Legal Aid

THE MORNING AFTER THE NIGHT BEFORE……

PRESENTED BY ANDREW KEOGH

Housekeeping

CPD – 3 hours

Fire exits etc

More CPD available tomorrow – so listen carefully!

Legal aid, sessions 1 and 2

Panel session

Legal Aid – changing landscape

Period of rapid change

Challenging lowering of remuneration

Doubtful that all other things remain equal

Things you do control and things you do not

Crown Court Funding

The text book is the 2013 funding order:

The Criminal Legal Aid (Remuneration) Regulations 2013

Amended by SI 2013/2803 and SI 2014/415

Sch 1 for Advocates

Sch 2 for litigator

There is much in common, but

There is also much that is different

Advocacy assistance

Probably the most repeated enquiry on the List A egroup

Contract Specification Part B para 10.133

Not CRM3

Prescribed proceedings

Or to vary or discharge an order/sentence where fee isn't a fixed fee (see later for that)

E.g. Jack and his sister's wedding party

How to claim?

Fixed fees

E.g. Appeals, committal for sentence, breaches etc

But 3 others:

(a) variation s 1C ASBO

(b) Slip rule proceedings

(c) Sentence reduction

It is (b) that we are most interested in today – relatively common

Find the most serious offence

Starting point is easy, but

You are looking for the most serious offence for which your client (*R v Mira* (2007) Unreported; *R v Martini* (2011) Unreported)) was indicted

The story of Jack and Jill – you represent Jill only

What happened in *Lord Chancellor v McCarthy* [2012] EWHC 2325 (Admin)?

Peculiar case of armed robbery

A robbery where a defendant or co-defendant to the offence was armed with a firearm or imitation firearm, or the victim thought that they were so armed, e.g. the defendant purported to be armed with a gun and the victim believed him to be so armed – although it subsequently turned out that he was not – should be classified as an armed robbery.

or

A robbery where the defendant or co-defendant to the offence was in possession of an offensive weapon, namely a weapon that had been made or adapted for use for causing injury to or incapacitating a person, or intended by the person having it with him for such use, should also be classified as an armed robbery.

An intimation by the defendant that he was so armed does not suffice. [R v Stables]

Find the offence in the table

Some offences straddle classifications based on value

TIC's do not count (R v Knight (2003))

If the offence is in the table (even class H, then it is billed in that class subject to any later rules) – you cannot 'wish it' into a different class

Conspiracy, incitement and attempts of offences are treated the same as the substantive offence would be (CLA(R)R 2013, Sch 1, r. 3(b) and Sch 2, r. 3(b))

Where a count is in the form of a specimen then only the value of the count should be included. Where the indictment simply alleges an attempt to cause or inflict grievous bodily harm without reference to section 18 or 20 of the 1861 Act, the claim is for a class B case (*R v Davis* (2012) Unreported)

Although the statutory provision of burglary - S9(1) is not on the list, statutory provision of the sentence - S9(3) is included, so burglary falls in class E. A charge of burglary falls within class E, notwithstanding the fact that an allegation of inflicting GBH may have been made (*R v Crabb* (2010) Unreported)

Where there is conspiracy to burgle which involves both simple burglary and aggravated burglary, the correct classification is B not E (Nutting, 2013 Unreported 6 November 2013); it is submitted that the decision in this case is clearly wrong in law and caution is advised

Defaulters

Offences this time, not client's

If an offence does not appear in the table then it is Class H by default, but you can apply to reclassify

Pedantry at work here, but the regs are clear so be careful how you bill it

Will you want to reclassify if possible?

Approach to reclassification

For cases on re-classification see: ***R v O'Donnell and Fawley* [2012] Costs LR 431**. Only a serious sexual offence will fall to be re-classified as class J (*R v Parveen Khan* (2012) Unreported)

Let's talk about waste…. A tale of 2 offenders

A case alleging depositing controlled waste was to be paid not as Class H as the LAA contended, but as class K. The work involved was 'akin to a fraud trial' and none of the offences in Class H bear any resemblance to this offence. The fact that the offence was one of strict liability, involving no dishonesty was not determinative of the issue (**Flannigan, Unreported 12 Feburary 2014)**

Flannigan tells us the approach

Is it like an offence in Class H, if so it probably stays as H

Is it like an offence in another class, if so it will probably be paid as that class

Surprisingly there is no list of previously reclassified offences

Proof

Where it is claimed by the litigator or advocate that the value of an offence is in excess of a lower limit (£30,000 or £100,000), the issue is to be decided on the balance of probabilities. A common sense approach should be adopted (**Garness, Unreported 15 January 2014**)

Alteration of class

See Sch 1 and Sch 2 para 3

Aggregate values, but no double counting (and again, no TIC's)

Offences not specifically mentioned e.g. receiving stolen goods

Fitness to plead or stand trial (class D option)

Hospital order with s 41 restriction (Class A)

Disposals

Guilty plea; Newton hearings and cracked Newtons

In relation to cases committed to the Crown Court for sentence a Newton hearing does not affect the basic fixed fee payable (***R v Holden*** **[2010] 5 Costs LR 851**).

If a defendant pleads guilty and prior to the Newton hearing the basis of plea is accepted, the case reverts to being paid as a guilty plea, not a cracked trial (*R v Riddell*, unreported).

Cracked trials (Lord Chancellor v Woodhall)

Trials (Lord Chancellor v Ian Henery Solicitors – power of trial judge) and re-trials

Oh, and every combination of transfer

Re-trials

When there is definitely one

The case of R v Cato

The case of Nettleton (No 2) and others, 28 February 2014

[_____] [_____]

Trial £40,000

RT £10,000

If continuation of trial - £40,000

Nettleton test

(1) If the second 'trial' took place before a new judge (in the instant case because the first Judge had been arrested), it would be a retrial.

(2) You look at the 'temporal and procedural matrix' to determine whether there is one trial, or a trial and a retrial. Each case will be fact specific.

(3) The mere service of new evidence or of additional witnesses would not of itself mean that the second trial was in fact a retrial. But, the court would not go so far as to say that factors such as these could never break the temporal and procedural matrix.

PPE

The following table summarises the legislative position. If prosecution evidence is not claimed as "paper PPE" then it must be claimed as special preparation under the relevant scheme provided that it qualifies under such head of claim. Material generated by the defence does not count as PPE (***R v Ward*, Unreported 6 January 2012**). Evidence served up to the end of the case should be included in the page count (***R v Debenham* (2012) Unreported 16 May 2012**) irrespective of whether or not it is served on each defendant (provided of course that the defendant's case has not concluded earlier – e.g. by virtue of being sentenced prior to the conclusion of proceedings against a co-accused). Where identical (or nearly identical) multiple bundles are served on each defendant in a multi-handed case only 1 can be counted for claim purposes.

Type of evidence	Fee payable
Witness statements	You count as paper PPE regardless of whether served digitally or paper
Records of interviews	You count as paper PPE regardless of whether served digitally or paper
Documentary or pictorial exhibit, served on paper	You count as paper PPE

Documentary or pictorial exhibit, served electronically only, which has previously existed in paper form	**You count as paper PPE**
Documentary or pictorial exhibit, served electronically only, which has NOT previously existed in paper form	**This is claimed as special preparation unless the appropriate officer decides that it would be appropriate to include it in the pages of prosecution evidence taking into account the nature of the document and any other relevant circumstances.** **See: R v Gordon Smith; R v Jackson for cases interpreting this provision.**

If a trial Judge held that material which has originally been served only in digital form could only be relied upon by the prosecution if a notice of additional evidence was served, that decision was persuasive of how the work should be claimed (as PPE as opposed to special preparation) (**R v Nutting, unreported 6 November 2013**).

The LAA guidance states that where it can be evidenced that the exhibit would (prior to the move towards the digital service of evidence) have been printed and served on the defence in that format, it will be paid as PPE. However, the regulation goes much further than this and makes clear that the taxing officer must consider ‘the nature of the document and any other relevant circumstances’ (see for example **R v Lee, unreported 26 February 2014, SCCO 343/13**). In **R v Wortley, Unreported 19 March 2014**, SCCO 06/14 it was stated that whilst the view of a trial Judge as to whether evidence ought to be treated as PPE was not binding on the LAA, 'considerabe weight' should be given to his views.

Interviews

ABE – counts as PPE

Other interviews:

Where a transcript is expanded and used in the case because the original transcript was insufficient, both the original served transcript and the amended one count towards PPE (*R v Brazier* (1998) Unreported). Where a transcript has been edited down (not expanded upon) only the original transcript is to be counted.

If the Judge requires a transcript of video evidence, it counts as PPE (LAA Guidance April 2013).

Cases concluding before service of evidence

In circumstances where the case concludes before the prosecution documents are served, and it does not fall within paragraph 22 of Schedule 1 of the Remuneration Regulations, and the PPE count is relevant, the correct number of pages of PPE is the material served on the court for the purposes of enabling the Judge to deal with the case, which is usually similar to the advance disclosure bundle.

This is going to be very important when the national EGP protocol comes in to force in the Autumn

How many claims?

It is not necessarily the case that separate fees are payable simply because there are (or were) separate indictments preferred against the defendant, nor that there are separate defendants represented by the same litigator or advocate in the case. The rules differ as between advocate and litigator claims, and suffer from a degree of complexity that has not been entirely addressed by costs decisions. It should also be noted that different principles apply to crown court cases that are not on indictment (appeals and committals for sentence). ***Lord Chancellor v Eddowes, Perry and Osbourne Solicitors* [2011] EWHC 420 (QB)**

Litigator: R v Hussain

Advocate: R v Fury

CFS: e.g. R v Sturmer; R v Griffiths

Quashed indictments

Where an indictment was quashed and a new indictment preferred, that being not as a result of mere 'house-keeping' or 'tidying up', it constituted an entirely separate case for fee purposes (**R v Sharif, Unreported 19 February 2014**).

Special prep (LGF)

Special preparation is payable in 2 instances:

For consideration of a documentary or pictorial exhibit which has never existed in paper form, served electronically, where the appropriate officer does not consider it appropriate to pay the claim as PPE, and

For pages of prosecution evidence exceeding 10,000.

Work is remunerated on the basis of what is actually and reasonably done and claims should not simply reflect a notional calculation based on X minutes per page (***R v Brandon* [2011] EWHC 90205 (Costs)**, ***R v Dunne, Unreported 28 October 2013***).

There is no payment available for viewing video evidence, listening to audio evidence or considering unused material as all of those tasks are deemed to be remunerated as part of the litigator graduated fee (see: ***Lord Chancellor v McLarty* [2011] EWHC 3185 (QB)**; *Lord Chancellor v Michael J Reed Ltd* [2010] 1 Costs LR 72). Lord Chancellor v Reed was revisited in **R v Oseteko [2014] Costs LR 190**, where the solicitors tried to reopen the principle, principally as they argued that the case had been erroneously rejected as a VHCC case (where payment for video would have been made). Of some interest is that the Costs Judge agreed to certify a point of principle in relation to the issues raised. Practitioners may therefore see some light at the end of this particular tunnel, but it will clearly require a High Court hearing to determine it.

Enhancement cannot be claimed in relation to special preparation (***Lord Chancellor v McLarty and Co Solicitors*[2011] EWHC 3182 (QB)**).

POCA - enhancement

Enhancement is claimable but only in respect to offences in Class A, B, C, D, G, I, J or K. For a claim to be 'exceptional' it must be out of the ordinary and exceptional compared to 'an ordinary criminal case', it not being sufficient that the case is merely exceptional compared generally to a case of its type (*R v Legal Aid Board, ex parte R M Broudie and Co Solicitors* [1994] 138 SJ 94).

It is important to ensure that any enhancement is made when the claim is submitted as it cannot be later made on any redetermination (*R v Walpole* [2002] 1 Costs LR 199).

Some other developments

Sexual Offences – new guideline in force 1 April 2014

Domestic Violence Prevention Notices and Orders – in force 8 March 2014 – these will start being used soon – be ready for it!

Marital duress – abolished as of 13 May 2014

Drug driving Offence – Autumn implementation

New legal aid forms mandatory as of 1 June 2014

Dangerous Dog sentencing

EGP national scheme (and new EGP sentencing guideline)

Hoping for the best, preparing for the worst

A tale of 2 contracts

Consider your options carefully – still all to play for,

Which takes us nicely to the panel session…

Panel discussion

A chance for you and the panel to take stock of where we now stand, particularly in light of the CBA's announcement last week.