

“No Win No Fee” But If You Win It Could Be “A Win No Damages and a Fee!”

A Claimant’s potential exposure to legal costs took a worrying and significant turn recently when a Claimant took a hospital to court for negligence in respect of nursing care. The Claimant won her case in court, was awarded damages **but was ordered to pay 30% of the defendant’s costs and only recovered 70% of her costs**. The Claimant pursued her claim by way of conditional fee agreement which was underwritten by an insurance policy. Because the Claimant had **won** her case the insurance policy did not cover the defendant’s costs nor the shortfall in the Claimant’s costs and so the Claimant faced losing her damages as well as a very significant costs bill.

The Claimant was an elderly lady in her 70s who had undergone hip surgery and had injured herself when she got out of bed in the early hours of the morning and fractured her left hip as she stumbled to reach her zimmer frame. The Judge found that there had been a lapse of judgement by the nursing staff in failing to have discussed the use of bedrails with the Claimant or her husband and failed to take account of the risk that the claimant may attempt to get out of bed without using the call bell – which she had done the night before.

The case highlights the fact that even though a Claimant pursues a claim on a no win/no fee basis underwritten by an insurance this does not guarantee they will have nothing to pay if they win or lose and indeed can be worse off if they win and do not obtain an Order for costs in full.

No win no fees underwritten with insurance are promoted as a fairly foolproof way to protect a Claimant in the event that the Claimant loses but few would warn a claimant that they could face a significant costs bill even if they win. Such a warning will only baffle and bewilder the poor claimant and is likely to put them off claiming altogether!

There seems to be an increasing trend by the courts not to award the Claimant’s all of their costs and to order them to pay a proportion of the Defendant’s costs even if they are successful. Fortunately in this case we were able to resolve the situation by mutual agreement.

Clearly therefore, there is an urgent need for the ATE insurers to re-examine the terms of their indemnity and to extend cover for adverse costs orders even in the event that the Claimant is successful. This may of course lead to higher premiums and further arguments about recoverability. However with the trend set to continue, urgent change is required because if not, Claimants cannot be reassured that a “no win/no fee” arrangement will give them the security they need to not only recover their damages but to avoid a costs bill. Until this happens it really is “no win/ no fee”, but if you win, it can be “no damages and a fee.”

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