

RECOVERING ANTECEDENT COSTS



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By Phillipa Alexander

Can the costs of representation at a coronial inquest be recovered as can those of subsequent negligence proceedings, such as a *Compensation to Relatives Act 1897* claim, or a claim for nervous shock? It appears, at least in certain circumstances, that the answer is yes.

As coronial inquest costs are often substantial, consideration should be given at the outset of a matter as to whether a plaintiff can recover such costs from a defendant.

Fundamental to this question is the meaning of an order for costs. Where an order is made for a plaintiff's costs in negligence proceedings, how can this order extend to cover the costs of an antecedent separate inquiry?

ANTECEDENT COSTS

The right to recover antecedent costs generally was established by the *Pecheries*¹ and *Frankenburg*² cases. As Atkin LJ observed in the *Pecheries* case, 'it would, indeed, be most unfortunate if the costs of obtaining evidence while it was fresh after an accident could not be allowed, even if litigation seemed probable, merely because no writ had then been issued'.³

In *Frankenburg*, three tests were proposed by Lord Hanworth MR; namely:

1. Were the costs incurred for material that ultimately proved to be of use and service in the action?;
2. Was the material relevant to some of the issues that had to be tried and in respect of which justice was sought?; and
3. Were the costs fairly attributable to the defendants' conduct and within the costs which it was contemplated would have to be paid by the defendants?'

The above tests were examined in *In re Gibson's Settlement Trusts Mellors and Anor v Gibson & Ors* by Sir Robert Megarry VC, who correctly noted that the 'test cannot be simply whether the materials in question proved in fact to be of use in the action, for otherwise when a case is settled before trial it would often not be possible to say with any certainty which materials had been or would have been of use in the action'.⁵ >>

Sir Robert Megarry also considered that it would not be right to penalise a successful litigant for obtaining materials which appeared likely to be of use in the action but which, in the event, were never used because the other party did not contest the point. Even where the 'immediate object in incurring the costs was to ascertain the prospective litigant's chances of success', such costs would not per se be excluded from the costs of ensuing litigation.

One caveat was established, in that if proceedings are framed narrowly, antecedent matters that bear no real relation to the subject of the litigation would not be regarded as being costs of the proceedings. However, costs could also become costs of the proceedings by issues put into dispute by the defendant in the sense of 'legitimation by subsequent litigation'.⁶

COSTS IN RELATION TO THE PROCEEDINGS

Section 3 of the *Civil Procedure Act 2005* defines 'costs' in relation to proceedings as meaning 'costs payable in or in relation to the proceedings, and includes fees, disbursements, expenses and remuneration'. The phrase 'in relation to' has replaced the former term 'of and incidental to' in s76 of the *Supreme Court Act 1970* which defined 'costs' where ordered by the court as including 'costs of or incidental to proceedings in the court'. While the inclusion of the latter words was held to extend rather than reduce the ambit of the order in *Re Gibsons Settlement Trusts*, there are a number of authorities that regard the words as meaning no more than an order for the costs 'of' the proceedings.⁷

As noted by Quick,⁸ the words 'of and incidental to' are relevant in two different contexts. These considerations remain applicable to the new definition of costs.

First, when considering the recoverability of preliminary costs before proceedings have been commenced. The test under s364(1)(a) of the *Legal Profession Act 2004* for such costs is 'whether or not it was reasonable to carry out the work concerned'. While it may be reasonable to incur costs of representation at an inquest to obtain evidence that is potentially relevant to establishing the liability of one or more of several defendants, it may not be reasonable to incur these costs where there is unlikely to be a real issue on liability.

Where an order is obtained for costs on an indemnity basis the onus of proof is reversed, and a defendant may have to prove that the inquest costs were unreasonably incurred. The costs consequences of failing to accept a plaintiff's offer of compromise may thus become far more serious for a defendant.

If the work in attending the inquest was reasonable to carry out, s364(1)(c) requires that the costs be fair and reasonable as to their amount. The principle of proportionality, whereby costs are not disproportionate to the amount of the verdict, may be an issue which has to be considered in determining the type of representation at the inquest and the level of participation.

Secondly, the words are relevant in determining whether costs of a particular proceeding in a sequence of proceedings are recoverable. This issue arises where costs of a particular proceeding cannot be recovered as costs of those

proceedings, as in the case of a coronial inquest where no costs are awarded. For example, in *Comcare v Labathas*,⁹ costs incurred prior to the date of a reviewable decision were not recoverable as costs of a subsequent appeal to the Administrative Appeals Tribunal.

THE PURPOSE TEST

One of main reasons the antecedent costs were disallowed in the *Comcare* case was not because the costs were incurred before the appeal was commenced, but because the purpose for which they were incurred was that of the prior review proceedings.

In *Masson Templier & Co v De Fries*,¹⁰ Vaughan Williams LJ confirmed the established principle that no costs are allowed 'but such as have been actually made for the purposes of the proceedings in respect of which the order for costs was made', and disallowed as costs of an appeal costs that had been incurred for divisional court proceedings.¹¹

An attempt in *Wright v Bennett*¹² to distinguish *Masson Templier* with respect to costs that would have had to have been incurred for an appeal in any event, irrespective of when they were incurred, was unsuccessful. Somervell LJ found that such costs could not be 'incident' to the proceedings in the Court of Appeal, as the costs were incurred in respect of a separate proceeding below.

This is a crucial issue in relation to costs of a coronial inquest. Is the purpose of involvement to facilitate the negligence claim? Assuming this is the case, it may prove prudent for plaintiffs' solicitors to give notice of the claim prior to the inquest, even though the negligence proceedings may not have been commenced.

Relevant evidentiary material to establish purpose may also include clearly documenting the purpose for attendance, and recording particulars of material that ultimately proved to be of use in the negligence proceedings, or which was relevant to some of the issues that had to be tried.

CORONIAL INQUEST COSTS ALLOWED

In *Cremona v RTA*,¹³ Dowd J ordered the defendant to pay the plaintiff's costs of the coroner's inquest into the death of Dr Cremona as part of the costs ordered in the *Compensation to Relatives Act 1897* proceedings. The evidence obtained from the coroner's inquest was used in the summary judgment. Dowd J considered there to be 'particular facts and circumstances demonstrating special and unusual features justifying exercise of the court's discretion to award costs'.¹⁴ There were two potential defendants, and at the time of the coroner's inquest the question of liability was still in issue and was examined in the inquest. In Dowd J's view, 'the circumstances here clearly warranted representation and was properly incurred'.¹⁵

Two recent English decisions have also allowed costs of representation at an inquest in reliance on the earlier decision of Clarke J in *East Coast Aggregates v Para-Pagan*.¹⁶ This case arose out of a collision on the Thames involving the loss of 51 lives. On appeal, Clarke J agreed with the Master that it was reasonable for a steering committee to co-ordinate the claimants, to instruct counsel and to attend the inquest, as the

evidence was potentially relevant to the loss of life claims. Unless there were particular costs that were not fairly referable to the attendance at the inquest for that purpose, the reasonable costs of attending the inquest were recoverable.¹⁷

In *Stewart & Anor v Medway NHS Trust*,¹⁸ inquest costs were allowed as costs of clinical negligence proceedings. The defence argued that the order for costs was limited to costs that were of and incidental to the clinical negligence proceedings, and that the costs of another action could not be of and incidental to the negligence action.

The court considered the purpose test and acknowledged that the purpose of an inquest is quite separate and distinct from the purposes of a negligence claim. However, the court rejected the defendant's submission that the costs of one action cannot be the costs of another action and neatly sidestepped the purpose hurdle by stating: 'The purpose one must look to is the purpose of the party incurring the costs, not the purpose of the action in which the costs were incurred.'¹⁹

Following settlement of a statutory claim for damages for bereavement, the plaintiff sought to recover the costs of attendance and representation at the inquest in *King v Milton Keynes General NHS Trust*.²⁰ It was held that the 'want of coronial power to award costs cannot of itself deprive a court in subsequent proceedings of the power to award a party in those proceedings the costs of attending an inquest if those costs are "incidental to" the costs of the subsequent proceedings'. The costs were not characterised as 'costs of the inquest' but rather as costs 'of and incidental' to the subsequent proceedings.

PRACTICAL MATTERS

Statement of claim

Consider framing the pleadings to incorporate issues arising out of the inquest and to seek an order that the defendant pay the plaintiff's costs of the coronial inquest.

Terms of settlement

Where the negligence claim is settled in favour of the plaintiff on terms that costs be paid by the defendant as agreed or assessed, consider including a specific term that such costs include the plaintiff's costs of the coronial inquest.

Court certification

Where the plaintiff has succeeded on hearing, consider requesting the court to make a specific order for the payment of the plaintiff's costs of the coronial inquest pursuant to the court's discretion under s98 of the *Civil Procedure Act 2005*.

Existing costs orders

The absence of court certification is not necessarily determinative, in that a costs assessor can determine what antecedent costs are recoverable in respect of an order for the plaintiff's costs. If sufficient evidence has been maintained and is provided to the assessor as to why it was reasonable in the context of the negligence proceedings to incur costs of

attending and participating in a coronial inquest, then there is no reason why the reasonable costs of representation at the inquest should not be allowed by an assessor.

Assessed or paid costs

If costs in the negligence proceedings have already been assessed or paid, and the costs of the inquest were not claimed, is it too late to seek recovery of those costs? Possibly not. In *Furber v Gray*,²¹ Master Malpass found that the *Limitation Act 1969* does not apply to applications for assessment because such applications are not 'proceedings' within the meaning of s14 of the *Limitation Act*, and the assessment system is used merely to quantify the amount payable under existing orders.

Section 353(1) of the *Legal Profession Act 2004* authorises a person who is entitled to receive or who has received costs as a result of an order for the payment of an unspecified amount of costs to apply for an assessment of the whole, or any part of, those costs. Arguably, where costs have already been assessed or paid, the door is not bolted shut in relation to assessing costs that were not included in the prior application.

CONCLUSION

The decision in *Cremona* establishes authority that in NSW costs of representation at a coronial inquest can be recovered as costs of negligence proceedings. Although there were particular circumstances in *Cremona*, this need not preclude the court from making an order in other cases where it is satisfied that the costs are in relation to and were incurred for the purposes of the compensation proceedings. ■

Notes: 1 *Société Anonyme Pecheries Ostendaises v Merchants Marine Insurance Co* [1928] 1 KB 750.

2 *Frankenburg v Famous Lasky Film Service Ltd* [1931] 1 Ch. 428. 3 Atkin LJ at 763. 4 Lord Hanworth MR at 436. 5 [1981] 1 Ch 179 at 187. 6 Sir Robert Megarry at 188. 7 *Minister for Home & Territories v Smith* (1924) 35 CLR 120 at 130; *Re Hudson*; *Ex parte Citicorp Australia Ltd* (1986) 11 FCR 141 at 144; *Myer v Myer* [1932] VLR 322 at 327. 8 Roger Quick, *Quick on Costs*, LBC Information Services. 9 *Comcare v Con Labathas* (unrep. No. ACTG35 of 1994); *Comcare v B J McMahon and Anor* (unrep. No. ACTG36 of 1994 Fed No. 996/95). 10 [1910] 1 KB 535 at 538. 11 There was an agreement not to seek to recover costs of the divisional court proceedings. 12 [1948] 1 KB 601 at 606. 13 [2000] NSWSC 735 (25 July 2000). 14 Dowd J at 43. 15 Dowd J at 45. 16 Clarke J, 8 August 1996 (unreported) cited in *Stewart & Anor v The Medway NHS Trust* [2004] EWHC 9013 (Costs). 17 Clarke J at para 14. 18 [2004] EWHC 9013 (Costs) (6 April 2004). 19 At para 8. 20 [2004] EWHC 9007 (Costs) (13 May 2004). 21 [2002] NSWSC 1144.

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