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Court of Appeal reserves judgment on assessing the '*proportionality*' of ATE premiums in clinical negligence cases

Maria McMenemy v. Peterborough & Stamford Hospitals NHS Trust
Mr Michael Reynolds v. Nottingham University Hospitals NHS Trust
A2/2016/0926 and A2/2017/0112

Article by David Bowden

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Executive speed read summary
In 2 separate cases involving 2 different NHS trusts, low value negligence claims were settled at an early stage and before court proceedings had been issued for £2500 and £12500. Bills of costs were then submitted by the patients' solicitors to the NHS. The claims occurred after the LASPO reforms came into force in April 2013. The NHS said that it had no liability to pay 'after the event' (ATE) insurance premiums because they were unreasonable in amount and disproportionate. The NHS said that this case was a 'paradigm example of an attempt to continue the Alice in Wonderland world' which existed pre LASPO. The NHS said that no right thinking person properly advised would objectively consider that it was either reasonable or proportionate to incur the claimed ATE premiums here. The patients contended that the 2013 changes meant that ATE premiums were still recoverable in clinical negligence cases with a value of at least £1000. The patients submit that the principal issue is whether the ATE policies were reasonably incurred at the point that they were taken out which has to be assessed by reference to both the 2013 Regulations and the *Callery v. Grey* principles. The District Judges in both cases ruled in the NHS's favour saying that the ATE was unreasonably and unnecessarily incurred because liability and causation were indefensible and the District Judges assessed the recoverable amounts as nil. The first instance ruling in McMenemy was overturned by a circuit judge. The Court of Appeal granted permission for a 2nd appeal as the cases raise an important point of principle or practice. The Court of Appeal has now heard argument from both sides. Judgement was reserved. Two other cases have also been granted permission to appeal and are awaiting a hearing date in the Court of Appeal on '*proportionality*' under the post April 2013 costs rules.

Maria McMenemy v. Peterborough & Stamford Hospitals NHS Trust
A2/2016/0926
Mr Michael Reynolds v. Nottingham University Hospitals NHS Trust
A2/2017/0112 *17/18 October 2017*
Court of Appeal, Civil Division (Lords Justices Lewison & Beatson and Mr Justice Hildyard)

What are the facts in *McMenemy*?
The patient miscarried her baby in February 2013. In June 2013 retained products were detected by an ultrasound scan and promptly removed. The patient accepted the NHS's part 36 offer to settle for compensation of £2500 in July 2014. No court proceedings were ever issued.

What costs were incurred in *McMenemy*?
The patient sought recovery of an 'after the event' (ATE) premium of £5700 plus IPT. The policy start date was 8 August 2013.

What did the District Judge rule on costs at first instance in *McMenemy*?
Deputy District Judge Holligan in Liverpool County Court on 17 July 2015 ruled in the NHS's favour on the point that the ATE premium was unreasonable and disproportionate.

What did the Circuit Judge rule on costs on 1st appeal in *McMenemy*?
HHJ Pearce on 15 February 2016 overturned DDJ Holligan's judgment and ruled that the patient could recover the ATE premium.

What are the facts in *Reynolds*?
In October 2013 the patient fractured his ankle and was treated at Queen's Medical Centre, Nottingham. After discharge he then was re-admitted to treat a pulmonary embolism and blood clot. The patient claimed the hospital was negligent not to spot the embolism when they treated his broken ankle. The patient accepted the NHS's part 36 offer made in February 2015 for £12,500. Again no court proceedings were ever issued.

What did the District Judge rule on costs at first instance in *Reynolds*?
The patient's solicitors (Ashton KCJ) submitted a bill for £13,215.68. The NHS put in its Points of Dispute and the patient served Replies. The ATE premium was initially allowed in full following a provisional assessment on 18 November 2015. However District Judge Rogers in Norwich County Court on 15 February 2016 ruled that the ATE premium was unreasonably and unnecessarily incurred because '*liability and causation were indefensible'* and he assessed the recoverable amount as nil.

What did the Circuit Judge rule on costs on 1st appeal in *Reynolds*?
HHJ Moloney QC granted permission to appeal on 22 June 2016. The patient then applied for and was granted permission to leap frog this appeal to the Court of Appeal.

How were these case funded? What about 'after the event' insurance?
Both patient's solicitors acted on a '*no win, no fee'* conditional fee agreement (CFA). A success fee of 100% was claimed by each firm. The allegedly negligent NHS treatments in each case occurred after 1 April 2013. This means that any CFA was taken out on **after** LASPO came into force on 1 April 2013. Each patient also had the benefit of an '*after the event'* (ATE) insurance policy from which provided indemnity of up to a certain limit against liability for adverse costs. Both patients sought to recover the full costs of all this from the NHS as paying party.

What objections were taken by the paying party in the Points of Dispute?
The NHS said that the ATE premium was unreasonable in amount and/or that its cost was disproportionate.

Were these cases covered by costs budgeting?
Yes - in theory. Neither patient had issued court proceedings before accepting the NHS's offer. If either patient had started proceedings, this would have had to have been after April 2013. It would have been subject to the new costs budgeting rules under CPR part 3.

Who acted in this case in the Court of Appeal?
The NHS in both cases was represented by costs lawyers Acumension in Manchester who instructed Mr Roger Mallalieu of 4 New Square to act in the Court of Appeal. McMenemy was represented by Fletchers in Southport and Reynolds was represented by Ashtons Legal in Thetford, Norfolk. They too turned to 4 New Square and instructed Mr Nicolas Bacon QC to lead Mr Rupert Cohen of Hardwick Building.

What other rulings have there been on ATE premiums?
There have been few reported cases on the assessment of ATE premiums with these 2 notable exceptions:

- *Redwing Construction Ltd v. Wishart* **[2011] EWHC 19 (TCC**) Akenhead J ruled that an ATE premium claimed of £8,480 for cover for adverse costs of £20,000 was '*substantially excessive'* and reduced it to £1696
- *Kelly v. Black Horse Limited* **[2013] EWHC B17 (Costs)** the then senior costs judge, Master Hurst, ruled on the recoverability of a ATE premium claimed in the sum of £15,900. He said there was '*no doubt that the ATE premium sought in this case is wholly disproportionate*' and he reduced the premium to £3,677.63 noting that he had '*been given no evidence as to the information which was given to the ATE insurers to enable them to rate the policy, but, given the risk assessment completed for the purpose of the CFA, which was entirely meaningless, it is safe to assume that the insurers were not given accurate information'*

What decisions have costs judges made on the proportionality issue so far?
There have been these 3 SCCO decisions with 1 ruling favourable to a paying party and the other 2 rulings favouring a receiving party. The *BNM* case has been appealed and is awaiting the result of a reserved judgement from the Court of Appeal.

- *BNM v. MGN Limited* **[2015] EWHC 3602 (Ch)** Senior Costs Judge Master Gordon-Saker ruled that costs which he had assessed as reasonable in the total sum of £167k were nevertheless disproportionate. He reduced the costs further to just under £84k. As to ATE, the senior costs judge ruled that an ATE '*premium of £58,000 at the stage that the claim settled, potentially doubling to £112,500, cannot be said to bear a reasonable relationship to a claim which settles for £20,000, where there was no substantial claim for non-monetary relief, which was not particularly complex, where no significant additional work was generated by the conduct of the paying party and where there were no wider factors involved'*. He concluded that '*no more than one half of that amount could be considered proportionate*' being a maximum amount of £29k.

- *King v. Basildon & Thurrock University Hospitals NHS Trust* **[2016] EWHC B32 (Costs)** Master Rowley ruled that the definition of '*costs'* in the pre-April 2013 CPR included '*additional liabilities'* but that the definition after April 2013 referred to '*profit costs'* and '*disbursements*' but did not include '*additional liabilities'*. As the '*proportionality*' test in CPR part 44.3(5) only applied to work

carried out since that definition came into being, the interpretation is that the test only related to the base costs of a CFA.

- *Murrells v. Cambridgeshire NHS Trust* **[2017] EWHC B2 (Costs)** Master Brown ruled that '*additional liabilities'* were not subject to the new test of proportionality under CPR part 44.3 or, even if they were, they should not be aggregated with the claimant's base costs for the purposes of that test.

What does the legislation provide?
CPR part 44.4 deals with '**Basis of assessment'** and it provides as follows:

> **'44.4**—*(1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs—*
> *(a) on the standard basis; or*
> *(b) on the indemnity basis,*
> *but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount. (Rule 48.3 sets out how the court decides the amount of costs payable under a contract)*
> *(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; and*
> *(b) resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party.*
> *(Factors which the court may take into account are set out in rule 44.5)'*

What were the grounds of appeal?
There were 3 grounds of appeal in *Reynolds* namely that the judge below was wrong to conclude that:

- part of the ATE premium which relates to the risk of incurring a liability to pay for experts reports relating to liability was unreasonably incurred,
- the ATE premium would reduce of the only risk insured against was the risk of incurring a liability to pay for expert's reports in relation to causation, and
- the evidential burden reverted to the patient as receiving party.

In *McMenemy* the NHS as appellant had these grounds, namely that the judge below:

- erred in law in placing undue reliance on *Callery v. Gray* **[2001] EWCA Civ 1117**, and
- Failed to properly consider whether the ATE premium was on an objective analysis an expense which had been reasonably and proportionately incurred at the time it was.

Was there a Respondent's Notice by the NHS?
Yes – the NHS had put in a Respondent's Notice in *Reynolds*. The NHS sought to uphold the ruling of DJ Rogers on the additional ground that judge ought to have found the ATE premium disproportionate.

What authorities are relied on by the parties?
These authorities (listed chronologically) are relevant in this case and are referred to in the written submissions:

Callery v. Gray (No 1) **[2001] EWCA Civ 1117** (Court of Appeal – Lord Woolf LCJ, Lord Phillips MR and Brooke LJ)
On a proper construction of section 29 of the Access to Justice Act 1999 and CPR part 44.12A, an ATE premium could in principle be recovered as part of a claimant's costs, even where the claim had settled without the need for substantive proceedings. In modest or straightforward damages claims following road traffic accidents it would normally be reasonable for a claimant to enter a CFA and take out ATE cover when he first instructed a solicitor. If at that stage a reasonable success fee was agreed and insurance at a reasonable premium was taken out, the costs of each were recoverable from the defendant if the claim succeeded or settled. On the evidence available, it was not possible to form any conclusion as to the reasonableness of premiums charged for ATE insurance, which would have to be the subject of a separate adjudication following an inquiry by a costs judge.

Karl Lownds v. Home Office **[2002] 1 WLR 2450** (Court of Appeal - Lord Woolf LCJ, Laws and Dyson LJJ)
A court should attach proper weight to the requirement of proportionality when making orders for costs and when assessing costs. The assessment of costs should be approached in 2 stages: (1) the court should take a global approach and consider whether the total costs claimed were proportionate or disproportionate, (2) the court should then conduct an item by item assessment. If the total costs seemed proportionate, all that was usually required was that each item should have been reasonably incurred and that the cost for that item should be reasonable. If the total costs seemed disproportionate, the court would have to be

satisfied that the work in relation to each item was necessary and, if it was, that the amount incurred in respect of the item was reasonable. If the global costs were disproportionately high, the receiving party should recover no more than would have been payable had the case been conducted in a proportionate manner. In such a case, reasonable costs would be recovered only for the items which would have been necessary had the case been conducted in a proportionate manner. The court should adopt a sensible standard of necessity which catered for the different judgments which those responsible for litigation could sensibly come to as to what was required. In deciding what was necessary, the conduct of the paying party was highly relevant and if that party was unco-operative, he might have to pay costs which would not normally have been necessary. In deciding whether the costs incurred were proportionate, regard would be had to what it was reasonable for the party in question to believe might be recoverable. For claimants regard would be had to the sum that it was reasonable for him to believe might be recoverable at the time that he made his claim. Defendants were entitled to take the claim at its face value.

Rogers v. Merthyr Tydfil BC **[2007] 1 WLR 808** (Court of Appeal - Brooke, Laws & Smith LJJ and Master Hurst, Senior Costs Judge as assessor)
Since there is in principle no difference between a two-staged success fee and a staged or stepped ATE premium, a staged or stepped premium model is not in principle illegitimate. If the court, in determining whether such a premium is recoverable in costs by a successful claimant, concludes that it was necessarily incurred it should be adjudged a proportionate expense, even although it may appear large in comparison with the amount of damages reasonably claimed. Necessity may be demonstrated by the application of strategic considerations which travel beyond the dictates of the particular case and may include the unavoidable characteristics of the ATE insurance market since that market is integral to the means of providing access to justice in civil disputes.

What submissions did *Peterborough NHS* in *McMenemy* as appellant and paying party make?
Its written submissions made these points:

- There is no statutory provision allowing for the recovery by a litigant from the other side of any element of an ATE premium which relates to the cost of insuring against non-recovery of the ATE premium itself.
- In August 2013 before the patient even notified the NHS of a claim, and before she had obtained her medical records, she had agreed to incur a liability of over £6000 for ATE, £984 of which she would have to pay out of her damages and the rest which might be recoverable from the NHS if she won and established it was a reasonable and proportionate expense.
- This case is a '*paradigm example of an attempt to continue the Alice in Wonderland world'* which existed pre LASPO and was a key factor in the removal of additional liabilities from opponents.
- No right thinking person properly advised would objectively consider that it was either reasonable or proportionate to incur an expense of £5058 to insure against this risk.
- The ATE policy for expert's reports was incurred simply because '*it was anticipated that the vast bulk of the cost'* could be passed on to the NHS to pay.
- It was both unreasonable and disproportionate to incur the ATE premium at the time it was incurred.
- Any perceived *Rogers* necessity is no longer a good or sufficient reason to allowing an ATE premium.
- The *Callery* decision was given shortly after the AJA 1999 was introduced when provisions about ATE were in their infancy. The Recovery of Costs Insurance Premiums in Clinical Negligence (No 2) Regulations 2013 **SI 2013/739** proceeds on a materially different basis.
- Experience of the ATE market since 2001 has shown that the justifications for ATE recovery in *Callery* were 'poor'.
- Although the 2013 regulations permit recovery of ATE in clinical negligence cases they have a far narrower policy objective than perceived in *Callery*.
- *Callery* is no longer applicable or appropriate for ATE premiums.
- The Court of Appeal should follow the approach set out in the dissenting judgment in the House of Lords by Lord Scott where he opined that '*if the expenditure was not reasonably required for the purposes of the claim'* then it would '*be contrary to long-established costs recovery principles to require the paying party to pay it*'.
- An adverse costs justification can no longer serve as an automatic justification for incurring an ATE premium at a particular level.

What submissions did *Reynolds* as receiving party make?
His written submissions made these points:

- The principal issue is whether the ATE policies were reasonably incurred at the point that they were taken out. This has to be assessed by reference to the 2013 Regulations which govern their recoverability. The court still has to assess ATE premiums by applying the *Callery* principles.
- Section 58C of the Courts and Legal Services Act 1990 permits the recovery of all or part of an ATE premium in clinical negligence claims which has a financial value of £1000 or more.
- Section 58C(1) uses the word '*risk*' and this contingent word is used because the risks of incurring a liability to pay for an expert's report is '*entirely dependent on whether the matter to which the report relates is in issue*'.
- Letters from the NHS's solicitors on liability do not amount to formal admissions. These letters merely indicated that there was a '*possibility*' that liability or causation '*might be admitted'*.
- It cannot be said it was unreasonable to incur ATE for an expert's report
- The judge below made many wrong assumptions. The ATE premium is a function of 6 difference factors including the total number of cases, the average cost of claims and the level or extent of cover.
- The judge below was wrong to assume that were the ATE policy to insure only against a liability to pay for expert's reports, the premium would be cheaper because he had no evidence on this.
- For the NHS to successfully mount a challenge to a block-rated ATE premium it needs to establish an erroneous fact alleged to have formed part of the methodology behind the rating and establish too that this presence or absence of that fact would have an appreciable effect of that part of the ATE premium.
- The NHS did not raise a real issue on the ATE premium to displace the usual burden of proof.

What did *Reynolds* submit on *Nottingham NHS*'s Respondent's Notice?
It said that if the appeal is allowed, then the remaining issues should be remitted back to a regional costs judge where they can be properly ventilated. It said that the quantum of the ATE premium is not before the Court of Appeal. By the patient seeking to uphold the order below on other grounds, it is inviting the court to opine on an issue which the judge below did not have submissions on. The issues on proportionality have been or will be addressed by the Court of Appeal in *BNM* and *Demouilpied* and which it is not appropriate for the Court of Appeal here to '*address on the hoof'*.

Is this the only appeal the Court of Appeal has on '*proportionality*'?
No. There are these only appeals which are waiting a hearing date. Again these relate to challenges to bills brought on the UK taxpayer's behalf by the NHS Litigation Authority:

- *West v. Stockport NHS Foundation Trust* - **A2/2017/0928**. This was granted permission to appeal on 22 July 2017 and is waiting a hearing date.
- *Demouilpied v. Stockport NHS Foundation Trust* - **A2/2017/0930**. This too was granted permission to appeal on 22 July 2017, is waiting a hearing date and will be listed with *West*. These are both appeals from HHJ Smith in Manchester County Court.

The Court of Appeal has also reserved judgment in *BNM v. MGN Limited* **A2/2016/3832.** There the senior costs judge ruled that a reasonable amount for base costs was just over £46k, allowed a 30% success fee and £61k for ATE. He ruled that he had to apply the new '*proportionality*' test noting that the base costs were 2½ times the damages. When he applied this he reduced the costs yet further to a global sum of just under £84k. He reduced the ATE premium in half. BNM appealed to the Court of Appeal contending that this was wrong and that the new '*proportionality*' test only applied to base costs not to either success fees or ATE.

What did the Court say about judgment in this case?
Lord Justice Lewison said a draft judgment would be sent to counsel to both sides and for any typographical errors to be sent it. No indication was given as to when judgement would appear. It is likely that judgment in these 2 cases will be handed down at the same time or shortly after the judgement in *BNM*. It seems unlikely that these judgements will appear in 2017.

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David Bowden is a solicitor-advocate and runs David Bowden Law which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at info@DavidBowdenLaw.com or by telephone on (01462) 431444.