

## Personal Injury and Medical Law Teams Case Note

**Rogers v Merthyr Tydfil Borough Council** [2006] Civ EWCA [Brooke LJ (V-P, Laws LJ, Smith LJ)]

Facts: The 11 year old C fell over the perimeter of a play area in a local park in Merthyr Tydfil and was cut by shards of glass embedded in the timber edging of the play area. C brought a claim in damages against the D local authority having been provided with ATE cover which had a three-stage premium. D resisted liability because of a hospital note to the effect that C sustained his injuries in a fall from a swing; this was innocent misinformation from C's mother but this fact did not emerge until trial<sup>1</sup>. The DJ found the D liable and was awarded agreed damages of £3,105 with interest. The DJ assessed costs at £16,821.30 (which included a £5,103 ATE premium) and allowed with a 100% success fee.

D successfully appealed the costs assessment; in particular the D's insurers objected to the high costs of the third stage premium under which £450 was payable at the outset, a further £900 when proceedings were issued and a further £3,510, 60 days before the trial. The judge was influenced by a magazine entitled 'Litigation Funding' produced by D and reduced the costs to £12,628.30 including a reduction of the ATE premium to £900. He considered the staged premium charges to be "wholly excessive" and that "nobody conducting litigation reasonably would have agreed to pay a premium of this order"

C's insurers (DAS) appealed contending the judge:

1. failed to pay any or any sufficient regard to the risks being insured under the policy. If he had done so he would have allowed the premium in the sum claimed.
2. was wrong to take any account of the material in Litigation Funding
3. was wrong not to have ordered a detailed assessment as opposed to attempting a summary assessment on the limited evidence and information available.

The arguments advanced on appeal were "significantly different" to those presented to the judge and included evidence from DAS and other major insurers as to how they set about fixing a premium, none of which was before the judge. This included the fact that the level of premium is not generally, nor in this particular case, predicated by or related to the amount of damages. It is set by reference to the risk to the insurer and his exposure

---

<sup>1</sup> the latter failing is more likely to be through an uninformative Defence: if this hospital explanation had been pleaded, the mother would have been able to clarify the situation in a witness statement well before trial.

to costs and disbursements in a failed case [paragraph 34]. DAS' own research over 12 years indicated that they had lost 70% of contested slipping and tripping cases [paragraph 72]

The Appeal therefore proceeded by way of a re-hearing of the costs issues. According to the DAS evidence presented before the Court: "defendants were refusing to pay an ATE insurance premium and were awaiting a decisive ruling from the Court of Appeal." [paragraph 8] and that many profile insurers have moved from the ATE marked in the last 2 years [paragraph 38]. At the courts' invitation therefore 5 major ATE insurers made written submissions [paragraph 10] and 2 ATE insurers (Temple and Keystone) and the Law Society, intervened in the appeal hearing.

#### Issues:

This is the first occasion on which the reasonableness of an ATE premium was considered authoritatively by the Court of Appeal its landmark decisions in *Callery v Gray (No 1)* [2001] EWCA Civ 1117; [2001] 1 WLR 2113 and *Callery v Gray (No 2)*[2001] EWCA Civ 1246; [2001] 1 WLR 2112 (concerned with the reasonableness of an ATE premium when ATE insurance was taken out before a claimant before a Letter of Claim was made. The issues were:

1. the proper approach to proportionality in a small personal injury case where the ATE premium could appear large in comparison to the amount of damages claimed.
2. whether stage premiums and single premiums for ATE insurance were legitimate for the purpose of the recoverability of an ATE premium by a successful litigant
3. an understanding of the proper approach to the evidence relating to the amount of the ATE premium in such cases.

Held: The unanimous judgment of the court (given by Brooke LJ) was that the decision of the District Judge restored.

- 1) The overriding objective required not only impartial judges and procedures that were fair as between the parties but also a use of resources that was proportionate to what was at stake. Should the court conclude that it was necessary to incur the staged premium, it should be adjudged a proportionate expense: Home Office v Lownds (2001) 1 WLR 2450 applied (Lord Woolf) [paragraphs 103,104]

"The idea that justice requires not only impartial judges and procedures that are fair as between the parties, but also a use of resources that is proportionate to what is at stake, is an important – perhaps the most important – dimension of the philosophy which underpins the civil procedure reforms carried into effect by the CPR." [paragraph 103]

- 2) 'Necessity' could be demonstrated by the application of considerations that went beyond the dictates of the particular case and could include the unavoidable characteristics of the market in insurance of that nature. This was because that

market was integral to the means of providing access to justice in civil disputes in the post-legal aid world. “Moreover, the context in which any resources had been expended had to be considered.

“If the court concludes that it was *necessary* to incur the staged premium, then as this court’s judgment in *Lownds* shows, it should be adjudged a proportionate expense. Necessity here is, we think, not some absolute litmus test. It may be demonstrated by the application of strategic considerations which travel beyond the dictates of the particular case. Thus it may include, as we are persuaded it does, the unavoidable characteristics of the market in insurance of this kind. It does so because this very market is integral to the means of providing access to justice in civil disputes in what may be called the post-legal aid world.” [paragraph 105]

“It is important to recognise that this conclusion runs with, not across, the grain of the procedural reforms expressed in the CPR. The very recognition that justice requires a use of resources that is proportionate to what is at stake implies the rightness of a strategic approach. There can be no touchstone of a proportionate use of resources so understood, without an eye to the context in which any such resources are expended. Once it is concluded that the ATE staged premium here was necessarily incurred, principle and pragmatism together compel the conclusion that it was a proportionate expense.” [paragraph 106]

- 3) There was in principle no difference between a two-staged success fee, consistently endorsed by the courts, and a staged ATE premium. The financial risk to which an ATE provider was exposed inevitably rose as a case proceeded towards trial and the risk to defendants if they took a case to trial and lost or resolved the claim 14 days before the trial date was no different by reason of the new arrangements for fixed recoverable success fees in CPR Part 45. [paragraph 107]. 01752 675158
- 4) The mere fact that the ATE premium was large compared with the agreed damages did not necessarily mean that it was proportionate since all the circumstances have to be taken into account by the court under Part 45, including the risks faced by an insurer. The estimated maximum loss figure of £6,500 compared favourably with the actual outcome and given D’s determination to go to trial, the handlers assessment of the risk at no greater than 51% was not unreasonable<sup>2</sup>. On these figures it could not be said that a total premium of £4,860 was unreasonable and the judge’s reliance on Litigation Funding as a source of dependable evidence was not well-founded. It was not legitimate to compare the total premium payable at the third stage of a three-stage premium model with a single premium under a single premium model that was payable throughout the progress of a claim. [paragraphs 108-110]
- 5) In the future a party who had an ATE insurance policy with staged premiums should inform its opponent and should set out the trigger moments when the second or later stages would be reached. If there were likely to be issues about the size of subsequent stage premiums it would ordinarily suffice for a claimant’s solicitor to write a brief note for the purposes of the costs assessment explaining how he came

---

<sup>2</sup> the writer would consider it was actually extremely modest in the circumstances

to choose the particular ATE product for his client and whether this was block rated or individually rated<sup>3</sup>. [paragraph 116]

NOTE: By prior direction of Brooke LJ when giving permission for the second appeal, the costs orders below stood and each party paid its own costs of the appeal subject to certain caveats which allowed further application up to a capped limit [paragraph 121].

Comment on the substantive judgment:

This is a carefully analysed judgment and is essential reading in tandem with Garrett and Myatt reported last month<sup>4</sup>.

Evidence from the Law Society highlighted the lack of choice, restrictions on cover, rigorous reporting controls, capped limits on indemnity, general lack of inflexibility and lack of negotiating power for small firms who may find their choice particularly limited since block funding requires a high number of claims per annum to balance the risk [paragraph 72]. The idea that solicitors would shop around in each case would be an extremely protracted and essentially unrealistic process [paragraph 73]; further a cheaper premium did not necessarily mean a better product [paragraph 80].

A potentially significant difficulty is that the Court expressly approved “cherry-picking” and rejected the D’s submission<sup>5</sup> that in allying himself with DAS, the Solicitor representing him was in breach of his obligation under s.4(1) of the Solicitors Introduction and Referral Code 1999 – one of the key points in **Garrett and Myers**:

“This was a surprising submission, given that the success of ATE insurance has been dependent from the outset on arrangements like these. They are designed to prevent “cherry-picking” and to ensure that very many low risk cases are available as a counterweight to the few high risk cases. Mr Cooksley immediately disavowed this proposition on behalf of the Law Society. He told us that solicitors had been advised by the Law Society that they would not act in breach of the Code if they made reasonable contractual arrangements of this kind with ATE insurers. The use of the milder word “should”, as opposed to the more prescriptive word “must”, shows that this approach by the Law Society to the construction of this part of its own Code was not an unreasonable one.” [paragraph 114]

The requirement for greater disclosure of CFA documents including the details of an ATE staged premium also presents in the light of the **Garrett and Myers** decision<sup>6</sup>. The loading of unpaid administrative work upon solicitors increases: the **Carter** proposals for careful preparation of tenders for publicly funded work and now detailed ATE information – these do somewhat of the archaic Forms of Action where the slightest error (however inconsequential) was deemed fatal to a claim.

<sup>3</sup> a task that now will be more difficult given the decisions in **Garrett and Myatt** – see digest and comment on these cases in 13 KBW PIMLU, July 2006, page \*

<sup>4</sup> see paragraph 23 where C’s solicitor accepted that all ATE insurers would require him to insure all his available cases through them to avoid the difficulties caused by adverse selection.

<sup>5</sup> incorrectly referred to as the ‘Claimant’s’ in the judgment

<sup>6</sup> digested and commented upon in 13 KBW PIMLU, July 2006, page \*

Comment on Smith LJ's 'Annex': **Smith LJ** elected to add what is described as an "Annex" in which through selective reference to the evidence received by the Court of Appeal, she accused claimant legal advisers of being "insufficiently robust in the advice they give at the late stage when a decision has to be taken whether to abandon the case or go on to trial". It is this aspect of the judgment that has been the subject of comment in the legal press which has failed to make it clear that the Claimant succeeded both on his substantive claim and the costs appeal<sup>7</sup>.

Smith LJ argued that in the days before the Access to Justice Act 1999 parties would not normally proceed unless the prospects of success were between 60% and 70% and not just over 51% as in the instant case

"When giving advice for the purpose of legal aid, solicitors and counsel were supposed to apply the same degree of rigour as they would apply when advising a private client. After becoming a judge, I became aware that that rule of practice was not always honoured as it should have been. I was shocked at how many obviously 'difficult' or even weak cases were proceeding to trial with the support of legal aid and were being lost. The provision of civil legal aid was, I believe, more expensive to the public purse than it should have been." [paragraph 125]

"What concerns me is that the ATE system does not provide any incentive for the claimant's side to have a second and more rigorous look at the merits, often even after a Part 36 offer has been made and refused. It appears that the claimant can just carry on. The only assessment that is made is as to the size of the premium; the lower the chances of success, the higher the premium. I have the impression that the insurer does not ask whether the claim should be stopped." [paragraph 129]

She expressed concern for insurers and thus the premium paying public at large on the basis that if the claim is lost the premium is not usually paid. This is expressed on the belief that claimants are "notionally" paying a high premium reflecting poor chances of success, knowing that the premium will be recovered if the case is won and that if the case is lost they can walk away unscathed leaving the burden of the lost premium to be borne by the insurance premium paying public [Smith LJ: paragraph 129, page 32].

The source of this statement is not apparent from the substantive judgments although this may have been part of DAS' written submissions<sup>8</sup>. In the writer's experience ATE insurers do insist on payment of these premiums and this is a significant factor to be taken into account when carrying out a risk assessment of whether to enter into a CFA. In any event, this concern is met by the observation made by Brooke LJ at paragraph 118:

"Finally, we would confirm that as the law now stands it is permissible and reasonable for the premium itself to be insured by the policy. This was decided by this court in *Callery v Gray (No 2)* [2001] EWCA Civ 1246 at [63]; [2001] 1 WLR 2142."

<sup>7</sup> even the brief LAWTEL summary stated: "party who had an after-the-event insurance policy with staged premiums should have informed its opponent of that fact and should have set out the trigger moments when the second or later stages would be reached.". This was not the *ratio decidendi* of this case and neither was it stated as a criticism of what had gone before but as guidance for the future. .

<sup>8</sup> and which is probably as statistically accurate as the recent ABI statistics of improved outcome for claimants where only insurers, not lawyers, are involved in settlement of their claims (see 13 KBW PIMLU, May 2006 (page 3) and July 2006 (page 2)

If Smith LJ's 'Annex' is adopted, the icon of proportionality will subvert justice for small claims where the ratio of likely damages recoverable and likely costs expended will inevitably be narrower than for the larger claims: the very mischief that the Act was intended to address, namely access to justice for the man in the street will be defeated or at the very least undermined<sup>9</sup>. On the other hand, insurers have been rightly concerned by the difficulties posed in trying to achieve a balanced portfolio of claims when clearly finely balanced claims are taken to trial.

Smith LJ however criticizes claimants for being able to litigate their claims without bearing the risk of doing so even when they are ultimately successful (my emphasis) despite this ability being a principal plank of the Access to Justice Act. It is this shift in emphasis, the skewing of logic, that is more worrying than the minority of solicitors who are persistently taking losing cases to trial. Fortunately, this was not the view of the majority of the court which emphasized the blunt instrument of applying such ratio without taking account of the subtlety and multiplicity of considerations involved (see quoted section of paragraphs 104 and 105 above)

There remains concern at this nascent appearance in the judicial climate of intolerance to personal injury claims which are the 'poor man at the gate' in the English Legal System. When public funding was withdrawn from personal injury claims, potential litigants were reassured that their access to justice would readily be assured through CFA schemes. This route however seems to be increasingly fraught for litigants and insurers despite the recent introduction of less draconian CFA rules.

In drawing attention to the 70% failure rate of the 5% of tripping cases that go to trial Smith LJ observes that she does not know how solicitors are managing with this level of failure rate [paragraph 130, page 32]. In so doing, her mathematical analysis seems to have gone awry since this 70% only applies to the 5% of such claims that are actually litigated. This disregards 1) that 95% do not go trial and, 2) when a CFA funded claim is lost, the lawyers that she criticizes do not recover any costs. It is scarcely in their interests therefore to contest these cases believing in their hearts that the cases are lost causes unless for some masochistic reason they consider they need the experience. The lawyers conducting the 95% balance of these cases that presumably are either won or withdrawn at an earlier stage, should not be tarred with the brush of the remaining 3.5% which fail (as on her own figures 1.5% of contested claims succeed which means that overall only 3.5% of all 'tripping' claims are lost at trial)<sup>10</sup>.

It should also be appreciated that her comments are made in the context of an appeal where the C was successful against the D on the substantive 'tripping' claim which does beg the question of why the insurer continued to contest C's claim up to and including a fully contested trial<sup>11</sup>? The law does not protect the party to a contract from a bad bargain; why therefore should it protect an experienced insurer from the consequences of a staged ATE premium where it should be clearly foreseeable to an experienced insurer that such a premium is likely to be in place?

<sup>9</sup> a point made by DAS in its evidence – see paragraph 8 of the judgment

<sup>10</sup> Moreover, evidence from other ATE providers provided failure rates of 40% of contested slipping/tripping claims [paragraph 71, Temple and Keystone]

<sup>11</sup> the observation that the formal Defence did not appropriately particularise the basis upon which the claim would be defended, the claim was trailed towards the beginning of the judgment, in which circumstances this default and resultant misunderstanding of the basis of the hospital A & E note, cannot be laid at the door of the Claimant or his solicitor

Smith LJ's annex leaves the distinct impression that she does not consider small claims of this nature should be litigated at all or if they are, that legal representation should be provided effectively *pro bono* thereby ensuring there will be no resultant increase in insurance premiums to the public at large for the funding of such *de minimis* litigation. The natural extension of the recent observations by Mr Haddrill of the ABI<sup>12</sup> is that in such circumstances this Claimant would not have been compensated – an unjust outcome with which Smith LJ appears to be entirely in agreement. The only glimmer of light to emerge from this judgment is that her 'Annex' does not appear to have the support of the other Lord Justices and as such does not perhaps merit as much coverage as been given by the legal press.

© DEIRDRE GOODWIN

13 King's Bench Walk  
Temple EC4Y 7EN

August 2006

Please note that this Case Note is intended to provide a summary and comment of the subject matter covered. It is not intended to be comprehensive or to provide legal or other professional advice.

---

<sup>12</sup> see 13 KBW PIMLU, July 2006, page \*