A case not lost

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Charles and I were out for a lunchtime walk and as we wandered through the gardens of the Middle Temple, one of the Inns of Court, we mused on the prosperity of the barristers' London headquarters.

'You never see a poor barrister,' *I said.*

'Not all my lawyer friends would agree with that,' *he replied,* **'but there certainly are some rich ones.'**

'How do they justify their earnings?' *I asked.* 'Surely they shouldn't be getting guilty people off? And in civil cases it's often an intellectual exercise in the interpretation of the law.'

'Again my legal friends would not agree with you,' *he replied.* **'So far as getting the guilty off is concerned, a barrister's duty is to the court and, through that duty, to his client to present the case in the best possible light. His duty to the court does not preclude him from defending the person whom he suspects might be guilty. There is only a conflict of duty when he knows for certain that the person is guilty, a relatively rare occurrence. Furthermore, even if a guilty verdict seems likely, his skill in presentation of the case may make a big difference to the judge's impression of a guilty party. This may greatly influence sentencing when the pleas in mitigation are made. Five years less in jail is worth quite a lot of money!'**

'But what about civil cases?'

'The judge has to make a decision based on the evidence presented and someone must do that for each side.'

'But surely justice demands that the greater persuasive powers of one counsel compared with another should not determine the outcome?'

'Nor should it,' *he replied,* **'but as one distinguished jurist said to me, "Barristers lose cases rather than win them".'**

'How do you mean?' *I asked. At this point Charles greeted a passing solicitor friend, Victoria, whom I knew chaired tribunals.*

'Did you hear that, Victoria? Tell Coe the story about when you produced your old girl's grumbles about the standard of new entrants to your profession.'

'The case was one of benefit recovery where the government was demanding repayment of statutory benefit from the insurers who had paid out damages in an asbestos case. There were two separate appeals: the first against the demand for repayment of disability benefit and the second for repayment of disability living allowance. In both situations the law says that as long as there is a contribution from the disease for which benefit is paid then the whole of that benefit, not merely an appropriate proportion, is recoverable.'

'That seems hard on the insurers, Victoria!' *I exclaimed.*

'It's the law and therefore has to be applied, but there is a provision with disability allowance that the repayment should have been properly made.'

'Fair enough,' *I said.*

Victoria continued. 'I did not see how the insurance company had a case. It was not disputed by the parties that the patient had severe heart disease and that the asbestosis (pneumoconiosis) was trivial but the company had made a payment based on 5% disability. In presenting the case the young barrister used the argument of *de minimus*, suggesting that the contribution of asbestosis to the disability was so minimal that it could be ignored. This argument could never succeed because asbestosis is one of the pneumoconioses where uniquely the law says that disability payments are made however mild the condition.'

'Interesting. Go on, Victoria,' *I said.*

'The medical member is a friend and a favourite of mine because he always sees the point and shows little interest in questioning about irrelevant matters. I asked him to go first. He immediately established that the barrister did not know the peculiarity of the law with regard to pneumoconiosis. She immediately realised she had lost that argument. Thereafter his line of questioning took me by surprise as it was entirely directed at the cardiac disease which was agreed in the reports of two medical experts as causing severe breathlessness. He repeatedly queried the severity of the cardiac disease suggesting that the objective evidence was of moderate disease, but she insisted it was very severe. She left dispirited convinced that she had lost both appeals.'

'I don't blame her, he was hard on her!' *I said.*

'Perhaps,' Victoria replied. 'However, there then followed the briefest discussion that I have ever chaired. As the parties left the room my friend had made a calculation on the margin of his papers. As he looked up, he said severe disablement equals inability to walk 100 yards, but the claimant had walked well over 200 yards during his exercise test. I summed up, "They have no case on the first count, but succeed on the second because disability living allowance should not have been paid". My friend said sadly, "I did my best to lead her in the right direction but she wouldn't take the hint".'

'So she didn't lose the case but deserved to do so.'

'Yes,' *Charles interjected,* **'when she saw the result I hope she learned her lesson. When a judge appears to disagree it may not be your case but your argument he is questioning. Give him the benefit of the doubt, go back to the start, think again and change tack if necessary.'**

'Difficult to do on your feet!' I exclaimed.

'Yes, but that is one of the skills that separates the good barrister from the bad, and a good expert witness from the bad. If one is not to mislead the court one's explanations must be absolutely sound and consistent!'

I felt that this story was a lesson for all of us who have anything to do with the law. I was also saddened that neither of the distinguished cardiologists had noticed the gross discrepancy between the claimed exercise limitation and performance on the Bruce protocol, so perhaps our friend was indeed hard on the young barrister.

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