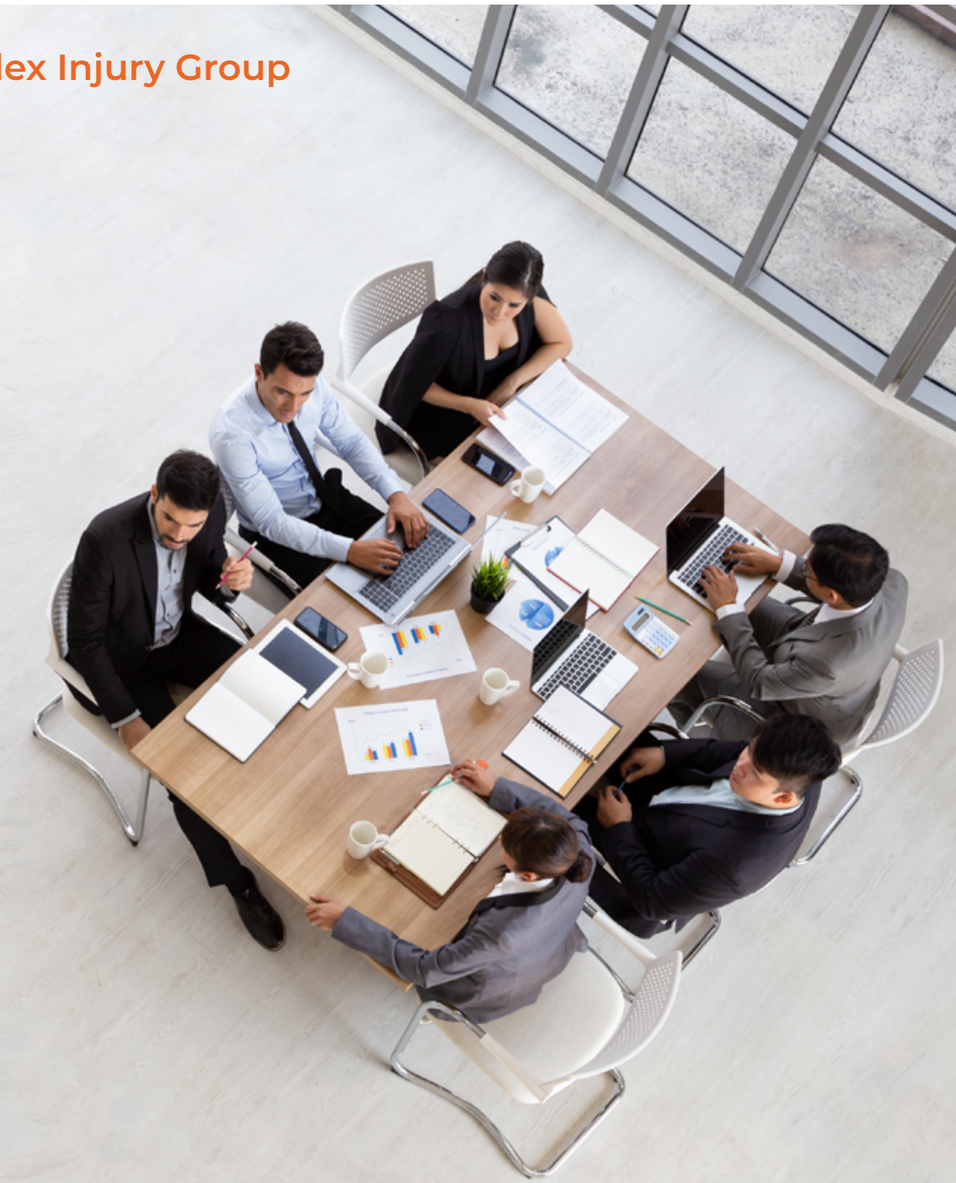
Insight 182

from Horwich Farrelly's Large & Complex Injury Group

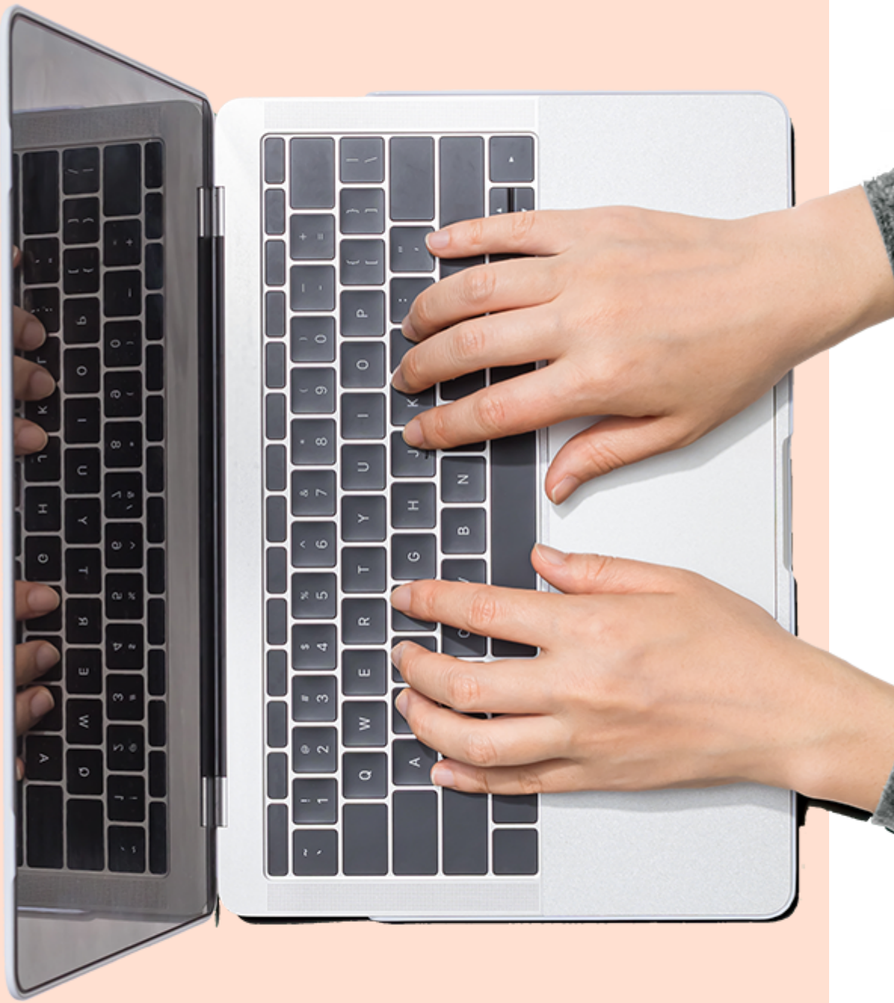


WELCOME TO INSIGHT

Welcome to this week's edition of Insight in which we report on cases relating to:

- The court limiting the claimant's uplift on costs under an old style CFA
- Increased hourly rates for solicitor's costs
- An interim payment award where the substantive law was Dutch

Malcom Henké
Partner & Head of LACIG
malcolm.henke@h-f.co.uk



Costs/CFA uplift

Chocken v Oxford University Hospitals NHS Trust (2020) EWHC 3268 (QB)

This was an appeal from a Master, who had assessed the claimant's solicitor's success fee under a conditional fee agreement (CFA) at 50%. The claimant submitted that the Master ought to have assessed the success fee at 80%.

The Master's judgment on the point was relatively short but may be summarised as follows:

2. *'Taking everything into consideration, my view is that the 50% risk assessment at the outset was about right. It was not too pessimistic. I think the defendant's suggestion of 25% really is little more than the Part 36 risk, and that would have to be for a much more straightforward case than this turned out to be….'*

3. *'I am troubled by the increase to 80% on issue of proceedings in a circumstance such as this whereby at the point proceedings were issued, the claimant had already known for some time, and certainly well over a year, that liability was not contested….'*

4. *'…(A)at the time that proceedings were issued, the claimant in effect already knew that liability was not going to be vigorously defended and that the battle royal in this case was going to be about quantum….'*

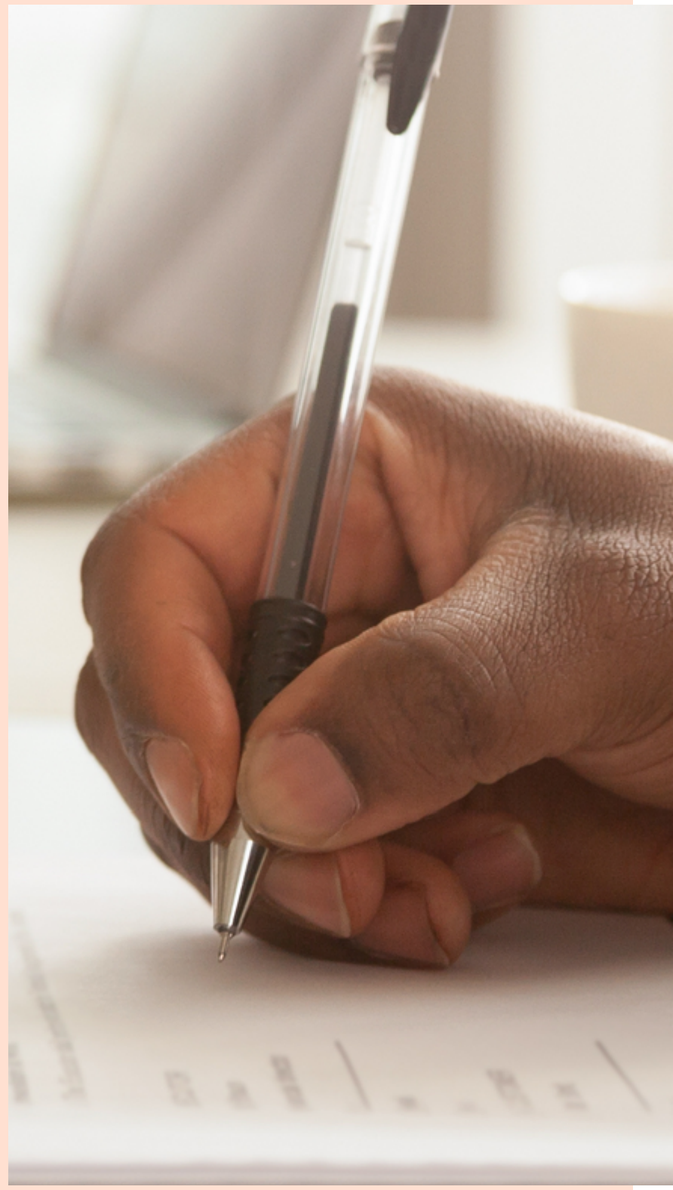
The claimant had instructed solicitors and entered into a CFA with them. This was dated 3rd December 2012. The CFA provided for the following staged success fee:

Stage 1 – if the claim is concluded at any time before service of proceedings, 50% success fee

Stage 2 – if the claim is concluded not less than 45 days before the date fixed for trial, 80% success fee

Stage 3 – if the claim is concluded at any time thereafter, 100% success fee

On 24th April 2013 a letter of claim was sent to the defendant. On 11th September 2013 a letter of response was received from the defendant, admitting breach of duty subject to causation. No offers to settle were made before issue of proceedings. Proceedings were issued on 13th February 2015. On 7th May 2015, prior to the service of proceedings, the defendant made a Part 36 offer to settle in the sum of £250,000. On 10th June 2015 proceedings were served, and on 29th July 2015 judgment was entered with damages to be assessed. The claim was allocated to the multitrack on 9th February 2016. The claimant underwent further surgery for bilateral fasciotomy on 21st September 2016. On 24th February 2017 directions were given to trial and costs budgets were approved.



The claimant instructed 11 experts and the defendant provided reports from 6 experts. Joint statements were prepared by experts of like discipline. The claimant served a schedule of loss totalling some £5,000,000. The defendant's counter schedule amounted to £1,200,000.

On 1st November 2018, 70 days before the 12-day High Court trial was listed to commence, settlement was reached in the sum of £2,850,000 lump sum, plus periodical payments of £48,000.00 per annum rising to £85,000.00 per annum.

In December 2019 the Master assessed the claimant's bill of costs and the staged success fee was assessed at 50%.

There were five grounds of appeal as follows:

Ground 1 – Hindsight

The claimant submitted that the Master in her judgment demonstrated clearly that she took into account the fact that the defendant subsequently admitted breach of duty. It was correct that, if the Master did use hindsight, that was an error which would require the decision on the success fee to be set aside and this court to exercise its discretion afresh.

When one considered what the Master said in her ruling, it was inconceivable that she made an error of principle such as was alleged by the claimant. The Master had dealt with the trigger for the increased percentage. She had already determined what the position was at the outset. This was made clear by what she said in the ruling where she considered the position at the time of entering the CFA. Any earlier references to what had in fact happened were to be construed as the Master doing what she said in submissions she would do, namely using it by way of a cross reference to how reasonable the assessment was at the outset, and no more. Ground 1 was not made out.

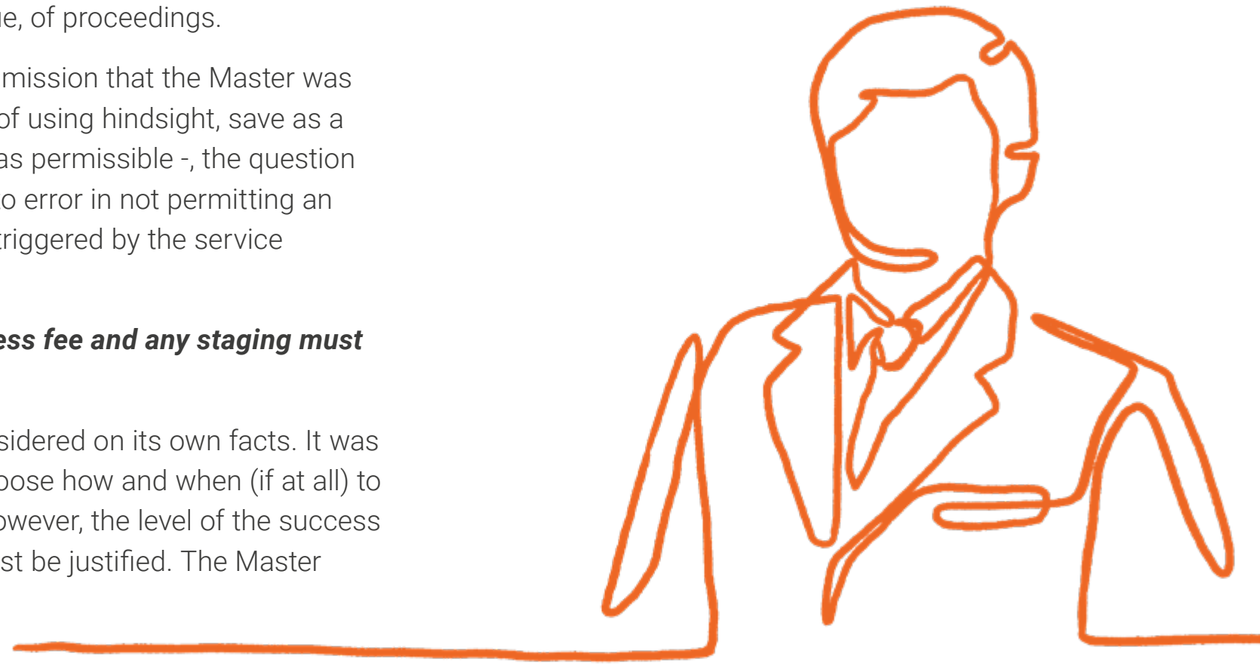
Grounds 2 and 3 – The staging point

Apart from the overlap of these grounds with ground 1, the complaint was that the Master erred in deciding that the issue of court proceedings did not on the facts of the case increase the risk of losing. Although it was not material to the Masters' reasoning, stage 2 applied from the service, not the issue, of proceedings.

Having rejected the submission that the Master was guilty of the legal error of using hindsight, save as a cross check – which was permissible -, the question was whether she fell into error in not permitting an increased success fee triggered by the service of proceedings.

'…the level of the success fee and any staging must be justified'

This case fell to be considered on its own facts. It was up to the solicitor to choose how and when (if at all) to stage a success fee. However, the level of the success fee and any staging must be justified. The Master



accepted a 50% success fee as reasonable from the outset, given all the risks (liability, Part 36 and risk of the claimant's deportation in 2015), but did not accept in the circumstances of the case and the initial level of success fee that any increase was justified at the point chosen for stage 2. She considered that 50% was reasonable up to a point close to trial. This was a decision she was entitled to make. In addition, she was concerned that in this case from the outset proceedings were likely, even if liability was conceded, such that the trigger could not be justified as reasonable. The central, though not only, risk of a CFA was total failure of the claim such that no costs will be recoverable.

Therefore ground 2 failed.

As to ground 3, the Master did not use the phrase 'heavily contested'. She fully accepted that this was a case of severity a nd substantial value. The point she made was that the claimant was always likely, given the facts, to have to issue proceedings. She may later have put it somewhat too high by saying that proceedings were 'more or less guaranteed', but her point was well made. What she was saying was that, having built in the risks of liability being challenged etc, if that risk had actually come to fruition and the trigger had been set by a contested liability issue, that may have been a different matter.

Ground 4 – Level of success fee

This ground was in the alternative. The claimant submitted that even if the Master was right to conclude that the service of proceedings was an unreasonable trigger point, she was wrong to conclude that the second stage success fee ought to be limited to the same level as the first stage success fee.

It flowed from what the appellate judge had previously set out, that this ground could not succeed. The Master found that, having regard to all the relevant risks, a 50% success fee was reasonable. She also found that an increased success fee at the stage of service of proceedings was not reasonable. She judged that a 50% success fee was reasonable up to and including the point at which the case settled. This she was perfectly entitled to do.

Ground 5 – Assessment

This was the ground added by way of amendment to the appellant's notice.

It was said that the Master rejected as a relevant consideration the fact that the claimant was a Mauritian national whose immigration status was uncertain, and which may have resulted in his removal from the jurisdiction before the claim was concluded.

In fact, as the claimant accepted at the hearing the ground was based on a misreading of the judgment. The Master had said: *'I do accept that repatriating the claimant to Mauritius would have made matters substantially more problematic and I think [therefore] more risky.'* The claimant did not therefore pursue this ground.

The claimant was represented by Shoosmiths Solicitors.

The defendant was represented by Acumension Ltd.

Comment

Although limited to the reducing number of cases under old-style CFAs, this case provides useful guidance that it is not just a solicitor's subjective assessment of when risk increases, but the court will apply an objective assessment of that risk.

Costs/Summary assessment & hourly rates

Cohen v Fine and others (2020) EWHC 3278 (Ch)

This was an appeal from a decision of a District Judge and raised issues as to the proper approach to the summary assessment of costs. As well as addressing the approach that was adopted in the instant case, this judgment also suggested how costs assessments might be conducted in future cases, consistently with both the authorities and the need to further the overriding objective. It also gave some consideration to the Guideline Hourly Rates.

The claimant's costs had been put at £48,835.59, inclusive of VAT but were summarily assessed by the District Judge at £27,000.

The claimant's grounds of appeal were:

(1) The District Judge was wrong and erred in law by failing to have regard, or give proper weight, to the fact that the summary assessment was of the costs of an executor and were to be assessed on the indemnity basis. Thus, it was submitted, that the District Judge applied the wrong test.

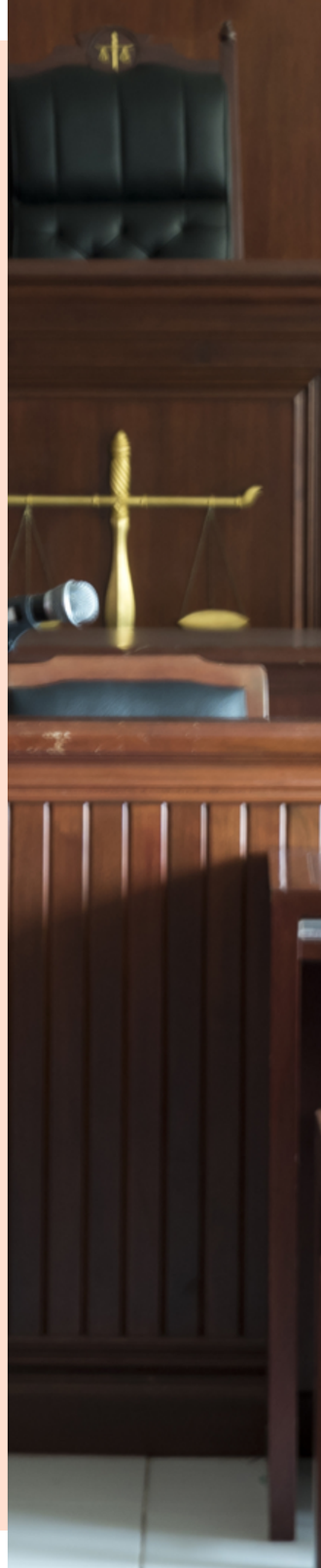
(2) The District Judge was wrong and erred in law by failing to have sufficient regard to the components of the N260 costs statement and effectively imposed her own unilateral tariff without any calculation or proper reasoning. The allowance of £27,000.00 against the costs itemised in the claimant's N260 costs statement was said to have been 'wholly arbitrary'.

(3) The District Judge was wrong and fell into serious procedural error by making it clear throughout the hearing that it was to last only an hour and by failing to consider the options of an adjournment of the claimant's costs for later summary or detailed assessment. As it was, the summary assessment was dealt with in what was said to have been 'a very rushed and rather intemperate fashion' resulting, so the claimant submitted, in procedural unfairness.

Allowing the claimant's appeal, the Deputy High Court Judge held that an appeal court would only allow an appeal where the decision of the lower court was either wrong or unjust because of a serious procedural or other irregularity in the proceedings in the lower court. Both features are present in the instant case.

The approach of the District Judge to the summary assessment she undertook was wrong. While summary assessment could be 'broad brush', a judge still had to consider the individual elements of the bill item by item. What was meant by 'broad brush', in the present context, was that, unlike the detailed assessment procedure under CPR 47, there was no need for any formal notice of commencement of the assessment, or any detailed bill of costs, or any points of dispute, or any points of reply. But the court must nevertheless address individually each separate objection that might be taken to particular items in the N260 statement of costs.

The District Judge's approach had produced an unjust result. The claimant's costs were summarily assessed at £27,000 whereas, having considered the individual elements of the bill item by item, the court now assessed them at £35,703. This would be substituted for



the earlier figure, rather than remitting the case for detailed assessment.

The appellate judge had given reasons for his line-by-line decision on each individual element of the statement of costs as he went through it, item by item.

That left only the issue of the applicable hourly rates for two of the eleven fee earners who featured in the statement of costs. It was necessary for the appeal court to determine the applicable hourly rates for those two fee earners in order to address the question whether each affected item in the costs statement was reasonable in amount because those rates exceeded the applicable (Band One) Senior Courts Costs Office Guideline Hourly Rates.

'...the present Guideline Hourly Rates were considerably below the rates actually being charged...(and)...an increase...in the order of 35% would be justified as a starting point...'

In his experience of sitting in the Business & Property Courts, both in the North-west and in the Rolls Building, the judge found that the present Guideline Hourly Rates were considerably below the rates actually being charged by the solicitors who practised in those courts. Likewise, the Table of Counsel's Fees bore no relationship to the fees which the courts saw being charged for counsel appearing in the Business & Property Courts. Pending the outcome of the present review of GHR, the Guideline Hourly Rates should be the subject of, at least, an increase that took due account of inflation. Using the Bank of England Inflation Calculator, it seemed that an increase in the (Band One) figures for Manchester and Liverpool broadly in the order of 35% would be justified as a starting point (appropriately rounded-up for ease of calculation).

What lessons were to be learned from the present appeal? How might costs assessments be conducted in future cases, consistently with the need to further the overriding objective? How could courts avoid the summary assessment procedure becoming 'bedevilled by formulaic and time-consuming intricacy which would often be wholly disproportionate to the exercise being carried out and the nature of the litigation in hand'.

First, the court should establish from the paying party how many, and which, individual elements of the statement of costs were subject to challenge. If there was simply no time available to undertake an item-by-item consideration of those elements, the court should make this clear; and it should ask whether all relevant parties expressly consented to the court adopting a broad brush, and global, approach to these disputed items, without minutely examining them in any detail. If such consent was forthcoming from all relevant parties, it should be expressly recorded in the court's order.

If no such consent was forthcoming from all relevant parties, then the court had the options of: (1) ordering that the assessment (and, if not previously determined, the incidence and/or t he basis) of the costs of the relevant hearing would be determined on paper following upon an exchange of short, sequential written submissions from the relevant parties; (2) re-listing the matter for a summary assessment of the costs; or (3) directing that the receiving party's costs should be the subject of a detailed assessment. If a detailed assessment was ordered, the court should exercise its power under CPR 44.2 (8) to order the paying party to pay a reasonable sum on account of costs unless there was good reason not to do so. This salutary power should always be borne firmly in mind as an alternative to a rushed, and procedurally improper, summary assessment.

The claimant was represented by Glaisyers Solicitors LLP, Manchester.

The other parties appeared in person.

Comment

It will be of concern to defendants that, even while the review of guideline hourly rates (GHR) is taking place, courts are applying percentage increases to the existing GHR which are far higher than are arguably justified.

Interim payment/Dutch law but English procedure

Duffy v Centraal Beheer Achmea (2020) 3341 (QB)

The claimant applied for a further interim payment in this case in which he was injured when he was a pedestrian hit by a car crossing a square in Amsterdam where he was on holiday. The claimant suffered severe injuries to his right foot in particular and despite significant treatment he was left with ongoing disability in terms of chronic pain, persistent stiffness and swelling, degenerative disease of the midfoot and limited mobility. He had also been diagnosed with post-traumatic stress disorder and depression.

Liability had been conceded and there was no question of contributory negligence.

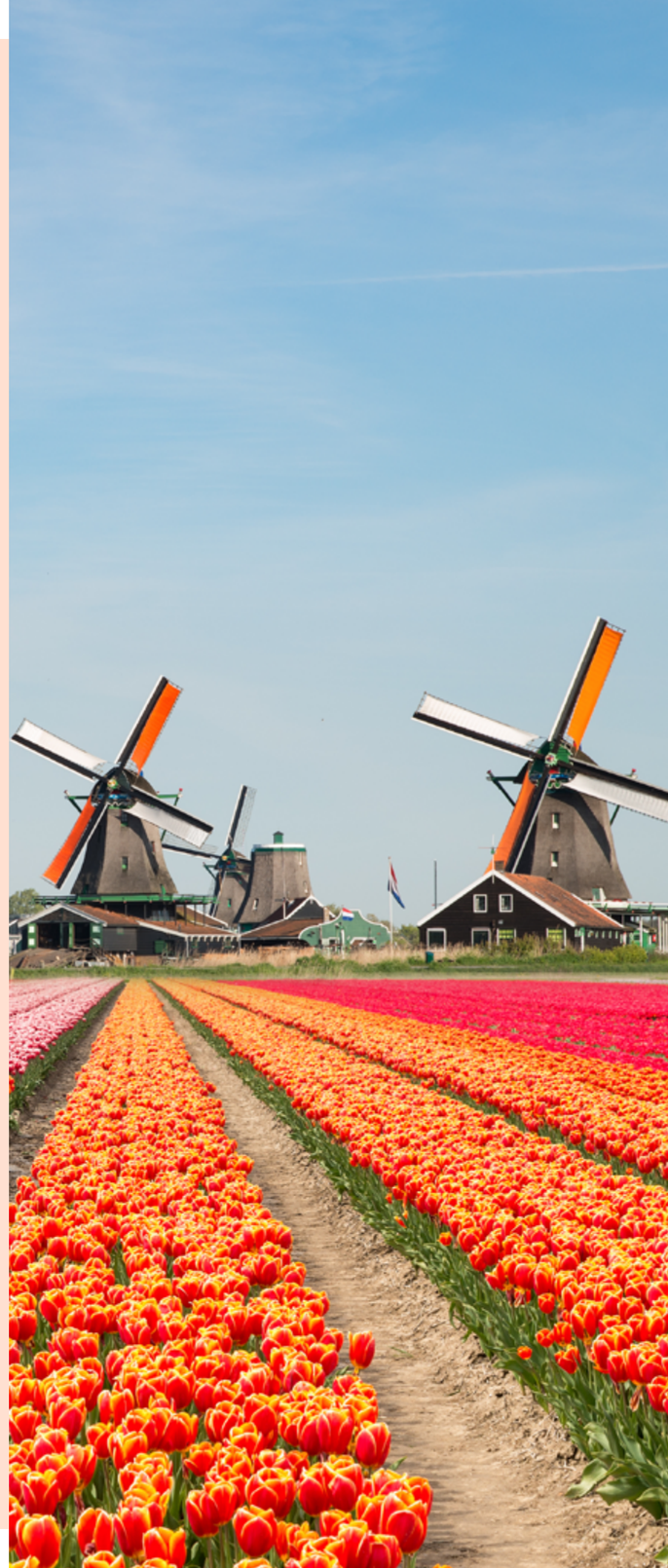
The claimant was born on 2 January 1967. He was 49 at the time of the accident and was now 53 years old. He was employed full-time at the Environment Agency. He was able to return to work and currently worked two days in the office and three days at home. However, he could no longer be out and about looking at flood defences because he could not walk on rough or slippery ground. He was not able to earn as much as he could before the accident.

For the purposes of the interim payment application the defendants accepted that the claimant would undergo a below knee amputation and that the application should be considered on the basis that the surgery would take place soon. The defendants however did not bind themselves at trial to accepting the reasonableness of the claimant's decision to have the amputation.

It also seemed unlikely that the matter would come to trial before the end of 2021.

Although the substantive law relating to the claim was Dutch law (including any assessment of the damages to which the claimant might be entitled), this was an application for an interim payment which was a procedural application and thus governed by English law.

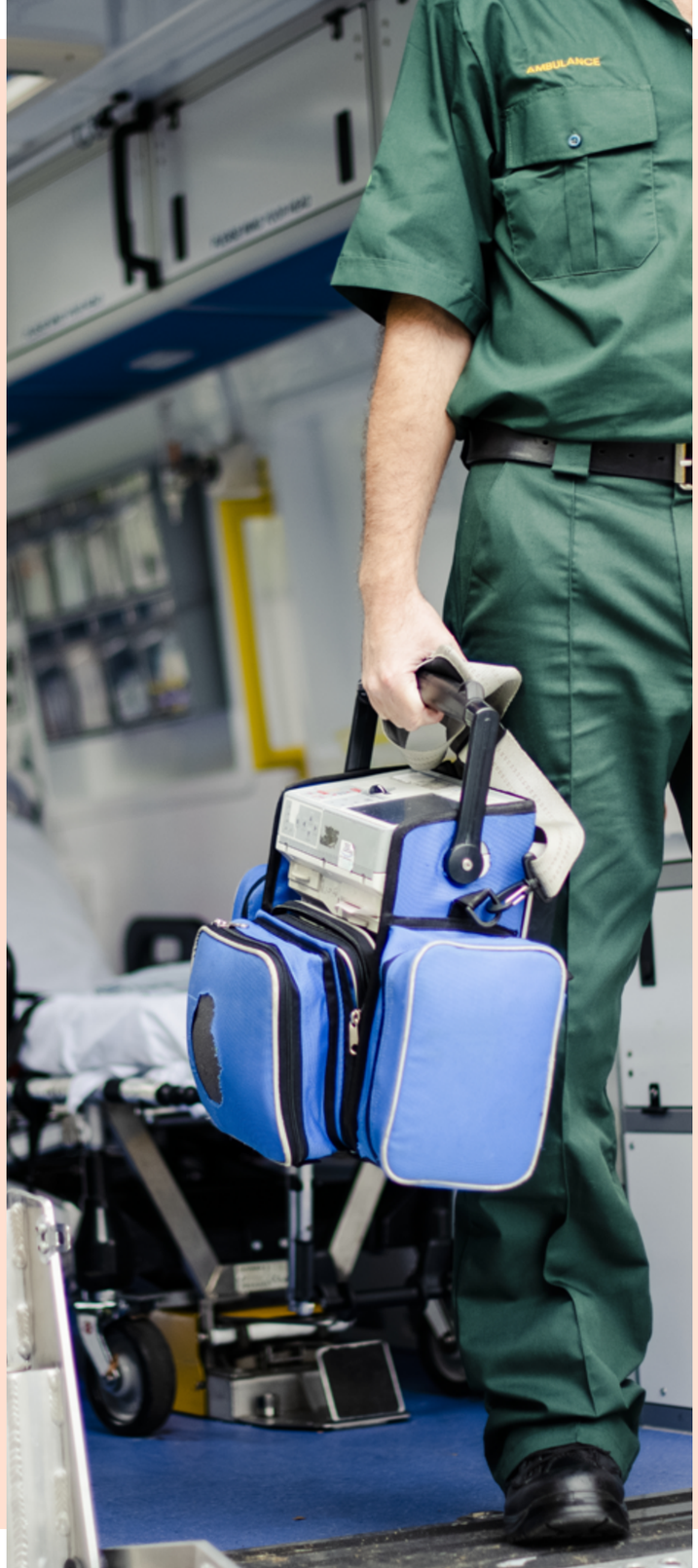
It was agreed that this case fell squarely within what was described as a Cobham v Eeles Stage 1 case and so the reason why the interim payment was being sought formed no part of a Stage I assessment.



The defendants accepted (whilst preserving their position) that the claimant would undergo the below knee amputation, and the claimant put the claim forward based on seeking funding for amputation surgery together with post-surgery loss and damage. Any 'unlevel playing field' or similar argument was limited to the claim for the purchase of a new vehicle and the extent to which the claimant sought an interim payment based on an assessment of loss which extended beyond the likely trial date such as would constitute future losses.

Against this background the court's task was to make a conservative assessment by reference to the principles of compensation applicable in the Netherlands which did not fetter the discretion of the trial judge to deal with future losses by way of periodical payments rather than a capital award or which established a status quo in the claimant's way of life which might have the effect of inhibiting the trial judge's freedom of decision. The assessment was made in relation to heads of loss which the trial judge was bound to award as a capital sum leaving out of account heads of future loss which might be dealt with by a PPO. The assessment thus comprised damages for pain, suffering and loss of amenity (plus interest thereon) and special damages up to the date of trial (plus interest thereon). The court should then award an interim payment which would represent a proportion of that figure (which may well be a high proportion) having deducted any interim payments previously received.

The parties were very far apart. The claim was for a further interim payment of £400,000. The defendants contended for a figure which could not be more than £69,000 and in oral submissions suggested the figure could not be higher than £58,500.



With the assistance of a report by a Dutch-qualified Attorney at Law, the Deputy High Court Judge found that the appropriate award for pain, suffering and loss of amenity was £45,000. Interest was allowed applying English law of £2,000.

The allowance for the claimant's loss of earnings was premised on him returning to work 18-months post amputation, by 31 July 2021, part-time after four months and full-time after six months. This produced a figure of £19,759.07. The claimant's wife's loss of earnings was agreed at £278.80.

'…even though gratuitous care was exactly that… an award could be made in respect of its value… on the basis of the cost of professional help'

In relation to care and assistance, the judge found the claimant's expert's figure to be too high but the defendants also argued that any award for services should reflect that the care would be gratuitous (other than cleaner, window cleaner, etc) so that the commercial sums claimed should be discounted as per the English approach. The claimant suggested that Dutch law did not make reference to any discount. The expert in Dutch law had indicated that compensation could be awarded for personal care and support provided by family and friends. This would not apply if the use of professional help was not 'normal and customary'. Evidence would be required from occupational care experts. The judge noted that the compensation was limited to the cost of professional help but he was not sure how properly to interpret the phrase, in the expert's report, *'the Supreme Court explained that in cases where injuries have been inflicted and efforts made*

by third parties to nurse and care for the injured party, the compensation is abstracted from the circumstance that no actual costs or payments are made'. This seemed likely to mean that even though gratuitous care was exactly that, gratuitous, an award could be made in respect of its value and this paragraph did seem to suggest that the award would be made on the basis of the cost of professional help. The claimant's care expert had quoted for agency care at a rate of £18 per hour. The defendants proposed an hourly rate of £7.50. While conscious that the claim should not be over inflated by reference to the report of the Dutch law expert, it seemed appropriate to take a figure of £10 per hour at this stage for care.

Other heads of damage were assessed by the judge to produce a conservative assessment total of £262,070.87.

As indicated, the judge had included a sum for interest on general damages, but he had no details of any basis on which to calculate interest on special damages in accordance with Dutch law. He therefore allowed 90% of the total figure by way of interim payment award, producing a figure of £235,863.78 from which must be deducted the sum of £120,210.37 already received by way of interim payment, The resulting figure was £115,653.41 which the judge rounded up to £116,000.

The claimant was represented by Irwin Mitchell.

The defendant was represented by BLM.

Comment

This judgment was based very much on the facts of the case but it does illustrate the interaction between the substantive law of the jurisdiction in which an accident occurred and the procedural rules of the jurisdiction where the action is brought.

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