
Legal Costs in Medico-Legal Cases

Introduction

- 1 In civil cases, the court may order a party to pay costs to another party. Usually a successful party would be awarded costs which are to be paid by an unsuccessful party.

Interest on Costs

- 2 Interest on costs awarded by the Court would accrue, as provided by the Rules of Court 2012 and as stated in decided cases.

Solicitor and Client Costs and Party and Party Costs

- 3 Usually, costs payable by a person to his or her advocate and solicitor would exceed the party and party costs awarded to such person, the principle being that a successful party should not profit from litigation.

Agreed Fees

- 4 Fees may be agreed between the client and the advocate and solicitor. The agreement shall be in writing and be signed by the client. The agreed fee may be in a lump sum. Or the fee may be for a retainer in a certain sum plus a further certain sum as a refresher for each additional day or part thereof spent by the advocate and solicitor in court in regard to the case.

Expenses and Sales and Service Tax

- 5 A client must also pay all necessary expenses and, where applicable, sales and service tax. Expenses may be included in the fee or may be charged as a separate item.

Duty to Pay Agreed Fee

- 6 If a fee is agreed, it becomes payable immediately, even if the case has not been commenced or completed. It would be payable whether or not the client receives later any benefit from the litigation. There may be an agreement between the solicitor and the client that there shall be a retainer fee, which shall be payable immediately, and a refresher for each day or part of it that the solicitor attends for the client in court. Such a refresher would be payable immediately as and when the attendance in court takes place.

Interest on Expenses

- 7 Interest on expenses advanced by a solicitor for a client's case may be charged.

Rule 11 of the Legal Profession (Practice and Etiquette) Rules 1978

- 8 Where there is no agreement regarding fees, legal costs payable to an advocate and solicitor may be computed according to the principles set out in rule 11 of the Legal Profession (Practice and Etiquette) Rules 1978. Rule 11 states as follows:-

“11. In determining the amount of fee for litigious or contentious matters involving representation of a client in Court, it is proper to take into consideration –

- (a) the time, labour and skill required;*
- (b) the novelty and difficulty of the question involved;*

- (c) *whether acceptance of the particular employment will preclude his appearance for others of which he has a reasonable expectation;*
- (d) *the customary charges of the profession for similar services;*
- (e) *the amount in controversy;*
- (f) *the benefit resulting to the client for the services;*
- (g) *the character of the employment – whether casual or for an established client; and*
- (h) *the special position or seniority of the particular advocate and solicitor.”*

Contingency Fee Agreements

9 Contingency fee (meaning, “no-win, no-fee”) agreements are illegal. It would be unethical of an advocate and solicitor to accept a case on the basis that his costs will be paid out of the fruits of the litigation. Similarly, it would be unethical of an advocate and solicitor to finance the litigation for a client and to agree to be paid only in the event of success.

Delayed Billing

10 As appears from rule 11, an advocate and solicitor may properly charge a fee taking into account the benefit that a client has received from the litigation and the value of the claim or the subject-matter of the dispute. Therefore, it is proper to fix a fee at or towards the end of the litigation when the amount of benefit and the value of the claim or subject-matter become more apparent. Delayed billing may however attract higher fees than usual because the advocate and solicitor is paid later than usual for his services.

High Costs in Medico-Legal Cases

- 11 In medico-legal cases, the costs can be high, especially in cases of claims of low value. The costs in medico-litigation are usually far higher than in ordinary personal injury litigation. Sometimes, in medical malpractice cases, the party and party costs and, even more so, the solicitor and client costs exceed the value of the claim.

Criminal Cases

- 12 In criminal cases, the court does not award to a successful party costs as understood in civil litigation. There is a rarely-exercised power vested in the court to order a convicted person to pay the costs incurred by the prosecution. The court may order payment out of public funds of the expenses incurred by witnesses, whether for the prosecution or the defence, and also compensation for their trouble and loss of time.

Cases with a Medico-Legal Content

- 13 There are various types of cases with a medico-legal content. Such cases may appear in the courts or before tribunals.

Medical Malpractice

- 14 A large number of medico-legal cases in court are in regard to medical malpractice.

Other Types of Medico-Legal Cases

- 15 There are also professional misconduct cases which go before tribunals such as the Malaysian Medical Council and the Malaysian Dental Council. There may appear in criminal cases, especially in regard to offences affecting the human body, heavy medico-legal content, e.g. as regards the mental state of an accused person and the cause of a personal injury or

death. Many an accident which has arisen outside a healthcare setting and which has caused personal injury would raise medico-legal issues. Personal injuries suffered at a social event too can raise such issues. Wrongful dismissal cases in the Industrial Court can involve issues of medical fitness for continued employment. Various types of claims for social security or insurance benefits often involve medico-legal issues. The need for protection of vulnerable classes of persons such as prisoners, refugees; the disabled; the poor; young children; and the elderly can raise medico-legal issues.

Medical and Dental Records; Literature; and Assistance from Experts

- 16 The conduct of such cases frequently requires access to medical and dental records and reports; obtaining relevant medico-legal and dento-legal literature; and the commissioning of expert opinion for use in proceedings before the courts and tribunals.

Costs Arising

- 17 Legal costs would be incurred as a result, including for orders of the court for discovery of medical records; the copying, arrangement, binding and pagination of copies of medical records; and experts' fees for their opinions and for their attendances in court.
- 18 It is not usual for orders for costs to be made in favour of a party in a case before a quasi-judicial tribunal. Tribunals do not usually order costs because either they do not have the power to do so or, even in the uncommon situation where they do have such a power, they do not exercise it.

- 19 The Malaysian Medical Council and the Malaysian Dental Council have the power to order costs to be paid by a registered medical practitioner or a registered dental practitioner, as the case may be, in regard to professional misconduct proceedings. Such costs can be ordered by these tribunals to be paid to the Registrar of Medical Practitioners; to the Registrar of Dental Practitioners; to another medical practitioner; or to a complainant. However, these tribunals are not known to exercise such power.

P S Ranjan & Co.'s Practice

- 20 It is the usual practice of P S Ranjan & C. to obtain at an early stage as complete a clinical picture of a medico-legal case as possible by way of obtaining the medical records and medical reports regarding the case. The records and reports are then screened and assessed by the firm's visiting medical advisers. In an intended claim in negligence, for example, if the medical advisers see sufficient merit in a case after studying the documents, and there appear at that time to be sufficient legal grounds for pursuing a claim, an independent outside expert would be instructed to give an opinion. Sometimes, a number of experts from various fields would be instructed. The medical advisers are not asked to give expert evidence in court.
- 21 After receipt of the opinion and scrutiny of it by the lawyers concerned and the medical advisers, the client is advised and a decision is made by the client as to whether to file a claim in court or not to do so.
- 22 Clients do not have to pay fees to a visiting medical adviser but would have to pay fees to an expert, including for the expert's report and for attending court.

Orders for Costs Regarding Discovery of Documents and Experts' Fees

23 In the case of a successful claim, the court usually orders payment to the plaintiff by the defendant of the costs of the case, including of obtaining discovery of medical and dental records; of obtaining medical and dental reports; of obtaining experts' reports; and of calling experts to give evidence in court.

Financial Risk of Litigation

24 It is not for an advocate and solicitor to bear on behalf of his or her client the financial risk of the litigation. Therefore, if a party fails in the litigation, such party would still have to pay solicitor and client costs.

25 In addition, the court may order an unsuccessful plaintiff to pay the costs of the defendant on a party and party basis.

Insurance against Wasted Costs and Adverse Orders for Costs

26 In some countries, there is insurance available to protect claimants against wasted costs or adverse orders made against them by the courts by which they have to pay to the defendants the costs of unsuccessful litigation. However, it has been difficult to obtain such insurance in Malaysia.

Advocate and Solicitor's Right of Lien and Set-Off against Client's Money and Property

27 An advocate and solicitor has the right of lien and set-off in respect of costs owing by a client to the advocate and solicitor against money and property belonging to the client which are in or have come into the possession of the advocate and solicitor. The costs owing by the client to the solicitor may therefore, after the solicitor has given notice to the client,

be taken out of the judgment or settlement sum and also out of the party and party costs received by the solicitor on behalf of the client.

- 28 A person, including a defendant or a defendant's solicitor, who knowingly deprives a solicitor to the plaintiff of the money which is the subject-matter of the solicitor's lien would be personally liable to pay such money to the solicitor.