

Legal Costs

NEGOTIATORS LTD

Newsletter

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TAG - The Beast That Never Dies

In our last Newsletter we optimistically suggested that the Accident Group (TAG) litigation could finally be drawing to a close.

Unfortunately this sorry saga appears to be one that will run and run. A further test case will now be heard by the Senior Costs Judge, Master Hurst, in relation to the reasonableness of insurance premiums post 2001. Although the number of claims that fall into this category

is limited, it is not insignificant, and many cases are now awaiting the outcome of this further tranche of litigation.

LCN predicts that the amounts that will be allowed will be identical or virtually identical to those previously allowed.

On a lighter note, TAG panel solicitors are facing huge legal claims from the TAG underwriters concerning their alleged negligence in accepting

“unwinnable” claims. The amount at stake is reported as being in the region of £70 million. This follows the Law Society’s guidance that solicitors should repay the unlawful £310 referral fees that had been deducted from some clients’ damages. There are now concerns as to whether affected firms will be able to secure professional indemnity cover in the future. Those who live by the sword... ■

Services to Panel Solicitors

LCN have a long-standing reputation for the services we provide to insurance companies. However, in recent years we have been quietly building a strong reputation for the services we offer direct to panel solicitors.

We provide these services not only as insurers’ nominated costs specialists, but also as the costs draftsmen of first choice for many panel solicitors. We offer a comprehensive range of assistance

including advice, negotiating and drafting Points of Dispute. Our specialist team of in-house advocates – all qualified barristers – are able to meet your advocacy needs at detailed assessment at any court in the country. Our extensive experience of high value claims, industrial disease and CFA issues, in addition to more routine claims, enables us to provide an extremely professional service when it is most

needed. We have also recently started to offer a traditional bill drafting service at very competitive rates.

We are happy to assist on either a one-off or more regular basis. Many panel solicitors make use of our services as an overspill to their own capacity.

To find out more, please contact Harriet Stone on 0870 766 4128 or email harriet.stone@lcnltd.co.uk. ■

Predictable Costs Chaos

We have previously warned of the problems that would be created by the new Predictable Costs scheme in RTAs. LCN will shortly be publishing a detailed analysis of the extent of this problem and the following example is simply a taster.

As readers will know, the Predictable Costs scheme applies to cases where the damages do not exceed £10,000 - as opposed to the £15,000 limit for fast track matters. The following is an extract from correspondence between LCN and a large firm of claimant personal injury solicitors, who shall remain nameless:

LCN: You have not provided a breakdown of time but we assume you have costed this case on the

basis of Predictable Costs. In fact, as damages exceed £10,000 this is not a Predictable Costs case.

Solicitor: We are entitled to costs on the predictive fee basis and unless we receive your insurer client's cheque within 14 days, we intend issuing Part 8 proceedings.

LCN: I understood that damages in this matter exceeded £10,000. On what basis are you suggesting that this is a "predictive fee" case?

Solicitor: Based upon the fact that damages do not exceed £15,000 and therefore this is a fast track matter.

LCN: What is the relevance of this being a fast track matter? Please read CPR 45.7(2)(c).

Solicitor: Can you please email

me a copy of the rule you are referring to?

The solicitors were originally claiming Predictable Costs of £3,461.25. When they finally produced a proper schedule of costs, the figure claimed had dropped to £2,779.16. This figure has not been accepted as reasonable and negotiations continue.

The above shows the difficulties some claimant solicitors are having in applying the new rules. Are all defendant insurers dealing with this in-house confident they do not also have problems?

For those who wish to discuss how LCN can help in this problematic area, please contact Simon Gibbs (contact details Page 6). ■

Referral Fees

The controversy over solicitors paying referral fees to obtain work shows no sign of disappearing. In our last Newsletter we reported the campaign to reinstate the ban, which had succeeded in securing a postal ballot of the whole profession on the issue.

The results of that vote were overwhelmingly in favour of reinstating the ban by a 3 to 1 margin. Unfortunately, the Law Society Council decided to ignore the results and voted in favour of keeping the ban lifted. Instead, the Society's Standards Board will conduct a review of the issue this spring, as had been required by the Master of the Rolls when the ban was first lifted in March 2004.

Prior to the Law Society Council's vote, Edward Nally, pres-

ident of the Law Society, said: "When the Council makes or changes rules, it has to decide the matter on the basis of the public interest. For that reason the Council cannot be bound on regulatory issues by any ballot of members." It is very hard to understand how the Council reached the conclusion that the payment of referral fees is in the public interest. The decision is all the more surprising as it followed on closely from very adverse reporting in the national press about a Liverpool firm of solicitors paying £175 "bounties" to doctors who referred patients to the firm. Hamish Meldrum, chairman of the British Medical Association's General Practitioners' Committee, said: "GPs may wish to advise

patients of their rights, but when it comes to recommending a particular firm of solicitors, that calls into question their own independence. Furthermore, if the GP is accepting money...I think it is highly questionable on ethical grounds."

It is to be hoped that the changes to the regulation of solicitors, to be brought about following the Clementi review of legal services, will lead to better decisions being made in the running of the profession. The TAG and Claims Direct schemes showed the dangers of solicitors being tempted to sacrifice their professional integrity through the payment of referral fees and the inability of the profession to self-regulate this area. ■

The Future of Claim Funding

It is gratifying to note that more and more in the legal profession are coming around to accepting LCN's often stated position that the key problems surrounding legal costs all stem from the rules relating to Conditional Fee Agreements (CFAs) and after-the-event (ATE) insurance premiums.

The Senior Costs Judge, Master Hurst, was recently reported as saying that there may have to be a change to the system of allowing success fees and ATE premiums to be recovered between the parties and that he was in favour of returning to the original model where success fees and premiums were not recoverable from the defendant but were paid out of damages. Costs expert Professor Peysner was reported as describing CFA funding as "daft" and a poor substitute for legal aid.

At the Law Society's annual conference at the end of last year, Fraser Whitehead, head of the trade union legal services group at Russell Jones & Walker, stated that the civil litigation "processes have become over-lawyered and too expensive".

Lord Justice Dyson, deputy head of civil justice, told the FOIL Annual Conference that the idea that a barrister can build a practice out of costs litigation is "sad and an indication that the Woolf reforms in relation to costs have not been a great success". However, these comments surely go too far - as the many barristers employed by LCN were quick to

point out when questioned.

All these views suggest that radical solutions will continue to be looked at to try to end the current difficulties. The introduction of fixed fees in RTAs, and fixed success fees in RTA and EL claims, are examples of the kind of approach that can be expected to be extended into other areas. The suggestion from some quarters that the small claims track limit should be raised to £5,000 is another example of the radical proposals currently being made.

Another area facing major change this spring is the CFA Regulations. These amendments will have the effect of simplifying the rules and moving a number of the provisions from the CFA Regulations to the Solicitors' Practice Rules.

Jason Rowley, managing partner at Vizards Wyeth, says: "Cavalier solicitors [will] now only breach the professional conduct rules and not the draconian section 58 of the Courts and Legal Services Act 1990. The effect is that such breaches will not cause the CFA to fall under the defendants' indemnity principle challenges. In other words, shoddy work can still be remunerative." It is "hardly an advert for the professional service" that claimant lawyers argue distinguishes them from dodgy claims farmers.

Costs expert Tony Girling says it is "questionable" whether consumers will better understand CFAs as a result of the changes.

"Consumer protection will depend on solicitors behaving in accordance with the Law Society client code, which now carries almost identical provisions as those used in the regulations," he explains. However, he points out that the regulations will no longer be policed by the paying party – the defendant insurer – who can bring to the court's attention any suggestion of improper conduct. "On the face of it, they will only be policed by clients saying they don't understand or like what's happening..."

Can solicitors or the Law Society be properly relied on to ensure that the regulations are complied with? Their record in relation to ensuring compliance with the old referral fee ban does not bode well for the future. It is certainly ironic when solicitors, whose very existence depends on sets of rules that are too complicated for laymen to understand, should seek to simplify the one area that has been causing difficulties to themselves.

Although the current costs rules are now being recognised as flawed, is there any willingness to realise that the answer may be to turn the clock back rather than dream up yet another raft of potentially flawed changes? Scrap recoverability of success fees and premiums and the problems will disappear. For the foreseeable future costs will remain a problematic area demanding expert input to control excessive claims. ■

CFA Victory for Defendants

A major blow has been struck against claimant personal injury lawyers in a recent court decision. Ruling earlier this year, in *Samonini v London General Transport Services Ltd*, the Senior Costs Judge, Master Hurst, disallowed a claimant's solicitors' costs in a road traffic accident claim.

The case had been referred to the solicitors by a claims management company, the Accident Advice Helpline, and was run under a CFA, together with an ATE insurance policy. Master Hurst held that the solicitors had failed to properly consider the availability of alternative methods of funding the case – such as before-the-event (BTE) insurance – before entering into the CFA, as required under the CFA Regulations. He held that this was a material breach of the Regulations, as the client was prejudiced by this failure, and the CFA was therefore invalid with no costs payable. This was despite the fact that it was subse-

quently shown that the client did not in fact have BTE cover.

Master Hurst appears to have been heavily influenced by the fact that he viewed the ATE premium of £798 as disproportionate for a claim with a value of under £2,000 and that this factor alone suggested that the court should investigate carefully whether appropriate funding checks had been made.

This decision will have potentially wide implications. Firstly, the level of premium claimed was similar or lower to many other cases where damages are also valued at a relatively low amount. The view of the Senior Costs Judge that the level of premium was, on its face, disproportionate will make it considerably easier to persuade courts to reduce such premiums. Secondly, the fact that he held that the size of the premium alone was sufficient to warrant investigation into exactly what had been discussed with the claimant, before

the CFA was entered into, will leave many solicitors' costs vulnerable to challenge.

The only negative element to this judgment is that it adds to the confusion as to the nature of challenges that the courts are prepared to entertain. Previous court decisions (such as *Hollins v Russell*) have criticised defendants for making "technical challenges" to CFAs. Lord Justice Brooke was reported as telling defendant personal injury lawyers to stop this "nonsense" or the courts "may have to get people up here and warn them off". However, this latest decision follows a number of more recent cases (such as *Spencer v Wood*) showing that some courts are increasingly willing to allow defendants to successfully attack these agreements.

There appears to be plenty of scope for properly advised insurers to achieve significant costs savings in CFA funded matters. ■

No Win, No Fee and No Risk?

Judgment is awaited on an important technical issue concerning CFAs entered into after liability has been admitted. LCN represented the defendants in the case of *Haines v Sarna* in the Supreme Court Costs Office. The case concerned a high value RTA claim where the claimant had changed solicitors several times during the case, moving with the fee earner. The final CFA was entered into with the last firm of solicitors after judgment on liability had been agreed by consent. The CFA used was the Law Society's Model Agreement.

The wording of this agreement allows the solicitor to charge their

fees if a "win" is achieved. A "win" is defined as a court decision or agreement to pay damages. There is a Part 36 clause which states that if a Part 36 offer is made by the defendant and is rejected, on the advice of the solicitors, and is not subsequently beaten, the solicitors will not add their success fee to their basic charges. LCN argued that as a "win" had already been achieved at the date the final CFA was entered into the success fee should be disallowed entirely, or only allowed at a very nominal amount. Even if the defendant made a successful Part 36 offer, the solicitors were still entitled to all their normal charges. The

reality was that the case was risk free to the solicitors, even if not to the claimant.

This case highlights the importance of solicitors considering the definition of "win" at the time of entering into CFA agreements. The outcome of this case will have potentially important implications in other matters. Although the volume of cases affected will not be large, the claims are more likely to be large in value. Cases which have been ongoing for several years are those where changes of solicitor or changes in the funding arrangement are more likely to have taken place. ■

Meet the Staff



Paul Jones

Paul was educated at The Manchester Grammar School and Manchester University before joining Gray's Inn and qualifying as a Barrister in 1994. He joined LCN in 1997 as a Trainee Negotiator and became Negotiations Manager in LCN's Manchester office in 1999. He is an experienced advocate and has attended Detailed Assessments throughout England and Wales. He is a leading expert in the field of Conditional Fee Agreements with articles and reviews published in The New Law Journal. Paul is a member of FOIL. ■



Harriet Stone

Harriet is a graduate of London University. She completed a Post-Graduate Diploma in Law at City University in 1998 and was admitted to the Bar in 2000 after successfully completing the Bar Vocational Course. Since joining LCN she has specialised in high-value disease cases, in particular asbestos related claims. Harriet is one of LCN's Cost Advocates and is now our appointed contact for panel solicitor clients. ■

Too Costly to Litigate?

The recent increases in court fees have been widely criticised by sections of the legal profession. When the Court Service first proposed an average 12% increase in fees across the civil courts, Mark Harvey, of APIL, warned that the hike in court fees "could potentially leave personal injury victims unable to take cases to court. It simply cannot be justified. It is bad enough that people have to pay to have their cases heard in the first place, but charging more money when there is a risk that access to justice will be under threat is totally unacceptable."

It is odd that solicitors' own spiralling fees are not similarly seen as a problem to access to justice by APIL. Normally they can't stand hypocrisy, but in their own case they're prepared to make an exception. ■

Raising the Small Claims Track Limit

The Association of Personal Injury Lawyers (APIL), together with many claimant solicitors' firms, have objected to the suggestions by a government think-tank and Norwich Union that the small claims limit in PI cases should be increased from £1,000 to £5,000.

They are concerned that because of the 'no costs' rule in Small Claims, litigants will either have to handle potentially complex matters without a solicitor or meet their solicitor's costs out of their own pocket. This, it is said, would result in delays in the court system

as defendants would have little or no incentive to settle cases early.

Of course, the change to the system may also have the effect that fewer litigants would be instructing solicitors to handle these claims. Could this possibly be a factor in APIL's attitude? ■

The Last Laugh

A man was sent to hell for his earthly transgressions. As he was being led to his place of eternal torment, he passed a room where a lawyer was in intimate conversation with a beautiful young woman.

"Wait a minute," the man protested

to his demon escort. "I have to roast in hell for all eternity, and someone else gets that?"

The demon jabbed the man with the pitchfork and snarled, "Who are you to question that woman's punishment?"

Tragedy

LCN would like to pass on our sympathy to the well-known Manchester firm of claimant solicitors whose law library was recent-

ly burnt down. We understand that both books were destroyed and they had not even finished colouring one of them in.

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AIRMIC Annual Conference

LCN will be running a workshop at this year's AIRMIC Annual Conference in Brighton on 14th June, entitled "Driving down third party legal costs". We look forward to seeing AIRMIC members at the event.

Competition Winner

John Matthews, of Mayflower Underwriting Limited, is the winner of the best joke competition from our last Newsletter and wins a bottle of champagne with this entry:

A man walks into a lawyer's office and inquired about the lawyer's rates.

"£50 for three questions," replied the lawyer.

"Isn't that awfully steep?" asked the man.

"Yes," the lawyer replied, "and what was your third question?"

This Newsletter, and previous issues, can be downloaded from our website www.lcnltd.co.uk. Please feel free to circulate these to your colleagues.

Contacts

To discuss any of the items within this newsletter in more detail please contact:
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If you are interested in finding out how LCN may be able to help you please contact:
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