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McMenemy v. Peterborough & Stamford Hospitals NHS Trust
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[2017] EWCA Civ 1941

Article by David Bowden

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Maria McMenemy v. Peterborough & Stamford Hospitals NHS Trust
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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 submitted that the principal issue was 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 has ruled that it is still permissible for ATE insurance to be taken out as soon as a claimant enters into a conditional fee agreement – even for low value personal injury cases that are almost bound to settle once a claim is notified. It has decided that now is not the right time for it to reconsider its earlier decision in *Callery v. Grey* noting that although there had been changes in the last 16 years these did not justify such a reconsideration. Lord Justice Lewison has cautioned that his judgment only deals with the principle of when it is reasonable for liability for ATE to be incurred. Consideration of the quantum of ATE premiums will be heard in 2 test case appeals from the NHS in July 2018. The NHS was ordered to make a payment on account of the patients' solicitors' costs in the Court of Appeal of £22,000 by 12 December 2017. These 2 cases will be remitted for the determination of the outstanding costs issues by a regional costs judge with a time estimate of 2 hours but a hearing is not to be listed until 14 days after the handing down of judgements in late 2018 or early 2019 in the *West* and *Demoulipied* appeals. There the Court of Appeal will have to grapple with the whether the quantum of ATE premiums was '*proportionate*' under the post April 2013 version of the Civil Procedure Rules or not.

Maria McMenemy v. Peterborough & Stamford Hospitals NHS Trust
Mr Michael Reynolds v. Nottingham University Hospitals NHS Trust
[2017] EWCA Civ 1941 *28 November 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. Solicitors were instructed and a conditional fee agreement (CFA) was signed in July 2013. 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 £6042 including IPT. The policy was provided by ARAG with a start date of 8 August 2013. Total costs of £15,795 were claimed being over 6 times the damages figure.

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. A CFA was signed in August 2014. The patient accepted the NHS's part 36 offer made in February 2015 for £12,500. Again no court proceedings were ever issued. An ATE premium (again with ARAG) of £5088 was claimed.

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.

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 it was neither reasonable nor proportionate for the patients to incur a liability to pay ATE premiums as soon as they signed a CFA with their solicitors as these cases were going to settle. The NHS also said that the ATE premium was unreasonable in amount and/or that its cost was disproportionate.

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.

What authorities are relied on by the parties?
These 6 authorities (listed chronologically) are referred to in the judgment of the Lord Justice Lewison:

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.

Callery v. Gray **[2002] UKHL 28** (House of Lords – Lords Bingham, Nicholls & Hope in the majority, Lord Hoffman doubting, Lord Scott dissenting)
The responsibility for monitoring and controlling the developing practice by which the new regime for funding personal injury litigation introduced by the Access to Justice Act 1999 was operated lay with the Court of Appeal - the House of Lords should be slow to intervene. The Court of Appeal was best placed to respond quickly and sensitively to changes in practice. The Court of Appeal had emphasised here that the issues had arisen at the very early stages of the development of a new regime where no trends had yet been identified. It was simply giving reviewable guidance on how the regime was to operate without laying down hard and fast rules which could not be changed. While the operation of the new regime was developing, district, costs and circuit judges together with the Court of Appeal would act as watchdogs to ensure that competing interests were fairly balanced in a publicly beneficial manner.

Callery v. Gray (No 2) **[2001] EWCA Civ 1246** (Court of Appeal – Lord Phillips MR, Brooke LJ and Master O'Hare sitting as an assessor)
In determining the test of whether an ATE premium was reasonable the court had to consider the terms of the contract of insurance under which the premium was paid. It had to take a view on whether the premium was a reasonable price to pay for the benefits purchased. Insurers had to be allowed to provide evidence to show the relationship between the premium charged and the business costs it was intended to cover. Such costs could be identified as the 'burn' cost being the cost of meeting claims, the risk/profit cost, that being the cost of taking out reinsurance, administrative costs and distribution commission. The reasonableness of any particular own costs insurance depended upon the individual circumstances of each case. The market in ATE insurance was at such an early stage of development that it was not yet possible to identify standard or average rates of premium for different categories of ATE insurance.

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.

BNM v. MGN Limited **[2017] EWCA Civ 1767** (Court of Appeal – Sir Terence Etherton MR, Longmore and Irwin LJJ)

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's appeal to the Court of Appeal was allowed. The assessment should have been conducted on the footing that the proportionality test in the pre-April 2013CPR part 44.4(2) and the relevant provisions in the pre-April 2013 costs practice direction applied to the success fees and the ATE. It would not have been appropriate to include a further exception in the new part 44.3(7) because that provision created exceptions from the post-April 2013 CPR part 44.3(2)(a) and 44.3(5). These new provisions were not capable of catching '*any additional liability incurred under a funding agreement'* as defined by the pre-April 2013 CPR part 43.2(1)(k) and (o) because such liability no longer fell within the expression '*costs*' as defined by the new part 44.1(1), which did not include any reference to '*additional liabilities'*. The senior costs judge was wrong to find that the old proportionality test in the pre-April 2013 CPR part 44.4(2) was not a provision '*in relation to funding arrangements'* within CPR part 48.1. There was a plain intention to continue the application of the pre-April 2013 costs rules which used to apply to funding arrangements. This was apparent from the transitional provisions in LASPO 2012 and the wording of the post-April 2013 CPR part 48.1(1) which provided that the provisions of the pre-April CPR Parts 43 to 48, as they were in force immediately before 1 April 2013, would continue to apply to a '*pre-commencement funding arrangement*'. Further the senior costs judge's assessment in relation to the reasonableness of issuing proceedings had been flawed because he failed to take into account that (a) BNM had not taken any steps to make a claim during the two years between the return of her phone and her instruction of solicitors, (b) the publisher had not indicated any intention to publish relevant confidential information, (c) BNM had not sought any interlocutory injunction, and (d) there was no evidence that BNM t feared that the publisher would seek to deal with the confidential information in an unlawful way if she gave notice of an intention to issue proceedings. The assessment would be remitted to the senior costs judge to reconsider both the proportionality of the costs and whether the proceedings were issued prematurely.

What papers or reports from Government or public bodies are relevant?
Lord Justice Lewison refers to these 7 papers or reports in his judgement which are listed in chronological order:

- **Report of Master O'Hare** on ATE market – annexed to *Callery v. Gray (No 2)* (2001),
- Pre-April 2013 **Costs Practice Direction**,
- Sir Rupert **Jackson** – Review of Civil Litigation Costs: **Preliminary Report** (8 May 2009),
- Sir Rupert **Jackson** – **Final Report on Civil Litigation Costs** (21 December 2009),
- **Parliamentary Joint Committee on Statutory Instruments** – 20th Report (2013),
- **Ministry of Justice – Explanatory Memorandum** to Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No 2) Regulations 2013, and
- **Department of Health** – Introducing fixed recoverable costs in lower value clinical negligence claims (2017),

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.

What did the Court of Appeal say were the issues that it had to decide?
In giving the unanimous judgment of the Court of Appeal, Lord Justice Lewison (who also granted permission for McMenemy to be 'leapfrogged') said that it had to decide these 5 issues:

- The position on ATE recoverability before the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) came into force,
- How LASPO changed the position on ATE recoverability,
- Whether recovery of ATE premiums is inside or outside the scope of the Civil Procedure Rules 1998,
- Applying the post-April 2013 proportionality test apply to ATE premiums, and
- If there had been sufficient changes in the last 16 years to justify a departure from its landmark decision in *Callery v. Gray* or not.

What did the Court of Appeal say about ATE recoverability pre-LASPO?
Lord Justice Lewison started by noting that the leading case was *Callery v Gray* in which the Court of Appeal had 3 issues before it, but only the 3rd issue there namely the '*stage at which it was appropriate to enter into a CFA and take out ATE insurance'* was the Court of Appeal concerned in these 2 appeals. He summarized the 9 factors in Callery which led it to conclude that it was right for an unsuccessful litigant to be left to pay the ATE premium of the other side. Lewison LJ summarized this as a '*global approach'* which '*essentially as a matter of policy, departed from the usual approach to the assessment of recoverable costs'*. However Lewison LJ cautioned that this departure whilst '*deliberate*' was made *'despite serious reservations by Lord Hoffmann and a powerful dissent by Lord Scott'* in the House of Lords on final appeal. Lewison LJ said that the recovery of ATE premiums '*was settled at a macro level by reference to the general run of cases and the macro economics of the ATE insurance market, and not by reference to the facts of any specific case'*.

What did the Court of Appeal say about ATE recoverability post-LASPO?
Lord Justice Lewison recited the history of the changes recommended by Sir Rupert Jackson in his interim and final reports on civil litigation costs noting particularly the new QOCS regime that applied post April 2013 which meant that (unless there was fundamental dishonesty) an unsuccessful claimant in a personal injury case would not have to pay his or her opponent's costs if the claim failed. Lewison LJ described the changes made to the Civil Procedure Rules 1998 to implement the Jackson recommendations as a '*radical revision'*. He noted too that general damages had been uplifted by 10% at the same time.

Whilst Sir Rupert Jackson initially recommended that the recovery of ATE premiums '*should be abolished in all cases*', this was softened in his final report in these 3 ways:

- No ATE premium should be recoverable if liability was admitted during a pre-action protocol period,
- No ATE premium should be recoverable for the risk of failing to beat a Part 36 offer, and
- ATE premiums should be capped at 50 per cent of damages.

However Lewison LJ noted that whilst the '*recommendation to abolish the recovery of ATE premiums was accepted*' that '*none of the detailed proposals for limiting recovery were accepted*' and in particular the recommendation about disbursements was '*not accepted as regards clinical negligence cases in so far as defendants collectively contribute, through recovery of ATE premiums, to the payment of unsuccessful claimants' disbursements'*.

Lewison LJ noted that the initial regulations laid under section 46 of LASPA were withdrawn in a hurry just as the April 2013 deadline approached because Parliament said they were *ultra vires*. The Ministry of Justice dashed off a replacement set of regulations at the 11th hour - the Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No 2) Regulations 2013 **SI 2013/739** – which were only laid before Parliament on Thursday 28 March 2013 to come into force on Monday 1 April 2013. These made these 3 changes:

- Removing the absolute bar against recovery of ATE insurance premiums in the event that an expert's report was not obtained,
- Introducing a minimum financial claim value before an ATE insurance premium was capable of being recovered, and
- Removing the contemplation that the cost of the report might not be allowed under a costs order.

Lewison LJ referred to the self-serving explanatory memorandum from the MoJ saying that it was '*clear from this that insurance against a party's own disbursements was always seen as one the benefits of ATE insurance*'. He went on to observe that there could be '*no doubt that the understanding was that ATE insurance was taken out "*after an actionable event*" and that often it was taken out at the same time as the CFA*'.

Finally Lewison LJ notes that the repeal of section 29 of the Access to Justice Act 1999 was '*only partial'* and that whilst Parliament had decided that '*in the general run of cases such premiums should no longer be recoverable*' nevertheless it had '*also decided on certain exceptions from that principle'*. Whilst some exceptions were time limited that was not the case for clinical negligence claims.

What did the Court of Appeal rule on whether recovery of ATE premium were inside or outside the scope of the Civil Procedure Rules 1998?
Lord Justice Lewison rejected Mr Bacon's valiant submission that somehow ATE fell outside the scope of the meaning of '*costs*' which the court had power to assess under the CPR. Lewison LJ rightly castigated this submission as being '*invited to conclude'* that Parliament '*made a policy choice to the effect that the level of ATE premiums would be regulated, in the first instance, by the market'* and that only '*if the market failed to produce acceptable results'* would further regulations be made. With a breath of realism unusual within the senior judiciary, Lewison LJ stated that he was '*sceptical about the submission that ATE premiums can be controlled solely by market forces*'. Lewison referred to Master O'Hare's report 16 years ago in *Callery* where even then he stated that '*he was not convinced that market forces impinged upon the premium levied on the ultimate consumer'*.

Pulling the *Rogers* and *Callery* strands together, Lewison LJ ruled that it seemed to him '*unlikely that Parliament chose to allow the level of recoverable ATE premiums to be determined solely by such an imperfect market, with further regulation as a back-up in case of market failure'*. Lewison LJ roundly rejected Mr Bacon's submission that ATE premium were not '*costs*' and could not be scrutinised by a court on a costs assessment for these 5 reasons:

- Neither section 58C nor the No 2 Regulations expressly empower the court to make a costs order at all,
- Regulation 3 does <u>not</u> say that ATE insurance premiums are recoverable - it merely says that a costs order may include them,
- Most cases settle – often, as here, by a claimant's acceptance of a Part 36 offer,
- The definition of 'costs' in CPR part 44 says that costs 'includes' certain categories of expense and those definitions apply 'unless the context otherwise requires'. Where the No 2 Regulations state expressly that ATE premiums may be included in a 'costs order' it is an inevitable consequence that either the definition of 'costs' in the CPR must be expanded to include ATE premiums where authorised by the No 2 Regulations, or alternatively, that the context does require an expanded definition, and
- Parliament must be taken to know that a '*costs order'* is an order made under the CPR.

As to *BNM*, the patients as receiving parties had put in post hearing written submissions following the handing down of judgment. However Lord Justice Lewison brushed these aside as having merely a '*superficial attraction'*. Instead he pulled out from *BNM* that it was '*common ground'* which was '*not doubted by the court'* that the new '*proportionality*' test in CPR Part 44.3 '*would apply to ATE premiums in post-April 2013 clinical negligence proceedings*'.

What did the Court of Appeal rule on the new proportionality test?
Here Lord Justice Lewison started by referring back to *Lownds* as well as *Rogers* noting that *Lownds* was heavily criticized in the *Jackson* reports. Again Lewison LJ rejected the patients' counsel submission that '*the recovery of ATE premiums in clinical negligence cases, even if the policies were taken out after 1 April 2013, continued to be governed by the old regime and were not subject to the new test of proportionality'* as being '*simply wrong'*. Instead Lewison LJ ruled that clinical negligence claims '*were to be a permanent exception to the abolition of the right to recover ATE premiums and were the subject of their own legislative provisions'*.

Concluding on this contentious issue, Lewison LJ ruled that he conclude that '*the new test, including the provisions about proportionality, apply to post-April 2013 clinical negligence claims'* which had been '*common ground between counsel'* in BNM and that nothing in the BNM judgment '*casts doubt on that measure of agreement*'.

Was the Court of Appeal persuaded to depart from *Callery v. Gray*?
No. This was very tight and they nearly were persuaded to do so by the NHS's counsel – but in the end it was just a leap too far. The NHS said the reasons in Callery '*ought to be given less weight'* now. However Lord Justice Lewison ruled that the Court of Appeal had to ask itself these 4 questions first:

- How likely is it that a claimant will need to incur the cost of an expert's report,
- If such a report is likely to be needed how much will it cost,
- How likely is it that a claimant will either not bring a case at all in the light of the report (or if the case is started that it will be lost), and
- In the light of the answers to these 3 questions, what will ATE insurance cost?

Lewison said it was '*not appropriate to use hindsight'* in answering these questions. The NHS counsel submitted that where claims were of low value, expert reports were unlikely to be needed and it was highly likely that the claims will succeed so it was unlikely to be reasonable or proportionate to take out ATE insurance except at very modest cost. However Lewison LJ rejected this submission saying it was '*precisely the same argument as insurers advanced'* in Callery which was '*rejected*' by the Court of Appeal. Instead Lewison was more swayed by the patients' counsels points about block rated ATE policies where there was a '*swings and roundabouts'* approach.

Lewison LJ ruled that the '*introduction of QOCS has not changed the position of an unsuccessful claimant as regards his own disbursements'* and that there '*is still a real incentive for a claimant to insure against the possibility of an adverse costs order even in a case in which he is successful in order to avoid the risk that part of the damages designed to compensate him for pain and suffering or proven financial loss will be swallowed up in paying legal costs'*.

Lewison LJ roundly rejected the patients' submission that there would be an *'apocalypse'* with costs judges being swamped by a '*proliferation of challenges up and down the country'* if they had to assess the proportionality of ATE premiums in low value claims. However in the end, Lewison LJ ruled that although there was '*undoubted force'* in the NHS's submissions, that he had '*not been persuaded that we should depart from the policy decision taken in Callery v Gray and examine the reasonableness of taking out ATE insurance on a case by case basis'* and that nor was he '*persuaded that the new proportionality test requires a case by case approach*'.

Concluding on this issue, Lewison LJ ruled that he considered that '*it is still permissible for ATE insurance to be taken out as soon as a claimant enters into a CFA'*. However Lewison LJ wanted to end by limiting the scope of his judgement knowing that the appeals in *West* and *Demoulipied* are waiting to be heard in quarter 3 of 2018. To avoid pre-judging those appeals where the Court of Appeal will have to rule on the proportionality on the **amount** of post-April 2013 ATE premiums, Lewison LJ ended with this telling observation:

> *'I have said that a number of different forms of ATE insurance have been identified in previous cases. It may well be that it would be open to a defendant to argue that it was unreasonable or disproportionate to take out one kind of ATE insurance rather than another. The old practice direction directed consideration to the question whether any part of the premium would be rebated on early settlement, and it may be that it would be unreasonable in some cases to take out a single premium policy rather than one with stage payments; or one with the possibility of rebated premiums. But those questions go more to whether the amount in question was reasonable or proportionate rather than to the question of principle whether ATE insurance may be taken out at all at the outset. Questions relating to quantum are not before us and are, we were told, due to be considered by this court in another test case*.'

What other recommendations did the Court of Appeal make?
Lord Justice Lewison recognized that legal costs were now 34% of the NHS's expenditure and that continuing payment of ATE premiums after April 2013 when it was thought that such premiums would no longer be recoverable from the other side had added to the NHS's woes. Lewison LJ noted that it was '*unfortunate*' that the Civil Procedure Rules Committee '*took the view that there was no need for rules or practice directions dealing with the recovery of ATE insurance premiums in clinical negligence cases'*. This was not a view that he shared and he ended his judgement with an invitation to the CPRC '*to reconsider the question*' noting presciently that '*at the moment, however the pieces of the jigsaw puzzle are manoeuvred they do not all fit properly*'.

28 November 2017

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.