COUNTING THE COST

Janine Collier and Tony Simpson offer some costs pointers from a recent clinical negligence claim

This article looks at points that can be learned for PI practitioners from the costs aspects arising from of *KC v Peterborough & Stamford Hospitals NHS Foundation Trust* (see *PI Focus* November 2017, p29 of Case Notes for details of the substantive case).

Assessing Costs Judge – Master Rowley

Sitting in on the detailed assessment hearing – Master Horner

For the claimant - Tony Simpson (costs draftsman, PIC)

For the defendant - Michael Brown (costs lawyer, Acumension)

Facts of the claim

The claim concerned the failure to identify an obstetric anal sphincter injury (a 'button hole' injury) in the claimant's rectum following the delivery of her daughter.

It was alleged that primary repair at the time of delivery would have been successful, avoiding the recurrent recto-vaginal fistula; the performance of a de-functioning colostomy; several procedures to repair the fistula over a period of 19 months; a reversal procedure; two further surgeries to repair hernias; and resulting in normal continence.

As it is, the claimant continues to experience ongoing rectal symptomology (including post-defaecatory soiling on a regular basis, with two episodes of frank incontinence and generally diminished anal control) and psychiatric sequelae. Her marriage has ended.

Funding

The claim was funded by a pre-LASPO conditional fee agreement, backed by after-the-event insurance. The CFA provided for a staged success fee.

The primary solicitor with conduct, Janine Collier, partner at Cambridge based Tees Law, was assisted by paralegals throughout.

The claim was subject to costs budgeting. At the CCMC, Master Roberts approved the claimant's budget, which came to a total of **£238,536.48.**

Totals for incurred and estimated costs under the budget headings were as follows:

Pre-action costs: £7,952.42
Issue / pleadings: £30,091
CMC: £9,958.40
Disclosure: £14,028
Witness statements: £14,736.20
Expert reports: £65,287
Pre-trial review: £5,770
Trial preparation: £19,980
Trial: £42,700
ADR / settlement discussions: £21,085.80
Past budgeting costs: £2,315.89
Future budgeting costs: £4,631.78

Excluding the cost of budgeting itself, incurred costs overall came to £59,918.82, while estimated costs in the budget came to £171,670.

The litigation

Liability was disputed for some 32 months before a 75/25% liability agreement was reached. Quantum eventually settled just two months before trial.

Quantum

The claim settled for £135,865.86, ie. nearly £182,000 on a full liability basis.

The bill

The claimant served a bill of costs which broke down as follows:

Base costs: £100,068.20
VAT thereon: £20,013.64
Disbursements: £18,761
VAT thereon: £1,650.95
Total excl. additional liabilities: £140,493.79
Success fee: £103,484.27
VAT thereon: 20,696.85
ATE premium: £9,010
Total inc additional liabilities: £273,684.91

The costs claimed fell well within the claimant's approved budget.

Points of dispute

The defendant contested costs, serving the standard Acumension points of dispute which raised all the 'normal' arguments, ie. retainer, hourly rates, success fee, time spent.

Best offers before detailed assessment

The defendant's best costs offer prior to detailed assessment totalled £180,000, inclusive of interest and costs of assessment.

At 16 days before the hearing, the claimant made a without prejudice offer of £210,000 (excluding interest and costs of assessment), which was open for acceptance for 14 days.

Detailed assessment – 30 June / 1 July 2016

The matter proceeded to detailed assessment at the Senior Courts Costs Office, listed for hearing on 30 June and 1 July 2016.

The defendant served supplemental points of dispute eight working days before the initial detailed assessment hearing raising issues of, inter alia, proportionality.

The hearing commenced on 30 June / 1 July before Master Rowley. Master Rowley dealt with the preliminary points (retainer, success fee, hourly rates and so forth) and assessed costs which had been

incurred prior to budgeting. The key findings were as follows:

1. **Success Fee:**

(a) **Master Rowley allowed the 100% success fee**, praising the CFA Risk Assessment, in particular the difficult causation issues identified on the limited evidence available at such an early stage.

(b) Master Rowley disagreed with Master Gordon-Saker's decision in *BP v Cardiff & Vale University Local Health Board* [2015] EWHC B13 (Costs) and found that the 1% and 2% limit on costs allowed in relation to budgeting itself were exclusive of additional liabilities.

2. **Hourly Rates:**

(a) **Grade A rates allowed as claimed at £250 - £290**. Master Rowley once again referred to the expertise needed by the primary solicitor when undertaking the initial risk assessment, and found that the claim was dealt with by the primary solicitor within the time expected. Master Rowley also considered the various facts of the claim and the general difficulties in conducting litigation in clinical negligence claims. He found this to be a significant claim, with 'suitable impact' on the claimant and no certainty of success;

(b) However, the costs lawyer rate was reduced from £210 to £161; and

(c) The costs draftsman, trainee/ paralegal rates of £136, £150 and £155 were reduced down to £120 throughout.

3. **Reductions to time claimed (costs incurred prior to budgeting)**

Very minor reductions were made to the time claimed. However, there were a few points of note:

(a) Master Rowley disallowed travel time to the claimant's home and found that she should have attended the solicitor's office.

(b) Dual attendance of the primary solicitor and assisting paralegal at conferences and RTMs was disallowed.

(c) Master Rowley agreed that the time for instructing the costs draftsman to prepare a costs budget should be claimed within the CMC phase, and not form part of the 1% initial budget preparation costs.

4. **Assessment of costs incurred after budgeting**

Because the case settled so close to trial, all the relevant directions relating to almost all of the phases were complied with, and the assumptions listed in the costs budget had all taken place.

The claimant's costs fell well within the costs budget. However, the defendant argued that there should be a detailed assessment of these costs (in addition to the incurred costs).

Master Rowley permitted the defendant to make further written submissions on this point, the assessment went part-heard, and was listed for a final day in September 2016.

Detailed assessment – September 2016

The defendant openly stated in its written submissions that Master Roberts errs on the side of caution and on a worst case scenario when approving anticipated costs.

Master Rowley gave this argument no weight whatsoever and allowed these costs in full where in line with the approved costs budget, save for minor reductions to three phases:

(a) In the bill of costs as claimed (ie. with the initial hourly rates) the claimant slightly exceeded the approved costs in the CMC phase, by £387.03. Therefore, in a genuine attempt to narrow the issues and avoid a detailed assessment hearing, 0.5 hours was conceded within the claimant's points of reply. However, when applying the hourly rates as assessed by Master Rowley (ie. paralegal rate reduction to £120), the claimant's costs for this phase fell within the amount approved by Master Roberts. As this phase was deemed complete and as a result of the above, Master Rowley only reduced the post-budget costs in the CMC phase by 0.5 hours, to reflect the concessions made by the claimant. No assessment on these costs took place;

(b) 10.1 hours was reduced from the expert phase, as the phase was not complete (joint expert discussions had not taken place and joint statements were not obtained as listed in the assumptions);

(c) 8.5 hours was reduced from the ADR phase as dual attendance at RTM was not allowed, despite this being listed in the assumptions.

Overall, the time claimed for both incurred and anticipated costs was reduced by just 12.48% (including budget, bill preparation and checking).

A total of £227,136.81 including additional liabilities was allowed.

5. **Proportionality**

(a) Master Rowley did not accept the defendant's submissions that the additional liabilities should be included for the purposes of considering proportionality. Therefore, the bill figure of £117,204.33 was used when making a comparison against the damages recovered.

(b) The claimant's submissions on proportionality included:

(i) Bill drafting and checking time should also be removed for the purposes of proportionality, as these costs are unrelated to the main action.

(ii) the following in respect of *CPR 44.5(5);*

The sums in issue in the proceedings;

The sum of approximately £182,000 (£131,250.00 after the agreed liability split) is a significant amount of money.

Master Rowley confirmed he would consider the total damages figure of approximately £182,000 (£131,250.00 after the agreed liability split).

The complexity of the litigation;

This was a fully contested claim with liability remaining in dispute for 32 months.

The defendant had contested that this was an extremely complex case when seeking an extension for service of their defence from the court in the main action (its whole application was made on this point alone).

Furthermore, Master Rowley had already ruled that this was a complex matter when dealing with both the hourly rates and success fees.

Any additional work generated by the conduct of the paying party

Reference was made to the defendant's application for time for service of the defence before Master Roberts in November 2013, where the defendant's conduct was heavily criticised (the defendant basically delayed instructing any experts despite having full knowledge of the claim and ample time in which to act on this). This clearly highlighted where the defendant's conduct had resulted in further work being generated.

Further, during the claim there had been no attempt to narrow the issues (eg. liability was disputed throughout, and the defendant's first settlement proposal amounted to just £25,000).

Master Rowley considered all the various factors and found that the costs were proportionate.

6. **Costs of Assessment**

Although the claimant had beaten its without prejudice offer of £210,000, Master Rowley declined to award costs of the hearing on 30 June and 1 July on the indemnity basis.

However, Master Rowley found that following the first two days at Court, efforts should have been made by the defendant to agree costs. The only offer that had been advanced was an all-inclusive offer of £209,000. For that reason, **Master Rowley awarded indemnity basis costs for the third day only, and standard basis costs for the remaining costs.**

Costs of assessment were awarded in the sum of £25,320.

7. **Interest**

Master Rowley allowed a further 28 days for interest/payment. After allowing for interim payments on account of costs, interest was calculated at £10,432.68.

Therefore, the total costs recovered amounted to £262,889.49.

Comment

In an increasingly tough costs environment, the decisions in this case were welcomed.

That costs were deemed to be proportionate must be right:

- base costs were significantly less than damages recovered even after allowing for the liability apportionment
- the claim was complex
- the claimant was left with lifelong and life-changing injuries, and
- the defendant's conduct had been criticised in the main action and liability had been contested for some 32 months

An interesting practice point is that when assessing hourly rates and success fees, Master Rowley appeared to give significant weight to the quality of the initial risk assessment, and the expertise required to assess the detailed risks in the case, despite the paucity of the information available. Rather than treating a risk assessment as a 'tick box' exercise, for all sorts of reasons, it is worth spending time getting this right.

The NHS Litigation Authority (NHSLA) and the media blames the rising cost of clinical negligence claims on big rises in claimants' legal costs.

However, recent data suggests that in 2015 – 2016, the NHSLA settled more than 76% of medical negligence claims that had been issued at court.

Stephen Webber, chair of the Society for Clinical Injury Lawyers (SCIL) has said: 'The NHSLA is defending cases too long and increasing costs. They are either being given bad advice or they are ignoring good advice.' Numerous organisations, including the Action against Medical Accidents (AvMA), APIL, SCIL and the Law Society have expressed concern about how much this costs the taxpayer, and the implication of delays on patient health.

In this case, a young woman required multiple surgical procedures and suffered significant ongoing faecal and flatus incontinence as a result of the failure of the Trust to identify and repair the obstetric injury. The NHSLA defended liability for 32 months and settled the case just two months before trial. Had the case settled pre-issue, the taxpayer would have saved in excess of £200,000 on costs in the main action. Had the issue of costs been dealt with sensibly, the taxpayer would have saved more than a further £30,000.

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