Insight 204

from Horwich Farrelly's Large & Complex Injury Group

WELCOME TO INSIGHT

Welcome to this week's edition of Insight in which we consider different but important issues arising from cases at each end of the spectrum on value:

- The Court of Appeal's decision on how to deal with the costs of a low value case pursued by the estate of a deceased person, and
- The High Court's consideration of an application for a substantial interim payment for accommodation in light of the *Eeles* criteria laid down in 2010.

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Portal or predictable?

West v Burton [2021] EWCA Civ 1005

Background

The claim arises out of a road traffic accident in which the claimant suffered injury. His solicitors started a claim in the MOJ Portal. The claim exited the portal, no admission having been made. The claimant then died for reasons unrelated to the accident.

The defendant was informed of the claimant's death and his solicitors obtained a medical report and Grant of Probate and sent them to the insurers. The insurers then made a Part 36 offer, which was accepted. Costs could not be agreed and Part 8 Costs only proceedings were issued.

Issue

The question that arose was simple – did costs under CPR Part 45 Section IIIA (i.e. Low Value Personal Injury Protocol) apply or predictable costs under CPR Part 45 Section II?

First instance decision and first appeal

It was agreed that CPR 45 Section III did not apply in any event because the notified claim had exited the MOJ Portal.

The defendant contended that Section IIIA applied whilst the claimant argued that costs were to be calculated by reference to Section II.

The District Judge accepted the claimant's argument that Section II was the applicable section in this case. His primary reasoning accepted the claimant's argument that the claim which was settled was that of the executor, not that initially notified by the deceased himself. Accordingly, he held that this was not a Section IIIA case but was a Section II case.

On first appeal in Liverpool County Court on 16 October 2020, HHJ Wood QC, the designated Circuit Judge for Liverpool, upheld the decision, confirming that portal costs did not apply but that Section II CPR 45 costs would apply. He found that once the estate pursued the claim it was a different claimant entirely to the one who started a claim in the portal, stating that his conclusion was:

"the only sensible interpretation bearing in mind the unequivocal preclusion of personal representatives from the portal process."

Permission to appeal to the Court of Appeal was granted on 20 December 2020.

Judgment of Court of Appeal

The matter came before Lord Justice Singh, Lord Justice Dingemans and Sir Nigel Davis on 15 June 2021. Judgment was handed down on 8 July 2021, the judgment given by Sir Nigel Davis with whom his colleagues concurred.

Upholding the earlier decision, The Court of Appeal stated the issue - there were two different costs regimes and the court had to determine which one applied.

"Where a person gives notification of a claim under the Protocol but thereafter dies before its conclusion and the notified claim then, without legal proceedings being issued, proceeds to settlement between the deceased's personal representative and the defendant's insurers, are the costs and disbursements payable by the defendant to be calculated by reference to Section IIIA (or, as the case may be, Section III) of Part 45 of the Civil Procedure Rules? Or are they to be calculated by reference to Section II of Part 45 of the Civil Procedure Rules?"

He noted that the word "claim" was not being used in the Protocol in a formal sense in the same way as in proceedings but rather as descriptive of a demand for damages prior to proceedings. Under the Protocol, a defendant was defined so as to usually mean the insurer. The definition of "claim" in paragraph 1(6) of the Protocol was therefore not to be equated with the definition of "claim" contained in CPR 2.3. Read as a whole, the Rules and the Protocol were drafted on the basis that the claimant was the person who issued the CNF.

The claimant throughout the protocol was regarded as the person who was involved in the road traffic accident. Furthermore, CPR 45.29A and 45.29B were in terms confined to claims started under the Protocol.

The claim that was settled was that of the executor who was not the person who started the claim within the meaning of the Protocol. As executor, he never could have started such a claim, given the provisions of paragraph 4.5(3) of the Protocol. Therefore, this was not a claim, for the purposes of assessing costs, within the ambit of CPR 45.29A or 45.29B. Accordingly, costs fell to be assessed by reference to Section II.

Considering whether there would have been any different conclusion had the deceased's claim not exited the MOJ Portal, Sir Nigel Davis confirmed that he agreed with the Judge that that the outcome would have been the same and that the provisions of Section III would not have come into play. He went on to conclude that:

"In all the circumstances, I would, for my part, uphold the decision of the judge and would dismiss this appeal. It will be a matter for the Rules Committee to consider whether it would be advantageous to set out the desired outcome for situations such as these in express terms."

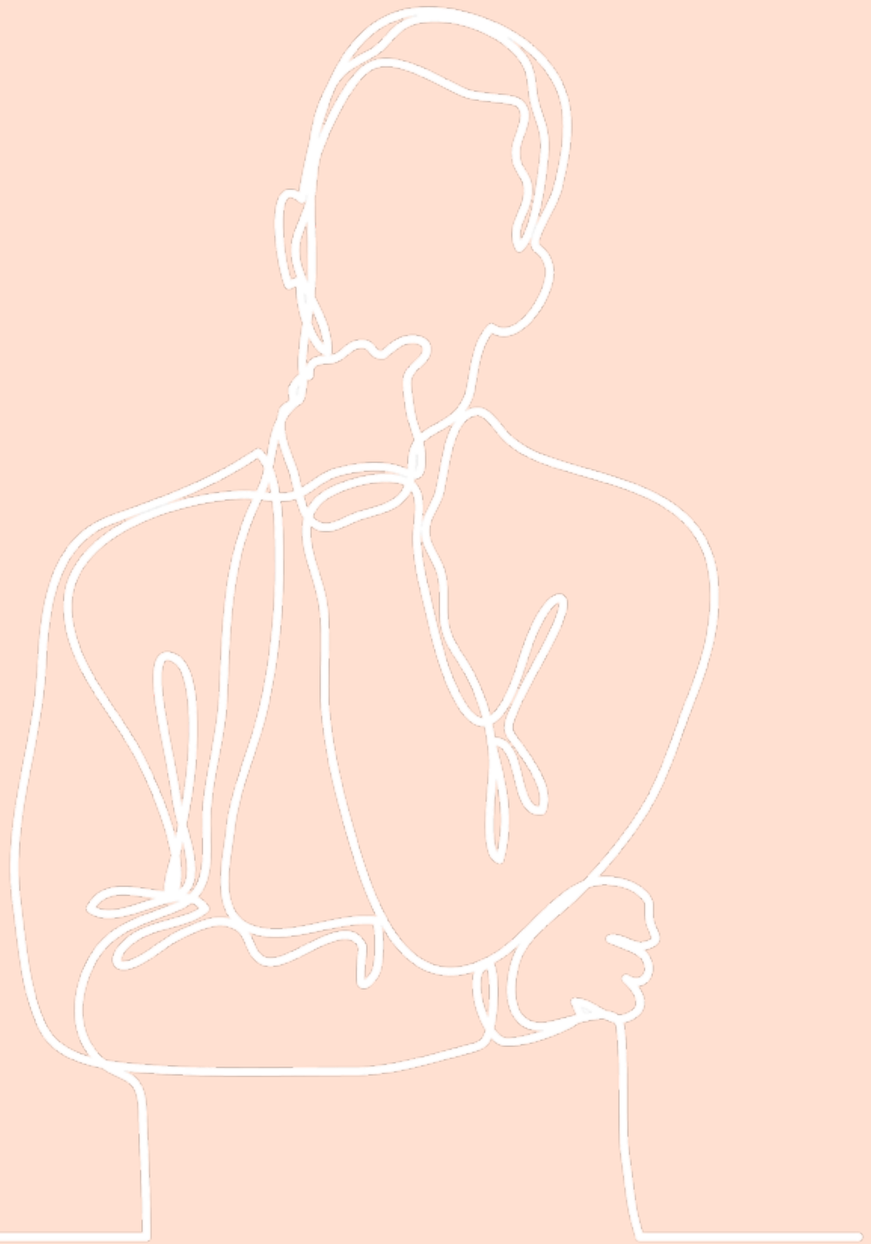
Commentary:

With no sign of movement on any further extension to the fixed costs regime, it will be interesting to see whether, and if so, how quickly the Rules Committee might change the rules to expressly deal with this scenario.

As with many similar issues, for any formal rule change it is a case of watch and wait.

However, this case makes the position clear for practitioners and insurers for the time being.

Although involving a claim of low value, this will apply to any similar case, of which there could be many.



How much is enough?

AL v Collingwood Insurance & Ors [2021] EWHC 1761 (QB)

Background

The infant claimant, by then aged seven and represented by her mother and litigation friend, suffered catastrophic brain damage in a motor accident. Interim payments totalling £400,000 had already been made. A request for a further interim payment of £500,000 to fund an accommodation purchase was requested. This was opposed by the defendant on the basis that the court had no jurisdiction to make the interim payment and alternatively that the evidence did not support it.

Issues

In short, they were:

(i) Did the court have jurisdiction to make the interim payment?

(ii) Did the evidence support the making of a further interim payment?

The court was referred by both parties to CPR 25 and to the Court of Appeal's guidance in *Eeles v Cobham Hire Services Ltd [2010] 1 WLR 409*.

CPR 25.7(4) states: ***The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.***

The two-stage approach in *Eeles* is:

(1) The judge has to assess the likely amount of the final judgment, leaving out the heads of future loss which the trial judge might wish to deal with by PPO. Awarding accommodation costs, including future running costs, as a lump sum is sufficiently established, meaning it will usually be appropriate to include accommodation costs in the expected capital award.

(2) The second stage is where a judge will be entitled to include the likely amount of the final judgment. This can be done when a judge can confidently predict that the trial judge will wish to award a larger capital sum than that covered by general and special damages, interest and accommodation costs alone. The judge must be satisfied that there is a real need for the interim payment requested.

Judgment

The matter came before Robin Knowles J who provided further guidance as to the application of the principles laid down in *Eeles*.

The defendant's jurisdictional argument was based on the fact that the claimant was seeking to rely on aspects of her future loss claim, that she said were likely to be capitalised by the trial judge, as opposed to being awarded as part of a PPO. This argument was rejected by the court, the Judge stating that "*the jurisdictional limit is that set by CPR 25.7(4)*", i.e. a reasonable proportion (which may sometimes be a high proportion) of the likely amount of final damages.

He went on to say that neither the CPR nor the guidance in *Eeles* precluded consideration at an interim payment application of likely capitalised future losses in appropriate circumstances.

On the evidence presented he was satisfied that the claimant's need for the interim payment sought was "*real*" and "*to a high degree of confidence, that expenditure of approximately the amount proposed to be awarded was reasonably necessary*".

He therefore included some future losses to the extent that he was satisfied they would be awarded as a lump sum at trial.

In dismissing the defendant's arguments that the evidence did not support the additional £500,000 claimed, and having considered all available evidence put before him, the judge found that general damages for PSLA, past losses and the likely capitalised element of accommodation and future running costs were conservatively to be assessed at £850,000.

In accordance with *Eeles*, he was also prepared to consider other likely future loss items such as loss of future earnings and future care.

He was satisfied that the further interim payment sought, resulting in interim payments totalling £900,000, was "*modest*" and that future losses may run into "*many millions of pounds*".

He encouraged the parties to "*work to a sensible conclusion*" and emphasised that the Court of Appeal's guidance in *Eeles* requires a principled exercise of discretion to meet the needs of the particular case.

Commentary:

It seems that the defendant may have misjudged their response to the application in what appears to have been quite testy litigation. A more collaborative approach may have been sensible.

Whilst all cases are dealt with based on their own set of facts and merits, in cases involving catastrophic injury interim payments required to support reasonable rehabilitation requirements from early in the litigation process are likely to be looked upon favourably by the courts, even where final prognoses are awaited.

The importance of accommodation to the claimant and family, and indeed to all the parties - it being the platform from which discussions aimed at the earliest possible resolution of the claim can be founded - should never be underestimated.

In such cases our view is that collaboration between the parties from day one is key and that an unnecessarily adversarial approach can be counterproductive. It is for this reason that both in protocols and similar agreements we have negotiated for our clients, and all claims where possible, a sympathetic (that does not mean overly generous) approach of the parties working together (accommodation experts side by side identifying and attempting to narrow areas of dispute as they arise) should be the preferred approach and of benefit to all parties.

This judgment following quickly on from *PAL v Ethan Davison and others [2021] EWHC 1108 (QB)* is a further reminder that the courts will not deal with these applications as mini-trials, deciding whose evidence is likely to be preferred, but will assess whether the claimant's request is reasonable and with maintenance of the claimant's rehabilitation being a key consideration.

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