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Case No: IHQ18/0735 / HQ17X04440

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/02/2019

Before :

MR JUSTICE WILLIAM DAVIS

- -

Between :

MR IAN GARTH WORKMAN	**Claimant**
- and -	
DEANSGATE 123 LLP	**Defendant**

- -
- -

William McCormick QC (instructed by **Hemingways Solicitors Limited**) for the **Claimant**
Hugh Evans (instructed by **Ashfords LLP**) for the **Defendant**

Hearing dates: 21 January 2019

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Approved Judgment

Mr Justice William Davis :

Introduction and background

1. On 7 April 2011 Susan Workman died as a result of a stab wound to the chest sustained when she was in the kitchen at her home in Lancashire. A kitchen knife with a blade almost 20 centimetres long entered her body horizontally to a depth of 12 centimetres. The wound penetrated the heart, severed a coronary artery and entered the left lung. Massive internal bleeding resulted and Mrs Workman died within minutes. The stab wound was inflicted with significant force.

2. Ian Workman was charged with his wife's murder. The prosecution case was that he had deliberately stabbed Mrs Workman whether as he held the knife himself or by guiding her hand holding the knife into her chest. His case was that his wife had taken up the knife and had tried to stab him. In order to defend himself he had taken hold of her so that he was gripping her from behind. At one point he lost his grip on her wrist or arm so as suddenly to cause a loss of resistance with the result that the knife entered her chest.

3. In November and December 2011 Ian Workman was tried at Preston Crown Court. On 19 December 2011 he was convicted of murder. At the trial he was represented by Pannone LLP and leading and junior counsel. Following his conviction Mr Workman dispensed with the services of his trial representatives. He appealed against his conviction for which purpose he was represented by fresh counsel and solicitors. The principal ground of appeal was that fresh evidence had been obtained which undermined the prosecution case as it was put at trial. In particular, the appellant relied on two expert witnesses with expertise in biomechanics. At the appeal it was said that such evidence should have been called at trial, that the failure to do so was due to inadequate representation by trial counsel and solicitors and that the jury might not have convicted had they heard the expert biomechanical evidence. The appeal was the subject of a full hearing over two days in early March 2014. A reserved judgment was handed down on 28 March 2014. The appeal was dismissed.

4. The full reasoning of the Court of Appeal Criminal Division is to be found in the judgment of the court: [2014] EWCA Crim 575. It is unnecessary at this point to rehearse the detail of the reasoning. In relation to the biomechanical evidence the court concluded that there was no reasonable explanation for the failure to adduce the evidence at trial and thereby it was inadmissible: see Section 23(2)(d) of the Criminal Appeal Act 1968. This was because there was clear evidence that nine different witnesses had been contacted, each of whom had expertise in biomechanics. None of those witnesses had been able to assist the defence of Mr Workman in that none was prepared to provide a report with a view to giving evidence. No further steps had been taken further to investigate the possibility of obtaining evidence of this type. The court proceeded on the basis that this was the result of an informed decision. Such a decision meant that Mr Workman could not rely on other evidence of this type to support an appeal.

5. I should say straightaway that there is an issue as to whether Ian Workman was party to the decision not to pursue further investigations vis-à-vis biomechanical evidence. Mr Workman does not accept that he was. It is a matter raised in the proceedings with which I am concerned. However, the court went on to consider the admissibility

of the evidence by reference to Section 23(2)(b) of the 1968 Act i.e. whether the evidence may afford any ground for allowing the appeal. The witnesses were called in the course of the hearing of the appeal. As is commonplace the court considered the evidence on its merits even though it was in due course decided that it was inadmissible pursuant to Section 23(2)(d) of the 1968 Act. The conclusion was that the evidence added nothing of substance to the evidence which was before the jury. Thus, it was not admitted because it afforded no ground for allowing the appeal.

6. Ian Workman met the costs of his defence from his own funds. After conviction and sentence a substantial proportion of the fees due to his solicitors and counsel remained unpaid. In June 2012 Pannone LLP issued proceedings against Mr Workman for a sum in the region of £130,000. He defended the claim. His three-paragraph handwritten defence and counterclaim was struck out for being too vague and unspecific. He was ordered to serve a fully particularised defence and counterclaim. A further defence and counterclaim was served in October 2012. It alleged negligence on the part of Pannone LLP. The negligence of that firm was not particularised.

7. In due course Pannone LLP applied for summary judgment in respect of the claim for unpaid fees. The application was heard by a district judge on 18 September 2013. The district judge entered summary judgment. The counterclaim was not struck out because no fee had been paid with the result that the counterclaim had not been issued. However, the order made by the district judge included these words: "To the extent the counterclaim pleaded by (Ian Workman) has been issued, there be summary judgment in favour of the Claimant on such counterclaim." Further, the district judge in the hearing stated that the counterclaim "has been disproved by the evidence". The evidence referred to was the witness statement of David Cook of Pannone LLP.

8. The judgment debt of £145,907.82 remains outstanding. In April 2014 Pannone LLP (by now known as Deansgate 123 LLP – "Deansgate") obtained interim charging orders over a number of properties said to be owned by Ian Workman. On the application for those charging orders to be made final, Mr Workman opposed the application on the basis that he had transferred all of the properties in November 2011 to his son, Grant Workman, for nil value. The date of the transfer was shortly before the start of his trial in Preston Crown Court. In November 2017 Deansgate issued proceedings under Section 423 of the Insolvency Act 1986 against Ian Workman and his son. The proceedings were served on 20 March 2018. There was more than one request by Mr Workman and his son for an extension of time to serve a defence in those proceedings. In the event Mr Workman and his son did not serve any defence to the proceedings. Rather, they made an application to strike out the proceedings as an abuse of process. As recently as 11 January 2019 that application was dismissed with the costs of the application to be paid by Mr Workman and his son.

The history of these proceedings

9. On 7 December 2017 Ian Workman issued proceedings against Deansgate 123 LLP (as Pannone LLP are now known) for damages in negligence and/or breach of retainer in the conduct of litigation. The litigation concerned was not identified but reference was made to "an adverse judgment" on 19 December 2011 i.e. the verdict of guilty delivered by the jury on that day. The Particulars of Claim were dated 4 April 2018. On 19 April 2018 Deansgate acknowledged service of the claim and indicated an

intention to defend. On 25 April 2018 Deansgate asked for an extension of time to serve the defence, the extension being until 1 June 2018. That was agreed as were further requests for extensions made on 31 May 2018 and 29 July 2018. The evidence served on behalf of Deansgate (uncontradicted by any evidence served by or on behalf of Mr Workman) is that discussions were continuing between the parties in respect of all ongoing proceedings.

10. The last request for an extension made in July 2018 was agreed in the following terms:

> 1. *It will be the final extension agreed by our client (proceedings having been served on 6 April 2018); and*
>
> 2. *In the event that your client makes an application to extend the date for service of the Defence further, your client accepts that there has been, in effect, compliance by our client with the pre-action protocol in that your client has been provided with a total period of more than 4 months to serve a Defence.*

The second paragraph was a reference to the fact that Mr Workman had not complied with the Pre-action Protocol for Professional Negligence. The time for service of the Defence was extended to 17 August 2018.

11. 17 August 2018 was a Friday. On Tuesday 21 August 2018 Mr Workman's solicitor requested judgment in default of a defence. The order for judgment in default was not sealed until 8 October 2018. Mr Workman's solicitors received the order on 12 October 2018. On 17 October those solicitors wrote to the solicitors acting for Deansgate enclosing the order. Deansgate's solicitors replied by return in a letter dated 19 October 2018 as follows:

> *We were, of course, not aware that you had applied for default judgment. We have finalised the draft Defence and we are in the process of completing an application for summary judgment and/or strike out of your client's claim. This will include an application to set aside the default judgment and (as applicable) an extension of time in relation to the Defence. We will be filing and serving the application on you shortly with our detailed evidence in support.*

12. Mr Workman's solicitors did not respond to this letter. Rather, they referred to the Case and Costs Management Conference listed on 27 November 2018 which had formed part of the order sealed on 8 October 2018 and, in a letter dated 6 November 2018, served proposed directions for that conference. It was not until 14 November 2018 that Deansgate's solicitors served the application promised in their letter of 19 October 2018, namely an application to set aside the default judgment and an application for summary judgment or a strike out of the claim. There followed a flurry of correspondence in which the question of whether the Case and Costs Management Conference should proceed in the ordinary way was considered. In the event Master Eastman adjourned that conference when the parties appeared before him on the basis that Deansgate's application necessarily had to be resolved before any further steps were taken in the proceedings. So it was that I heard the application in full at the hearing on 21 January 2019.

The substance of Mr Workman's claim

13. Ian Workman's case as pleaded is that it was of obvious importance to obtain expert biomechanical evidence to support his account of how his wife came to be stabbed with a kitchen knife. A solicitor acting with reasonable skill and care would have appreciated that fact and would have obtained such evidence. The pleaded negligence on that issue is that Deansgate had failed to take reasonable steps to obtain biomechanical evidence, had failed to take proper steps to keep Mr Workman informed about any problems with obtaining such evidence and had failed to take steps to have the trial adjourned in order to provide sufficient time to assemble evidence from a biomechanical expert. The pleaded case also alleged that, notwithstanding the account given by Mr Workman, Deansgate were negligent in not considering with him whether the jury should be directed in relation to self-defence i.e. was the fatal blow inflicted by Mr Workman in lawful self-defence?

14. The particulars of negligence do specify what it is that Deansgate did not or did not do in relation to the obtaining of expert evidence on the issue of biomechanics. It is pleaded that Mr Workman cannot identify those matters without access to Deansgate's records. The pleading invites the inference that Deansgate failed to exercise proper skill and care because Mr Workman's son very quickly had been able to locate two experts who supported the defence case. Though these experts are not identified by name in the Particulars of Claim it is clear that this is a reference to the experts called in the hearing before the Court of Appeal Criminal Division in March 2014.

15. The damage said to have been caused by Deansgate's negligence is Mr Workman's conviction for murder which led to a sentence of life imprisonment with a minimum term to be served of 17 ½ years. It is pleaded that "but for the Defendant's breaches he would have been acquitted or he would have had a substantial chance of being acquitted".

The issues in this application

16. The first issue is whether the judgment in default should be set aside. It is accepted by Deansgate that this is an essential stepping stone before I can consider the merits of the claim. That requires me to consider the provisions of Part 13.3 of the CPR. The critical question under Part 13.3 is whether Deansgate acted promptly in making the application to set aside judgment, it not being disputed that Deansgate has a real prospect of successfully defending the claim.

17. Further, for the judgment in default to be set aside Deansgate require relief from sanctions. On that question Part 3.9 of the CPR requires me to consider all the circumstances of the case. Part 3.9 must be applied in accordance with the principles in *Denton v TH White Limited [2014] 1 WLR 3296*. There are three stages to the process: the seriousness and significance of the breach; why the default occurred; an assessment of the overall circumstances of the case.

18. If the judgment in default is set aside, Deansgate's principal application can be considered. The application is two-fold although there is cross-over between the two limbs of the application. First, is Ian Workman's claim an abuse of the court's process such that it should be struck out pursuant to Part 3.4 of the CPR? Second,

does Ian Workman have no real prospect of succeeding on his claim so as to entitle Deansgate to an order for summary judgment pursuant to Part 24.2 of the CPR? The merits or otherwise of Mr Workman's claim are of relevance to each of the issues which arise. It is appropriate to consider first the factual material available in relation to his conviction and his appeal.

The criminal proceedings

19. At the trial the independent expert evidence called in relation to the issue raised by Mr Workman – that his wife had died in effect at her own hand when he had let go of the hand in which she was holding a knife so that there was a sudden release of pressure – came from a Home Office pathologist, Dr Carter, and an experienced forensic physician, Dr Garbutt. Dr Carter was a prosecution witness; Dr Garbutt was called by the defence. Dr Carter considered the mechanism proposed by Mr Workman. She considered that it was very unlikely but not impossible: "not by any means" was the phrase she used. Her doubts as to the viability of this mechanism arose from the force required to cause the relevant wound. Dr Garbutt's opinion was that the account given by Mr Workman was "a realistic possibility".

20. At the appeal two biomechanical experts gave evidence on behalf of Mr Workman. The prosecution called their own expert in that field. The defence experts, Dr Lane and Professor Fowler, conducted experiments by way of reconstructions in order to assess the prospect of the knife having entered Mrs Workman's chest when pressure suddenly was released. Each acknowledged that they had never conducted such experiments in the past. Their written evidence was to the effect that the proposed mechanism was "highly possible" (Dr Lane) or "not only possible but highly probable" (Professor Fowler). When giving evidence at the hearing of the appeal each expert revised and explained their view. They conceded that they could not put the proposed mechanism as a matter of probability. What they were saying was that it was a possibility.

21. The prosecution expert, Dr Jones, had considerable experience in the field of biomechanics of injury including stabbings. He did not dismiss the mechanism put forward by Mr Workman. Rather, he concluded that biomechanics as an expertise had little to offer in assessing that mechanism and its likelihood. His view was that, where there was a dynamic and fluid struggle, the science was "largely unsuitable" because it could not reliably measure or simulate the proposed mechanism. At the hearing of the appeal the defence experts accepted that their experimental model was of very limited – indeed essentially theoretical – value only.

22. In the light of the evidence as given at the hearing of the appeal it is wholly unsurprising that the Court of Appeal Criminal Division reached the conclusion as set out in paragraph 5 above. Once tested the evidence of the biomechanical experts added nothing to the evidence which had been before the jury at trial. The reality was that this kind of evidence could not assist in resolution of the issue raised by Mr Workman. As the Court of Appeal noted the defence team at trial had contacted nine different experts with biomechanical expertise and none had been able or willing to assist. Those experts plainly took the same view as Dr Jones.

23. It is also of significance that the biomechanical evidence obtained by Mr Workman for the purposes of the appeal did not address the issue of how the knife came to be

removed or displaced from Mrs Workman after it had entered her body to a depth of 12 centimetres. The mechanism suggested by Mr Workman provided a possible explanation for the knife going into Mrs Workman. It did not begin to explain how or why it came out of her body.

Setting aside the judgment in default

24. Pursuant to Part 13.3 of the CPR Deansgate seek to set aside the judgment in default of defence of which they had notice on 18 October 2018. They have to show that they have a real prospect of successfully defending the claim. That is not in issue. On behalf of Mr Workman it is expressly conceded that there is such a prospect. I also "must have regard" to whether the application to set aside was made "promptly".

25. The term "promptly" has been the subject of detailed consideration in the context of Part 39 i.e. where an application is made to set aside an order made after a party has failed to appear at a hearing or trial. In *Regency Rolls v Carnall [2000] EWCA Civ 379* Simon Brown LJ (as he then was) concluded that, for a party to act promptly, they needed to exercise "all reasonable celerity in the circumstances". This was to be contrasted with the concept of "no needless delay whatever" which Simon Brown LJ concluded would be too high a threshold. In *Bank of Scotland v Pereira [2011] EWCA Civ 241* Lord Neuberger MR emphasised that what constituted promptness in any particular case was highly fact-sensitive.

26. In Part 39 promptness is a requirement which must be satisfied before relief can be granted. The same does not apply in Part 13. As was made clear in *Standard Bank v Agrinvest International [2010] EWCA Civ 1400* it is nonetheless a factor of considerable significance.

27. I am satisfied that, subject to the requirements of Part 3.9 of the CPR, it is appropriate to grant the application to set aside the judgment in default of defence. It was in the circumstances of this case made promptly. Clearly it could have been sooner but that is not the test. I take into account the fact that no significant steps had been taken in the proceedings between the entry of judgment in default and the application to set aside, the fact that the judgment was entered against a background of continued discussion between the parties in which the position of Deansgate was made perfectly clear and the fact that there is genuine merit in Deansgate's case. They have more than "a real prospect" of successfully defending the claim.

Relief from sanctions

28. The terms of Part 3.9 of the CPR require consideration of the need for litigation to be conducted efficiently and at proportionate cost. On behalf of Mr Workman it is argued that Deansgate's failure has meant that this litigation cannot be conducted either efficiently or proportionately in terms of cost. That argument cannot be tenable. If the judgment is allowed to stand there will have to be a full trial of the issue of quantum. This will permit Deansgate to argue that any negligence on their part caused at most nominal damage. That much is conceded by Mr Workman. Such a trial would require full consideration of the course of the criminal proceedings and the effect, if any, of a failure to obtain biomechanical evidence. All of this would take place against a backdrop of a claim in negligence which it is said has no prospect of

success and is an abuse of process. Refusing relief from sanction would not lead to the litigation being conducted efficiently and at proportionate cost: rather the reverse.

29. The first matter to be considered by reference to the *Denton* principles is the seriousness and significance of the breach. This applies not to the delay after judgment was entered or notified to Deansgate but to the default which gave rise to the sanction of a default judgment in the first instance: see *Gentry v Miller [2016] EWCA Civ 141*. The delay in making the application is something to be considered at the third stage of the *Denton* principles. Deansgate conceded in their written submissions that the default was serious and significant. I find that this concession was misconceived. The delay between 18 October 2018 when they were first notified of the judgment in default and the making of the application on 14 November 2018 is relevant when assessing the overall circumstances of the case. The breach in this case amounted to the failure to serve a defence in the period 17 August 2018 to 21 August 2018. That cannot be described as serious and significant. The need to consider the second and third stages of the *Denton* principles arises because of the significant delay following the entry of the judgment by Mr Workman.

30. Deansgate also conceded that there was no good reason for the failure to serve the defence by 17 August 2018. I consider that this concession was properly made. The evidence served on behalf of Deansgate establishes that there were continuing discussions between the two sides. But the terms of the extension granted in July 2018 made the position of Mr Workman clear in respect of these proceedings. He intended to pursue his claim for negligence. There was no reason why the defence in the terms of the draft in due course served with Deansgate's evidence in November 2018 could not have been served on or before 17 August 2018. It contains nothing which was not known to Deansgate in August 2018. Deansgate had had some four and a half months to prepare the document.

31. The overall circumstances of the case clearly justify relief from sanctions. All that occurred between the entry of the judgment and the application for relief from sanctions was the service by those representing Mr Workman of a costs budget and an agenda for a CCMC in relation to the trial in respect of quantum. That was done after the solicitors had been informed by the solicitors acting for Deansgate that they intended to apply for summary judgment and/or a striking out of the claim. This is not a case in which relief from sanctions will affect the true progress of the proceedings. The only real consequence will be to deprive Mr Workman of a fortuitous windfall. Moreover, it is a case in which there is more than an arguable defence. The proposition that the claim has no foundation at all requires careful consideration, but it has apparent merit. This is of high importance in terms of the overall circumstances of the case.

32. The written submissions on behalf of Mr Workman argue that refusing relief from sanctions will cause no injustice to Deansgate. It is said that I should infer from the lack of explanation for the default that Deansgate knowingly ran the risk of being shut out on the issue of liability notwithstanding the apparent merit of their case. If it were a proper inference that Deansgate had knowingly run the risk, that would provide support for the proposition that no injustice would be caused to Deansgate. It would indicate that this was more than careless oversight of the need actively to engage with Mr Workman in relation to any further extension of time. The written submissions suggest that the lack of any detailed explanation shows a deliberate decision to

conceal what is referred to as unattractive behaviour. Had such a decision been made it might have been a just outcome for Deansgate to bear the consequences. I do not accept that the inference proposed on behalf of Mr Workman is a proper one. The proper inference is that the time for the service of the Defence was overlooked and that there is embarrassment in respect of that careless error. I cannot accept that there was some more malign motive. To refuse relief from sanctions would undoubtedly do a considerable injustice to Deansgate. It would do little or nothing to promote efficiency or proportionality in this litigation. I am satisfied that I should grant relief from sanctions. In that event I conclude that the judgment entered on 21 August 2018 should be set aside.

The factual merits of the claim

33. As I have already outlined Mr Workman's claim is for damages arising out of the negligence of his solicitors in the conduct of his criminal trial. With one exception the allegations in the particulars of claim are directed to the absence of biomechanical evidence at the trial. The exception is the allegation that no advice was given to Mr Workman nor his instructions taken on whether the jury should be directed to consider the issue of self-defence i.e. that he had stabbed his wife deliberately but when he was defending himself.

34. I deal with that discrete issue first. Precisely how the case was left to the jury is not clear from the judgment of the Court of Appeal Criminal Division. The judgment indicates that the summing up was fair and identified the relevant issues as they appeared from the evidence adduced at trial. On all of the material I have seen the issue of self-defence simply did not arise. It appears that the trial judge did not leave the issue to the jury. For the purposes of this judgment I shall assume that to be the case. This assumption is supported by what appears at paragraph 85 of the judgment of the Court of Appeal Criminal Division.

35. Quite what would have been achieved had Mr Workman's instructions been taken is not apparent. If the proposition is that, had he been asked about the issue, he would have changed his instructions, it cannot begin to provide a basis for a case in negligence against Deansgate. The solicitors (and trial counsel) were entitled to proceed on the basis that Mr Workman had given them a truthful account and advise him accordingly. If the proposition is that, even on the evidence adduced at trial, self-defence should have been left to the jury by analogy with the principles in *Coutts [2007] 1 Cr App R 60*, it is unarguable on the facts of this case. There was no evidence to support self-defence. I can see no conceivable basis on which discussing the matter with Mr Workman would have affected the issue. Had this allegation been the totality of his case against Deansgate, summary judgment against Mr Workman would have been inevitable.

36. I observe that this point was not touched on in oral argument. In the written submissions this was said:

> "…competent representation requires preparation for that stage of the trial (submissions to the trial judge in relation to directions of law) by advising the client what directions are to his best advantage……If Mr Crighton (the solicitor acting for Deansgate) was familiar with criminal cases he would know that it is common for a

Judge to leave defences to a jury even if those defences were not those advanced by the defendant."

I do not understand the first part of that submission. In making submissions to a trial judge in relation to directions of law counsel is there to give assistance to the judge on how the law applies to the facts of the case. Whether the proper directions of law are to a defendant's advantage is neither here nor there. Counsel would be failing in his duty to the court were part of his approach to be to consider which directions were to the defendant's best advantage. In relation to the second limb of the submission, whether Mr Crighton is familiar with criminal cases is not something about which there is any evidence. I am able to say that I am familiar with criminal cases. A judge will not leave a defence to a jury unless there is some evidential basis for doing so. None existed here.

37. In the appeal in 2014 – when every possible point was taken on behalf of Mr Workman – nothing was said on his behalf about the possibility of self-defence being left to the jury. It was argued that the judge should have left loss of control. The Court of Appeal Criminal Division had no hesitation in rejecting that argument. Had there been a scintilla of merit in the suggestion that self-defence was a live issue for the jury, it would have been raised on Mr Workman's behalf in the course of the appeal. It was not because it was and is a point totally without merit.

38. The gravamen of Mr Workman's claim is the allegation that Deansgate failed to take steps to place biomechanical evidence before the jury. Had such evidence been before the jury he would have been acquitted or he would have had a substantial chance of being acquitted. There is no doubt that the jury did not have any biomechanical evidence. There is a factual dispute as to the extent to which Mr Workman was kept informed of the position i.e. the fact that nine potential biomechanical expert witnesses had declined to assist. Further, it is denied by Mr Workman that he was party to the decision not to call any such expert evidence. It is not necessary to resolve these disputes. Were they relevant to the outcome of the proceedings, consideration would have to be given to how (if at all) they could be resolved at this point and their effect on the outcome of Deansgate's application for summary judgment and/or to strike out the claim. In fact, the application can be determined without reference to the matters in dispute.

39. Had Deansgate and trial counsel adduced the evidence of Dr Lane and Professor Fowler at trial, what would have been the outcome? Is there any prospect that Mr Workman would have had a substantial chance of being acquitted? The answer to the latter question is a resounding no. The Court of Appeal Criminal Division had as its focus the question of whether the conviction was safe. The court's conclusion was that it was safe. It was not specifically considering whether the biomechanical evidence would have given Mr Workman a chance of being acquitted. Equally, the conviction could not have been regarded as safe if the new evidence might have led to Mr Workman's acquittal.

40. The Court of Appeal Criminal Division is a court of competent jurisdiction. The three judges sitting on Mr Workman's appeal heard the biomechanical evidence. Insofar as it took Mr Workman anywhere the court decided that it added nothing to evidence which the jury had from Dr Carter and Dr Garbutt. Were Mr Workman's claim to proceed he would have no realistic prospect of success. I doubt whether his case even

could be described as arguable. I reach that conclusion without engaging in the impermissible exercise of a mini-trial. The argument presented on behalf of Mr Workman is that not all of the issues on which he now relies were canvassed before the Court of Appeal Criminal Division. It is true that there are allegations of negligence which did not figure in the judgment of the court. But the fundamental issue is whether biomechanical evidence would have provided a substantial chance of an acquittal. It quite clearly would not have done so. It also is suggested that the judgment of the Court of Appeal Criminal Division is of limited relevance because, had the defence case been properly prepared and presented, Mr Workman would have had a substantial chance of acquittal in which event there would have been no consideration of the case by the appellate court. This proposition ignores the fact that the Court of Appeal was considering what Mr Workman then said was the properly prepared case. The judgment dismissing the appeal makes it clear that this case would not have affected the outcome.

41. The consequence of these matters is that Deansgate is entitled to summary judgment and that the claim must be dismissed. Irrespective of whether there was any negligence Mr Workman suffered no damage. In the course of argument it was said that there might only be nominal damages. I find that concept more than a little problematic in the context of this claim. Either Mr Workman lost a substantial chance of acquittal at his trial or he did not. In the latter event his claims fails.

Abuse of process

42. Most of the hearing before me was occupied with submissions in relation to abuse of process, in particular whether the claim brought by Mr Workman amounts to a collateral attack on the verdict of the jury in his criminal trial and, as such, an abuse of process. Both parties engaged in a detailed analysis of the speeches of the House of Lords in *Hall v Simons [2002] 1 AC 615.* In that case the House of Lords was concerned with whether claims against solicitors could be defeated on the basis of immunity of advocates from suit in respect of negligence in the course of proceedings. The House considered the question of collateral attacks on verdicts in criminal trials because arguably, in the event of such attacks being an abuse, maintaining the immunity of advocates from suit no longer properly could be justified.

43. There were seven members of the House, all of whom gave speeches. The majority view appears from the speech of Lord Steyn who said as follows:

Unless debarred from doing so, defendants convicted after a full and fair trial who failed to appeal successfully will from time to time attempt to challenge their convictions by suing advocates who appeared for them. This is the paradigm of an abusive challenge. It is a principal focus of the principle in Hunter v Chief Constable of the West Midlands Police [1982] AC 529 . Public policy requires a defendant who seeks to challenge his conviction to do so directly by seeking to appeal his conviction. In this regard the creation of the Criminal Cases Review Commission was a notable step forward. Recently in R v Secretary of State for the Home Department, Ex p Simms [2000] 2 AC 115 , 127-128, there was uncontroverted evidence before the House that the Commission is seriously under-resourced and under-funded. Incoming cases apparently have to wait two years before they are assigned to a case worker. This is a depressing picture. The answer is that the functioning of the Commission must be improved. But I have no doubt that the principle underlying the Hunter case

must be maintained as a matter of high public policy. In the Hunter case the House did not, however, "lay down an inflexible rule to be applied willy-nilly to all cases which might arguably be said to be within it": Smith v Linskills [1996] 1 WLR 763 , 769, per Sir Thomas Bingham MR. It is, however, prima facie an abuse to initiate a collateral civil challenge to a criminal conviction. Ordinarily therefore a collateral civil challenge to a criminal conviction will be struck out as an abuse of process.

Thus, public policy means that, in the ordinary case, a claim of the kind brought by Mr Workman will be struck out as an abuse of process.

44. *Hunter* was the case of the Birmingham Six and their attempt to sue police officers for assault. In the criminal trial which led to their conviction allegations of assault leading to false confessions were at the forefront of the defence case. Both the judge in a voir dire as to the admissibility of the confessions and the jury in the light of the judge's directions reached clear conclusions on whether any assault had occurred. The House of Lords concluded that the proceedings brought against the police were a collateral challenge to the convictions. Lord Diplock gave the single substantive speech in the course of which he said this:

The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

On behalf of Mr Workman it is argued that the words "for the purpose of" are significant. The submission is that those words indicate that abuse of process in this context only will arise if an ulterior motive is present. Otherwise, civil proceedings should be permitted even where there is a subsisting criminal conviction.

45. That is not a view to which Lord Steyn subscribed. Likewise Lord Browne-Wilkinson who said this:

…..the law has already provided a solution where later proceedings are brought which directly or indirectly challenge the correctness of a criminal conviction. Hunter v Chief Constable of the West Midlands Police [1982] AC 529 establishes that the court can strike out as an abuse of process the second action in which the plaintiff seeks to re-litigate issues decided against him in earlier proceedings if such re-litigation would be manifestly unfair to the defendant or would bring the administration of justice into disrepute. In view of the more restrictive rules of res judicata and issue estoppel it is not clear to me how far the Hunter case goes where the challenge is to an earlier decision in a civil case. But in my judgment where the later civil action must, in order to succeed, establish that a subsisting conviction is wrong, in the overwhelming majority of cases to permit the action to continue would bring the administration of justice into disrepute. Save in truly exceptional circumstances, the only permissible challenge to a criminal conviction is by way of appeal.

On behalf of Mr Workman it is argued that this opinion does not prevent him from pursuing Deansgate for negligence. The proposition is that, to succeed in his action,

he will not have to prove that his conviction is wrong. He simply seeks to establish that he lost the chance of an acquittal.

46. Mr Workman relies on the minority views as expressed by Lord Hope and Lord Hobhouse in support of his argument in relation to ulterior motive. Lord Hope distinguished the situation in *Hunter* where the claim was in relation to allegations already made and disposed of in the course of the criminal trial from the case where a defendant sought to recover damages from his advocate on the ground that his conduct of the defence was negligent. Lord Hobhouse said that, where an action was brought bona fide for the purpose of recovering compensation from his lawyer for negligence, the action would not on the face of it be an abuse of process.

47. The contrary view on the question of ulterior motive was most fully expressed by Lord Hoffman. He dealt with the issue of loss of a chance. He also considered the public policy involved in concluding that an action for negligence on the part of a lawyer who conducted criminal litigation would be an abuse of process where there is an extant conviction. Under the heading "Collateral challenge" Lord Hoffman said as follows:

If a client could sue his lawyer for negligence in conducting his litigation, he would have to prove not only that the lawyer had been negligent but also that his negligence had an adverse effect upon the outcome. This would usually mean proving that he would have won a case which he lost. But this gives rise to the possibility of apparently conflicting judgments which could bring the administration of justice into disrepute. A client is convicted and sent to prison. His appeal is dismissed. In prison, he sues his lawyer for negligence. The lawyer's defence is that he was not negligent but that, in any case, the client has suffered no injustice because whatever the lawyer did would not have secured an acquittal. In seeking to establish the latter point, the lawyer may or may not be able to re-assemble the witnesses who gave evidence for the prosecution. The question of whether the client should have been acquitted is then tried on evidence which is bound in some respects to be different, before a different tribunal and in the absence of the prosecution. The civil court finds, on a balance of probability, that the lawyer was negligent and that if he had conducted the defence with reasonable skill, the client would have been acquitted. Or perhaps that he would have had a 50% chance of being acquitted. Damages are awarded. But what happens then? Does the client remain in prison, despite the fact that a judge has said there was an even chance that he would have been acquitted? Should he be released, notwithstanding that the prosecution has had no opportunity to say that his conviction was correct? Should it be referred back to the Court of Appeal and what happens if the Court of Appeal, on the material before it, takes a different view from the civil judge? The public would not understand what was happening. So it was said that to allow clients to sue for negligence would allow a "collateral challenge" to a previous decision of another court. Even though the parties were different, this would be contrary to the public interest.

This explanation of "collateral challenge" does not engage in distinctions as to motive. Where the effect of the action against the lawyer means that doubt will be cast on the criminal conviction the proceedings will constitute an abuse of process. Thus, an abuse will be established irrespective of any ulterior purpose.

48. Lord Hoffman endorsed the analysis set out by the Court of Appeal in *Smith v Linskills [1996] 1 WLR 763.* The court in that case reviewed whether the phrase "for the purpose of" as used by Lord Diplock in *Hunter* was intended as a restriction on the doctrine of abuse of process in this context. The relevant part of the judgment of the court is as follows;

It was argued for Mr. Smith that these proceedings were not an abuse because it had not been found that his real purpose in bringing them was to attack his conviction. Since he has now served his sentence (unlike the intending plaintiff in Hunter's case) his only and genuine purpose is to recover damages for professional negligence. That, it is said, distinguishes the case from Hunter's case.

It is certainly true that in his speech in Hunter's case, at p. 541E, Lord Diplock attached considerable significance to the ulterior purpose which lay behind the proceedings brought by the intending plaintiff in that case. We have no doubt at all but that the existence of such an ulterior motive provides a strong and additional ground for holding proceedings to be an abuse. The question is whether such an ulterior motive is a necessary ingredient of abuse. In our judgment it is not. We consider that the law was accurately stated by Ralph Gibson L.J. in Walpole's case [1994] Q.B. 106 , 120:

"I am unable to attach any decisive importance to the point about dominant purpose upon which Mr. Norris relied. In Hunter's case [1982] A.C. 529 , the collateral attack upon the final decision of Bridge J. on the voir dire was an abuse of the process because based upon no sufficient fresh evidence. The fact that the purpose of the plaintiffs was to provide themselves with an argument upon which to attack the true validity of their convictions supported the conclusion that those proceedings amounted to an abuse [of] process; but it seems clear to me that, if their purpose had been the apparently more acceptable aim of recovering damages for the injuries which they claimed were inflicted by the police, the proceedings would unquestionably have remained an abuse of process because it constituted a collateral attack upon a final decision which was manifestly unfair to the defendants and because it was such as to bring the administration of justice into disrepute. No doubt, when it is present, some collateral purpose on the part of the plaintiff, other than the pursuit of his remedy at law, will be relevant to the assessment of the case and to the exercise of the court's discretion for the purpose of deciding whether it is shown so clearly to be an abuse of process that the proceedings should be struck out. If, however, it is clearly shown that the plaintiff's claim is a collateral attack upon a final judgment within the principle stated and applied in Hunter's case, then the simple purity of his purpose in seeking financial damages alone would not save his action."

We agree. The rule with which we are here concerned rests on public policy. The basis of that public policy, further considered below, is the undesirable effect of relitigating issues such as this. We cannot see how those undesirable effects are mitigated by the motive of the intending plaintiff to recover damages rather than simply to establish the unsoundness of the earlier decision. Bragg v. Oceanus Mutual Underwriting Association (Bermuda) Ltd. [1982] 2 Lloyd's Rep. 132 and Saffron v. Federal Commissioner of Taxation (1991) 102 A.L.R. 19 , relied on by Mr. Smith, do not persuade us to the contrary: in those cases the relevant proceedings were not, in any event, initiated by the party accused of abuse.

49. This decision is binding on me. Since it was cited with approval by Lord Hoffman in *Hall v Simons* it vitiates any suggestion that Lord Diplock intended to restrict the operation of abuse of process when the relevant proceedings involved an attack on an extant criminal conviction. In this instance Mr Workman proposes to litigate effectively the same issue as was considered by the Court of Appeal Criminal Division. It is argued that the criminal appeal process did not concern precisely the same issues. It is said that not all of the issues relied on in these proceedings were canvassed before the Court of Appeal Criminal Division. The written submission made on Mr Workman's behalf does not descend to any further detail. The reality is that all of the core issues in these proceedings were considered in the criminal appellate process. As pleaded the claim against Deansgate covers the same ground as canvassed in the Court of Appeal Criminal Division. It follows that, irrespective of the merits of the claim (which I have already concluded are illusory), Mr Workman's claim is an abuse of process for the reasons set out above.

50. I must deal with a subsidiary point made on behalf of Mr Workman relating to Section 11(2) of the Civil Evidence Act 1968 which provides as follows:

In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the United Kingdom …..

(a)he shall be taken to have committed that offence unless the contrary is proved;

It is said that this demonstrates that it is not an abuse of process for someone in Mr Workman's position to bring proceedings which may challenge the fact that he committed the offence of which he has been convicted. Section 11(2) permits a litigant to prove that he did not commit an offence of which he has been convicted in a criminal court. This reasoning is fallacious. Section 11(2) is concerned with a party against whom a claim is made where that party has been convicted of an offence relevant to the civil wrong alleged. The most common circumstance in which this arises is where there has been a road traffic accident. The claimant will rely on the conviction for dangerous or careless driving. The defendant will still be able to maintain that he was not negligent albeit that this will involve proving that he did not commit the offence.

51. The point was addressed directly by Lord Diplock in *Hunter* as follows:

Although section 11 is not in express terms confined to convictions of defendants to civil actions or persons for whose tortious acts defendants are vicariously liable, this must in practice inevitably be the case. It is the plaintiff who will want to rely upon a conviction of the defendant, or a person for whose tortious acts he is vicariously liable, for a criminal offence which also constitutes the tort for which the plaintiff sues. It is scarcely possible to conceive of a civil action in which a plaintiff could assist his cause by relying upon his own conviction for a criminal offence. So section 11 is not dealing with the use of civil actions by plaintiffs to initiate collateral attacks upon final decisions against them which have been made by a criminal court of competent jurisdiction; and the public policy that treats the use of civil actions for this purpose as an abuse of the process of the court is not involved.

The passage deals conclusively with the subsidiary point put on behalf of Mr Workman. It superficially appears to be ingenious but in fact is without merit.

Other arguments

52. Deansgate also apply to strike out the claim as an abuse of process because the claim should have been brought as a counterclaim in the proceedings for non-payment of fees brought in 2012 by Deansgate. This application cannot succeed. Mr Workman could have brought the claim by way of a counterclaim in the proceedings taken by Deansgate. There was no obligation on him to do so. As I have already observed Mr Workman did purport to make a counterclaim as part of his defence to the claim by Deansgate for their fees. Due to non-payment of fees it was never issued. The District Judge made comments about the unissued counterclaim when giving judgment on the claim. Those comments could not found a claim for abuse of process by way of res judicata since there was no counterclaim before the court.

53. Deansgate also allege that the claim issued in December 2017 was time barred because the negligence complained of pre-dated 6 years prior to the date of issue. This proposition is not sustainable. The cause of action accrued at the date of conviction. These proceedings were issued 12 days prior to the sixth anniversary of that conviction.

Conclusion

54. I am satisfied that Mr Workman's action against Deansgate cannot proceed. It has no real prospect of success so Deansgate is entitled to summary judgment pursuant to Part 24 of the CPR. If I am wrong about that, and in any event, the proceedings brought by Mr Workman are an abuse of process because they constitute a collateral attack on his conviction for murder as affirmed by the Court of Appeal Criminal Division.

55. I require the parties to agree an order to give effect to my conclusions.