Clinical Negligence & Costs: XDE v North Middlesex University Hospital NHS Trust [2020] EWCA Civ 543

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Is it reasonable to change funding regime from legal aid to CFA giving rise to additional liabilities of about £1.1million?

Facts

The appellant's clinical negligence claim followed an alleged delay in recognising and treating her tuberculosis meningitis, which, she claimed, caused her catastrophic brain injury. This was her second appeal against judgment disallowing additional liabilities, namely success fees of solicitors, counsel and the after the event insurance premium.

Issues

There were four issues.

First, whether or not there is a broad equivalence between legal aid and CFA-lite. Secondly, what importance should be given to the *actual* reasons for the change in funding.

Thirdly, whether CFA-lite is obviously superior to legal aid, so that the change in funding is justified by this fact alone. Fourthly, whether a good, objective reason for the change in funding is sufficient, regardless of the actual reason.

Discussion

Coulson LJ – with whom Floyd and Lewison LJJ agreed – gave the leading judgment.

On the first issue, there is a broad equivalence between legal aid and CFA-lite. The latter comprising an agreement whereby a client's liability to pay his lawyers' costs is limited to that which is recoverable from the other party.

The guidance in *Surrey (A Child) v Barnet and Chase Farm Hospitals NHS Trust* [2018] EWCA Civ 451, [2018] 1 WLR 5831 ("*Surrey*") at [29-30] is of general application when assessing the reasonableness of costs consequences following change from one funding regime to another. It applies even where there is no question of a *Simmons v Castle* [2012] EWCA Civ 1288, [2013] 1 WLR 1239 uplift.

On the second issue, the *actual* reasons for incurring costs are *material*; in general, matters that were *not* part of the decision-making process are *im*material.

On the third issue, five reasons were given that CFA-lite was not obviously superior to legal aid, including the findings of three costs judges that there was little to choose between the regimes.

On the fourth issue, there were two "very high hurdles" before a good, *objective* reason for the change in funding would be sufficient to render the decision reasonable, regardless of the *actual* reason: the weight of contrary *authorities* and the inherent *un*likelihood.

Disposal

The appeal was dismissed with the following conclusion:

"The decision in *Surrey* appears to have worked well in practice. It stresses that, in general terms, there is little to choose between legal aid funding, on the one hand, and a CFA-lite arrangement on the other. In disputes about the recoverability from the paying party of additional liabilities where the funding has changed from the former to the latter, what matters is the reasonableness of the decision to change funding. That inevitably highlights the actual reasons for the change."