



# **Costs in International Illness and Injury Cases**

**Simon Browne QC**  
**Temple Garden Chambers**

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 1<sup>st</sup> 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

	<b>Reasonable costs</b>
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
<b>Total costs</b>	<b>£167,389.45</b>

# BNM – Reasonable and Proportionate

	<b>Reasonable costs</b>	<b>Reasonable &amp; Proportionate costs</b>
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
<b>Total costs</b>	<b>£167,389.45</b>	<b>£83,964.80</b>

# 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”*

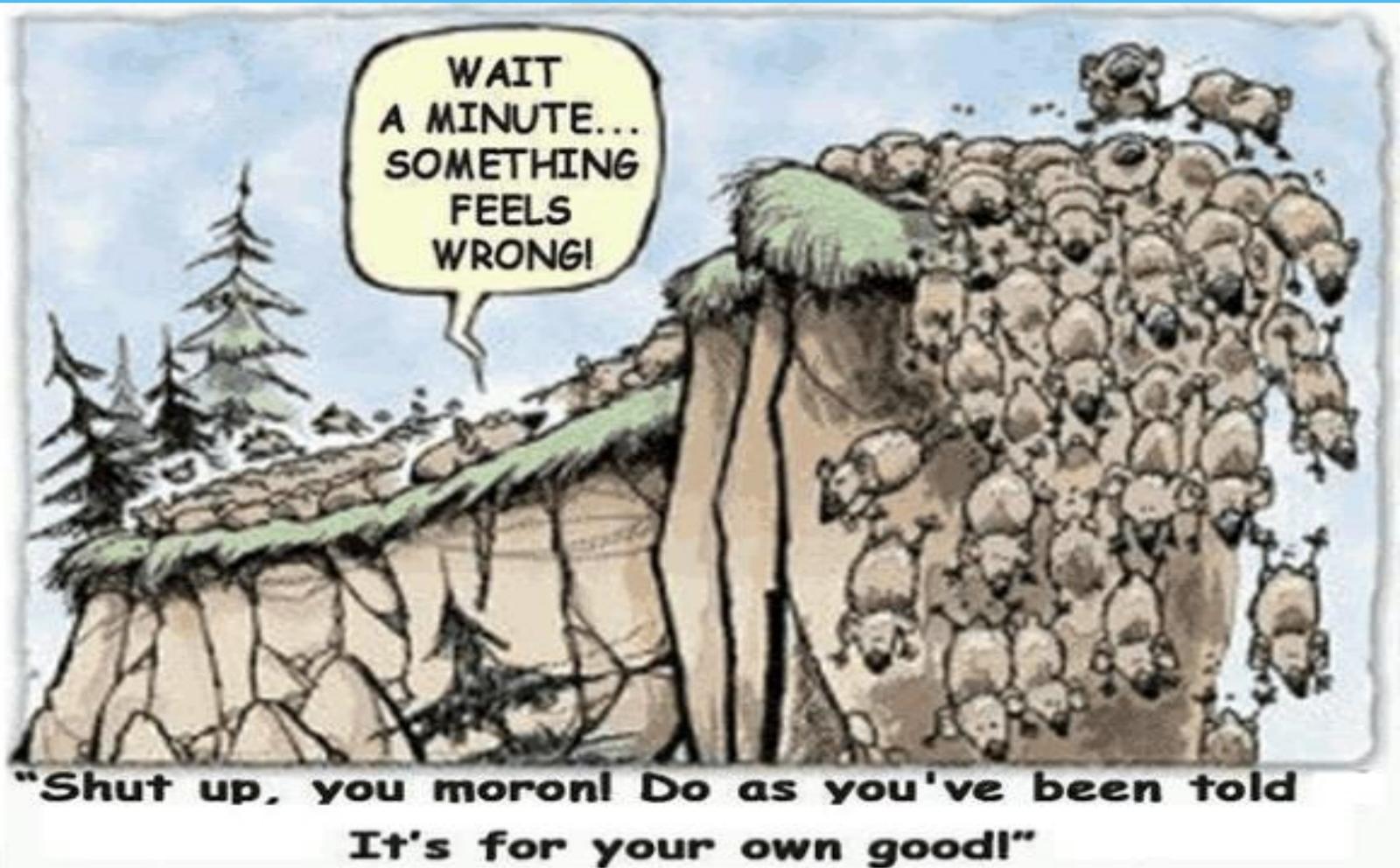
New test found in **CPR 44.3(2)**

(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 1<sup>st</sup> 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 1<sup>st</sup> 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 – 25<sup>th</sup> 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 1<sup>st</sup> 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**