



SUMMER ISSUE 2007

CONTENTS	Page 1.	INTRODUCTION
	Page 1.	FIXED RECOVERABLE COSTS – Brian Dempsey
	Page 3.	OTHER SERVICES THAT WE CAN PROVIDE
	Page 4.	ENHANCING YOUR INPUT - Neil Newton
	Page 5.	FOCUS ON OUR PEOPLE – Rob Kent
	Page 6.	HIGH COST CASE PLAN – Lynsie Whyke
	Page 7.	CASE LAW
	Page 9.	DR COSTS

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INTRODUCTION

It has been three months since our last newsletter and that period has been very busy for MRN. We have reached a whole range of milestones such as having our 12,000th case, hitting 250 clients and recording our best ever year end results.

Various other law cost drafting companies have recently ceased trading but we sincerely believe that our fundamental strengths of professional excellence coupled with an unparalleled level of client care allows us to maintain our market position. We are grateful to you for continuing to use our services and hope that you continue to feel that they offer value for money.

Within this edition we have highlighted several of the services which we undertake which not everyone knows we provide – such as providing independent work-in-progress valuations. Please take a few moments to look over them and please do not hesitate from contacting us should you wish to discuss them. Looking ahead to the next quarter, we are hoping to take new office premises for our Leeds office and we are continuing with our recruitment drive across our offices.

Thank you for taking the time to read this newsletter and, as always, please do not hesitate from picking up the phone to speak to us.

FIXED RECOVERABLE COSTS IS IT WORKING ? **Brian Dempsey**

Fixed Recoverable Costs came into being on 6 October 2003 by the enactment of The Civil Procedure (Amendment No. 4) Rules 2003 [S.I No.2003 No. 2113 (L. 33)]. This followed a substantial amount of discussion under the auspices of the Civil Justice Council in which representatives of the Judiciary, Claimant's Solicitors, Defendant's Solicitors, Before-the-Event Insurers, After-the-Event Insurers, consumer groups, The Law Society, The Lord Chancellor's Department, as well as Barristers and Academics and others agreed the scheme that can now be found under Part II of CPR 45. The intention was that the scheme itself would go some way to putting an end to what has been described as "trench warfare" between the insurance industry and Claimant's Solicitors with regard to costs.

Over three years on we see that it has done anything but this. It was hoped by Claimant Personal Injury Practitioners that they would be able to settle their client's claim and then receive a cheque for damages and a further cheque for costs. At MRN, we continue to receive instructions from clients in a number of such cases where what was hoped has simply not happened. *These generally fall into five categories:*

1 No response is received
In a number of cases, the damages cheque is received but the insurers go quiet in relation to costs. On these occasions, we will issue Part 8 proceedings pursuant to CPR 44.12A using the Alternative Procedure for Claims under CPR Part 8. The Court is asked to grant an order in the sum of the Fixed Recoverable Costs as a paper exercise together with an order that the Defendant pay the costs of the Part 8 proceedings. These additional amount of costs are often dealt with by way of a summary assessment.

There is an argument about payment of the success fee.

2 We have had a number of cases where the Defendant argues that a success fee is not payable. In the main, the argument tends to be cases where the Claimant is a passenger and the driver's policy has Legal Expenses Insurance. In such cases, we issued Part 8 proceedings and following receipt of an Order for costs have proceeded to assessment where we successfully argued that the recoverability of a success fee under CPR 45 stems not from its reasonableness but solely by virtue of their being a Conditional Fee Agreement. In those cases, we have recovered the success fee together with costs of the assessment proceedings. ⇨

3 There is an argument about payment or recoverability of an After-the-Event Insurance Premium.

We have had a number of instances where the Defendant has sought to argue that the premium under fixed recoverable costs is too high. Again, Part 8 proceedings have been issued and an order sought for assessment. Once assessment proceedings have been commenced, the Defendant's representatives will pay the premium in full. This has occurred both on cases where all cases are insured and the premium is comparatively low but also on those cases where the premium is only taken out on cases which are about to be issued and thus the premium is higher. We have successfully recovered all premiums in full in these instances.

4 There is an argument about payment or recoverability of disbursements.

These usually fall into two categories, medical disbursements or disbursements which do not appear under CPR 45.10 (2) (a) but have arisen as a matter of dispute. In the first category, we are seeing a concerted effort by paying parties to limit the amount recoverable for a medical report. This is a difficult matter and one which will be dependent upon the facts of the case. However, we are seeing matters where insurers, having initially agreed the instruction of a Consultant Orthopaedic Surgeon during the matter are instructing their cost consultants to argue that only the reasonable fee of a GP should be allowed. In such circumstances we have argued that if the insurers wanted only to pay a GP report fee, they should not have agreed to the instruction of a Consultant Orthopaedic Surgeon. In a similar matter, one of our clients wrote to the insurers enclosing a CV which at the bottom stated the cost of the report would be estimated at £395-£495. At assessment, we successfully argued estoppel and £495.00 was allowed for the report from an A&E Consultant. It is difficult to say precisely how much will be allowed on such matters as a lot will depend on the quality of the report however, we have recovered £350.00 for a GP report arguing that the detail contained in the report, in which the expert reviewed both the GP and Hospital records and commented on both the Claimant's physical and psychological injuries justified the cost. In relation to other disbursements, again it is a matter of persuading the Court that such a disbursement was reasonable in all the circumstances. We have previously recovered a translation fee of £240.00 plus VAT. Again, in all the instances above, assessment fees are recovered in addition.

5 There is an argument about the amount of damages which apply to fixed costs

We have seen some repeated arguments that some heads of damage are not to be included in the calculation of damages for the purpose of calculating Fixed Recoverable Costs such as hire charges. Often, we see situations where the Defendants will argue that only those heads of damage which are for Personal Injury or related to the injury such as care costs. The intention of the amendment to CPR 45 was intended to encompass the client's general and special damages and as such these arguments tend to fall away once Part 8 proceedings are issued and costs again follow.

As can be seen from the above, there are a number of options open where the insurers seek to delay payment of costs or seek unnecessary reductions. We would refer to the comments of Mr Justice Smith in *Butt -v- Nizami* [2006] EWHC 159 (QB) when he said, "...the intention underlying CPR 45.7-14 was to provide an agreed scheme of recovery which was certain and easily calculated. This was done by providing fixed levels of remuneration which might over-reward in some cases and under-reward in others, but which were regarded as fair when taken as a whole."

If insurers insist upon trying to undermine the Fixed Recoverable Costs regime and fail to act in the spirit in which it is intended, then the Claimant is left with no option other than to issue Part 8 proceedings in order to seek reasonable remuneration. Finally, it must be stressed that Fixed Recoverable Costs are the amount of costs to be allowed under CPR 44.12A. If you do not have a contractual agreement to pay costs you cannot recover Fixed Recoverable Costs. Therefore it is imperative that when settling damages you must ensure that this is always made subject to payment of costs. ■



OTHER SERVICES THAT WE CAN PROVIDE

Legal Aid Cost Estimates

Over recent months we have prepared several claims to the LSC to recover costs in failed clinical negligence cases. In all of these cases we have noted that the claim from the LSC had been severely limited by virtue of a low limit placed on the legal aid certificates.

Often, especially on the high value cases, you are invited to submit a cost matrix and the limit is applied in light of the same. We have now started to assist our client's in preparing these matrices to ensure that you have got adequate cover.

Furthermore we can regularly assess your file to ensure that you are staying within the limit and thereby helping you to get paid for all the work that you have done.

Landlord and Tenant Documentation

Whilst everyone is aware of the various ways that we can assist in general civil litigation, we can also help whenever your client has the benefit of a costs indemnity. A typical example of this is where you are acting for a landlord whose costs are indemnified, by virtue of a lease, by the tenant.

Let us cost out the non-contentious solicitor own client to ensure that the full amount is recovered from the paying party. Our fees will also be recoverable and so there is no need to be concerned about instructing us.

Attending Yours Offices

We are only too happy to attend your office to assist with any of the following:

Give seminars and round the table discussions. This is a particularly useful tool for us to give you feedback on the results that we get for your firm and any issues flowing from our review of your files.

We can draft bills in your office so long as we can benefit from a broadband connection. This is particularly useful for large commercial matters which are often live even after a costs order has been achieved.

Prepare urgent schedules of costs in preparation of applications, trials or perhaps when you are transferring your file of papers to another firm of solicitors

Putting a Realistic Value on Your WIP

There are various reasons as to why you would need a true valuation on the work in progress. These can include any of the following:

- To comply with the new accountancy rules demanding an accurate reflection on the WIP within your accounts.
- You are transferring your files to another firm.
- Your firm may be looking to dispose of some files or you may be considering purchasing some files.
- Calculation of bonuses.

This is a highly sensitive area and we now work with various accountancy firms to assist in valuing the same.

Please speak to our Elliot Mocton should you wish to take advantage of this service as our fees are bespoke to each and every situation. ■



ENHANCING YOUR INPUT **Neil Newton**

Recently we were asked to draft a Bill of Costs in a Clinical Negligence matter where the Claimant was Legally Aided. We noted that this was a matter where the Claimant was a child who had been born physically and mentally impaired, who was initially represented through his mother, and then through his father due to the unfortunate death of his mother due to cancer. The case was the essentially against the doctor delivering the Claimant, and the Health Authority, in that they had been negligent in relation to his birth. The matter eventually settled with the Defendants paying the Claimant the sum of £2.5 million plus costs.

When the file initially came to us the Claimant was looking to recover the guideline hourly rates for a Grade A Solicitor. We looked at the matter and took the view that this matter warranted an enhancement given the complications involved. It was a matter that was funded by way of a Public Funding Certificate. We therefore contacted the client and informed them that the hourly rates should be enhanced, after some discussion they agreed to an enhancement being claimed.

We claimed an enhancement of 60% to the guideline rates within the Bill of Costs, which totalled over £364,000.00. After negotiations the matter settled for £310,000.00.

It is always important to note that an enhancement can be added to rates, not just if the client is Legally Aided. If you tell the client that the matter may well get complicated, which I would always advise in larger matters, or if legally aided there is no need to tell the client about rates at all, then an enhancement can always be claimed. If you do not advise the client that there may be an enhancement, then it is not possible to claim one.

In the above matter had the enhancement not been claimed, then it is likely that the costs would not have been recovered at the level that they were, and possible not even claimed at over £310,000.00. We have a wealth of experience here at MRN and are more than prepared to advise as to retainers, even before you send it out to your client, so as to maximise any costs claim you may have. ■

LEEDS GROWTH

Since the opening of the Leeds office in April 2005, which was manned only by Lynsie, who is now our Office Manager, MRN Leeds has grown considerably.

We now boast four employees and are looking for a fifth. We have a consistent flow of work from various clients, spread across the whole of the North of England, specialising in Personal Injury, Clinical Negligence, Family and Commercial.

A vast amount of work has also been undertaken by Michael and Elliott in a bid to secure new premises still within the legal quarter of Leeds City Centre. The premises will be available to move into in early July 2007.

FOCUS ON OUR PEOPLE

ROB KENT

What is your background in costs?

I came to work in costs by chance whilst working as a Bailiff and began working for P I Costing Plc dealing mainly with Claimant personal injury and clinical negligence claims. I started work initially as a Trainee Costs Negotiator back in 2002 and progressed to Negotiations Manager before I left the company at the beginning of this year. I moved to MRN in order to develop my knowledge and improve the service MRN provide.

What is your approach to the file?

When I receive a file the first thing I look for is to see how the case is funded. I then consider and review the pleadings, note any adverse costs orders and consider the final authority for costs. Whilst costing the file I make a note of any potential problems/concerns and inform the Claimant of the same at the outset. I strive to obtain the best results possible for my clients on an individual basis.

What is the silliest point of dispute/ argument you have ever come across?

The Defendant ran a matter to Assessment (only settling on the court steps) on the grounds that the Conditional Fee Agreement did not adhere to the regulations, nothing wrong with that you may say. However, the case was funded via a Collective Conditional Fee Agreement which had been disclosed! Although redacted first.

Favourites?

Film – Platoon & Michael Collins
Meal – Italian
Band – Paul Weller
Drink - Guinness

Personal Ambition

To ride the Isle of Man TT & to be a good dad to my forthcoming child.

What really annoys you about people?

Ignorance, there is just no need for it. ■



High Cost Case Plans **Lynsie Whyke**

The Very High Costs Case requirements apply to Investigative Help or full representation cases where costs are likely to exceed £25,000 and Litigation Support cases where a Conditional Fee Agreement is in place and funding is sought above £15,000 or disbursements above £5,000.

The Legal Services Commission's Special Cases Unit is responsible for the administration of funding these cases. Once a case has been referred to the SCU a fully costed case plan must be provided. Each case results in an individual contract and progression occurs on a stage by stage basis with an agreed price for every stage.

Costs have often been occurred prior to entering into the Case Contract, these costs will be claimed as part of the Case Plan and should be claimed under the appropriate regime. The rates utilised are those that would be expected to be achieved through assessment and it is therefore important to include the enhancement to the prescribed rates at this stage, should it be deemed appropriate for the matter in question.

The priced stages of the contract are based on profit costs, counsel's fees and disbursements including expert's fees. Profit costs are worked out on the basis of the work required at the appropriate hourly rate. For cases where inter partes costs are expected to be paid the appropriate rate of £70 per hour for solicitors, £50 for junior counsel and £90 for senior counsel. For cases where inter partes costs are not expected to be paid the rates are paid in line with the correct remuneration rates for the appropriate type.

At the early stages of a case it is extremely difficult to predict future events and the case may change as it develops. The Case Plan can be amended where work which could not have been reasonably foreseen has to be done or in other exceptional circumstances provided that the costs increase by 5%.

The Legal Aid Certificate is limited in line with the agreed case plan and it therefore essential that the estimates provided within the case plan are accurate. It is not possible to recover the costs that exceed the limitation and unfortunately failure to allow for sufficient work could result in a substantial under recovery. Careful consideration of the work required at each stage is therefore essential to maximise recovery. ■



CASE LAW

Failing to better a Part 36 payment – Is it mandatory where a claim concludes at trial that there be 100% success fee uplift?

Tony Lamont v James Burton

[2007] EWCA Civ 429

The Claimant in this matter was injured in a Road Traffic Accident. He instructed solicitors under a Conditional Fee Agreement and took out after the event insurance. The Defendant admitted liability. Proceedings were issued and no defence was filed. A Part 36 payment in the sum of £1,800 was made but was not accepted. A 'disposal hearing' was conducted and the Claimant was awarded damages of £1,774.32. In relation to costs, the Defendant argued that the Claimant should have accepted the Part 36 payment within the time for acceptance, and that had he done so, the claim would have concluded before the trial so that the percentage increase for solicitors' fees prescribed under CPR 45.16 (i) would have been 12.5%. Accordingly, it was submitted that the judge should exercise his discretion to allow the Claimant an uplift of only 12.5%. The Judge had awarded the Claimant costs up until the latest date on which the Part 36 payment could have been accepted without the permission of the Court, making a summary assessment which included a sum representing the base costs and a success fee of 100%

The Defendant appealed to the Judge on the ground, inter alia, that the Judge was wrong to consider himself bound by CPR 45.16 (a) to award a success fee of 100%. The Defendant argued that although CPR 45.16 did not itself give the Court jurisdiction to allow a different percentage increase, it contained a lacuna in that it did not deal with situations in which a Claimant failed at trial to better a Part 36 offer.

The appeal was dismissed. While there might well be a case for deciding that where a Claimant failed to better a Part 36 offer or payment he should only be allowed the same success fee as he would have recovered had he accepted it, this was not the effect of the CPR. The Court could not use rule 44 to circumvent the mandatory rules of CPR 45. However when read together, CPR r.44 and r.45 did not have that effect. Moreover, there was nothing in the language of the rules that required the Court to allow a 12.5% success fee where a Claimant had failed to better a Part 36 offer or payment, and the Appellant did not seek to argue that r.44 could be invoked to award a reasonable success fee in cases to which Part 45 III applied.

Dealing with the indemnity principle in relation to the retainer between insurance company and client.

Dr J B Ilangaratne v British Medical Association

[2007] EWHC 920 (Ch) – Appeal

The Claimant brought an unsuccessful claim against the Defendant and as a result was ordered to pay the Defendant's costs. The Claimant appealed on the grounds, inter alia, that the order offended against the Indemnity Principle. The Claimant argued that because the Defendant had defended its claim with the support of insurers and the insurers had instructed a firm of Solicitors, and since the Defendant had not disclosed its contract of insurance it should have been inferred that there had been no retainer between the Defendant and the insurers' Solicitors, pursuant to which the Defendant was not under any liability to pay their fees. The Judge rejected that submission but allowed the appeal to the limited extent that the matter should return to the Master for him to satisfy himself whether or not the Indemnity Principle had been complied with.

The concern that led the Judge to remitting the matter was that there might have been a contract, which provided for charging rates lower than those found to be in the Bill of Costs. Further directions were given and the Defendant disclosed under cover of a letter from the insurers' Solicitors dated March 2006 and an earlier letter dated December 2000. The March 2006 letter stated that whereas the December 2000 had provided a charging rate of £110 per hour for a Trainee, a higher rate had in fact been charged of £115 per hour. It was held; save in relation to two other separate issues there had been no breach of the Indemnity Principle reflected either in the Bill of Costs and that the December 2000 letter was a binding and enforceable agreement, rejecting a submission that it was a mere negotiating document made inadmissible by previous precedent.

The Claimant appealed and argued that the Deputy Master was wrong to have concluded that the December 2000 letter constituted a binding and enforceable agreement, or formed any part of the retainer.

Dismissing the appeal it was concluded that in relation to charging rates previously agreed, the same constituted a form of master agreement included in each succeeding retainer. Nonetheless it was also held that the December 2000 letter was not in itself a written contract of retainer or a self contained con- ➔

tract. It was a letter which evidenced that, when it was written, the standing arrangement between the insurers' Solicitors and the insurers was such that any instructions by the insurers to the insurers' Solicitors regarding a matter of one of the insurers' insured customers would give rise to a retainer between the customer and the insurers' Solicitors the terms of which included by incorporation, remuneration for the insurers Solicitors services at the charging rate described in the letter as being already agreed or in force. (Investors Compensation Scheme Ltd v West Bromwich Building Society 1998 1 All ER 98 applied)

Where a settlement takes place on the day fixed for commencement of the trial there is a lacuna in the CPR as there would be no figure for success fees from midnight on the date before the fixed hearing till the commencement of the trial i.e. as soon as it has been called into Court. Thus in the case below it was imperative for the judge to decide when a case "concludes at trial".

Amarjeet Singh Dahele v Thomas

Bates & Son Limited

[2007] EWHC 90072 (Costs)

This matter was an asbestos related Employers Liability Disease Claim. A consent Order was drawn up and the Defendant was ordered to pay the Claimants costs to be assessed on the Standard Basis. The Claimant submitted a bill for assessment totalling £144,364.80, included within the same was both Counsel and Solicitor's success fee of 100%.

Points of Dispute were served and in relation to the success fee the Defendant submitted that the 100% success fee claimed was excessive as it exceeded the fixed success fees recoverable under CPR. In relation to the 100% success fee claimed by the Solicitor in this matter, it was argued that the fixed rate was in 27.5% as the claim was defined as a "Type A claim" where a claim concludes before a trial had commenced. The present case settled at Court immediately prior to the commencement of the final hearing. Further the Defendant argued that Counsel's fees was also fixed under CPR Part 45.25 at 75%. The Claimant in this matter however argued to the contrary that in fact the settlement occurred after "the commencement of a trial". Further submissions included that the taking of the Claimants evidence on commission constituted the start of a trial

The Judge held that the latter submission as to the meaning of a "Trial" pursuant to Rule 45.15(6)(b) means "the final or contested hearing or...the contested hearing of any issue ordered to be tried separately" and therefore the Judge held that examination "must be conducted in the same way as if the witness were giving evidence at trial", which he decided did not and stated that: *In my judgement the analogy between the split trial where issues of liability and quantum are dealt with separately and obtaining evidence on commission is flawed.*

In relation to the submissions regarding success fees claimed the Judge agreed with the Claimant that a case "concludes at trial" if it settles on the day fixed for trial and thus permitted the percentage increase of 100% to both Solicitor and Counsel.

How an 'exaggerated' claim for damages can affect ones claim in relation to costs.

Paul Sheridan Finster & Arriva London v Steven Booth SCCO

Reference CCD0604044/Claim No. 4BK05734

The Claimant was injured in a Road Traffic Accident and claimed damages in relation to the same from Arriva. A Part 36 offer was made by the Defendant in the sum of £10,000 in January 2005, which was initially rejected. Some twelve months later the matter settled by payment out of Court in the sum of £10,000 plus Standard Basis costs. However, the claim was pleaded and pursued at a value in excess of £1.4 million. This marked difference between the sum claimed and that received triggered the arguments, which ensued on assessment of costs.

The relevant part of the offer letter dated 19 December 2005 had been referred to in this case and was as follows:

"The Defendant offers to permit the Claimant to accept the Part 36 payment of £10,000 out of time without costs penalty."

The Bill of Costs in this matter amounted to approximately £54,000 and the main Points of Dispute were entitled 'exaggeration' and 'proportionality'. In relation to proportionality the case of *Lownds v Home Office* was cited as to the approach that should be followed:

"When considering whether costs are proportionate, one should consider what you reasonably thought might be recovered on behalf of your client."

In relation to proportionality Deputy Master Williams took the view that the bill was globally disproportionate adopting the standard of necessity by applying the item-by-item approach as set out in *Lownds*. Thus on this point found in favour of the Defendant.

With regard to the 'exaggeration' and the same being dealt with at trial, the Judge decided that the Defendant committed itself to a more rigorous (and costly) defence once the Claimant had not accepted the payment into court, without counter-offer. Consequently the trial was expanded from a one day hearing to a three day trial. The Judge held that the best way to deal with 'exaggeration' was again the *Lownds* approach but further stated that:

I shall allow, for trial costs, the reasonable costs equivalent to a one day liability trial. ■



Dear Dr Costs

I am having difficult in recovering the cost of a medical report fee under predictive fees. The report is £275.00 and the Defendant's will offer no more than £245.00. I have a number of colleagues with similar matters. Is it worth going to Part 8?
Frustrated, Denbigshire

Dear Frustrated,

The insurers hope that you feel it will not and hence the offer. As can be seen from the article on this subject, there are a number of matters which are still being argued some three years after the introduction of Fixed Recoverable Costs. All I can say is that you must look at the report itself. It is the same as any other purchase. Ask yourself, does the report go into sufficient detail, what is the level of the expert, has he reviewed the notes, etc. You will see the example given where £350.00 was allowed for a medical report where it was detailed and of sufficient quality.

With regard to the appeal in Wollard which was due to be heard at the Court of Appeal, this was stayed for mediation following which an agreement was reached, dated 10 May 2007, full detailed of which can be found on the Mobile Doctors Website.

Dear Dr Costs

I have dealt with a Road Traffic Accident matter and despite my experience my opponent will only offer me Grade C rates. Is this reasonable?

Confused, Darlington

Dear Confused,

As with all such considerations, each case turns on its own merits. The hourly rate to be allowed will always be dependent upon the facts of the case. The hourly rates published by the SCCO are guidelines only. These are not set in stone. There have been numerous cases where these have been exceeded where the case merited it.

In relation to Road Traffic Accident matters, the Courts will usually take Grade C as a starting point it is for you to show that the case was outside the norm of other Road Traffic Accident matters. If liability was a thorny issue or quantum was substantial or complex you can usually argue for higher rates but on a straightforward rear end shunt it is unlikely that the Court will allow higher than the guideline Grade C rate.

Dear Dr Costs

I have got a matter where the Defendant is arguing my success fee on an Road Traffic Accident matter, but I was under the impression that these were now fixed.

Aggravated, Stockport

Dear Aggravated,

That is correct. Success fees on Road Traffic Accident matters after 6 October 2003 are fixed by virtue of the amendment to the CPR which inserted Section III to CPR 45. Also, see the recent decisions upon these in the case law section which deals with the definition of trial.