JUDGMENT : DEPUTY MASTER JAMES, Costs Office : High Court : 16th December 2003

1. I will now deliver my judgment.

2. Firstly, on hourly rate, both sides appear to have agreed, and I certainly find that, based on the guideline hourly rate, we are looking at a base rate of about £108 per hour. The Defendant has offered 70 per cent on this, which is an average of £184 per hour for Miss Harman, a lower figure of £168 an hour for Mr. Fairweather and £93 for the junior staff and nothing at all for the clerks.

3. The Defendant in his submissions accepted that all seven of the pillars of the wisdom are present and indicated that quantum in this case was only high because of the loss of earnings aspect, which is rather unusual. He referred me to a number of pre-CPR decisions on the old A plus B figures and invited me to find that it was not reasonable to go higher than, for example, **Finlay v. Glaxo** 75 per cent, **Johnson v. Reed** 75 per cent, and referred to the comment in that case to the effect that in order to justify 100 per cent a case must approach the exceptional. The Defendant accepted that this case was complex but not in the top bracket; it did not go to trial, if it had gone to trial he might have conceded 75 or even 80 per cent.

4. The Defendant pointed to the fact that the Claimant had a leader involved; that liability was admitted in September 2002 and that interim payments were made in October 2002, February and March 2003. So that from a reasonably early stage, in his submissions, the Claimant was on to a winner and knew that they were on home ground. Finally, he made the submission that under Jones v. Secretary of State for Wales the Claimant would have to prove extra expense for being a medical expert firm and that they had, after some submissions from the Claimant, no documentary evidence to that effect.

5. For the Claimant Miss Harman pointed to her known expertise, which she has acquired through many years of self-education and her many cases of cervical cancer. She contested that this is not a middle of the road case, liability was strongly disputed at the outset, which is quite unusual. This was a case in which it was accepted that there were pre-cancerous cells in the smear; the main question was whether it was negligent to have missed these.

6. £ 160 per hour being the start rate would be the appropriate rate for a very straightforward, for example road traffic accident, case and clearly needed to be increased significantly for this case.

7. The Claimant also stated that most firms would have bailed out on getting the MOD's response of 1st February 2002, which was a blanket denial of any responsibility whatever.

8. Mr. Fairweather is apparently less expert on cervical cancer but much more expert on the issue of quantum, and I would say at this stage that the Defendant then appeared to accept that both Mr. Fairweather and Miss Harman should be on the same rate, so that whatever rate I decided for one would hold good for the other.

9. The Claimant indicated the leader was only brought in on breach of duty and that in effect Miss Harman ran the case solo for the rest of the time.

10. The Claimant referred to the crucial hearing on 18th March, at which the MOD tried to prove that the Claimant had an organic bone defect, which would have cut damages to about £50,000 or £60,000, as being the average for a cervical cancer case, without any loss of earnings.

11. The trainee is in his mid-thirties and has benefits agency and paralegal experience and was doing highly skilled work on loss of earnings and schedules of loss, but it was accepted that the other trainee, AT, was more ordinary and the Claimant indicated would accept a lower rate, but it should still be over £ 100 per hour.

12. It was further pointed out that supervision of the trainees has not been charged for, and that is a factor which I am entitled to take into account. The unreported case of **R v Sandhu** says that where a senior fee earner conducts supervision of a junior fee earner without charging it, that can be reflected in the B figure.

13. The Claimant's solicitor, Miss Harman, pointed out that she prepared the pleadings in house without recourse to counsel. The case was prepared and listed for trial and, having higher rights, the solicitor was going to run the case in effect herself.

14. Finally, for the Defendant it was pointed out that under Brush v. Bower, Cotton & Bower I can allow differential rates for different pieces of work, should I see fit, and it was conceded, for example, that the 18th March hearing was more complex and could warrant a higher rate.

15. Having heard these submissions I have gone through the CPR at 44.5(3) to look at the factors there which might affect my decision. The first one, 44.5(3)(a), conduct, including conduct before as well as during proceedings, and in this regard I bear in mind the blanket denial in February 2002, lengthy delays in producing the defence and the attempt in March 2003 to bring in new evidence which would in effect have decimated the claim.

16. Also under conduct, efforts to resolve - and I note that mediation was not offered until a very late stage and that interim payments were only forthcoming after court proceedings.

17. Under (b) "the amount or value of any money or property involved", although the Defendant plays this down a settlement of £725,000 is highly significant and is also highly unusual in cases of this nature, which normally settle at less than a tenth of that figure.

18. Under (c) "the importance of the matter to all the parties", I do not think we need to state too much about a case in which the Claimant was left with, in effect, a terminal illness, from which she is in remission but is still a very sick lady.

19. Under heading (d) "the complexity of the matter or the difficulty or the novelty of the questions raised", I do not find this is a middle of the road case. Liability was disputed for the first year and three months of this case. Even once liability had been admitted quantum and causation were hotly disputed until at least March 18th 2003, and in effect there were two experts of equal eminence with opposite views. There was a very good as chance here of failing the Bolam test that a reasonable body of medical opinion would have found any differently.

20. As to "skill, effort, specialised knowledge and responsibility", Miss Harman has got higher rights, prepared the pleadings and so forth without counsel, handled hearings on her own and was preparing to run the trial on her own. Mr. Fairweather is a Panel member. It is an expert firm handling the case with minimal recourse to counsel.

21. Under "the time spent", I think the time spent is considerable but that is more of a matter for the item by item assessment.

22. As for "the place and circumstances", that is not really of great relevance save that both sides have agreed a starting rate of £108 per hour.

23. As such, in addition to the Defendant's concession that all seven of the pillars of wisdom are here, it seems to me that most of the factors laid down in Rule 44.5(3) of the CPR are present and in a very high degree. As such, I find that this case is approaching the exceptional. That it settled pre-trial does not detract from the fact that it was clearly heading for a contested trial, at which the stakes would have been in excess of £650,000, being the difference between the Defendant and the Claimant's assessment of value.

24. It is not a 100 per cent case but nor is it a 70 per cent case. In my view it is an 85 per cent case. As 85 per cent on £108 gives £199.80 I have no difficulty in finding the rate of £200 for Miss Harman and Mr. Fairweather should stand as drawn. However, the trainee's rate is far too high. At £150 an hour that is about 150 per cent enhanced from the base rate of £60. Instead for the trainee DT the rate should be £110 per hour and for the trainee AT £100 per hour to reflect the less complex nature of the work that they have undertaken.

25. As for the clerk's rate, for any chargeable work the rate of £25 will stand, but obviously any non-chargeable rate should be disallowed in any event.

26. I will go straight into judgment on the success fee. In making this judgment on success fee I have had regard to first of all CPR Rule 48.8(3), which deals with solicitor and client assessment, but in particular states that the court should have regard to all of the relevant factors as they reasonably appeared to the solicitor or counsel when the CFA was entered into or varied. All that CPR Rule 44.5(1)(a) adds to that is that on the standard basis I must consider whether the costs were proportionately and reasonably incurred; or were proportionate and reasonable in amount.

27. For the Claimant Miss Harman states that she took the case on in June 2001, with a very intelligent client who had already done research, including having at least one of her smear tests from 1997 checked and adjudged as not something that the technician should reasonably have spotted. On the other hand, this was a woman with a history of regular smear tests and suddenly presenting with terminal cancer, so something was clearly amiss. I refer to her having terminal cancer advisedly; I know that she has had a miracle remission but she is in effect terminally ill. There could have been smear tests overseas which would have caused severe difficulty in the case. The client had no funds to pay, no before the event insurance and no prospect of employers funding the action on her behalf. On the other hand, the Claimant solicitor knew that this was a squamous cell cancer, which is the more common and more spottable kind, but, on the other hand, can still be missed without any finding of negligence, for example if the smear was taken from the wrong part of the cervix.

28. Miss Harman stated that this was, in her view, a 50-50 case and therefore based on the Law Society tables would attract a 100 per cent success fee. It was very hotly contested. The experts were completely at variance; the experts' meeting was s torpedoed by the Defendant. The defence was only received after court intervention and the letter of response originally received was simply a blank denial. There was no suggestion of mediation until a late stage and, in effect, it is the Claimant's submission that the levels of risk were kept up throughout the case because of these facts. In effect the Claimant was setting up for a fully contested trial and the interim payments made were only made after interlocutory proceedings. In effect, the Claimant had to force money out of the Defendant. Quantum and causation were very much in dispute. In the March 2003 hearing it went to the very heart of this issue. It was perfectly proper in those circumstances to have the same success fee throughout.

29. Also, the Claimant's solicitor relies on the risk of the costs of causation and quantum. In effect, if the Claimant had lost the cost of proving these then even if she won she could have lost all of those costs because the Defendant's costs would in effect have wiped out an award of damages. The Claimant referred to a number of cases, **Bensusan** and **Callery v. Gray**, for example.

30. The Defendant made brief submissions and relied on his earlier submissions on hourly rate, but mainly stated that one hurdle of liability was overcome at an early stage and that clearly other factors were tailing off. The Claimant knew that they were on to a winner and his offer for success fee on that basis was 65 per cent.

31. So far as counsel is concerned, the Defendant stated that counsel does not carry the same risk or expense and offered 45 per cent. At this point the Claimant's solicitor indicated that if it had gone to trial counsel would have been exposed for about £50,000, but I have not taken that into account because I think Miss Harman was actually getting carried away and arguing against herself there, having already said that if it had run to trial she would have run it herself.

32. I have read both the solicitors' and the counsel's risk assessment and statement of reasons. At the time that the solicitors entered into the CFA there was no expert evidence. The case appeared to them to be 50-50. At the time counsel gave his statement of reason he did have the benefit of an expert opinion, but unfortunately he also had the Defendant's expert opinion and this was the diametrically opposed expert opinion, which led to a possibility of a failure of the **Bolam** test.

33. As such, in my view a success fee at 100 per cent is reasonable for both. However, counsel has got a five per cent delay element in his fee and that should not be allowed against the paying party.

34. I do not find that it would have been reasonable to have revised the success fee after liability was admitted as causation and quantum were still hotly contested, and had they been successful the Defendant's costs would probably have wiped out an award in the normal £50,000 to £60,000 range.

35. The fact that this case did not proceed to trial does not affect my decision. **Callery v. Gray** suggested a 100 per cent fee rebated to five per cent if the case settled within the protocol period. In any event, on any reading of this case it was 50-50 at the important point at the outset, and indeed for most of the rest of the time. That is my judgment on success fee and that gets us to 3000 on the counter.

MISS S. HARMAN (Solicitor) instructed by Harman & Harman Solicitors appeared for the Claimant

MR HARRINGTON: (Costs Draftsman) instructed by the Treasury Solicitor appeared for the Defendant