Unregulated legal advisers and negligence liability: a timely warning for McKenzie Friends

Paul Wright v Troy Lucas (a firm) & George Rusz

[2019] EWHC 1098
High Court of Justice (Queen's Bench Division)
Eady J QC
15 March 2019

McKenzie Friends – Litigants in person – Duty of care – Standard of care – Clinical negligence – Loss of a chance

Introduction

One of the consequences of the reduction in the public funding of civil cases has been a rise in the number of litigants seeking legal advice and assistance from McKenzie Friends who operate beyond their usual role of providing in court assistance and support. As unregulated entrants to the legal services sector, McKenzie Friends do not offer their clients the same protections as solicitors and barristers should they act in an unprofessional or exploitative manner. *Paul Wright*[1] seeks to address this imbalance by confirming that unregulated legal advisers who hold themselves out as having the skills and expertise of members of the legal profession will be held to the same duty and standard of care. This is an important first step in providing litigants with a means of redress, but greater protection can be afforded through use of the courts' case management powers and regulation.

Facts

Paul Wright (the claimant) instituted proceedings against his former legal advisers, Troy Lucas (a firm) and George Rusz (the defendants) for professional negligence. He argued that the defendants' breach of duty of care led to loss of a chance in respect of his clinical negligence proceedings, commenced in 2008, against Basildon and Thurrock University Hospital NHS Foundation Trust (the Trust). The action against the Trust arose following surgery in July 2004 for acute pancreatitis during which a plastic bag (legitimately used surgically) was left inside his body. After commencing proceedings, the claimant sought the advice of the defendants and entered into a contract for legal services, the terms of which were contained in a letter dated 1 December 2008. The letter included statements which claimed that the firm was authorised by the Ministry of Justice, was regulated by the Solicitors Regulation Authority and that a 'full list of partners and consultants is available on request'.[2] These assertions proved impossible to support. Mr Rusz was not a solicitor but rather a law graduate without professional qualifications and, as the sole principal of the firm, was without partners or consultants.

1 *Paul Wright v Troy Lucas (a firm) & George Rusz* [2019] EWHC 1098.
2 *Ibid* at [13].

Although aware that he had not engaged the services of a solicitor, the claimant was led to believe, by Mr Rusz, that he was an experienced legal professional who had extensive experience of 'these types of claims' and was 'as good as, if not better than any solicitor or barrister'.[3] This belief was inaccurate. Mr Rusz only gained his LLB a few years previously and Mr Wright was his first clinical negligence client. Despite his inexperience and lack of qualifications, Mr Rusz conducted litigation on Mr Wright's behalf and was permitted on several occasions to act in court as his McKenzie Friend.

The defendants conceded that a duty of care was owed to the claimant[4] but refuted that they fell below the acceptable standard of care to constitute a breach of duty. This was despite the documentary evidence painting 'a very troubling picture' of their involvement in the claimant's litigation.[5] When the defendants eventually terminated their involvement in the case, a considerable number of heads of claim had been struck out for lack of evidential foundation. The matter concluded when the claimant, confronted by an application for summary judgment, accepted the Trust's Part 36 offer of £20,000 whilst incurring costs of over £70,000.

Decision

Six main issues were determined in respect of the claim for breach of duty and loss of a chance. Firstly, the status of the defendant was determined to be that of legal adviser who went beyond 'simply providing paid McKenzie Friend services to the claimant; they were advising him in the conduct of his claim against the Trust and providing him with other assistance in the conduct of that claim'.[6] Secondly, there was a clear contract between the parties which was set out in the letter of 1 December 2008.[7] In deciding the third issue of the legal duty owed by the defendants, Eady J confined her answer to the facts of the case.[8] As conceded by the defendants and recognised in the analogous case of *Freeman v Marshall & Co*,[9] they should be 'held to the duty and standard of care that they had chosen to assume when holding themselves out as competent to carry out legal services for the claimant in his clinical negligence litigation'.[10] In this respect, they had professed to have the skill and experience of an experienced litigation executive in a firm of solicitors.[11] The fourth question of whether the defendants had satisfied the obligation arising under their duty of care to properly advise the claimant was decided negatively. Eady J remarked that there was little evidence of advice and that which existed 'can only be described as positively harmful'.[12] Fifthly, the defendants' conduct was deemed negligent and in breach of contract, as they were 'out of their depth and simply had no idea

3 *Ibid* at [18].
4 See *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.
5 *Supra* n 1 at [66].
6 *Ibid* at [79].
7 *Ibid* at [80].
8 *Ibid* at [82].
9 [1966] EGC 695. An unqualified surveyor who described himself as being qualified was judged by the standard of the reasonably competent surveyor.
10 *Supra* n 1 at [82].
11 *Ibid* at [81].
12 *Ibid* at [83].

how to carry out the work they had undertaken to provide'.[13] Sixthly, when considering the loss of a chance aspect of the case, Eady J applied the recent guidance in *Perry v Raleys Solicitors*.[14] On the balance of probabilities, if the claimant had been properly advised, he would have likely submitted documentary and/or expert evidence in support of his claim and withdrawn exaggerated claims.[15] It was also 'most likely' that the parties would have settled the claim, which would have included the Trust paying the claimant's costs.[16] The claimant's culpability in failing to produce relevant information in respect of his earnings and exaggerating his case did not defeat his claim, as the defendants submitted. In accordance with *Perry*, it could still be honestly made,[17] thus retaining a value. *Fairclough Homes Ltd v Summers*, which confirmed that the court could strike out a statement of case on the ground of abuse of process after trial,[18] was decided a year before the issue arose and so had not been considered by the trial judge. He had nevertheless made the decision not to strike-out the claim in its entirety.[19] Consequently, the claimant's credibility should be considered in the assessment of the overall loss of a chance, which, together with the 'vagaries of litigation' and the fact that causation remained an issue, justified a 35 per cent deduction from the damages awarded.[20]

Analysis

Paul Wright must be analysed against the litigation landscape in which it is decided. The Legal Aid, Sentencing and Punishment of Offenders Act (LASPO), introduced in April 2013, heralded the withdrawal of legal aid from most civil and family matters.[21] A major consequence has been an increase in the number of litigants attending court without representation, known as 'litigants in person' (LiPs), because they are unable to afford the services of the legal profession.[22] In order to fill the legal advice gap, some LiPs are instructing McKenzie Friends[23] to provide legal assistance beyond their usual role of 'taking notes, quietly making suggestions, and giving advice'[24] to include, with the judiciary's permission,[25] the reserved legal activity[26] of rights of audience. Concerns have

13 *Ibid* at [84].
14 [2019] UKSC 5 affirming *Allied Maples Group Ltd v Simmons and Simmons* [1995] EWCA Civ 17. The claimant must prove, on the balance of probabilities, what they would have done and, if accepted, the matter proceeds as if that is what would have happened. What the third party would have done depends on a loss of chance evaluation, which can include a deduction for the contingencies of litigation. See also, (2019) 3 PN XXX (Case Comment).
15 *Supra* n 1 at [93].
16 *Ibid* at [96].
17 *Supra* n 14.
18 [2012] UKSC 26 at [36]. The power is exercisable by the court under CPR 3.4(2) and its inherent jurisdiction in 'very exceptional circumstances'.
19 *Supra* n 1 at [88].
20 *Ibid* at [97].
21 Sch 1 pt 1.
22 In the family court between July to September 2018, 37 per cent of disposals involved neither parent receiving legal representation and in only 19 per cent of cases were both parties legally represented. Ministry of Justice, Family Court Statistics Quarterly: July to September 2018 (13 December 2018) 7.
23 The term derives from the case of *McKenzie v McKenzie* [1970] 3 WLR 472 when the Court of Appeal confirmed that litigants may receive in-court assistance from a third party not on record as their legal adviser.
24 *Collier v Hicks* (1831) 2 B & A 663 at 669.
25 N E Corbett and A Summerfield, *Alleged perpetrators of abuse as litigants in person in private family law: The cross-examination of vulnerable and intimidated witnesses* (Ministry of Justice Analytical Series 2017) 21.
26 Legal Services Act 2017, pt 3, s 12(3) (b).

been raised that this is occurring more often post LASPO[27] despite guidance stipulating that courts should grant these rights only in 'exceptional circumstances'[28] and after 'very careful consideration'.[29] Known as 'fee-charging'[30] or 'professional'[31] McKenzie Friends, empirical evidence suggests they have become a particular feature in private family matters where legal aid is restricted to matters alleging domestic and/or child abuse.[32] Thus, Paul Wright's use of a McKenzie Friend in clinical negligence litigation may be atypical. Although legal aid eligibility for clinical negligence is restricted to neonatal brain injuries, conditional fee agreements provide an alternative source of funding for litigants who, like the claimant, have a robust case.

As non-members of the legal profession, the dangers of instructing a 'fee-charging McKenzie Friend' are self-evident. They are unregulated, they do not have to hold legal qualifications, follow a code of practice or obtain professional liability insurance. Paul Wright successfully pleaded loss of a chance but enforcing judgment against Mr Rusz, as a sole trader, will depend solely on the defendant's financial position and/or whether he has taken the initiative to acquire insurance. Mr Wright's fee recovery position is also weakened. LiPs can recover fees incurred by McKenzie Friends lawfully exercising rights of audience from the opposing party as a recoverable disbursement,[33] but not for the conduct of litigation[34] or legal advice and clerical assistance.[35] This was Mr Wright's predicament. By entering into a contract with the defendants, he exposed himself to costs which would be unrecoverable from the Trust.[36]

Paul Wright does not actually extend protection for LiPs in respect of the quality of services provided by 'fee-charging McKenzie Friends' but it is still a significant decision. For the first time post-LASPO, a court has confirmed that the well-established negligence principle that those who hold themselves out as having the skill and experience equivalent to that of a member of the legal profession will be held to that duty and standard of care. It will be recalled that the first part of the *Bolam* test provides that if a situation requires the use of 'some special skill or competence', then the test as to whether there has been negligence is 'the standard of the ordinary skilled man exercising and professing to have that special skill'.[37] The standard of care, therefore, depends on the representations made by a defendant as to the level of skill they possess rather than actual membership of a profession.[38]

27 Lord Chief Justice of England and Wales, Reforming the courts' approach to McKenzie Friends: A consultation (February 2016).
28 Practice Guidance: McKenzie Friends (Civil and Family Courts) (12 July 2010) at [23].
29 *Ibid*.
30 *Ibid*.
31 *Supra* n 27 at [4.20].
32 L Smith et al, 'A study of fee-charging McKenzie Friends and their work in private family law cases' (Project Report, The Bar Council, June 2017); K-A Barry, 'McKenzie Friends and litigants in person: widening access to justice or foes in disguise?' (2019) 31 (1) CFLQ 69.
33 *Supra* n 28 at [30].
34 *Ibid* at [29].
35 *Ibid* at [27].
36 *Supra* n 1 at [36].
37 *Bolam v Friern Hospital Management Committee* [1957 1 WLR 582 at 586 (McNair J). For application of this principle to solicitors see *Midland Bank v Hett, Stubbs and Kemp* [1979] Ch 383 at 402.
38 *Supra* n 4 at 531 (Lord Hodson) 'those who hold themselves out as possessing a special skill are under a duty to exercise it with reasonable care'; *Chaudhry v Prabhakar* [1988] 3 All ER 718 at 721 (Stuart-Smith LJ) 'if he

Paul Wright sends a salutary warning to 'fee-charging McKenzie Friends' that their lack of professional status will not offer them immunity from suit if they go beyond the traditional McKenzie Friend role of providing moral support and assistance. McKenzie Friends are now put on notice that partaking in legal advice and/or seeking rights of audience or to conduct litigation puts them at risk of owing a duty of care and being held to the skills and expertise they claim to possess. This threat of liability may be enough to curtail any willingness of McKenzie Friends to exaggerate their capabilities and may encourage them to clearly qualify the extent of their experience as well as the desirability of sole reliance on their services.[39] LiPs would then be afforded the protection of making a fully informed choice about whether to accept or decline their assistance.

While this is an important development, using negligence liability to protect the interests of LiPs is problematic. McKenzie Friends are under no obligation to provide their clients with a written agreement detailing their involvement in the matter or keep records of attendance and so it may be challenging for LiPs to establish the extent of their relationship by providing documentary evidence. This will be even more difficult if the McKenzie Friend has assisted outside the courtroom only and has not been involved in conducting litigation, as there may be no evidence of their contribution or influence on the matter. McKenzie Friends motivated by a desire to take advantage of the vulnerable position of LiPs are less likely to record their involvement, thus leaving LiPs exposed to exploitation from the most insidious type of McKenzie Friend behaviour. Bringing a negligence action is an inefficient means of protecting the rights of LiPs. It not only subjects them to the additional stress of more litigation, but the cost is prohibitive. LiPs who instructed a McKenzie Friend in the first instance because they could not afford the services of a lawyer are unlikely to be able to fund a negligence action unless they can find a solicitor willing to act on a conditional fee basis.

Negligence liability alone will not provide adequate protection for LiPs. Courts must use their powers of case management to control McKenzie Friends. They can do this by consistently requiring sight of a CV and supporting statement[40] before granting rights of audience. They should then engage in a balancing exercise to determine whether the access to justice needs of the LiP outweighs the risk of allowing non-members of the legal profession to perform a reserved legal activity.[41] Additionally, regulation is needed so that protection extends to advice and assistance conducted outside the courtroom. The comprehensive review of the legal aid eligibility regime to take place by summer 2020[42] is an ideal opportunity to investigate the issue of how best to regulate McKenzie Friends who have entered the legal services sector in response to public funding cuts.

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has represented such skill and experience to be greater than it in fact is and the principal has relied on such representation, it seems to me to be reasonable to expect him to show that standard of skill and experience which he claims he possesses';

39 *Supra* n 4 at 486, Lord Reid explains that those who know their skill and judgment are being relied on can decline to give the advice or information sought, respond with qualification or answer without qualification. If they chose the latter, an assumption of responsibility will arise to exercise such care as the circumstances require.

40 *Supra* n 28 at [6].

41 *Ravenscroft v Canal and River Trust* [2016] EWHC 2282 (Ch).

42 Ministry of Justice, *Legal Support: The Way Ahead – An action plan to deliver better support to people experiencing legal problems* (February 2019) 11.

Conclusion

The confirmation in *Paul Wright* that the principles of negligence liability extend to unregulated legal advisers is a welcome development. It sends an important message to those outside the legal profession that entering the legal services sector may expose them to a duty of care, but this alone will not protect LiPs from McKenzie Friends who act incompetently or seek to exploit their vulnerable position.

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