Recovering ATE premiums - case law

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Appendix two

Case law relating to the recoverability of ATE premiums

Callery v Gray 1 and 2 [2001] (CA)

The Issues: The Court of Appeal considered at what stage in a personal injury claim is it appropriate for a solicitor to enter into a CFA and for an ATE insurance policy to be purchased. Additionally, was a 20% success fee (reduced from 60% at previous hearings) reasonable in the particular circumstances of this road traffic accident, where the Claimant was a passenger in a car which had been hit in the rear by the Defendant's vehicle.

Held: It was reasonable to take out a CFA and an ATE premium on day one. The Defendant's suggestion that ATE insurance should be purchased only when proceedings were issued, was rejected. The "basket" approach to ATE insurance was approved, so that the premiums recovered on straightforward cases with negligible risk of adverse costs, pay for lost cases. Where a reasonable uplift was agreed and ATE insurance at a reasonable premium was taken at the outset of a claim, the costs of each were recoverable from the Defendant.

Insurance premiums benefited defendants as they ensured payment of the defendant's costs when a claimant was unsuccessful. Premiums taken out at an early stage were substantially cheaper than when it was known that the defendant was going to contest liability. Further, it would assist access to justice for solicitors to offer legal services where claimants will not pay costs whatever the circumstances.

With regard to the amount of the premium, satellite litigation on the subject would be unsatisfactory. Master O'Hare, considered the evidence of the relationship between the premium, the risk and the cost of alternative cover, and concluded that a premium of £350 (exclusive of IPT) was not unreasonable, and the Court of Appeal accepted his advice and allowed the premium in full.

Callery v Gray House of Lords 2002

The House of Lords refused to interfere with the Court of Appeals findings. However all their Lordships acknowledged the concerns of the defendant insurance industry that the new regime was open to abuse, as evidenced form the quotes listed below, and all stressed that the Court of Appeal should keep matters constantly under review.

Lord Scott gave a dissenting judgment and did not agree that additional factors outside of the facts of the specific case should ever be taken into account in deciding whether costs in a particular case were reasonably incurred, and in his view was an unacceptable departure to long established costs principles.

Lord Bingham of Cornhill identified the risk of abuse in relation to ATE as follows:

> *A third possible abuse was that claimants, although able to obtain after the event insurance, would be able to do so only at an unreasonably high price, the after the event insurers having no incentive to moderate a premium which would be paid by*

the defendant or his insurers and which might be grossly disproportionate to the risk which the insurer was underwriting. Under the new regime, a claimant who makes appropriate arrangements can litigate without any risk of ever having personally to pay costs either to those acting for him or to the other side and without any risk of ever having to pay an after the event insurance premium whatever the outcome: the practical result is to transfer the entire cost of funding this kind of litigation to the liability insurers of unsuccessful defendants (and defendants who settle the claims made against them) and thus, indirectly, to the wider public who pay premiums to insure themselves against liability to pay compensation for causing personal injury.

I would decline to intervene because, as the Court of Appeal repeatedly stressed, the present issues arise at a very early stage in the practical development of the new funding regime, when reliable factual material is sparse, market experience is meagre and trends are hard to discern.

The Court of Appeal made plain that it was not purporting to lay down rules applicable for all time but was giving provisional guidance to be reviewed in the light of increased knowledge and developing experience.

Lord Nicholls made similar comments:

As a result, it was said, the new arrangements, as they are currently working, are unbalanced and unfairly prejudicial to liability insurers and the general body of motorists whose insurance policy premiums provide the money with which liability insurers meet these personal injuries claims and costs. The appellant urged your Lordships to promulgate guidelines to reduce the scope for abuse in this situation.

My Lords, I agree that for the two reasons given by Lord Bingham your Lordships should decline this invitation. Plainly, however, the criticisms outlined above give cause for serious concern. It is imperative that these aspects of the new funding system should be watched closely as the system develops and matures.

Lord Hoffman said this:

ATE insurers do not compete for claimants, still less do they compete on premiums charged. They compete for solicitors who will sell or recommend their product. And they compete by offering solicitors the most profitable arrangements to enable them to attract profitable work. There is only one restraining force on the premium charged and that is how much the costs judge will allow on an assessment against the liability insurer.

Again, the costs judge has absolutely no criteria to enable him to decide whether any given premium is reasonable. On the contrary, the likelihood is that whatever costs judges are prepared to allow will constitute the benchmark around which ATE insurers will tacitly collude in fixing their premiums. In its submissions to Master O'Hare, Temple said that the court "should not arrogate to itself the functions of a financial regulator of the insurance industry": see [2001] 1 WLR 2142, 2164, para 22. I am sure that is right, because the costs judge is wholly unequipped to perform that function. But that does not mean that some form of financial regulation is not

necessary. Such regulation is normally considered necessary in those parts of the economy in which market forces are insufficient to produce an efficient use of resources. And that seems to me to be the position in ATE insurance, in which the premiums are not paid either by the claimants who take out the insurance or by the solicitors who advise or require them to do so.

Lord Hope of Craighead said this:

unless the new regime is controlled very carefully, its effect may be to benefit ATE insurance providers unreasonably and to place a burden on liability insurers which is disproportionate. It may lead to a culture of incurring additional costs which lacks any incentive on claimants to keep costs down

Lord Scott of Foscote gave a dissenting judgment and said this:

Your Lordships cannot know what will be the consequence for the ATE insurance market if premiums payable under ATE policies that have been taken out where there is no real risk of litigation, and therefore no real risk of the occurrence of the event insured against, are ruled to be irrecoverable from defendants. I would for my part be prepared to accept that, if recovery of premiums is restricted to those premiums paid in respect of policies taken out where there is at least a fair likelihood that litigation in pursuit of the damages claim will be needed, the size of premiums will rise. But I would certainly not be prepared to accept that cover will be unavailable. In any event, however, it is, in my opinion, contrary to principle for the reasonableness of the premature taking out of ATE insurance to be judged by reference to arguments about the impact on the ATE insurance market if recovery of premiums in commonplace cases such as Mr Callery's is not allowed.

The correct approach for costs assessment purposes to the question whether an item of expenditure by the receiving party has been reasonably incurred is to look at the circumstances of the particular case. The question whether the paying party should be required to meet a particular item of expenditure is a case specific question. It is not a question to which the macro economics of the ATE insurance market has any relevance. If the expenditure was not reasonably required for the purposes of the claim, it would, in my opinion, be contrary to long-established costs recovery principles to require the paying party to pay it.

The argument advanced by the respondent, both in the Court of Appeal and before your Lordships, is, in effect, that defendants to claims which are bound to succeed and where litigation to pursue the claims is highly unlikely, must bear the cost of ATE insurance cover that is not needed in order to enable ATE insurance cover in cases where it is needed to be offered by insurers at lower rates than would otherwise be commercially possible. The clear principles on which costs recovery is based, both before and after the 1999 Act, are in my opinion hostile to this argument. In my opinion, the Court of Appeal fell into error in accepting it and in adopting an approach to the ATE premium that was not case specific but was based on the evidence about the ATE insurance market to which I have referred.

Tyndall v Battersea Dogs Home [2005] EWHC 90015

The Claimant sought damages for personal injuries sustained in a road traffic accident. Liability had been consistently denied and proceedings were necessary. The insurance in question was a Europ Assistance after the event policy. The premium was deferred over three stages:

- Stage 1 up to issue of proceedings, £367.50 inclusive of IPT
- Stage 2 after issue but up to 45 days before trial, £787.50 inclusive of IPT
- Stage 3 after stage 2 £1,890.00 inclusive of IPT

The judgment held that a staged premium policy gave considerable incentive to the parties to settle before too much expense had been incurred, but if settlement couldn't be reached the insurer should be able to charge a realistic premium to cover all the risks inherent in a trial, and the stage 3 premium was allowed in full.

Able UK Ltd v Reliance Security Services Ltd High Ct Master Wright 29/03/06

The Issues: In a successful contractual claim the Claimant claimed the cost of an ATE legal expense insurance policy in the sum of £63,000 (inc of IPT), being 30% of the indemnity provided under the terms of the policy. The Claimant's solicitors had obtained one quote for legal expense cover. The Defendants argued that the premium was excessive and there had been a lack of investigation as to the availability of a reasonable insurance premium. Should the Claimant's solicitors have obtained more than one quote for legal expense cover?

Held: In all the circumstances, it was reasonable for the Claimant to pay an ATE premium based on 30% of cover. The Claimant's solicitors had considerable experience of the ATE market and the Defendants did not prove that a more suitable alternative premium was available. The Claimant had made a reasonable choice of ATE cover and to insist that he should have gone in search of alternative insurers would fail to have regard to the overriding objective, specifically CPR 1.1(2)(b) and (c)

Rogers v Merthyr Tydfil County Borough Council [2006] EWCA Civ 1134

The Court had to decide upon 3 main issues:

1. What is the proper approach to proportionality in a small personal injury case where the ATE premium may appear large in comparison with the amount of damages reasonably claimed?

   Para 105 - *"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."*

2. What is the proper approach to evidence of reasonableness of the choice and of the amount of the ATE premium in such cases?

Para 108 - *"Under CPR 44.5(1) a court must take into account "all the circumstances". These include the financial risk faced by the insurer."*

Para 111 - *"On the evidence now before the court the judge's reliance on Litigation Funding as a source of dependable evidence was not well founded. We would endorse what Master Hurst said about this material in his judgment in Re RSA Pursuit Test Cases. It is not legitimate to compare the total premium payable at the third stage of a three-stage premium model with the single premium under a single premium model that is payable throughout the progress of a claim to trial."*

Para 117 - *"If an issue arises about the size of a second or third stage premium, it will ordinarily be sufficient for a claimant's solicitor to write a brief note for the purposes of the costs assessment explaining how he came to choose the particular ATE product for his client, and the basis on which the premium is rated – whether block rated or individually rated. District judges and costs judges do not, as Lord Hoffmann observed in Callery v Gray (Nos 1 and 2) [2002] UKHL 28 at [44]; [2002] 1 WLR 2000, have the expertise to judge the reasonableness of a premium except in very broad brush terms, and the viability of the ATE market will be imperilled if they regard themselves (without the assistance of expert evidence) as better qualified than the underwriter to rate the financial risk the insurer faces. Although the claimant very often does not have to pay the premium himself, this does not mean that there are no competitive or other pressures at all in the market. As the evidence before this court shows, it is not in an insurer's interest to fix a premium at a level which will attract frequent challenges*"

3. Are both staged (or stepped) premiums and single premiums for ATE insurance legitimate for the purposes of the recoverability of an ATE premium by a successful claimant, and is it reasonable that such premiums should be wholly or partially block-rated?

Para 107 - *"Nobody has suggested that a staged premium model is in itself an illegitimate way of rating the risk. Although this court has never previously had to address this issue, there is in principle no difference between a two-staged success fee (whose merits this court has consistently endorsed) and a staged ATE premium. The financial risk to which the ATE provider is exposed inevitably rises as a case proceeds towards trial. While defendants may be liable to pay a higher premium if they take a case to trial and lose, the situation is no different from that facing them in relation to their liability to pay a higher success fee when claims are resolved against them 14 days or less before the date fixed for the commencement of a trial in the cases covered by the new arrangements for fixed recoverable success fees in CPR Part 45. Exposure to this greater liability requires a defendant to think very seriously about the merits of his position before a trial takes place. This obligation, too, runs with the grain of the philosophy of the CPR."*

Smith v Interlink Express Parcels (July 2007)

The Claimant took out an ate policy with Temple Legal Protection. The premium was staged; £750 prior to issue, £1,200 after issue but not more than 45 days before trial, and £2,700 if settled 45 days or less before trial.

The claim settled without proceedings being issued for £1,700 damages. D's insurers contended that the staged premium for stage 1 was unreasonable and disproportionate. On assessment, the court agreed and allowed £450 plus IPT.

Avril V Boultby Senior HHJ Inglis 14/05/08

The Issue: Liability had been admitted from the outset in a road traffic accident. Could an ATE premium taken out after that admission, be recovered?

Held: The Defendant in the case had attempted to rely on the often quoted dicta from Master Hurst in the Claims Direct Test Cases ([2002] EWHC 9002 (Costs) - Para.223). The Senior Costs Judge however decided that, six years on, Master Hurst would most likely have come to a different conclusion when considering the risks in personal injury cases faced by today's claimants.

There were several real risks which could result in the claimant having to pay adverse costs after an admission namely:

1. The admission being withdrawn
2. Adverse costs awarded on an interlocutory hearing
3. Disbursements being disallowed
4. The claimant failing to beat a Part 36 offer.

It was considered that these were real risks which clearly came within those identified by Section 29 of the Access to Justice Act 1999 and therefore they should be insured against, even after an admission of liability. In line with the reasoning in Callery v Gray, a solicitor should not 'wait and see' but should insure claims from the outset of a case or as soon as possible thereafter, notwithstanding an admission of liability.

Burgess v J Breheny Contracts Limited SCCO Master Haworth 16/01/09

The Issues: The Claimant claimed for injuries suffered through dust inhalation. Was it reasonable for the Claimant to purchase an ATE insurance policy with a premium of £2,730 (inc IPT) after the Defendants had admitted primary liability but had expressly reserved their position on causation?

Held: In Master Haworth's judgment there were a number of risks which it was proper to insure at the time the policy was taken out, some 5 months after primary liability had been admitted. These were:

1. A real risk on causation, i.e. that the Court would find the dust exposure had not caused the injury;
2. The risk of the Defendant withdrawing its admission;
3. The risk of the Defendant making a Part 36 offer which the Claimant does not accept but fails to beat;
4. The risk of an adverse interim costs order; and
5. The risk of failing to recover a disbursement

It was therefore reasonable for the Claimant to purchase an ATE policy after an admission of liability, and Master Haworth concurred with the judgment of HHJ Inglis in Avril v Boultby (see above). A premium of £2,730 (inc IPT) was reasonable in all the circumstances.

Kris Motor Spares Limited v Fox Williams LLP [2010] EWHC 1008 (QB)

The Defendant firm had acted for the Claimant in litigation under a CFA against a firm of stockbrokers. The Defendant raised its Bill and the Claimant considered it excessive. The Claimant applied for detailed assessment. Master Rogers ordered the determination of a preliminary issue of whether the Defendant had lawfully terminated the CFA. This preliminary issue was heard over 4 days. The Defendant served an N251 on 16/12/08 on the Claimant which informed them that the Defendant had taken out an ATE insurance policy regarding the trial of the preliminary issue.

It was held that the CFA had been lawfully terminated by the Defendant and the Claimant was ordered to pay the costs of the assessment proceedings. The Claimant appealed the decision but the appeal was dismissed and the Claimant was ordered to pay the costs of the appeal.

The detailed assessment took place and the Defendant's costs payable by the Claimant were £249,208.02 which include the ATE insurance premium of £95,550 (inc. IPT) which was to obtain cover for £130,000 (with a rate of 73.5%). The Claimant contended that the premium was excessive and disproportionate and that it was unreasonable to take the premium out at such a late stage.

The appeal was dismissed and it was held that under Section 29 of the Access to Justice Act 1999, that ATE premiums were recoverable from the paying party. There was no principle of law that stating that a late policy was an unreasonable policy and there was an evidential burden on the paying party to advance at least some material in support of the contention that the premium is unreasonable.

At Paragraph 41, Mr Justice Simon states:

"*I can see no basis for concluding that Fox Williams should not have taken out any insurance, or (more importantly) that they should not be able to recover the ATE insurance premium because they insured at a late stage…there is no principle that the premium on a late incepting policy is irrecoverable as an unreasonable cost, and each case is likely to depend on its facts*."