

### Hourly Rates

With the growth and increasingly specialist nature of personal injury claims, it has become increasingly rare for a Claimant to instruct their local high street solicitor to act for them. Often a claims management company, trade union or legal expense insurer will instruct a solicitor off their panel on behalf of the Claimant or, as in the recent case of *A v The Chief Constable of Sheffield* (2008), the Claimant may choose to instruct a particular firm of solicitors. The problem is that is that choice often leads to increased costs which the paying party is then faced with paying and the court has to decide whether this is reasonable.

The case of *A* concerned a claim against the police arising from his arrest and subsequent failed prosecution. The Claimant alleged that the police had unlawfully searched and detained and thereafter maliciously prosecuted him and as a result, the Claimant had developed schizophrenia. The claim was valued at over £1 Million but settled for £300,000 together with costs on the standard basis.

The Claimant had originally instructed a local firm in Sheffield, Peel & Co, to deal with the criminal case against him. During the criminal proceedings, the Claimant's partner contacted a high profile civil liberties firm, Birnbergs in London, with regards to the possibility of a civil claim against the police. She discussed matters with a solicitor at Birnbergs, Fiona Murphy, and they agreed to speak again after the criminal case. Following further discussions, it was agreed that Ms Murphy would act for the Claimant in the civil case, although she had by now set up a new firm in London, Bhatt Murphy. The Claimant formally instructed Bhatt Murphy and legal aid was transferred to them.

Following settlement of the case, the Claimant's costs could not be agreed between the parties. The dispute concerned the hourly rates claimed by the Claimant Solicitors. It was argued by the Defendant that these were too high and had been unreasonably increased by the Claimant's unreasonable decision to instruct a specialist firm of solicitors in London when the matter could reasonably have been dealt with by a firm in Sheffield with commensurately lower hourly rates. The Claimant argued that it was a reasonable choice of solicitor in all the circumstances of the case. The matter came before the Court and Deputy Costs Master Rowley held for the Defendant. He concluded that the claim was, in essence, a personal injury claim, albeit one with complicating features:

*'It seems to me, on balance, that a solicitor dealing with actions against the police could competently have dealt with this, using Counsel if necessary in relation to the finer points of it, but the vast majority of this is a personal injury claim...As a result I have come to the conclusion that the Claimant had in essence a personal injury claim to be brought and that somebody who was used to dealing with police matters ought to have been able to deal with this case properly and secure the same sort of level of damages (at paragraph 12)*

The Claimant appealed and the matter came before Mr Justice Teare who sat with assessors.

The appeal was based on 2 grounds; firstly that the Master was wrong to categorise the case as a personal injury claim and failed to appreciate the specialist nature of the claim or the solicitor's expertise, and secondly, that there was no evidence to support the conclusion that there was a sufficiently expert solicitor in Sheffield who could have handled the claim.

On the first issue, the Claimant submitted evidence to show that the case was one of 'exceptional complexity' and the conducting fee-earner, it was argued, was particularly suited to dealing with a claim of this nature. It was accepted by the Court that this was a case that required a solicitor with experience of claims against the police. However, the Court agreed with the decision of the Master that the claim could reasonably have been dealt with by a solicitor with experience of such claims generally together with specialist Counsel if necessary:

*'I do not accept that experienced personal injury counsel instructed by a solicitor with experience of actions against the police would not have been able to bring this claim to a successful conclusion.'* (at paragraph 23)

On the second issue, it was the Claimant's case that there was no evidence that there was a firm of solicitors in Sheffield who could reasonably have dealt with the case. The Defendant, in their Points of Dispute to the Claimant's Bill of Costs, had argued that there were large numbers of solicitors in Sheffield with experience of claims such as this and named Irwin Mitchell and Howells and but two. The Court held that, at the very least, the Claimant should reasonably have made enquiries in this area:

*'A reasonable person in the position of the Claimant in 1999 would surely have been able to inquire about solicitors in Sheffield with experience of bringing claims against the police from the local Law Society, from the Citizens Advice Bureau or from any local solicitor including Peel & Co. Such enquiries would have brought Irwin Mitchell to his attention.'*

The Judge therefore concluded that the decision of the Master was correct:

*'The reasonable litigant would inevitably consider whether, in those circumstances, it was reasonable ad proportionate to instruct Ms Murphy. In my judgement he would have considered that it was not, because of the added substantial cost of doing so.'*

The decision in this case is an application of a principle most famously set out in the case of *Wraith v Sheffield Forgemasters* (1998) and restated in *Sullivan v CIS* (1999). In *Sullivan*, the Court of Appeal summarised the issue as:

*'whether objectively the plaintiff acted reasonably in engaging the lawyers in question.'*

In deciding this question, a court has to consider all of the circumstances surrounding the case to include the reason why the particular solicitor was chosen and the relative advantages and costs associated with the same. Ultimately, it is a balance between the right of a Claimant to instruct a solicitor of their own choosing and their common law duty to mitigate their legal costs. For example, in *Wraith*, the decision to instruct solicitors based in London was made by the Claimant's trade union on the basis that the solicitors they routinely used were based in London. In these circumstances, it was held that this was not a sufficient reason and the solicitors were limited to the hourly rates applicable in Sheffield, where Mr Wraith lived and the accident occurred. By contrast, in *Griffiths v Solutia UK Ltd. (2001)*, the decision of the Claimants to instruct solicitors in London in their group action arising from a chemical leak in North Wales was considered reasonable on the basis that the same firm of solicitors had already dealt with 2 previous groups of Claimants in relation to the same event. The additional costs of instructing a new local firm would outweigh the increased costs incurred by instructing solicitors in London.

In summary, the issue is a particular demonstration of the distinction between costs as between a solicitor and their own client and costs between the parties. If a client chooses to instruct solicitors in London or who are considered a luxury choice, then that is their prerogative if it is they who are paying the bill. However, when those costs come to be paid by a Defendant, the question is one of reasonableness. As Teare J held in the case of A:

*'A reasonable litigant might well consider it advantageous and beneficial to instruct a solicitor such as Ms Murphy with the three-fold experience of actions against the police, claims for psychiatric damage and of the significance of racist action in the causation of psychiatric harm. However, a reasonable litigant would not necessarily require such a solicitor.'* (at paragraph 35)

The distinction between what is desirable from the Claimant's perspective and what is reasonable from a paying party's perspective underpins much of the dispute between parties in relation to the costs of personal injury claims. The reality is that, with the advent of conditional fee agreements, a Claimant is very rarely ever expected to actually pay the costs of their own solicitor and therefore has very little interest in what it is going to cost. The hourly rate charged by a client's own solicitor becomes, in a strange reversal of the situation in any other commercial arrangement, of no interest to the actual purchaser of the service, that is the client, but becomes of very great interest to a third party, namely the Defendant to the claim. As long as this continues, disputes over costs will never go away.

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Cases Cited:

A v The Chief Constable of Sheffield [2008] EWHC 1658 (QB)

Wraith v Sheffield Forgemasters [1998] 1 WLR 132

Sullivan v CIS [199] Costs LR 158

Griffiths v Solutia UK Ltd [2001] EWCA Civ 736

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