



Costs in International Illness and Injury Cases

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It would be
“ so nice if
something
made sense
for a
change.

Lewis Carroll
Alice in Wonderland



Topics of the Day

- * How the new test of proportionality is operating
- * Update – Multi party actions at varying levels
- * Update – QOCS and Multiple Defendants
- * Update – CFAs post 1st April 2013

How the New Test of Proportionality is Operating

What is this new test? Found in **CPR 44.3(2)**

(2) Where the amount of costs is to be assessed on the standard basis, the court will –

(a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and

CPR 44.3 (5)

(5) Costs incurred are proportionate if they bear a reasonable relationship to –

- (a) the **sums in issue** in the proceedings;
- (b) the **value of any non-monetary relief** in issue in the proceedings;
- (c) the **complexity** of the litigation;
- (d) any additional work generated by the **conduct of the paying party**; and
- (e) any wider factors involved in the proceedings, such as **reputation** or **public importance**.

Flaming June

(acknowledgements to Frederic Leighton)



Two Bombshell Cases

BNM v MGN

[2016] EWHC B13 (Costs) 3 June 2013

May & May v Wavell Group PLC & Bizarri

[2016] B16 (Costs) 16 June 2016

BNM v MGN – Reasonable Costs

	Reasonable costs
Base profit costs	£46,321
Base Counsel's fees	£14,687.50
Court fees	£1,310
Base costs of drawing the bill	£4,530
Solicitor' success fee	£16,780.83
Counsel's success fee	£4,846.88
ATE premium	£61,480
VAT	£17,433.24
Total costs	£167,389.45

BNM – Reasonable and Proportionate

	Reasonable costs	Reasonable & Proportionate costs
Base profit costs	£46,321	£24,000
Base Counsel's fees	£14,687	£7,300
Court fees	£1,310	£1,310
Base costs of drawing the bill	£4,530	£2,250
Solicitor's success fee	£16,780	£7,920
Counsel's success fee	£4,846.88	£2,409
ATE premium	£61,480	£30,000
VAT	£17,433.24	£8,775.80
Total costs	£167,389.45	£83,964.80

May & May v Wavell

- Nuisance claim over basement extension
- Settled for £25000 prior to Defence being filed
- C's Bill of Costs £208,236
- Reasonable costs assessed at £99,655
- Went through the 5 factors
- Decided proportionate costs were £35,000

Take Precautions

- * Warn your litigation client about shortfalls in recovery
- * Create a work plan that acknowledges proportionality
- * Always have in mind the 5 stage test
- * Record and highlight work where complex
- * Record and highlight conduct of opposition

Multiple Claimants at varying levels of illness



Briggs v First Choice 2016

QBD High Court

- * 599 holidaymakers sued for illness and/or ruined holiday
- * 152 were not ill but had a ruined holiday because of poor standards at hotel and traveller in group being ill
- * Defendant persuaded Judge that non ill Claimants unreasonably failed should have entered the FC mediation scheme and only costs due were costs of mediation process

Mr Justice Singh sitting with Senior Costs Judge

(1) Court not entitled to go behind the Order as to costs in the action (see *Lahey v Pirelli* [2007] 1 WLR 998 and *Halsey v Milton Keynes* [2004] 1 WLR 3002

“ I do not consider the position has yet been reached that the mere availability of ABTA is enough to deny a successful party costs where they have a costs order.”

(2) Rejected Defence contention that unreasonable to instruct solicitors prior to entering into mediation scheme

Jackson Review

- * Removal of recovery of additional liabilities
- * Traded off success fee being paid by client to own solicitor by higher general damages
- * Traded off qualified one way costs shifting against the need for ATE for adverse costs
- * Sections 44 and 46 LASPO 2012

The LASPO reforms were engineered to achieve “Proportionality”

“If additional liabilities are added to reasonable and proportionate costs those costs will become disproportionate”

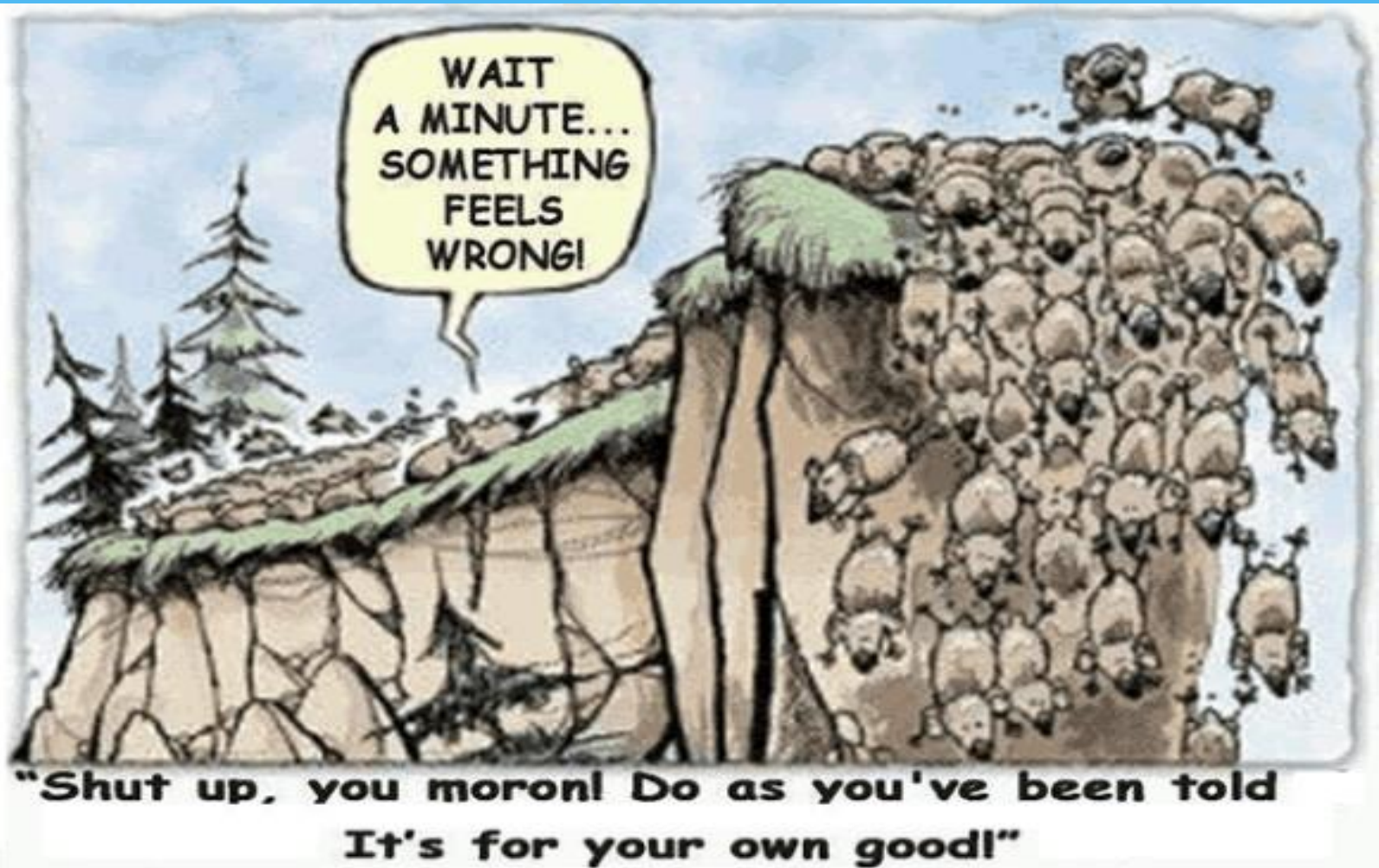
New test found in **CPR 44.3(2)**

(2) Where the amount of costs is to be assessed on the standard basis, the court will –

(a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced **even if they were reasonably or necessarily incurred**; and

....

Pre or Post LASPO CFA?



LASPO SECTION 44.6 To still be able to recover Additional Liabilities

- * (6)(a) agreement entered into before the commencement day for advocacy or litigation services in connection with the matter which is subject to proceedings
- * 6(b) advocacy or litigation services provided prior to commencement day in connection with the agreement

Choudhury v Markerstudy (March 2017)

- * Instructions taken before end of March 2013 but CFA not signed until 1st April 2013
- * Did communication with client amount to litigation services provided to C with regard to the subject matter/agreement prior to the commencement day
- * They were not litigation services, so the client entered a retainer which was not valid on or after 1st April 2013 so no costs recovered

Appeals

- * **Plevin v Paragon Finance Limited** [2017] UKSC 23
- * Costs issues following Appeal to full Supreme Court
- * Assignments of the CFA – if these were new contracts after 31st March 2013 to disallow additional liabilities
- * If ATE taken out for appeals, were these new arrangements post LASPO so non recoverable
- * Appeals can be categorised for the purposes of LASPO transitional provisions as the same proceedings – examine the underlying issue being argued over

Personal Injury Claims – QOCS

CPR rule 44.13

- * Set off of costs against damages except where:
- * The Claimant fails to beat the Defendant's Part 36 Offer
- * The Claimant was fundamentally dishonest
- * The Claimant's conduct is likely to obstruct the just disposal of proceedings
- * The claim discloses no reasonable grounds for bringing proceedings
- * There has been an abuse of process.

Multiple Defendants?

- * **Bowman v Norfran – 25th September 2017 Newcastle CC – HHJ Freedman**
- * Industrial disease claim - C sued three defendants
- * Discontinued against D2, succeeded at trial against D1 and D3 with costs orders
- * D2 applied for costs under CPR 38.6 but C said pointless as QOCS applied
- * The definition of “proceedings” was paramount: **44.13**
- * *(1) This Section applies to proceedings which include a claim for damages—*
- * *(a) for personal injuries;*

Bowman Ruling

- * Judge held “proceedings” related to the individual claim against each Defendant and not the three claims as a whole
- * Set-off imported the concept of mutuality of liabilities, whereby there were cross claims as between the paying party and receiving party
- * The idea of QOCS is to protect a Claimant from financial disadvantage in proceedings which did not result in an order for damages

Exceptions to LASPO

- * Jackson LJ envisaged no exceptions
- * **Mesothelioma** appeared in LASPO at section 48
- * **Insolvency and Publication and Privacy Proceedings** appeared in the CPR
- * All three appeared on PD48 Transitional Provisions
- * These proceedings could be issued as “old style” CFAs after 1st April 2013 and still recover additional liabilities from the paying party
- * 48PD4 Clinical Negligence ATE for expert evidence
- * These provisions have dropped a grenade into the concept of PROPORTIONALITY

Goodbye Alice – Hello Cheshire Cat

“We’re all mad here, I’m, mad. You’re mad”

“How do you know I am mad “ said Alice

“You must be” said the Cheshire Cat “or you wouldn’t have come here”



Thank you for attending

Simon Browne QC, Afqar Dean