APIL
EAST MIDLANDS REGIONAL MEETING

THURSDAY 8TH JANUARY 2003

SPEAKER **David Marshall**

Fixed Costs, CFA and Success Fees:

'The Predictable Costs Scheme for pre-issue Road Traffic Accident cases'
'The Milton Hill House' Agreement in December 2002
Came into force on 6th October 2003

Scope: Rule 45.7
Costs only proceedings as the rules apply for only cases settled pre-issue.
The dispute arises from an RTA.
Agreed damages do not exceed £10,000.00.
It would not have been in the small claims track if issued.

Practice Direction 25A.1
This scheme applies to road traffic accident disputes …… where the accident which gave rise to the dispute occurred on or after 6th October 2003.

You can of course agree to apply the Scheme to existing cases if you so choose.

Insurance companies have been trying to do this in large blocks rather than on a case by case basis. DM sure that any District Judge will take into account what the costs under the Predictable Costs Scheme would be when they are looking at older cases.

For these purposes a road traffic accident is one resulting in bodily injury to any person or damage to property caused by or arising out of the use of a motor vehicle on a road or other public place in England and Wales – motor vehicle means mechanically propelled vehicle intended to be used on the road and road means any

highway and any other road to which the public has access and includes bridges over which a road passes.

Practice Direction 25.4A

This section applies to cases under the Uninsured Drivers Agreement but does not apply to those in the Untraced Drivers Agreement – a new Agreement 2003 applies re costs for untraced claims.

Agreed Damages? – what are they – see Practice Direction 25A.3

Specials and general damages and interest.

Any interim payments must be included.

When parties have agreed an element of contributory negligence that should first be deducted together with CRU payments and NHS expenses to calculate whether the claim does not exceed £10,000.00.

Rule 45.8

The costs which are allowed are:-

(a) fixed recoverable costs calculated in accordance with Rule 45.9

(b) disbursements allowed in accordance with Rule 45.10

(c) a success fee allowed in accordance with Rule 45.11

The amount of base costs (Rule 45.9)

£800+

A sum equal to 20%of the damages agreed up to £5,000.00+

A sum equal to 15% of the damages agreed between £5,000.00 and £10,000.00

Plus VAT

There is also a London Weighting of 12½%.

Success fees – see Rule 45.11

The Claimant may recover a success fee if he has entered into a CFA/CCFA. Where the parties have not agreed the amount of the success fee it shall be assessed by the Court – success fees for road traffic accidents have of course been agreed and these apply to all road traffic accident cases but this has not yet come into force.

Disbursements – Rule 45.10

The cost of obtaining:-

Medical records

A Medical Report

A Police Report

An Engineer's Report

A search of the records of the DVLA

The amount of an ATE insurance premium

Any other disbursements that have arisen due to a particular feature of the dispute

Possible scales for report fees are possible but these have not been established as yet. Cost negotiators objection to disbursements are not in the spirit of these fixed costs agreements and should this become a problem then in theory the matter could be reviewed.

Agency fees – the Rules Committee specifically drafted disbursements being 'the cost of obtaining' arguably this will now include agency fees although there may well be a dispute from the Defendants about this. However, given that we will not get paid to get the records now and will be paid a fixed rate should we try and use the agencies to increase profitability?

In relation to the insurance premium, this has, in DM's view, been assessed by the Court of Appeal at currently £350.00 being reasonable – see Callery v Gray.

Infant Settlement

Where an Infant Settlement Hearing is necessarily incurred by reason of one or more of the claimants being a child or a patient then disbursements recoverable are:-

Fees payable for instructing Counsel; or

Court fees payable on the application to the Court.

Strangely solicitors do not get additional costs for having to attend an Infant Settlement Hearing but Counsel would do (this appears to be the interpretation) – arguably this is now an incentive for us to use junior Counsel to attend Infant Settlements rather than go ourselves – again to maximise profitability.

Multiple Claimants (Practice Direction 25A.7)

Where there is more than one potential claimant in relation to a dispute and two or more claimants instruct the same firm of solicitors, the provisions of the section apply in respect of each claimant.

Escape from the Predictable costs regime

The best and simplest way out of the regime is to issue substantive proceedings.

However, this is only if it is justified to take that step and as such it is going to be sensible to protect the claimant by making a reasonable Part 36 offer prior to issue.

The Court will 'entertain' a claim for an amount of costs (including any success fees or disbursements) greater than the fixed recoverable costs but only if it considers there are exceptional circumstances making it appropriate to do so – however, rather unhelpfully there are no examples in the rules at all as to what will be exceptional. David Marshall indicated 'you will know it when you see it' – possibilities include :-

Multiple Defendants

No client recollection of the event

Fundamentally differing accounts of events

Translaters needed??

The procedure for escape from the fixed costs regime (see Practice Direction 25A.8-10)

- Costs only proceedings (Rule 45.12A)

This is a new type of costs only proceedings as it falls within neither of the current situations of serving a bill of costs post issue or issuing Part 8 proceedings.

Under Rule 45.12A you do not actually need a Bill of Costs but you must set out the amounts of base costs, disbursements and success fee you wish to claim and must specify the exceptional circumstances that you believe the case falls into.

(If only arguing over the amount of success fee or disbursements proceedings should be issued under Rule 44.12A in the normal way and not by reference to Section 2 of Part 45.

What can the Court do if you attempt to escape from the predictable costs regime?

If the Court considers such a claim appropriate it may:-

(a) Assess the costs; or

(b) Make an Order for the costs to be assessed.

In theory therefore the Judge can just look at costs without the Defendants contributing anything! – even David Marshall conceded that this may be a little unfair and it is unclear what steps the Court will realistically take.

If the Court does not consider the claim appropriate it must then make an Order for fixed recoverable costs only.

If the Court considers your application for escape from fixed costs and then assesses the costs, to be successful your costs must be assessed at 20% or more over and above what would have been the fixed costs sum.

If you fail to be awarded such a figure the Court will order the Defendant to pay to the Claimant the lesser of:-

(a) either the fixed recoverable costs; or

(b) the assessed costs

These are quite stringent penalties if you do not beat 20% more than what the fixed costs would be.

The Court will also make no award for payment of the claimant's costs of the costs only in bringing the proceedings under Rule 44.12A – and order that the claimant pay the defendant's costs of defending those proceedings!

Is the predictable costs regime set in stone?

These figures have now been set for a period of two years.

After two years they will be subject to a two year RPI increase.
Thereafter automatic RPI review (presumably annually).
After two years there should also be a fundamental review of the regime and we should assess whether it should stop/continue or be extended.

Up to date information will be required at that time as to how the predictable costs regime has worked.

Your Retainer

Costs belong to the client and not to the lawyer in the absence of any agreement. These are costs under the fixed costs regime are fixed recoverable costs not fixed solicitors/client costs.

Options……..

1. You can agree with your client that you will accept fixed recoverable costs in full settlement of the client's liability if the scheme applies and no exceptionality escape – but what about the indemnity principle?

   Section 51 of the Supreme Court Act gives the power to impose fixed costs and fixed costs are payable come what may if the scheme applies.

   Costs Judges Hurst and O'Hare have indicated when asked by David Marshall that they are of the view it is okay to make this agreement with your client despite the breach of the indemnity principles. There are no specific authorities for this but it would appear that should it get as far as these Judges they would agree the costs were recoverable and payable to the lawyer.

2. You can agree with your client that you will charge on your normal hourly rate basis. You must warn the client that the client will only recover the fixed recoverable costs if the scheme applies and there is no exceptionality.

Strictly if your time comes to less than the fixed costs you should account to the client for the balance.

David Marshall is of the view that something could be drafted that protects the lawyer's position against the 'unreasonable' claimant for that second medical report fee, unreasonable behaviour etc. In theory this is not inconsistent with fixed costs.

Conditional Fee Agreements – Hollins v Russell

The indemnity principle does apply to Conditional Fee Agreements.
No decision has been reached as to whether the CFA is a privileged document or not.
IBC v Bailey (solicitors certificate leads to a rebuttable presumption of compliance) has been distinguished 'the law does not care about very small matters'.

'The parliamentary purpose is to enhance access to justice, not to impede it, and to create better ways of delivering litigation services, not worse ones. These purposes will be thwarted if those who render good service to their clients under CFA's are at risk of going unremunerated at the culmination of the bitter trench warfare….."

"In future District Judges and Costs Judges must be equally astute (as previously mentioned in Burstein v Times) to prevent satellite litigation about costs being protracted by allegations about breaches of the CFA Regulations where the breaches do not matter".

But …….

Law Society Gazette – 17th July 2003 – Jason Rowley, President of FOIL, said Defendant insurers are looking at how high the material test is 'so there are bound to be challenges for a time' and ……. Dominic Clayden ….. told the Gazette that insurers will continue to push up what he described as the real issue 'what is the correct level of remuneration for a claimant organisation in order to recover reasonable damages for an injured person?"

CFA – not so Simple or Lite

The Access to Justice Act 1999 (Commencement No 10) Order 2003 brings Section 31 of the Access to Justice Act 1999 into force.

In short this allows Court Rules to limit or regulate the indemnity principle.

The Civil Procedure (Amendment No. 2) Rules 2003

Where advocacy or litigation services are provided to a client under a Conditional Fee Agreement, costs are recoverable under Parts 44 to 48 notwithstanding that the client is liable to pay his representatives fees and expenses only to the extent that sums are recovered in respect of the litigation, whether by way of costs or otherwise

The CFA (Miscellaneous Amendments) Regulations 2003

3A(1) This regulation applies to a CFA under which, except in the circumstances set out in paragraph 5 (client defaults) the client is liable to pay his legal representatives fees and expenses only to the extent that sums are recovered in respect of the relevant proceedings, whether by way of costs or otherwise.

'3A(3) The CFA Regulations 2000 Regulation 2 (the cap) 3 (reduction of success fee to between the parties agreement or assessment percentage) and 4 (prior oral and written explanations) do not apply to a Conditional Fee Agreement to which this regulation applies'

These were the supposed advantages of the Conditional Fee Agreement simple i.e. the explanations etc prior to entering into the Agreement.

However, the CFA Simple does still require the CFA to specify the particular proceedings (Regulation 3A(4)(A)(i) – the circumstances in which these are payable (Regulation 3A(4)(A)(ii)) to briefly specify the reasons for the success fee (Regulation 3A(4)(B)(i)) and to authorise for the lawyer to disclose them (Regulation 3A(4)(B)(ii)).

Before the CFA Simple is made the lawyer must inform the client of:-

The circumstances in which the client may be liable to pay the legal representatives fees and expenses and provide such further explanation, advice or other information as to those circumstances as the client may reasonably require (Regulation 3A(6)).

Some of the problems :- …….

'Or otherwise' must presumably allow the lawyer to look to recovered damages as well as costs (instead of just costs as was originally intended) – this appears to be doing away with client protection and any cap on what can be charged to the client. It is unclear why the words 'or otherwise' were added as it appears to extend the scope of the Regulations in a way that was not intended.

You cannot have ATE insurance with the CFA Simple/Lite as you cannot bill the client for the disbursements (which you would do payable by the ATE)

The existing model agreement does not comply with the 2003 Regulations.

It seems unlikely that a new model CFA Simple will be drafted – neither APIL or the Law Society have any plans to do so, the risk being too high given previous challenges.

The standard CFA has been comprehensively upheld in Hollins v Russell and David Marshall's view is that the CFA Simple is in reality likely to fall by the wayside.

A new tranche of challenges by the Defendant is equally likely against the CFA Simple as against the standard CFA and at least part of the latter has already been implicitly approved.

<u>The TAG Test Cases Tranche 2 judgement Senior Costs Judge Hurst:</u>

There appears to be no reason why the circumstances specified should not be the recovery of those costs and/or disbursements (i.e. an arrangement under which a client's fees and expenses were to be payable only if a claim was successful and would equal the costs received) from the paying party.

The Rules Committee has recently agreed to amend CPR 43.2 and amendments to the CFA Regulations is envisaged – Section 31 of the Access to Justice Act 1999 will be implemented.

David Marshall's view – this will not alter the law.

Simplifying CFA's

DCA Consultation June 2003

Responses by 26th September 2003

New secondary legislation mid 2004

Should client protections be contained in Practice and Costs Rules instead?

What may happen? – it is likely that this consultation will look at establish basic statutory protections only and will put consumer protection in the Solicitors Practice Rules – this should mean that the Defendants cannot exploit them on technical challenges and then we may have a model CFA – it is unlikely to be set in statute but will probably be in consultation with the insurance industry.

Success Fee Negotiations

The first step in assessing appropriate agreed levels of success fee were to establish what the success fee was to achieve? – the Rules do not deal with this in any detail at all.

The options are:-

- Revenue neutral – (so that the winners pay for losers); or
- Premium for risk

Whilst originally it was likely to have been envisaged as premium for risk this is not what has emerged in the RTA success fee negotiations.

(NB the cost of waiting for payment (subsidy) is not recoverable from the Defendants in any event).

In assessing success fees the paradox is this – the CPR look at setting success fees on the basis of the risk of the individual case – however the risks in that particular case did not occur because the case was by definition successful otherwise you wouldn't be asking for a success fee at all – as such you cannot measure the risk other than by looking at a series.

But which series of cases is relevant?
The individual firm's own book of cases?
All personal injury claims?
Categories of personal injuries claims?
Sub-categories of claim?
Value?

In looking at the individual firm there is always a risk that good lawyers would be subsidising the poor lawyers. The risk averse would get less than the risk takers – but which is which and is this right? – in any event looking at the individual firm's performance it would be a question of evidence and is it really realistic to have firms turn up at Court with details of all the cases won and lost to justify a certain success fee – highly unlikely.

<u>Categories of claim? – success rates from the CRU data.</u>

CRU data – all cases are required to be notified by insurers to the CRU. All settlements must certainly be notified on a CRU102. They must specify whether a compensation payment was made or not and the CRU for some reason do not record the level of compensation actually awarded.

The lack of the wider picture provided by the CRU data is that it takes account only of raw failure rates. It does not take account of:-

- Turn downs, pre-notification
- Are higher value cases riskier?
- Do winning and losing cases cost more, less or the same.
- What premium, if any, should be paid for assuming the risk?

- Cases discontinued before they were notified to the CRU

The figures from the CRU show that in EL cases the risks of accident and disease as compared to RTA's but the figures do not differentiate between normal accidents at work and disease claim and they also include 'scheme' claims.

Mathematically it is theoretically possible to model variations for sub-categories e.g. driver, pedestrian, cyclist, value – but at this time no data is available.

Callery v Gray

Callery v Gray established that it was appropriate to set the success fee at the outset. They took a series approach. 20% was approved as a maximum for simple RTA's.

Halloran v Delaney attempted to reduce this to 5% but whatever the defendants may think this does not provide the same authority!!

Why negotiate?

The war can be fought case by case almost indefinitely but everyone needs a solution including the Government, the Judges, the Insurers, APIL members and our clients.

The profession is increasingly under pressure from the 'compensation culture' accusation which the insurance industry have been using heavily for lobbying of the relevant parties.

If we do not negotiate a settlement we will have a very low level of success fees imposed upon us.

The Master of the Rolls speech to FOIL conference on 27th November 203.

It was also made clear in this speech that after the fixing of the success fee we are looking to the areas of employers liability and public liability.

Government Involvement:

Recoverability – political quick fix "to distance the Government from blame for removing legal aid. It was not piloted and it was said "the market will resolve teething troubles".

The Insurance industry has clearly been a significant factor and the blunt instruments that the Government have at their disposal would be upping the small claims limit tp £5,000.00 and to impose success fees.

Objectives were set out in the DCA strategy "delivering our Public Service Agreement" August 2003.

Objective II – ensure a fair and effective system of cil and administrative law. Reduce the proportion of disputes which are resolved by the courts reducing unnecessary delay and costs.

The Clementi Review:- DCA Scoping Study July 2003

"There was general agreement …… that it had been a mistake to make the success fee and insurance premium recoverable"

"There was a clear consensus that a workable compromise was needed quickly"

"More than one interviewee (including the MR) argued that the Court based mechanisms for controlling costs were slow and expensive".

APIL cannot reach agreement on behalf of and bind its individual members. However, the Government were set to impose schemes for fixed costs cases (i.e. 85% of the total) first at 5%.

The APIL lobbied then for the victim's voice to be heard in the debate to enable more opportunity for influence and simple consultation.

Fenn and Rickman

These are the academic specialists on the legal and insurance industry who put together the report commissioned by the DCA to consider success fees after negotiations broke down over disputes over rates and the cost of failure.

APIL and the liability insurers asked for participation.

The Latimer House Mediation:

CJC – MR, Mike Napier, John Peysner, Bob Musgrove

Mediators – Frances McCarthy and Tim Wallis

Insurers – ABI, NU, Zurich, Groupama, FOIL

Claimants – APIL, MASS, Law Society and individuals

CJC website contains the Fenn and Rickman report

Negotiated Solution

This is in relation to motor cases only for the time being.

Fenn and Rickman calculated the revenue neutral RTA figure to be 14.2%.

If trials were awarded 100% this reduced the revenue neutral RTA figure to 12½% for the rest – revenue neutral of course meaning getting paid enough on the successful cases to cover cases that are lost or abandoned.

In general many more cases settle pre-issue than post-issue and Fenn and Rickman in principle did not support a risk premium.

Fenn and Rickman got 14.25% as the revenue neutral RTA figure by effectively looking at data from the CRU, APIL members and insurers.

Assumption:

Costs earned in won and settled cases have to be increased by a percentage i.e the success fee sufficient to pay for costs foregone in lost or abandoned cases) so an analysis of percentage of cases abandoned and lost and relative costs of won/settled and lost/abandoned cases had to be made.

Cases investigated and turned down before notification to the insurers were assessed at 12% at an average

Cases abandoned or lost before trial were 13% of the remainder

Average cost pre-issue was 55% of the costs of won/settled cases
Average cost of abandonments post-issue was 95% of the won/settled cases
i.e. lost cases cost 55% of successful cases pre-issue and post issue cost 95% of the successful cases.

At trial 37.5% fail – at the same cost as winning trials.

NB – trial includes quantum only.

Catastrophic Injury cases:-
There is no hard evidence that bigger cases are in fact riskier than smaller cases.
There is an argument that in fact you are more likely to win something in the bigger cases because of the economic settlement options open to the insurers for larger claims.
But 12.5%/100% is an average – averages are less suitable for high cost cases because of statistical variation from the norms – there are also possible issues of access to justice for the most seriously injured claimants.

Claims with a full value of £500,000.00 (so take into account any finding or discount for contributory fault or litigation risk).
If exceptional, individual assessment of success fees (i.e. higher or lower than 12½% is possible provided that it is assessed at more than 20% or less than 7½%.

The Bar:-
The fixed RTA success fees scheme applies to the Bar
@ 12½% except:-
Settlement at trial – 100%
Settlement in Multi Track – 21 days before trial at 75%
Settlement in Fast Track – 14 days before trial at 50%
NB – brief fee abatement if settled
This is to reflect the Bar's end-loading of fees, fewer pre-issue cases and individual risk.

What happens next:-

Civil Justice Council's recommendation to the Government

The Rules Committee

Fixed costs cases likely to be implemented at April 2004 and to apply retrospectively to cases since 6th October 2003 at 12½%.

Other cases it will probably not apply retrospectively i.e. those outside the predictable costs regime.

Implementation likely mid 2004.

Other Categories of Claim

Further mediated negotiations are already ongoing to deal with:-

EL claims

PL claims

They are again being looked at by Fenn and Rickman and data is required. Further investigation of data and CRU information together with arguments in relation to further sub-divisions – further research is ongoing as is the CRU.

In real terms however the figures are already available from the CRU in relation to 2001/2002 and 2002/2003 settlements – see attached table.

David Marshall emphasised the importance of being realistic in relation to these negotiations. It is best that we are involved and have some input rather than success fees merely being imposed on us. David Marshall emphasising that for example Ireland have just gone into a system where prior to seeing a solicitor/incurring legal costs, every claim has to go to a Bureau for consideration first. Insurers here are of course pressing for this as this will cut their bill substantially.

Conclusions:

We are negotiating with informed opponents who do want a settlement but not at any price – a robust and stable long-term solution is in everyone's interest and we need urgently to move the debate on from costs.

NB – DM is going to chase up wording that he put together with the Law Society in relation to amendments to the CFA.

Speaker:- David Marshall
APIL President
Partner, Anthony Gold
8th January 2004