OUTER HOUSE, COURT OF SESSION

[2025] CSOH 27

A37/22

OPINION OF LADY HALDANE

In the cause

AMIE MCCANN

Pursuer

against

HARPER MACLEOD

Defender

Pursuer: Di Rollo KC, McGregor KC; Digby Brown LLP
Defender: Paterson KC, K Tyre advocate; Kennedys

11 March 2025

Introduction

[1] The pursuer is Amie McCann. She has brought proceedings against the defender, which is a firm of solicitors, alleging professional negligence on their part. The pursuer and the defender entered into a contract for the provision of legal services. Those legal services took the form of the defender agreeing to act on behalf of the pursuer in connection with a claim arising from a road traffic accident. The negligence alleged, put very simply, is that the defender failed properly to investigate the claim and that notwithstanding that lack of investigation the pursuer was advised by the defender to accept an offer in settlement of her claim that was substantially below its' potential true value. She followed that advice and

compromised her claim and as a result it is contended that she has now lost the opportunity to negotiate a substantially better settlement, or to go to court and seek a significantly higher award of damages from the court.

[2] The case came before me for a discussion on the Procedure Roll at the instance of the defender. There were originally three broad areas of criticism of the pleadings, relating to causation, the lack of an expert report, and the averments on quantum. However as a result of discussion between the parties, the challenge relating to the lack of an expert report was not insisted upon, with the criticisms of quantum also said to be by this stage an "add on" rather than the substantive point in issue. The discussion therefore focussed to a large extent on the averments relating to causation.

Background

[3] In order to give context to the arguments advanced, it is necessary to understand a little about the original claim underlying the present case. On 24 August 2014 the pursuer was on a road in Beith when she was struck by vehicle driven by a Mr Johnstone. He failed to stop at the scene. She avers that she suffered significant and serious injuries, including orthopaedic injuries, and a head injury. A medical report instructed by the defender described those as "life changing injuries which have left her (the pursuer) with permanent disability". The report further advised that the pursuer's disability "will significantly compromise her in the long term to carry out any meaningful occupation."

[4] The pursuer instructed the defender to pursue a claim on her behalf in October 2014. A claim was intimated to the driver's insurers. In October 2016, an offer in settlement of £125,000 net of recoverable benefits was made. At that time the benefits amounted to approximately £25,000. The medical report referred to above was instructed in January 2017

and sent to the agent for the driver, a Mr Johnstone. In February 2017 the defenders' Ciaran Dougherty met with the pursuer and provided her with a copy of the aforementioned medical report. He advised her that there were difficulties in establishing liability and that contributory negligence might be between 60 and 90%. He thought the "best case" scenario on contributory negligence was 70% and suggested that implied a full valuation of the claim at between £500 - 800,000. A counter proposal in the sum of £200,000 was advised. The pursuer accepted that advice. A further offer was made by the agent for Mr Johnstone and his insurer in the sum of £168,224 net of recoverable benefits. Mr Dougherty advised the pursuer that the offer was a reasonable one. The pursuer accepted that advice and the offer in settlement of her claim. It is averred on the pursuer's behalf that at no point were full and proper investigations into the circumstances of the accident carried out by the defender, and nor was the quantum of her claim fully and properly investigated. The advice to settle on the terms offered was therefore, in all the circumstances, negligent.

Submissions for the defender

[5] Counsel for the defender, Mr Paterson, adopted his note of argument, subject to certain qualifications, as summarised in paragraph 2 above. The principal issue for determination therefore was whether the pursuer has averred a relevant case in causation. The defenders' position was that she had not, and so for that reason, the court should sustain the defenders' first plea-in-law and dismiss the action.

[6] Mr Paterson began by looking at what he submitted were the relevant legal principles as encapsulated in the judgment of the Supreme Court in *Perry* v *Raleys Solicitors* [2020} AC 352. The facts of *Perry* were not entirely on all fours with the present

case, arising as they did from an alleged failure to make a services claim upon a government compensation scheme for miners who had developed Vibration White Finger. However the Supreme Court confirmed the proper approach to be taken when claims involving loss of a chance are made. In summary, that to the extent that the question whether negligent advice had caused a claimant's loss depended on what the claimant would have done upon receipt of competent advice, this had to be proved by the claimant upon the balance of probabilities. To the extent that the question depended on what others would have done any loss would be determined on a loss of chance evaluation. Therefore, where negligent professional advice had caused the loss of an opportunity to institute a legal claim, the claimant would have to prove that, if competently advised, he or she would have taken any necessary steps required of him or her to convert the receipt of competent advice into some financial advantage to him or her, which was an essential element in the chain of causation.

[7] Mr Paterson relied in particular upon the following passages in the speech of Lord Briggs:

> "20. For present purposes the courts have developed a clear and commonsense dividing line between those matters which the client must prove, and those which may better be assessed upon the basis of the evaluation of a lost chance. To the extent (if at all) that the question whether the client would have been better off depends upon what the client would have done upon receipt of competent advice, this must be proved by the claimant upon the balance of probabilities. To the extent that the supposed beneficial outcome depends upon what others would have done, this depends upon a loss of chance evaluation.
>
> 21. This sensible, fair and practicable dividing line was laid down by the Court of Appeal in *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602, a decision which received surprisingly little attention in either of the courts below (although, in fairness, the trial judge cited another authority to similar effect: namely *Brown v KMR Services Ltd* [1995] 4 All ER 598). *Allied Maples* had made a corporate takeover of assets and businesses within the Gillow group of companies, during which it was negligently advised by the defendant solicitors in relation to seeking protection against contingent liabilities of subsidiaries within the vendor's group. Allied Maples would have been better off, competently advised, if, but only if: (a) it had raised the matter with Gillow and sought improved warranties and (b) Gillow

had responded by providing them. The Court of Appeal held that Allied Maples had to prove point (a) on a balance of probabilities, but that point (b) should be assessed upon the basis of loss of the chance that Gillow would have responded favourably. The Court of Appeal (Stuart-Smith, Hobhouse and Millett LJJ) were unanimous in that statement of legal principle, although they differed as to the outcome of its application to the facts. It was later approved by the House of Lords in *Gregg v Scott* [2005] 2 AC 176, at para 11 by Lord Nicholls of Birkenhead and para 83 by Lord Hoffmann.

22 The Allied Maples case was about the loss, due to negligence, of the opportunity to achieve a more favourable outcome in a negotiated transaction, rather than about the loss of an opportunity to institute a legal claim. But there is no sensible basis in principle for distinguishing between the two, and none was suggested in argument. In both cases the taking of some positive step by the client, once in receipt of competent advice, is an essential (although not necessarily sufficient) element in the chain of causation. In both cases the client will be best placed to assist the court with the question whether he would have taken the requisite initiating steps. He will not by the defendant's breach of duty be unfairly inhibited in proving at a trial against his advisor that he would have done so, save perhaps where there is an unusual combination of passage of time and scarcity of other probative material, beyond his own unaided recollection.

23. Two important consequences flow from the application of this balance of probabilities test to the question what the client would have done, in receipt of competent advice. The first is that it gives rise to an all or nothing outcome, in the usual way. If he proves upon the narrowest balance that he would have brought the relevant claim within time, the client suffers no discount in the value of the claim by reason of the substantial possibility that he might not have done so: see Stuart-Smith LJ in the Allied Maples case [1995] 1 WLR 1602, 1610. By the same token, if he fails, however narrowly, to prove that he would have taken the requisite initiating action, the client gets nothing on account of the less than 50% chance that he might have done so.

24, The second consequence flows directly from the first. Since success or failure in proving on the balance of probabilities that he would have taken the necessary initiating step is of such fundamental importance to the client's claim against his advisor, there is no reason in principle or in justice why either party to the negligence proceedings should be deprived of the full benefit of an adversarial trial of that issue. If it can be fairly tried (which this principle assumes) then it must be properly tried. And if (as in this case) the answer to the question whether the client would, properly advised, have taken the requisite initiating step may be illuminated by reference to facts which, if disputed, would have fallen to be investigated in the underlying claim, this cannot of itself be a good reason not to subject them to the forensic rigour of a trial. As will appear, this has an important bearing on the extent of the general rule that, for the purpose of evaluating the loss of a chance, the court does not undertake a trial within a trial".

[8] From that analysis, Mr Paterson drew three propositions:

- One does not depart from the basic requirement that the pursuer must prove his or her loss has been caused by the alleged breach of duty;
- It is for the pursuer to aver and prove what she would have done once in receipt of competent advice; and
- It is axiomatic that as a component part thereof the pursuer must aver and prove the competent advice that she ought to have received and upon which she would have acted.

[9] Lest there be any doubt about those propositions, Mr Paterson submitted, that approach was the one adopted in this jurisdiction a number of years before the decision in *Perry* in the case of *Kyle* v *P&J Stormonth Darling* WS 1993 SC 57. There the pertinent observations of the court (Lord McCluskey, Lord Brand and Lord Weir) are to be found at page 67:

> "In our opinion, the correct view of the law of Scotland in relation to a claim by a person who, as a litigant, has lost the right to pursue some legal right in a litigation, the loss resulting from negligence on the part of his legal advisers, is to be found in the opinion of Lord Avonside in *Yeoman*, to which we will return. But before turning to the particular circumstances of this case as they emerge in the pleadings, we should say something about the principles that govern ordinary claims for damages in the law of negligence of Scotland. In such cases, the pursuer claims that a negligent act has caused him to sustain loss, injury and damage. He has to aver, and establish, (a) the negligent act, (b) loss, injury and damage, and (c) that that act caused the loss, injury and damage complained of.
>
> The burden of proof rests upon him in relation to each of these three elements; and, under our system of pleading, he must aver each element with a degree of specification of detail that gives the alleged wrongdoer fair notice of the facts which the pursuer intends to prove relating to each element. In these respects, the rules governing claims based on breach of contract or on both such breach and on negligence are not materially different.
> […]
> If the same analysis is made of the present type of case where, as a result of his solicitor's negligence in failing to take a peremptory step timeously, a litigant or would-be litigant loses the right to advance in court against a third party a claim that

> he would otherwise have been able to advance, the same three elements are present. The negligent act consists of the agent's neglect to take the peremptory step timeously. The loss consists of the inability to pursue the claim thereafter.
>
> The causal link between the act and the loss presents little problem in such a case. However, when it comes to a closer consideration of the loss itself it must be clearly recognised that the solicitor's negligence has not caused the would-be litigant to lose his claim against the third party; it has caused him to lose only the right to advance that claim in a court of law. Accordingly, in assessing the monetary value of what has been lost, the court has to ask two questions: (1) Did the right to advance the claim have any tangible value at all at the time when it was lost? (2) If it did, how can that value be assessed? Obviously, if the right to advance the claim had no value at all at the time of the negligent act, then the would-be litigant would not be entitled to an award against the negligent solicitor: having lost nothing he would not be entitled to compensation for any loss. If, however, the right to advance the claim did have a tangible value then the court would have to assess that value on the basis of the material placed in evidence before the court. Factors that may be taken into account in arriving at the monetary value of the loss may well include any factor that would have been directly relevant to the assessment of the value of the original claim now lost against the third party, the hypothetical prospects of success in the litigation in which that claim was to be pursued, and the lost possibilities of a compromise settlement with the third party in the now lost litigation."

The court continued at p 69G - 70B,

> "The criticisms of the specifications were, in the particular circumstances of this case, misconceived. In addition to what is already averred, counsel for the reclaimers suggested that the pursuer should also have condescended upon (a) the mechanics of how a compromise might have been reached and (b) the terms on which the opposing party in the original litigation would have been prepared to settle. In our view, the first is unnecessary and the second is virtually impossible. It cannot be suggested that it would be necessary for those acting for the present pursuer to precognosce his original opponent, the solicitors and counsel for the original opponent, and endeavour to obtain their current views as to the terms that might have tempted them to decide that a compromise settlement would have been in Mr Harvey's best interests. That would be an absurd exercise, yet, without it, the averments desiderated as to the potentially acceptable terms could not properly be made. The responsibility will rest upon the court in the light of all the facts established before it, including, in this case, the terms of the interlocutors of the sheriff and sheriff principal and the observations thereon in the note by counsel which forms part of the pleadings, to determine if a compromise could have been achieved and, if so, upon what terms. In our view, the pleadings are adequate to enable the parties to lay before the court material upon which the court can properly be invited to make that judgment. Of course, if insufficient material is laid before the judge who hears the proof, then the person on whom the onus lies in relation to the matter at issue will fail in relation to that matter."

[10] In summary, Mr Paterson submitted that in order to plead a relevant case there must be firstly averments of causation which explain how the negligence alleged has caused the loss complained of, and secondly those averments must be averred with sufficient specificity to give fair notice of the case that the defender required to meet. In the present case the pursuer's pleadings were missing the "connective tissue" between the averments of breach of duty, and the averments of loss.

[11] Applying that legal framework to the pleadings in the present case. Mr Paterson accepted that the factual averments set out in statement 4 of the Record were sufficient to allow the inference to be drawn that the pursuer was offering to prove that the driver of the car, Mr Johnstone, was responsible for the accident, although he observed that there was no express averment to that effect. However in statement 5 the pursuer set out criticisms of steps taken (as well as those not taken) by the defenders and in particular their solicitor Ciaran Dougherty. It is then averred on page 7, letter C/D, that:

> "No ordinarily competent solicitor exercising reasonable care and skill would have failed to instruct such reports or advise the pursuer of changes affecting the value of her claim. Had the claim in terms of both liability and quantum been properly investigated, it is likely that the pursuer would have negotiated an increased pre-litigation settlement failing which she would have raised proceedings at the Court of Session. In those circumstances, it is likely that the pursuer would have negotiated an increased judicial settlement or alternatively that the Court would have awarded damages far more than the sum she did in fact settle at. As a result of the defenders' failures, the pursuer lost the opportunity to advance her claim reflecting the full nature and extent of her loss, injury and damage. As a result, the pursuer has suffered loss and damage as hereinafter condescended upon."

The difficulty with those averments was two-fold, contended Mr Paterson - firstly that in a loss of a chance claim quantum is assessed on the basis of the value of the lost right, and it was wrong therefore to advance such a claim on what bore to be a balance of probabilities basis. Secondly the pursuer did not explain what the proper investigation of the claim in terms of liability would have shown, nor what advice the pursuer would have received on

that issue, relative to the advice Mr Dougherty did in fact give on the question of liability and contributory negligence. That was a criticism different to the one made by the defender, and rejected by the Inner House in *Kyle*, and similarly a different criticism to the one made by the defender and rejected in the recent Outer House case of *Darknell-King* v *Slater and Gordon* [2024] CSOH 100.

[12] In the case of *Darknell-King*, the alleged negligence was a failure on the part of the defenders to advise the pursuer, then a police constable serving with South Wales police, that she might have a claim, and to institute such, against the police force arising out of injuries suffered by her when sent by them on a diving course in Scotland. She thus lost the opportunity to negotiate an advantageous settlement with the force. The criticism of her pleadings were summarised by the Lord Ordinary (Sandison) as follows:

> "[22] Finally, counsel turned to criticise the pursuer's averments as to the causation of her loss. Her claim was now only for the loss of the chance of securing a negotiated settlement. There were well-known and settled pleading requirements in a case concerning loss of a chance. The chance in question required to cross a threshold of materiality. That required pleading. Such a case also required specific averment of what the contingencies were. Different approaches were taken to issues which depended on what the pursuer would have done compared to issues which depended on what a third party would have done: *Centenary 6 Limited v TLT LLP* [2024] CSIH 29, 2024 SLT 1106 at [68] and [69] and the further authorities there cited. The pursuer made no attempt to set out the counterfactual scenario she maintained would have been the consequence of the advice she claimed the solicitors' defenders should have given. The case could not succeed without proof of these matters and there could be no proof without averment".

However, at paragraph 35, the Lord Ordinary concluded:

> "[35] The abstract relevancy of the pursuer's claim to have suffered loss in consequence of a lost opportunity to negotiate a settlement with the Chief Constable of South Wales Police is not disputed; the complaint is essentially one of a lack of specification as to what the pursuer proposes to prove about the incidents and timing of the hypothetical negotiation I question. Although this case is not entirely on all fours with *Kyle v P & J Stormonth Darling*WS, where the pursuer claimed the loss of a chance in litigation as opposed to the loss of chance in negotiation, at least some of the observations made by the court in that case comfortably read over into

> the present context (His Lordship then sets out the passage from *Kyle*, quoted at the end of paragraph 9 above)"

and concluded:

> "The court's observations about what it considered respectively to be unnecessary and virtually impossible apply to the demands for further specification made in the present case. The solicitor defenders' pleadings set out at length - and their counsel repeated orally in argument - the difficulties, which they estimate as likely and formidable, which may attend the pursuer's attempt to establish that she lost, by way of the defenders' claimed negligence, something of tangible and ascertainable value. The last sentence in the passage just quoted from *Kyle* deals with how the court will require to approach any such difficulties as manifest themselves in the course of the proof. The pursuer's pleadings are, for the reasons set out in *Kyle*, adequate to justify the allowance of such a proof."

[13] Drawing all these strands together, Mr Paterson sought to distinguish the complaint made by the defenders in the present case from that made in both *Kyle* and *Darknell-King* by submitting that the difficulty in the present case arose because the pursuer did not aver in a non-negligent scenario the advice that she ought to have received nor that she would have followed that advice. That mattered because the court was not bound to determine causation as a loss of a chance, rather it would depend on which of the two categories described in *Perry* the present case fell. The steps that the pursuer would have taken were not to be based on the loss of a chance principles but on the balance of probabilities. There was an absence of essential pleading in the pursuer's case. If that were accepted, then the pursuer had not averred a relevant case and the action fell to be dismissed.

[14] Mr Paterson ultimately touched only briefly on the averments of quantum, accepting that the pursuer did aver what the potential value of her claim might have been but he suggested it was not easy to discern on what basis the sum concluded for in the Summons was put forward.

Submissions for the pursuer

[15] Mr Di Rollo invited the court to allow a Proof before Answer of his averments. He adopted his note of argument with one caveat related to his expression of the relevant test in paragraph 5, where it was stated that the pursuer must show, on a balance of probabilities, that if she had received competent advice, she would have settled her claim for a reasonable sum. That did not reflect his positon and he would seek to formulate that proposition differently in the course of submissions. Otherwise, Mr Di Rollo contended, his note of argument anticipated the approach that had been taken by the Lord Ordinary in the case of *Darknell-King*, although the note had been drafted some 4 months before that decision had been issued. That case properly encapsulated the approach to be taken in a case of this kind.

[16] Mr Di Rollo contended that the pursuer made it entirely clear in her pleadings that she would have succeeded in establishing breach of duty in the original action, and the basis upon which she would have established the responsibility of the driver of the vehicle in question. He noted that the defender made no positive averment to the contrary, and that there were no averments raising the question of contributory negligence. That, he suggested set the context for the claim on liability which had been lost to the pursuer.

[17] This was a claim for a loss of a chance, therefore the pursuer was in the second limb of the *Allied Maples* test, that is to say the question for the court would be what the actions of a third party would be, whether that be the putative insurer or the court itself, if a compromise had not been achieved. There would not be a re-litigation of the case, but the court would need to assess a reasonable award and the notional value of the original claim would be a reference point. An assessment would then need to be carried out of the difference between the notional reasonable award and the amount already received by the pursuer. The point that the defender had not engaged with, was that the question was not

what advice the pursuer should have been given, rather the key allegation was that she had been advised to compromise the claim at a figure at which she should not have compromised. Despite not having investigated liability or quantum the solicitor had tendered advice to the pursuer that the offer made was a reasonable one. What could clearly be seen was that the pursuer was a person who took advice tendered to her. Here, having been told that the offer was a reasonable one, she took that advice. The defender contended in answer 5 that the offer was a reasonable one. There was no requirement for a "counterfactual" scenario in a case like the present.

[18] Such an approach was entirely consistent with *Yeoman* v *Ferries* 1967 SC 255. There, in a claim by a painter whose claim for injuries suffered at work had been allowed to time bar through the negligence of his solicitor, Lord Avonside made clear at pages 260-261 that the proper approach is not simply to re-litigate the original action and award damages (or not) based on the hypothetical outcome of the case. He went on to summarise the proper approach at page 264 in the following way:

> "Where a solicitor has been negligent, in a case like the present, he has, in my opinion, been guilty of depriving his client of a right, the right legitimately to press a claim for damages. I consider it would be grossly unjust to that client to say that that right had no value because, years after it should have been pressed, if necessary, to action and trial, it was held that the action of the pursuer failed at a time when, and in a court in which, it would not have been judged, but for the negligence of the solicitor concerned.
>
> In my opinion, it cannot be said that the pursuer would have failed in his action and, on balance, I think the odds are that a jury would have given him a verdict. In addition, and apart from that, I am of opinion that the employer would have been advised to make an offer, and that not a derisory or 'nuisance value' offer, in the circumstances I have outlined. I am at a loss to see why, in the appropriate case, that factor should not be taken into account. As Lord Strachan pointed out in *Robertson* v*Bannigan*, it is a matter of judicial knowledge that it is very usual for reparation actions to be settled before trial, and, it might be added, more are settled than go to trial. I would respectfully agree with him, and this seems to accord with what was said in Kitchen, that this is a matter of real and definable value to an intending pursuer and that he may well recover something in settlement, although

> he might not have succeeded had a trial gone on. I do not accede to the argument pressed on me that all those are inadmissible speculations incapable of proof in a legal sense. I consider that a judge in a case of this kind, having heard the evidence available to him, is entitled to draw on his own experience in a field in which probabilities are open to decision and practice within knowledge. The purported application of narrow limits of legalistic rectitude to preserve a solicitor from the consequences of his admitted negligence is at once distasteful in suggestion and unjust in result. I see no difficulty in a judge coming to a proper decision on all the facts and circumstances of the case, insofar as those lie within the field of the test of probability."

[19] This was exactly the approach explicitly endorse by the Inner House in *Kyle*. In the present case, the negligent act consisted of the pursuer being advised to accept an offer, and her loss arose from her being unable to proceed with her claim because she has now compromised it. This was exactly the scenario envisaged in *Kyle* at page 69A/B where the court stated:

> "That is a different situation from one in which a litigant has, through the solicitor's carelessness, lost the right to advance some legal claim. If it can be shown that at the time when it was lost the claim had a value, then there is both *injuria* and *damnum* and the only remaining issue is the potentially difficult one of assessing what is the true measure of the loss".

[20] In the present case the pursuer was offering to prove that the claim did have a value. Therefore in a case of this kind once the pursuer has established that there was negligence, thereafter the question of causation becomes a matter for the court. The negligence in the present case was not a failure to give advice, rather it was the giving of positive advice that resulted in settlement of the claim at a figure that was substantially below what the case was worth. It was not incumbent upon the pursuer to aver what she would have done in receipt of competent advice. The course desiderated by the defenders required the pursuer to aver not just that she should not have been told to settle, but what advice would have been given had a better offer been made or had she not been given negligent advice. That was not the proper approach in the context of a claim based on loss of a chance.

[21] Mr Di Rollo acknowledged the criticism made of the use of the phrase "it is likely" in the averments setting out what ought to have happened absent the allegedly negligent advice to settle as suggesting a balance of probabilities test, but submitted that such was an overly technical criticism and that it was clear that what was being averred was the loss of the chance, which was not assessed on the basis of a balance of probabilities. Rather the court would determine what the prospects would have been, applying its own knowledge of the court system and practice in the same way as Lord Avonside had done in *Yeoman*, the Inner House had confirmed in *Kyle*, and as had been accepted by the Lord Ordinary in *Darknell-King* at paragraph 36.

[22] The pursuer was offering to prove a relatively straightforward case - that she had been extremely badly injured, sustaining life changing injuries, that she had a claim which looked "very good on paper", and that her averments demonstrated that (a) the accident was caused by the fault of the named driver, and (b) the nature and extent of the injuries suffered as a consequence. Her pleadings offered fair notice of all relevant matters. In addition, although not required to do so at this stage, the pursuer had prepared a valuation supported by relevant vouching and this had been disclosed to the defenders. There was thus adequate in the pleadings, supported by a valuation and vouchings, to give fair notice to the defenders what the potential value of the claim might be.

[23] Although the defenders no longer insisted on an argument based on a lack of expert report, Mr Di Rollo nevertheless touched briefly on that aspect of matters, under reference to *Cockburn* v *Hope* [2024] SLT 1089 and *D* v *Victim Support Scotland* 2018 SLT (Sh Ct) 91 to suggest that an expert report would not in any event have been required, as in a case like the present, the assessment was all one for the court to make.

[24] In summary, Mr Di Rollo submitted that the pursuer had sufficiently averred that she has been deprived of her right of action by being given negligent advice to settle the case, and that if the court accepted that contention then it would have to value the loss of chance suffered by the pursuer and would do so by applying well established principles set out by Lord Avonside in Yeoman, as approved in *Kyle* v *P&J Stormonth Darling*. In concluding with the assistance of a visual aid to underline his point, Mr Di Rollo produced a copy of the Session papers containing the pleadings in *Yeoman* v *Ferries* - the short point being made was that there was very little by way of averment at all in that case, and nothing of the sort of specification desiderated by the defenders in the present matter, and yet the court was well able to carry out its task of evaluation of the worth of the chance lost to the pursuer in that case.

Analysis and decision

[25] In common with the position in the recent decision in *Darknell King* v *Slater and Gordon*, the complaint in the present case is not directed at the fundamental relevancy of the pursuer's claim, rather it is focussed on what is said to be a lack of averments linking the alleged breach of duty with the loss said to have been sustained. The defenders contend that the template for the proper approach is to be found in *Perry* v *Raleys solicitors* (as recently approved and applied in this jurisdiction in *Centenary 6 Ltd* v *TLT LLP* [2024] CSIH 13 at paragraph 66). Specifically, that the pursuer requires to aver, firstly, what is the counterfactual scenario assuming non-negligent advice had been given, tested on a balance of probabilities, and thereafter what the loss arising is said to be, evaluated as a loss of a chance. It is argued that the pursuer fails to do the former, and pleads the latter on the wrong basis.

[26] The question of whether or not the two limbed approach set out in *Perry* v *Raleys* (essentially confirming the earlier dicta in *Allied Maples* on this issue) is applicable either separately or cumulatively is of course fact sensitive. The court in *Perry* explains that pleadings setting out what the claimant would have done if given competent advice are required in a scenario where the claimant has lost the right to institute a claim. Lord Briggs states at paragraph 20:

> "**To the extent (if at all)** that the question whether the client would have been better off depends upon what the client would have done upon receipt of competent advice, this must be proved by the claimant upon the balance of probabilities. To the extent that the supposed beneficial outcome depends upon what others would have done, this depends upon a loss of chance evaluation."
> (Emphasis added)

[27] Lord Briggs therefore recognises that it will not always be the case that both limbs will require to be fulfilled in every case. He goes on to confirm that there is no reason to distinguish the scenario in *Perry* from the one in *Allied Maples* where the negligence consisted of failing to advise the claimant about a point that should have been raised in negotiation. That of course makes perfect sense; the claimant has to prove, in a scenario where a claim has not been instituted timeously, and based on longstanding principles requiring proof of loss linked to a breach of duty, that had the correct advice been given he or she would have followed that advice, thus engaging an enquiry into the potential value of that loss of the chance to institute proceedings or negotiate on a better footing. The scenario in both *Perry* and *Allied Maples* of course related to a failure to give advice on a cause of action, or line to be taken in negotiation, at all.

[28] In the present case the underlying alleged failure is slightly different. Here the pursuer is not suggesting that the defenders failed to give her advice in relation to instituting an action, rather it is said that the positive advice that was tendered following

intimation of her claim was negligent. In taking that advice the pursuer settled her claim at considerably undervalue and has now lost the chance of securing a better settlement, or award of damages. That is a different scenario from the one in *Perry*, and begs the question as to whether it is truly incumbent upon the pursuer in a case such as the present one, to plead in terms, as a matter of fair notice, (a) what advice ought to have been tendered in respect of liability, contributory negligence and quantum, (b) that the defenders ought to have advised her not to accept the offer made on the basis that it was inadequate, and (c) that she would have accepted that advice.

[29] In addressing that question it is worth observing that in the recent case of *Darknell-King*, in which reliance was placed upon the decision in *Centenary 6 Ltd* and paragraph 68 in particular, the factual scenario was, to an extent, closer to that of *Perry* v *Raleys*, than the present case. That is to say that the allegation was that due to allegedly negligent advice relating to the prospects of success of her claim, the pursuer was deprived of the right to intimate proceedings to South Wales police at all. And yet in that case the Lord Ordinary did not find it necessary, as a matter of specification or fair notice, that the pursuer required to plead the counter factual situation had competent advice been tendered in order to be entitled to a Proof before Answer of her averments relating to the lost chance of raising proceedings.

[30] Therefore, bearing in mind the words of Lord Briggs, the proper approach is to consider the extent, if at all, to which the pursuer's losses depend on steps she would have taken, as opposed to what a third party (the insurer of the driver, or the court) would have done. She pleads that no ordinarily competent solicitor would have advised her that the sum offered in settlement was reasonable, and that the defenders knew or ought to have known that she was likely to follow the advice they provided. She further offers to prove

that had a claim in terms of both liability and quantum been properly investigated it is likely that the pursuer would have negotiated an increased pre-litigation settlement failing which she would have raised proceedings at the Court of Session, and that she would have received an award of damages in a sum greater than she did in fact receive. On those averments, the claim sits more easily on the "what a third party would have done" or "loss of a chance" side of the line rather than in the first limb described by Lord Briggs, being a scenario where the loss is dependent on what the pursuer would have done. Specifically, her loss is essentially predicated on what either an insurer or the court would have done, rather than depending more on what she would or would not have done. It is tempting to regard the "dividing line" described in *Perry* as a bright and immutable one. Such would not reflect the reality of the factual background to many litigations that are often less than binary. One might have a scenario where both limbs of the *Perry* test are relevant, although it is clear from the language employed by Lord Briggs that he, at least, did not regard it as inevitable that both limbs required to be addressed in every case.

[31] It does not seem to me that the pleadings in the present case, looked at fairly, instruct a case based on anything other than traditional "loss of a chance" principles. That said, the averments summarised above, and to be found in statement 6, are sufficient, for the purposes of proof, to lay the ground for the proposition that competent advice - meaning that the offer made in settlement was insufficient having regard to the chances of establishing breach of duty and the nature of the injuries suffered - would have been accepted by the pursuer.

[32] Separately, the defender is critical of the use of the phrase "it is likely" on more than one occasion, in the pleadings setting out the chance that has been lost. There is no doubt that such language is more readily associated with an approach based on a balance of

probabilities test. However, Mr Di Rollo was explicit in his submissions that the pursuer is squarely in the "second limb" of the *Allied Maples*/*Perry* test and, as indicated above, that submission is consistent with a fair reading of the whole of the pleadings. Therefore the linguistic infelicity identified, though perhaps unfortunate, would not be sufficient on its own to withhold the case from proof.

[33] In conclusion, in a case such as this one, based squarely on the loss of a chance to secure a better result, assuming the pursuer can satisfy the court that her loss had a tangible value, then it will be for the court to assess what that value might be (*Yeoman, Kyle*). However, the requirements of pleading such a case, assuming there are the requisite averments linking breach of duty and loss, are not onerous. A counterfactual set of averments is not a pre-requisite in every case (*Perry, Darknell-King*) either as a matter of relevancy or fair notice. The defenders seek to suggest that the criticisms made in the present case are conceptually different from those made in *Kyle* or *Darknell-King*. I am unable to discern a meaningful difference between the criticisms made of the pleadings in the latter case in particular, and as recorded by the Lord Ordinary, and those made of the pleadings in the present case. In any event the opinion of the court in *Kyle* is binding in this case, as it was in *Darknell-King.*

Conclusion and disposal

[34] The pleadings in the present case meet the test set out in *Kyle* and are thus adequate to allow a the pursuer a proof of her averments. A Proof before Answer was sought by the pursuer. Accordingly I shall repel the second plea-in-law for the defenders, and *quoad ultra* allow a Proof before Answer, reserving all questions of expenses meantime.