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WHEN A CLAIM FALLS OUT OF THE PROTOCOL, WHO WINS?

1. On 20 April 2016 Deputy District Judge Cooksley sitting at Peterborough County Court granted both parties permission to appeal the assessment of costs of Counsel attending an infant approval hearing and the cost of Counsel's advice on quantum.

2. The majority of these cases start off in the Pre–Action Protocol for Low Value Personal Injury Claims In Road Traffic Accidents ("the Protocol"). Fixed costs apply to those that settle whilst in the Protocol. What then happens if one or both parties fail to follow the Protocol? And if the matter falls out of the Protocol which party benefits in costs? It was these questions that the Court in Peterborough had to address.

Under the Protocol

3. Costs for claims under the Protocol are dealt with under Civil Procedure Rules 45 Part III (CPR 45.16 to CPR 45.29). CPR 45.21 addresses the question of what costs are recoverable in the event of a settlement which is approved at a Stage 3 hearing where the Claimant is a child. It provides:

(1) This rule applies where
   a. The Claimant is a child;
   b. There is settlement at Stage 2 of the relevant Protocol; and
   c. An application is made to the court to approve the settlement

(2) Where the Court approves the settlement at a settlement hearing it will order the defendant to pay:
   a. The Stage 1 and 2 fixed costs;
   b. The Stage 3 Type A, B and C fixed costs; and
   c. Disbursements allowed in accordance with rule 45.19.

(3) Where the Court does not approve the settlement at a settlement hearing it will order the Defendant to pay the Stage 1 and 2 fixed costs.
   ....

4. Type A is for legal representative costs, type B is for the advocate's costs of attending the hearing and type C is for the costs of obtaining an advice on the level of damages to be awarded (CPR45.18(2)).

5. Importantly under CPR 45.21 the draftsman has permitted both the attendance of an advocate at Court for the hearing (Type B costs) and a sum for the advice of Counsel on the issue of quantum (Type C).

6. In cold hard cash terms the Claimant's Solicitor receives the following (for a claim where an award for damages is not more than £10,000):

Stage 1	£200
Stage 2	£300
Stage 3	
- Type A	£250
- Type B	£250
- Type C	£150
Total	£1150

7. So far so clear. What then happens when things fall out?

The position out of the Protocol

8. CPR 45 Part IIIA (45.29A to 45.29L) deals with the costs of claims that fall out of the Protocol. The relevant rules provide:

45.29B
Subject to rules 45.29F, 45.29G, 45.29H, and 45.29J, if, in a claim started under the RTA Protocol, the Claim Notification Form is submitted on or after 31 July 2013, the only costs allowed are:
(a) the fixed costs in rule 45.29C;
(b) disbursements in accordance with 45.29I

45.29C
(1) Subject to paragraph (2), the amount of fixed costs is set out in Table 6B.

(2) Where the claimant—
(a) lives or works in an area set out in Practice Direction 45; and
(b) instructs a legal representative who practises in that area, the fixed costs will include, in addition to the costs set out in Table 6B, an amount equal to 12.5% of the costs allowable under paragraph (1) and set out in Table 6B.

(3) Where appropriate, VAT may be recovered in addition to the amount of fixed recoverable costs and any reference in this Section to fixed costs is a reference to those costs net of VAT.

(4) In Table 6B—
(a) in Part B, 'on or after' means the period beginning on the date on which the court respectively—
(i) issues the claim;
(ii) allocates the claim under Part 26; or

(iii) lists the claim for trial; and

(b) unless stated otherwise, a reference to 'damages' means agreed damages; and

(c) a reference to 'trial' is a reference to the final contested hearing.

45.29I

(1) Subject to paragraphs (2A) to (2E), the court—

(a) may allow a claim for a disbursement of a type mentioned in paragraphs (2) or (3); but

(b) will not allow a claim for any other type of disbursement.

(2) In a claim started under either the RTA Protocol or the EL/PL Protocol, the disbursements referred to in paragraph (1) are—

(a) the cost of obtaining medical records and expert medical reports as provided for in the relevant Protocol;

(b) the cost of any non-medical expert reports as provided for in the relevant Protocol;

(c) the cost of any advice from a specialist solicitor or counsel as provided for in the relevant Protocol;

(d) court fees;

(e) any expert's fee for attending the trial where the court has given permission for the expert to attend;

(f) expenses which a party or witness has reasonably incurred in travelling to and from a hearing or in staying away from home for the purposes of attending a hearing;

(g) a sum not exceeding the amount specified in Practice Direction 45 for any loss of earnings or loss of leave by a party or witness due to attending a hearing or to staying away from home for the purpose of attending a hearing; and

(h) any other disbursement reasonably incurred due to a particular feature of the dispute.

...

9. Table 6B referred to in CPR 45.29C provides the following so far it relates to claims which settle prior to the issuing of proceedings:

TABLE 6B

Fixed costs where a claim no longer continues under the RTA Protocol			
A. If Parties reach a settlement prior to the claimant issuing proceedings under Part 7			
Agreed damages	At least £1,000, but not more than £5,000	More than £5,000, but not more than £10,000	More than £10,000, but not more than £25,000
Fixed costs	The greater of— (a) £550; or (b) the total of— (i) £100; and (ii) 20% of the damages	The total of— (a) £1,100; and (b) 15% of damages over £5,000	The total of— (a) £1,930; and (b) 10% of damages over £10,000

10. Accordingly in a case of less than £5,000 the Claimant Solicitor received £550 up to a settlement value of £2,750, and thereafter amounts up to £1,100 depending on the level of award of £5,000. Up to a £10,000 settlement figure the Claimant's Solicitors receive costs from £1,100 to £1,850 depending on the value of the claim.

11. There are two things that are striking about CPR 45 Part IIIA, the first is that there is no distinction between adult and child claimants such as the provision of CPR 45 Part III. The second is that there is no direct reference to the recoverability of either a formal advice on quantum, or the attendance of an advocate at the hearing. Do then both of these fees fall to be recovered as a disbursement under CPR 45.29I?

Advice on quantum

12. Upon reading CPR 45.29I it would be easy to assume that Counsel's Advice is provided for in 45.29I(1)(c) that "*advice of specialist solicitor or counsel as provided for in the relevant Protocol*". Such an assumption would however be incorrect. The Protocol provides at paragraph 7.10 that in cases which are valued over £10,000, an additional advice from a specialist solicitor or from counsel may be justified where it is reasonably required to value the claim.

13. In cases therefore below £10,000 the provision at CPR 45.29I(1)(c) does not permit advice on quantum as a disbursement. Is then an advice on quantum "*any other disbursement reasonably incurred due to a particular feature of the dispute"* (CPR45.29I(2)(h))?

14. To find out it is worth taking a look at the provisions of CPR 21, and in particular the Practice Direction to Part 21, paragraph 5.2 which provides:

(1) An opinion on the merits of the settlement or compromise given by counsel or solicitor acting for the child or protected party must, except in very clear cases, be obtained.

15. At the hearing before DDJ Cooksley the Defendant insurer took the position that although the practice direction made it a requirement to provide the advice it did not say that a separate fee ought to be recovered. The cost should therefore come out of the fixed cost.

16. This argument however has some difficulties. Consider if a solicitor has two cases, both of them of a similar value, but one is for an adult and the other is for a child. The solicitor in the child case will receive the same amount of fixed fee for doing more work (such as the advice on quantum) because they are required to do so under the Rules. Over a long period of time solicitors will find it less economical to take on child claimant cases and instead cherry pick the adult claimants. In doing so the Court may inadvertently have reduced the access to justice of a child seeking recompense for the actions of a Defendant.

17. DDJ Cooksley in Peterborough accordingly allowed the award of Counsel's advice finding that it was reasonably incurred due to a 'particular feature of the dispute' under CPR 45.29(2)(h).

Advocate attendance fee

18. What then of the attendance fee? Is it a *"disbursement reasonably incurred due to a particular feature of the dispute"?*

19. To find out it is worth looking back to the Court of Appeal decision of Tubridy v Sarwar [2012] EWCA Civ 184. Tubridy was a case arising out of a road traffic accident which settled pre-issue and was dealt with outside the Protocol with costs awarded under CPR 45 Part II. When deciding whether or not to allow costs of the advocate attending the hearing the Court reminded itself of (the old) CPR 45.10(2)(c) [now found in CPR 45.12(2)(b)] which asked whether or not the fees are "*necessarily incurred by reason of one or more of the Claimant's being a child or protected party*".

20. From paragraph 53 Lord Justice Patten found:

> *53. It seems to me that the wording of CPR 45.10 contemplates that the fees of counsel will only be recoverable if they had to be incurred because of the special status of the claimant. "Necessarily" imports a causal link of this kind which is not established merely by general considerations such as that counsel may be more competent or better equipped to deal with a hearing than a local agent appointed on an ad hoc basis. The rule is looking to*

identify some factor attributable to the claimant being a child or protected person as defined in CPR 21 which requires counsel to be instructed and which by process of elimination would not exist in a case where the claimant was a competent adult.

54. The costs of instructing counsel to provide the opinion required under 21 PD 5.2 and 6.4 will ordinarily satisfy this test because they are a specific requirement of Part 21.10 proceedings. But for counsel's fees for attending a hearing to be recoverable there must, I think, be some complexity in the case which justified their being instructed to appear on the approval hearing. It is not enough to say that counsel would help to remove the stress of the occasion. That is a problem in every case. It is not unique to claimants under CPR 21.10.

55. Judge Hornby thought that children and protected parties merited the services of counsel in all cases but that, I think, puts the matter too widely. If the use of counsel in all Part 21.10 cases had been considered appropriate by the Rules Committee then one would have expected to see that reflected in CPR 45.10(2)(c) or in the provisions of the Practice Direction to CPR 21. As it is, a much stricter test has to be satisfied.

56. Many of these cases (and this one seems to be no exception) do not involve difficult issues and can be dealt with shortly on the basis of the written advice on the merits. In such cases the convenience of having counsel attend the hearing has, I think, to be borne by the solicitors as part of their costs just as they would have had to meet the costs of instructing a local agent.

21. Ordinarily therefore the costs of an advocate attending the hearing would not appear to be recoverable. Tubridy however was a case outside of the Protocol and without the Protocol being taken into consideration. In the circumstances where a claim comes out of the Protocol, either because of no parties fault or the Defendant's fault, then a Claimant Solicitor, who has taken on the work knowing what costs they might reasonably be able to recover and charge for, now has lost a portion of their fixed fee in order to attend with the Claimant, or instruct someone else to attend on their behalf.

22. Moreover the draftsman in CPR 45 Part III distinguished between child and adult claimants, and allowed the recovery of the fees as Type B. Given this how could the draftsman have intended those to be recovered under the Protocol and not if the matter fell out?

23. The Court in Peterborough however accepted the Defendant insurer's arguments that the old rule of Tubridy is still good law and therefore should be included under the fixed fees.

What is the upshot of this?

24. Depending on the value of the claim, one party is to lose if the matter comes out of the Protocol when it comes to costs. Here is a helpful table of claims up to £10,000 comparing the two (settlement pre-issue):

Settlement figure	Costs in the Protocol under CPR 45 Part III	Costs outside of the Protocol under CPR 45 Part IIIA
£1,000	£1,150	£550
£2,000	£1,150	£550
£3,000	£1,150	£700
£4,000	£1,150	£900
£5,000	£1,150	£1,100
£6,000	£1,150	£1,250
£7,000	£1,150	£1,400
£8,000	£1,150	£1,550
£9,000	£1,150	£1,700
£10,000	£1,150	£1,850

25. Evidently in claims under £5,000 where they fall out of the Protocol the Claimant Solicitors are likely to suffer in costs, however for claims from £5,000 to £10,000 it is the Defendant Solicitors who are likely to incur additional cost of the matter falling out of the Protocol.

26. The outcome no doubt it to ensure that all parties try to keep the matters in the Protocol whenever possible, with the award varying depending on the nature and extent of the injury, the negotiating position of either party and any special damages claim, both parties will have to ensure that they keep claims in the Protocol in order to avoid any unwelcome cost implications should the case fall out.

27. Even if that was not an incentive given the issues with recoverability of both advices on quantum and attendance at a hearing both parties will be inclined to keep matters in the Protocol to avoid the uncertainty of what can and cannot be recovered if the matter falls out.

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