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Clinical negligence costs

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What we are going to be looking at



- Fixed costs in clinical negligence claims.
- ADR and mediation: the new Consultation.
- Hourly rates
- Deductions from damages: success fees, ATE and shortfalls.



Fixed costs in clinical negligence claims

- Minutes of the Civil Procedure Rule Committee
- 1st March 2024
- <https://www.gov.uk/government/organisations/civil-procedure-rules-committee/about#minutes>
- Item 2: draft rules and a preaction protocol for inclusion in the summer update, implementation October 2024.

Government proposals: fixed costs

- War and peace?
- <https://www.gov.uk/government/consultations/fixed-recoverable-costs-in-lower-value-clinical-negligence-claims>
- Key document is the government proposals:
- Fixed recoverable costs in lower damages clinical negligence claims Government response: 23rd September 2023

Government proposals: disbursements

- Supplementary consultation on disbursements
- <https://www.gov.uk/government/consultations/fixed-recoverable-costs-in-lower-damages-clinical-negligence-claims-a-supplementary-consultation-on-disbursements>
- Consultation closed 22nd December 2023.
- As of 23rd April, responses being analysed.

Overview of key elements of fixed costs proposals

- 2022-2023 £650 million costs overall.
- 2022-2024: £23,200 Claimant costs sub 25k.
- New Pre-action Protocol for the Resolution of (Low Value) Clinical Disputes.
- £1500 to £25,000.
- Already fixed costs: small category intermediate track cases, where speedy admissions.

Overview of key elements of fixed costs proposals (2)

- Light track and standard track.
- Letter of Claim with bundle of evidence
- Response
- Stocktake
- Neutral non binding evaluation.

Fixed costs

- Standard track
- Stage 1: For work conducted in all steps up to and including Standard Track Stocktake £5750 plus 30% of damages.
- From Stocktake up to completion of LVCD Protocol £1250.
- Protected party or child: £1800

Overview of key elements of disbursements proposals



- No counsel fees.
- ATE insurance allowed.
- Expert evidence allowed.
- Bolt on of £1800 should cover work relating to children and protected parties.



Alternative dispute resolution

- Why ADR is taking priority now.
- Outsourcing and privatisation of justice.
- Blurred lines between negotiation and litigation.
- **Churchill v Merthyr Tydfil CBC**
[2023] EWCA Civ 1416
- Upshot: Court decided it did have power to impose mandatory ADR.
- No answer to the party who turns up but does not participate.

Small Claims Compulsory Mediation

- <https://insidehmcts.blog.gov.uk/2024/04/11/preparing-for-the-requirement-to-mediate-in-small-claims-what-you-need-to-know/>
- Claims issued after 22nd May 2024
- Practice Direction 51ZE
- Doesn't apply to personal injury and road traffic accident claims

CPRC Consultation

- <https://www.gov.uk/government/organisations/civil-procedure-rules-committee/about#alternative-dispute-resolution-consultation>
- 2 pages of consultation.
- 7 pages of proposed rule amendments.

Proposed Rule changes

- Overriding objective: promoting ADR.
- Duty to manage cases: ordering ADR.
- Case management: order ADR.
- Directions: whether to order ADR.
- Costs: Whether a party failed to comply with an Order for ADR or unreasonably failed to participate in ADR.

Hourly Rates

- The 2022 Cases
 - *Samsung Electronics Co Ltd & Ors v LG Display Co Ltd & Anor [2022] EWCA Civ 466* and
 - *Athena Capital Fund SICAV-FIS SCA & Ors v Secretariat of State for the Holy See [2022] EWCA Civ 1061*.
 - “Clear and compelling justification”

Hourly Rates

- The 2021 Guide
 - Foreword by Vos MR: -

“... I would emphasise that the Guide is, as it has always been, no more than a guide and a starting point for judges carrying out summary assessment. This Guide is no different to its predecessors in that it continues to offer assistance to Judges. In every case, a proper exercise of judicial discretion has still to be made, after argument on the issues has been heard...”

Hourly Rates

- The 2021 Guide
 - “Broad approximations” – para 27;
 - Starting point for summary assessment and may also be a helpful starting point for detailed assessment – para 28;
 - In substantial and complex litigation an hourly rate in excess of the guidelines may be appropriate for grades A, B and C.

Hourly Rates

- *Harlow DC v Powerrapid Ltd [2023] EWHC 586*, Choudhury, J. (CJ Rowley assessor)
- Appeal from preliminary rulings upon detailed assessment. D had successfully resisted a CPO.
- Hourly rates allowed: Grade A - £525

Hourly Rates

- *Harlow DC v Powerrapid Ltd [2023] EWHC 586*
- “[88]...The judge was not conducting a summary assessment and was not required to take the same approach to the Guide as he might have done had that been the case. It was open to the judge to conclude, as he did, that the GHR were not particularly useful in this case.”

Hourly Rates

- *Harlow DC v Powerrapid Ltd [2023] EWHC 586*
- “[88]...London 2 therefore encompasses all manner of work from the most straightforward and simple of cases to work that is legally highly specialised and difficult. Some work fitting the latter description might well be considered by a costs judge to warrant a considerable uplift from the London 2 starting point notwithstanding the fact that it does not amount (in terms of volume or value) to "very heavy commercial or corporate" work.”

Hourly Rates

- *Harlow DC v Powerrapid Ltd [2023] EWHC 586*
- “[88]...the GHR do not dictate that London 1 rates are reserved exclusively for very heavy commercial or corporate work. The judge in the present case concluded that whilst this was "not massively heavyweight litigation" (which would probably be London 1), it was: "certainly not routine"; "a very specific sort of work"; and "quite difficult and specialised". In my judgment, there is nothing that precluded the judge from making those judgments in the present case.”

Hourly Rates

- *Various Claimants v News Group Newspapers Limited [2023] EWHC827(SCCO)*
- “[70] I also accept the argument that the GHR may be a useful starting point in a detailed assessment as well as in a summary assessment. I do not, however, consider that the guidance given by Males LJ regarding the need for a “*clear and compelling justification*” for exceeding the GHR extends with any great force to this particular situation.”

Hourly Rates

- *Various Claimants v News Group Newspapers Limited [2023] EWHC827(SCCO)*
- “[71] The GHR are provided predominantly to assist judges who do not specialise in costs cases to deal with a summary assessment of costs when faced with the successful party's summary assessment schedule and competing arguments from the advocates.”

Hourly Rates

- *Various Claimants v News Group Newspapers Limited*
[2023] EWHC827(SCCO)
- “[72] The relevance to the GHR being a starting point in detailed assessments is no more than a reflection of the scarcity of any other starting point. Expense of time calculations or other potential starting points, as is demonstrated here, are invariably absent. But a starting point by its very name does not suggest it is the finishing point and that is particularly so where the court has the opportunity for the parties to address it in detail in respect of the CPR 44.4 factors.”

Hourly Rates

- The 44.4 Factors (“the 7/8 pillars of wisdom”)
- (a) conduct
- (b) value;
- (c) importance;
- (d) complexity/novelty;
- (e) skill, effort, specialised knowledge and responsibility;
- (f) time spent;
- (g) place/circumstances in which work was done; and
- ~~(h) the receiving party’s last approved or agreed budget.~~

Hourly Rates



- Think about and address hourly rates at the outset;
- Attendance note;
- Retainer letter.



Deductions from Damages

- Three elements to Protected Party assessments: -
 - Approval of the *inter partes* settlement;
 - Assessment of the Solicitor/Own Client Costs
 - Shortfall
 - Success Fee
 - ATE Premium
 - Certification of deductions from damages pursuant to CPR r.21.12;

Deductions from Damages

- Evidence required: -
 - Witness statement from Solicitor or Costs Lawyer with conduct of the costs proceedings;
 - Supporting exhibits/bundle.

Deductions from Damages

- Approval of the *inter partes* settlement
 - Ensure a fair settlement;
 - Take care to justify ‘all inclusive’ settlements;
 - Give reasons for accepting reductions from the sums claimed.

Deductions from Damages

- Assessment of shortfall: -
 - Rare you will be able to justify full shortfall recovery – if you cannot, do not try!
 - Exceeding the budget;
 - Hourly rates – advice per CPR r.46.9(3) - “unusual” and “might not be recovered from the other party”.

Deductions from Damages

- Assessment of success fee: -
 - Contemporaneous risk assessment/other documentation;
 - If not set by reference to risk, make sure that is explained;
 - Ensure your calculation of the ‘Jackson Cap’ is supported by Counsel’s advice on settlement.

Deductions from Damages

- Assessment of ATE Premium: -
 - *Herbert v HH Law [2019] EWCA Civ 527* – arguably puts ATE premium outside the scope of a Solicitor/Own Client assessment;
 - Pursuant to CPR r.21.12 the Court must still certify that as a deduction from damage.