to advise clients to settle earlier and/or on more favourable terms and/or failing to advise on costs exposure;
- acting for solicitors alleged to have negligently failed to advise that ancillary relief proceedings might preclude a personal injury claim by reason of abuse of process arguments;
- acting for solicitors alleged to have failed to adduce evidence in a criminal prosecution - issue as to application of collateral attack doctrine;
- advising solicitors alleged to have adopted unsuitable tactics in long running company dispute. Acting for clamant in claim that solicitors failed to advise on effect of a business sale agreement and related insolvency proceedings;
- acting for Insurers in claim against former solicitors for failure to compromise action on direct instruction;
- acting for solicitors alleged to have negligently failed to appeal case management directions, failed to advise correctly as to distinction between licensee and tenant for purposes of PEA 1977 and inadequately advised as to a claim for unlawful arrest - issues as to standard of duty;
- advising solicitors in lost personal injury actions where claim form not issued in time and where claim form issued against wrong party - both cases defended on basis there had been a break in causation/failure to mitigate because new solicitors had failed to apply for extension of time under section 33 and/or for substitution;
- acting for recruitment consultant company against solicitors where underlying commission claim struck out due to non-compliance with court orders and inadequate pleading - issue as to whether company had received any value for money;
- advising solicitors on quantum of claims where original action against builders for negligent construction and against mortgagee in possession for sale at an undervalue not issued in time - issue as to effect of contingency insurance policy on damages;
- advising solicitors in claim for £500,000 based on alleged failure to appeal in time the decision in medical negligence trial - issue as to whether chance had actually been lost;
- advising solicitors in claim for £40,000 due to failure to advise of Part 36 offer in underlying commercial dispute - issues as to causation and treatment of costs of counterclaim;
- junior in claim for £1m+ against solicitors where heads of loss in underlying personal injury action barred due to delay;
- acting for solicitors in claims that they negligently advised on offer of settlement in unfair dismissal claim and that they negligently failed to negotiate better settlement terms in underlying contractual action;
- advising solicitors alleged to have negligently agreed a consent order in ancillary relief proceedings and acting for solicitors alleged to have given inadequate advice on the Hague Convention;
- advising landowner on quantum of claim against grantee of option where solicitors failed to issue contribution proceedings in time;
- acting for claimants where solicitors repeatedly mishandled the underlying personal injury claim;

Conveyancing and property disputes:

- acting for solicitors in a £620k claim arising from the defendant's alleged negligent advice on the effect of an option clause;
- advising solicitors in additional claim brought by vendor, arising from dispute between purchaser and vendor involving allegations of misrepresentation and failure to disclose latent incumbrances. Issues as to limitation, duties owed to third parties and the duty of disclosure in conveyancing transactions. Settled at mediation;
- advised and pleaded defence to claim brought by elderly client that solicitors allowed sale of her property at an undervalue. Issue as to whether the sale was void or voidable and the effect on subsequent registration of mortgagee's charge impacting on causation of any loss. Claim withdrawn after service of defence and negotiations;
- advising solicitors in claim by mortgagee - alleged breach of warranty of authority in acting for the borrower (an impostor) and for failing to ascertain the identity of the vendor (another impostor);
- advising solicitors as to quantum of claim where they had failed to ascertain whether they had the authority of the co-owners of a property in completing the sale of it to third co-owner;
- acting for solicitors alleged to have failed to identify extent of property to be sold at auction and to have substituted plans upon

completion of transfer - issues as to specific performance and impact upon part 20 claim - 3 day trial;

- acting for claimant property developer where solicitors exchanged contracts without verifying financial situation and then failed to complete when mortgage situation unclear - issue as to degree of advice required;
- advising solicitors in claims involving alleged failure to advise properly on repairing responsibilities in sub-underlease/failure to include compensation clauses in commercial leases/failure to properly advise on break clauses - standard of care and extent of loss sustained;
- advising solicitors on alleged failure to renew statutory business tenancy - value of commercial leasehold;
- advising solicitors on recovery from client of monies they had to pay under their undertaking to the purchaser of property to discharge all mortgages prior to completion;
- acting for solicitors alleged to have failed to advise property developer that planning permission had expired prior to purchase and numerous cases involving failure to advise on absence of planning permission/building regulations consent/NHBC guarantees/listed building consent etc - various issues as to assessment of diminution in value of property, contribution from valuers, recoverability of loss of business profits and consequential losses ;
- advising solicitors in claim by house-owners that house sold by mortgagee in possession at an undervalue because of access issues which could have been rectified had the owners known of the proposed sale - deliberate concealment also alleged;
- acting for solicitors who negligently failed to advise residential purchaser on rights of access - whether measure of damages should be diminution in value or costs of rectification ;
- advising solicitors on failure to serve statutory leasehold notice - whether costs of subsequent litigation with landlord recoverable;

Wills, trusts and commercial disputes including:

- advised solicitors in complicated claim by executors, beneficiaries and trustees for £100K+ alleging increased liability to inheritance tax and capital gains tax arising from negligent estate planning advice given to testator. Daniels v Thompson issues as to whom any duty was owed and who had suffered the loss alleged;
- advising accountants alleged to have negligently exercised their powers of investment as professional trustees in claim by co-trustee and executor and beneficiary;
- advising beneficiaries as to potential claim against professional solicitor executor for failures in administration during the executor's year and increased exposure to inheritance tax - issue as to whom duty of care was owed and possibility of claim in devastavit;
- advising solicitors where failure to deal with consequences of annulment of bankruptcy alleged;
- acting for solicitors in claim that they had wrongly distributed monies held on trust by them pursuant to the sale of co-owned property under terms of consent order;
- advising solicitors in claim by trustees for loss of tax relief where solicitor alleged to have acted for the trustees, beneficiaries, and grantee of option under the will - issues as to assumption of duty of care to third parties and causation of loss;
- advising solicitors on failure to advise testator on need to sever joint tenancy and accrual of cause of action for limitation purposes;
- advising solicitors on liability and quantum where failure to administer estate timeously alleged;

Contribution and fraud claims including:

- junior for solicitors in £1m+ contribution claim brought by accountants against them and leading tax counsel arising from failed and allegedly fraudulent tax saving scheme involving multiple companies;
- advising solicitors whether to join leading counsel where right to appeal allegedly lost due to delay;

Defence of reliance on counsel including:

- acting for solicitors in claim based on alleged incorrect advice on prospects of appeal following criminal trial on legal aid;
- advising solicitors where original complicated action struck out at trial due to pleading;

Architects, surveyors and builders

Cases include:

- defending surveyors alleged to have failed to advise of risk of flooding;
- advising architects of hotel extension in claim for £1.1m on liability generally and limitation relating to consequential losses, effect of

arbitration and possibility of contribution from quantity surveyor;

- junior in large claim against architects and contractors resulting from a fire at a supermarket built under a D & B contract - issues concerned scope of duty of care and contractual obligations, accrual of causes of action and limitation;
- acting in various claims against builders and surveyors raising issues as to the correct measure of loss;

Insurers, Financial and others

Cases include:

- advising Insurer on claim to recover outlay arising from independent contractor's alleged negligence in failing to secure premises such that vandals caused fire;
- defending broker in part 20 claim for £370,000+ based on alleged non-notification leading to refusal of indemnity;
- advising Insurer on claim to recover outlay arising from fire caused by independent contractor of the Insured's neighbour;
- advising on construction of personal accident policy;
- advising security firm on refusal of cover due to late notification;
- advising accountants in claim for loss arising from negligent tax advice;
- acting for independent financial adviser in pension mis-selling claim;

Veterinary

- advising claimant in action against vet for failing to explain significance of previous double neurectomy and negligence in declaring horse fit for dressage following prior to purchase examination

MEDICAL NEGLIGENCE

Eva's medical negligence practice has developed over the past few years. In this field, more than any other, she understands the need to be sensitive to the emotional stress and upset that litigation brings, both for claimant and defendant clients. She is acutely aware of the disbelief and frustration experienced by claimants when breach of duty can be established but causation cannot. Consequently she aims at all times to be rigorous in her approach to the expert evidence whilst sympathetic to the client. Eva has acted mainly for claimants but is keen to expand her defendant work.

Further details appear below:

- acting for claimant alleging inappropriate dental treatment;
- various incidents of delay in diagnosis and/or referral by GPs (ie essential thrombocythaemia; non Hodgkin's lymphoma; cauda equine syndrome) - recurring issues as to inequality of arms where GPs have different insurers each wanting own legal team and own experts;
- failure by orthopaedic consultants to refer for immediate neurosurgeon opinion following disc prolapse resulting in cauda equina syndrome;
- misdiagnosis of optic nerve compression by tumour as optic neuritis;
- advising claimant on claim for premature birth possibly caused by RTA - application of *Fairchild v Glenhaven* principles;
- advising claimants in FAA cases on failure to diagnose penile cancer and failure to diagnose oesophageal cancer - causation issues;
- delay in diagnosis of colitis
- advising claimant on failure by consultant to advise of uncertainties in pioneering Endoscopic Laser Foraminoplasty surgery and failure to treat post-operative discitis;
- advising claimant on failure of private clinic to detect retained products of conception;
- advising claimant on failure by consultant to diagnose cholesteatoma;
- advising claimant on failure by consultant to advise on risks of AP resection surgery post *Chester v Afshar*;
- acting for claimants in cases of allegedly negligently performed surgery (from corrective squint surgery, circumcisions, to removal

of varicose veins and facial hair);

- acting for claimant in a case of incorrect diagnosis of testicular cancer leading to radical orchiectomy - liability and quantum issues - 2 day trial;
- defending allegations of post-operative mismanagement;
- defending allegation of failure to identify undisplaced fractures;

COMMERCIAL LITIGATION

Execution-only stockbrokers

Eva regularly defends a large execution-only stockbroker in claims (mainly brought by litigants in person) giving rise to numerous liability, mitigation, application of UCTA and UCCTR and quantum of loss issues, and acts in claims for recovery of unpaid commission and debts with related enforcement proceedings.

Most recently she defended a claim for £350,000 based on alleged failure of stockbroker to carry out instructions properly and is bringing a claim for monies lost by the customer short-selling in breach of the contract.

Estate agents

Eva advises and acts in claims for breach of agency agreements and unpaid commission (both for agents and vendors). She has argued at trial on the interrelation of the common law concept of 'effective cause' and statutory provisions for sole agency and is currently defending a claim concerning the construction of a joint sole agency agreement.

General experience includes:

- acting for local authority in contractual dispute arising from a profit share agreement. Issues as to whether partnership, or quasi-partnership formed and resultant, if any, fiduciary duties;
- defending NHS Trust in claim for monies due on basis of limitation. Issues as to whether there had been acknowledgement of debt due, and whether without prejudice correspondence can be relied upon;
- advising purchaser in claim by vendor for resulting trust and/or unpaid vendor's lien;
- advising on construction of various Insurance policies including personal accident policy, D & O policy, General Policy and condition precedents;
- defending possession proceedings on basis legal charge obtained by fraud;
- acting for security monitoring firm in multi-party £100,000 dispute as to responsibility for theft from commercial premises - issues as to duty of care in tort and extent of contractual responsibilities;
- advising motor insurance broker on breach of restrictive covenants by ex-employees, unlawful interference with trade and conspiracy;
- junior in large-scale multi-million pound IT dispute - alleged failure to implement new system timeously giving rise to repudiatory breach of contract issues - worked closely with accountancy experts in formulating and evidencing our case on quantum. Settled at trial;
- advising variously on the effect of clauses in leases and other contractual documents;
- advising and acting in sale of goods and supply of goods and services claims for breach of contract/misrepresentation by and against recruitment consultants/workmen/distributors/travel agents/stores - consideration of UCTA and UCCTR, consumer and travel regulations, right to reject etc;

PERSONAL INJURY AND EMPLOYER'S LIABILITY

Eva has wide-ranging advocacy and advisory experience for both claimants and defendants in **all aspects of personal injury** and claims of all value up to and over £1 million. She **frequently defends employers in accidents in the workplace claims** and is familiar with most of the regulations applicable to various workplaces. These cases often give rise to contribution issues between

sub-contractors and construction of indemnity clauses issues. More recently she has been involved with occupational disease claims (industrial deafness and asthma).

She enjoys the opportunity this work gives for getting into court and has written articles for the Solicitors Journal on dual vicarious liability, industrial deafness and payments into court.

Eva has appeared before the **CICA**, most recently on behalf of a nurse who faced the hurdle of establishing that an injury caused by a patient acting virtually as an automaton was '**a crime of violence**'.

LANDLORD AND TENANT

During her early years Eva acted for or advised landlords in numerous possession actions under various Acts including agricultural occupancies; landlords and tenants on the applicability of various statutory provisions (tenant's right of first refusal, creation of perpetually renewable leases); tenants on damages for breach of covenants to repair and landlords for dilapidations.

PROCEDURAL MATTERS

Eva is always alert to the possibility of taking advantage of procedural lapses by claimants when acting for defendants, and avoiding such situations when acting for claimants. In particular she is very familiar with all the case law on **relief from sanctions** and **service of the claim form** and recently successfully defended an application to strike out for (admittedly) invalid service on the basis that the defendant had waived its right to contest jurisdiction by failing to follow CPR r.11.

Strike out/summary judgment

Numerous applications to strike out/obtain summary judgment including:

- acting for management agents in multi-party dispute where claimant's settlement with co-defendant gave rise to release by accord and satisfaction;
- acting for solicitors where fraud and deliberate concealment alleged but insufficient particulars given;
- acting for solicitors where loss of opportunity to pursue unfair dismissal claimed but no case on causation pleaded;
- acting for property management company where tenant alleged negligent misstatement and malicious falsehood in the provision of information to the local authority;
- acting for bailiffs where negligence alleged in respect of goods damaged whilst in their custody;

Other applications include

- resisting on behalf of a London health authority an application for permission to apply for judicial review;
- solicitors' costs - opposing request for detailed assessment of solicitors' bill under s.70 SA 1974; seeking recovery of costs pursuant to ss.67, 69 and s.73 SA 1974 in ancillary relief proceedings; seeking recovery of costs under the Insolvency procedures;
- resisting application to lift automatic stay imposed by transitional provisions of the CPR;
- obtaining order setting aside joinder of solicitors into ancillary relief proceedings;
- applications for financial orders (setting aside winding up petitions; applications for charging orders and orders for sale; resisting litigant in person's appeals against costs orders);
- applications for specific disclosure;
- applications for interim payments;

OTHER TRIBUNALS

Eva has acted in mediations, round table discussions and coroner's inquests. She has also appeared before the RCN.

Further Information

Year of call: 1999 Middle Temple

Specialist areas: Professional Negligence, Medical Negligence

Education: B.A. History: First Class Honours - University of Durham, Hatfield College; Diploma in Law: Commendation - York College of Law; Postgraduate Diploma in Law: Very Competent - ICSL; Diplock Scholarship, Middle Temple (1998)

Committees: Member of PNBA and LCLCBA

Recent cases

GMAC-RFG v Watson & Brown - ongoing lender's claim. Instructed with Spike Charlwood, Paul Mitchell and Mark Simpson QC in defending solicitors in over 200 potential claims arising from 'sub prime' buy-to-let mortgage lending.

BKR Haines Watts (a firm) v (1) Rollit Farrell & Bladon (a firm) and Ors - settled second week of trial early 2007. Co-defending solicitors with tax counsel in large value contribution claim brought by accountants following a failed tax saving scheme claim. Patrick Lawrence QC leading.

Tesco plc v Costain & Others [2003] EWHC 1487. With Peter Coulson QC and Derek Holwill. A fire claim giving rise to preliminary issues on the accrual of causes of action, limitation and scope of duty against building contractors and architects.

Publications and lectures

Eva is a contributor to the online Lloyds Law Reports (PN) and writes occasionally for the Solicitors Journal

Eva has given the following talks:

Securitisation and lenders' claims - seminar for Chambers' clients (March 2009);

Scope of a solicitor's duty following Pickersgill v Riley - talk for the PNLA (2005);

Civil Procedure Update - seminar for P I Direct, London (2004);

Causation in light of Chester v Afshar - talk for Bond Pearce (2004);

Developments in Fatal Accident Act Damages, including damages for death of a single parent - seminar for Taylor Vinters, Cambridge (2004);

Part 20 Claims under the Civil Liability (Contribution) Act 1978 - seminar for selected solicitors and insurers on practicalities of such claims, problem areas and recent developments (2002);

Eva has written the following articles:

Blame the Boss: Viasystems and Dual Vicarious Liability - Solicitors Journal, 20.01.2006

Need Defendants ever pay in? - Solicitors Journal, 30.09.05, Vol 149 No 37

Health & Safety Focus: Deaf ears - the effect of *Harris v BRB [2005] EWCA Civ 900* on levels of exposure in industrial deafness claims - Solicitors Journal, 19.08.05

Personal info

Eva joined Chambers in October 2000 following pupillage here. Ever the optimist she believes that she will win (regularly) on the horses and will learn to appreciate the difference between a good white and a bad red! Apart from beating fellow members of chambers at chess Eva enjoys relaxing at the bridge table, perfecting (if that's the word) her tee-shot and playing guitar. She looks forward to developing her fledgling poker skills and in a fantasy world will travel the world on those winnings.
