BRIEFING

MEDICAL LAW

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CONTRIBUTORS

David Thomson

Nicholas Yell

INTRODUCTION

LISA DOBIE

Head of the 1 Chancery Lane Medical Law Group

Welcome to the November edition of the Medical Law Briefing.

Undoubtedly, 2020 has been a year where parties will have faced difficulty in progressing claims owing to the lockdown / semi lockdown state of flux we have found ourselves in. Parties will want to ensure that claims keep pressing forward to a conclusion and (where appropriate) a costs order. I doubt there has ever been a time where applications for interim payments on account of costs have been more important to keep cases going. David Thomson looks at the rules and case law in such applications.

With an ever increasing number of clinics and treatments being provided privately, Nicholas Yell looks at contractual claims in Medical Law and, in particular, when and why a contractual claim might be pleaded.

INTERIM PAYMENTS ON ACCOUNT OF COSTS – NO TIME LIKE THE PRESENT

DAVID THOMSON

Clinical negligence proceedings are often costs heavy for Claimant and Defendant. One of the many effects of the pandemic has been to retard the usual pace of proceedings. Everyone's cash flow has been affected, so steps to garner what is due in costs, such as applications for interim payments on account of costs, are taking on greater significance.

In general a party needs to have a judgment for costs to seek an interim payment on account of costs [IPAC], however, as discussed below, if a claimant's Part 36 offer is accepted, by virtue of CPR 44.9, a costs order is deemed to have been made.

Unless by consent, a party has to make an application for an IPAC. It is trite to say that "If you don't ask, you don't get it" (apparently ascribed to Mahatma Gandhi, but I am sure this must have originated in Yorkshire many years ago). A frequently missed opportunity is where there has been a trial of a preliminary issue or issues, such as breach of duty and causation, for a claimant. The court should be asked for a costs order, say, the costs of an occasioned by the preliminary issue, and an IPAC sought. Often the IPAC is also with an application for an interim payment on account of damages [IPAD].

Whether interim payments are sought at the hearing or a later application will depend on the particular circumstances of the case, the attitude of the Court and the other party, in particular whether there is consent in principle to or to the sums sought as an interim payment(s).

The Court has the power to make an IPAD pursuant to **CPR 44.2** where the Court has a wide discretion as to costs:

CPR 44.2

1. The court has discretion as to -
   (a) whether costs are payable by one party to another;
   (b) the amount of those costs; and
   (c) when they are to be paid.

2. **If the court decides to make an order about costs –**
   (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
   (b) the court may make a different order.

3. The general rule does not apply to the following proceedings –
   (a) proceedings in the Court of Appeal on an application or appeal made in connection with proceedings in the Family Division; or
   (b) proceedings in the Court of Appeal from a judgment, direction, decision or order given or made in probate proceedings or family proceedings.

4. In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
   (a) the conduct of all the parties;
   (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
   (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

5. The conduct of the parties includes –
   (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;
   (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
   (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
   (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim. and which is not an offer to which costs consequences under Part 36 apply.

6. The orders which the court may make under this rule include an order that a party must pay –
(a) a proportion of another party's costs;
(b) a stated amount in respect of another party's costs;
(c) costs from or until a certain date only;
(d) costs incurred before proceedings have begun;
(e) costs relating to particular steps taken in the proceedings;
(f) costs relating only to a distinct part of the proceedings; and
(g) interest on costs from or until a certain date, including a date before judgment.

7. Before the court considers making an order under paragraph (6)(f), it will consider whether it is practicable to make an order under paragraph (6)(a) or (c) instead.

8. Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so.

As a reminder, the Cost Practice Direction - CPR PD 44 – addresses the general rules about costs and at paragraph 4 the Court's discretion concerning CPR 44.2:

PD 44 paragraph 4 - Court's discretion as to costs: rule 44.2

4.1 **The court may make an order about costs at any stage in a case.**

4.2 There are certain costs orders which the court will commonly make in proceedings before trial. The following table sets out the general effect of these orders. The table is not an exhaustive list of the orders which the court may make.

Term/Order | Effect on costs

Costs in any event

The party in whose favour the order is made is entitled to that party's costs in respect of the part of the proceedings to which the order relates, whatever other costs orders are made in the proceedings.

Costs in the case/ Costs in the application

The party in whose favour the court makes an order for costs at the end of the proceedings is entitled to that party's costs of the part of the proceedings to which the order relates.

Costs reserved

The decision about costs is deferred to a later occasion, but if no later order is made the costs will be costs in the case.

Claimant's/Defendant's costs in case/application

If the party in whose favour the costs order is made is awarded costs at the end of the proceedings, that party is entitled to that party's costs of the part of the proceedings to which the order relates.

If any other party is awarded costs at the end of the proceedings, the party in whose favour the final costs order is made is not liable to pay the costs of any other party in respect of the part of the proceedings to which the order relates.

Costs thrown away

Where, for example, a judgment or order is set aside, the party in whose favour the costs order is made is entitled to the costs which have been incurred as a consequence. This includes the costs of –

- preparing for and attending any hearing at which the judgment or order which has been set aside was made;

- preparing for and attending any hearing to set aside the judgment or order in question;

- preparing for and attending any hearing at which the court orders the proceedings or the part in question to be adjourned;

- any steps taken to enforce a judgment or order which has subsequently been set aside.

Costs of and caused by

Where, for example, the court makes this order on an application to amend a statement of case, the party in whose favour the costs order is made is entitled to the costs of preparing for and attending the application and the costs of any consequential amendment to his own statement of case.

Costs here and below

The party in whose favour the costs order is made is entitled not only to that party's costs in respect of the proceedings in which the court makes the order but also to that party's costs of the proceedings in any lower court.

In the case of an appeal from a Divisional Court the party is not entitled to any costs incurred in any court below the Divisional Court.

No order as to costs

Each party to pay own costs

Each party is to bear that party's own costs of the part of the proceedings to which the order relates whatever costs order the court makes at the end of the proceedings.

There is not a great deal of case law on CPR 44 concerning IPAC as yet. The most important now are: *X v Hull and East Yorkshire Hospitals NHS Trust* [2019] WLUK 723, *RXK (a child proceeding by her mother and litigation friend GXK) v Hampshire Hospitals NHSFT* [2019] EWHC 2751 (QB), *Siddiqi v Aidiniantz* [2020] EWHC 699 (QB) and *Argus Media Ltd v Halim* [2020] EWHC 1062 (QB).

X v Hull and East Yorkshire Hospitals NHS Trust concerned a brain damaged child in which the Defendant NHS Trust admitted 90% liability and the Claimant sought an IPAC of £150,000. The Defendant objected on the grounds that the Claimant had already received £100,000 IPAC and it had made a further voluntary IPAC of £115,000. The Defendant commented that the Claimant was seeking costs that were quantum costs before quantum determined. The Claimant asserted that he should not have to foot his legal, expert and other evidence costs from the following 3 or so years until quantum determination. At first instance, the district judge was not satisfied that the additional £150,000 would not exceed a reasonable proportion of the costs to which the appellant was entitled. She ruled that the proper course was for the appellant to seek a detailed assessment of costs in order that she could have certainty over the IPAC sought. The Claimant appealed.

The County Court decided that CPR 44.2(1) and 44.2(2) allowed the Court to make a costs order where liability had been admitted in a clinical negligence claim, but where quantum could not be finally determined for some years.

The Court outlined the factors important to making an interim payment of costs on account and gave guidance about how any ultimate overcharge to the defendant should be remedied.

The Court explained also that lawyers experienced in handling cases like this would be able to anticipate, in broad outline, the shape of the final monetary award, including whether it would be achieved by judicial determination or settlement, and the individual components making up the award. In *Giambrone v JMC Holidays Ltd (costs)* [2002] EWHC 3932 (QB) the Court acknowledged that solicitors engaged in heavy and protracted litigation were entitled to expect an adequate cash flow. The Court commented that voluntary interim payments were the norm, however under CPR 44.2(8) (then 44.38) it could order a payment on account of costs.

The Court in X anticipated costs “tranches”. The Trust had made no Part 36 offer, so X was “virtually certain of recovering costs to date.” If no adequate cash flow could be secured between determination of liability and quantum, solicitors might be deterred from taking these types of cases, which would have perverse and undesirable consequences. The District Judge was wrong to have found that the IPAC might exceed a reasonable proportion of the costs to which the Claimant's solicitors would be entitled. There was no

real risk of the appellant's solicitors being overpaid and a payment or adjustment being required.

An issue also considered was the effect of Part 36 offer on "future" costs paid as an IPAC. There was a risk that, if a claimant failed to beat a Part 36 offer, after an IPAC, some costs could be owing to the defendant. It commented that it was unlikely that this would happen. If it did, a defendant's remedy would be to deduct the overpayment from the claimant's damages, so this provided protection for a defendant.

The Court also stated that an immediate detailed assessment of liability costs was not a prerequisite to ordering an IPAC.

In *RXK v Hampshire Hospitals NHSFT*, Master Cook heard another application for an IPAC in a complex high-value clinical negligence case in which liability had been admitted, however there would be a long time before quantum determination. The Claimant suffered brain injury at birth in 2013. A realistic determination of quantum was not possible until she was at least 12 years old, more likely not until 22 years old.

She received an initial IPAC in 2017 and sought a further £150,000. Her application was lacking in detail and supportive evidence. The Master explained that parties applying for interim payments on account of costs should provide the relevant information the court needed to enable it to take into account the factors in CPR 44.2(4) and 44.2(5).

In the course of a clinical negligence claim, the claimant applied for a further interim payment on account of costs.

Due to the defendant Hospital Trust's negligence, the Claimant had suffered neurological injury when she was born in 2013. She issued proceedings in 2016. Although the trust admitted liability, it was common ground that the extent of the damages that should be awarded to the claimant would not be known for some time as, in the majority of cases of such injury, the patient would be aged between 12 and 22 before a final prognosis could be given on their health and care requirements. In 2017, the court ordered the trust to make interim payments on account of damages and of costs. In 2019, the claimant made the instant application, requesting the court to use its discretion under CPR 44.2 to grant a further £150,000 on account of costs. CPR 44.2(8) empowered the court to make an IPAC only where it had made a costs order that could then be subject to a detailed assessment. Applications were for a costs order to a specific date and an IPAC of those costs. For the application, the court would want to take into account the factors in CPR 44.2(4) and 44.2(5), such as the conduct of the parties, their level of success in the case, and whether any offers to settle had been made. Other considerations might include:

- preserving security for a defendant
- ensuring there was a limited risk of costs repayment, however overpayment might be set off against damages
- the type of funding agreement and details of any payments m ade under that agreement
- whether any Part 36 or other admissible offer had been made
- any payments on account of damages (IPAD)
- a realistic valuation of the likely damages to be awarded at the quantum assessment
- a realistic estimate of the quantum (and any prior liability) costs incurred to the date of the application
- the likely date of trial or trial window
- any other factor relevant to the final incidence of costs, for example issue-based costs order, arguments over hourly rates or relevant conduct; and (see paras 11-15 of judgment).

The Court commented that the Claimant's application failed to address those issues and amounted to no more than an appeal for more money! The need for parties/solicitors engaged in heavy and protracted litigation to expect adequate cash flow was understood. The Claimant was ordered to apply to re-list the application with the relevant evidence. The application was adjourned.

The judgment in *RXK* was a clear indication that **applicants for IPACs must make an adequate application or suffer consequences, likely a refusal of the application and/or costs penalties**.

The technicalities do not stop with RXK, which sound too much like an energy drink or similar. There other circumstances that may have to be taken into account:

- A claimant's Part 36 offer is accepted, and where, by virtue of CPR 44.9, a costs order is deemed to have been made.

CPR 44.9 - cases where costs orders deemed to have been made
44.9
(1) Subject to paragraph (2), **where a right to costs arises under** –
(a) rule 3.7 or 3.7A1 (defendant's right to costs where claim is struck out for non-payment of fees);
(a1) rule 3.7B (sanctions for dishonouring cheque);
(b) **rule 36.13(1) or (2) (claimant's entitlement to costs where a Part 36 offer is accepted)**; or
(c) rule 38.6 (defendant's right to costs where claimant discontinues),

a costs order will be deemed to have been made on the standard basis.

(2) Paragraph 1(b) does not apply where a Part 36 offer is accepted before the commencement of proceedings.

- That said, in *Global Assets* it is decided that there was no reason to restrict the power to make an order for a payment on account of costs under CPR 44.2(8) to circumstances in which the court had physically made the costs order under the general discretion in 44.2 as opposed to circumstances in which a costs order was deemed to have been made pursuant to 44.9. A deemed order was no less an order of the court. In *Global Assets Advisory Services Ltd v Grandlane Developments Ltd* [2019] EWCA Civ 1764, the appellants appealed against the refusal of their application for an IPAC on account of costs following the respondents' acceptance of a Part 36 offer.

The court had jurisdiction to order an interim payment on account of costs pursuant to CPR 44.2(8) where a Part 36 offer had been accepted within the relevant period. The fact that under 44.9 a costs order was deemed to have been made on acceptance of the Part 36 offer did not affect the jurisdiction under 44.2(8). Although Part 36 is described as a "self-contained procedural code" about offers to settle, there was nothing in the terms of Part 36 which suggested that it was entirely freestanding and that all costs consequences of accepting a Part36 offer were to be found within Part 36 itself. On the contrary, express reference was made in CPR 36.16 to 44.2(2) and 44.9.

- The Court can order a stay of proceedings if an interim order for costs is not paid – *Siddiqi v Aidinian* [2020] EWHC 699 (QB) An order requiring a claimant to comply with an unpaid interim costs order as a condition of continuing with proceedings was appropriate where the claimant could not show that he was unable to obtain the relatively modest amount of costs from either his own resources or third parties. The underlying action related to a long-running dispute over a business, the Sherlock Holmes Museum, Baker Street, London. The judge refused the Claimant an injunction and a number of other applications by him, and ordered him to pay the interim costs order of around £30 thousand. The Claimant failed to pay the costs.

He subsequently applied for permission to amend his claim form and to stay the costs order.

The Court explained that where there was no other effective way of ensuring that an interim costs order was complied with, it could require those costs to be paid as a condition of the party continuing with the proceedings, provided that it would not "unjustifiably interfere" with rights under ENCR Article 6 (right to a fair trial). The Claimant did not demonstrate that he could not obtain the relatively modest costs from either his own resources or third parties. Therefor the Court decided to sanction him for failing to comply with the order, and ordered that his claim would be stayed if he did not pay the interim costs within 28 days. He was also precluded from making any other

applications during that period.

- Finally Argus Media Ltd v Halim [2020] EWHC 1062 (QB) - unless there was good reason not to order it, an order for IPAC of a reasonable sum on account of costs usually followed a costs order for detailed assessment. The sum would usually be an estimate of the likely level of recovery with an appropriate margin for error. Relevant factors had to be considered including:

  - the likelihood of the claimant being awarded the costs claimed or a lesser sum, and if so what proportion
  - possible difficulties in recovery
  - the parties' means
  - the imminence of any assessment
  - any delay
  - whether recovering any overpayment might be difficult.
  - Want of means might be a good reason for not ordering an IPAC. It is a question of justice in each case.

So the opportunity afforded for an IPAC by CPR 44 is clear and should be used whenever possible. Evidence is required; however it is worth repeating that unless there was good reason not to order it, an order for IPAC of a reasonable sum on account of costs should usually follow a costs order for detailed assessment.

WHEN AND WHY TO PLEAD A CONTRACTUAL CLAIM

NICHOLAS YELL

A significant proportion of clinical negligence claims are brought by clients (patients) who have instructed their medical provider on a private basis. Clinical negligence claims are frequently brought against non- NHS providers, e.g. private physicians or hospitals, opticians, dentists, cosmetic surgeons etc. The provider may be the individual who was the medical practitioner advising and/or providing treatment or a company/institution employing or engaging medical practitioners to do so.

The general principle is that medical practitioners, whether NHS or private, owe a duty of care in tort to exercise reasonable skill and care in advising and treating the patient. When a practitioner is privately instructed, there will normally be an implied term of the contract to similar effect. This implication arises in common law and/or, as a result of s49 of the Consumer Rights Act 2015 (a patient will ordinarily be a consumer under their s2 of the 2015 Act).

In a clinical negligence claim, it is a common practice to plead negligence and/or breach of contract on a further or in the alternative basis in the Particulars of Claim.

However, the fact that a practitioner agrees to operate, or provide medical services, on a private basis does not necessarily impose on the defendant any greater responsibility than he would have under the law of tort (see *Morris v Winsbury-White* [1937] All E.R. 494 @ 500A-D and *Dove v Jarvis* [2013] Med LR 284). Philosophically, it is hard to accept that the standard of care provided should depend upon whether healthcare is being provided privately.

This therefore raises the question of what does the bringing of a concurrent contractual claim add to the claim as a whole?

It is unlikely to make any significant difference to the limitation position because s11(1) of the Limitation Act

1980 provides: "*This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the [claimant] for the negligence, nuisance or breach of duty consist over include damages in respect of personal injuries to the [claimant] or any other person*", see also ss 14 and 33 of the 1980 Act. So the three year limitation period running from the accrual of the cause of knowledge or "date of knowledge" (if later) will be apply (with the Court having power to exercise its discretion to dis-apply the primary limitation period under s.33). Indeed the patient's cause of action may accrue earlier for breach of contract than in tort because in contract, it runs from the date of breach. In tort, the cause of action only accrues when damage results from the breach of duty.

Nor does the fact that a contractual claim is pleaded preclude a finding of contributory negligence (unusual though that would be in a clinical negligence claim, but not unknown).

In both the contract and tort claims, the patient will have to prove causation. If the patient cannot prove any injury, loss and damage resulting from the breach of contract, only nominal damages will be recoverable.

So what then are the advantages of pleading a concurrent claim for breach of contract? I would suggest the following.

- Firstly, it is conceptually possible for a practitioner to expressly or impliedly agree contractual obligations that are more extensive than the duty of care in tort to exercise reasonable skill and care. Whether the provider did so would depend upon the facts of the case. However, were such a situation to arise, there could be a breach of contract even though negligence (breach of duty) could not be established. The problem of proving causation would nevertheless remain (and one wonders in how many cases this could make a significant difference).

  Secondly, there are cases in which there is an implant or medical product used in the treatment that subsequently transpired to have been defective. The practitioner may not have been negligent in using that implant or product. Rather than the patient having to sue the manufacturer, the patient could rely upon (prior to 01.10.15) s.4(2) of the Supply of Goods and Services Act 1982 and (post 01.10.15) ss 9-11 of the Consumer Rights Act 2015 because the implant or medical product would not be of "satisfactory quality". Effectively the provider would be strictly liable (albeit he could claim indemnity or contribution from the manufacturer).

- Thirdly, the results of medical treatments are not usually guaranteed. There is a risk of complications or sub-optimal outcome. However, it is conceptually possible for a provider to be treated as having contractually agreed or warranted that proposed treatment would be successful, see *Thake v Maurice* [1986] QB 644. Clear words would normally be needed to achieve this, see *Worster v City & Hackney HA*, The Times, 22.06.87. It is worth pointing out that in most such cases, a Montgomery type claim in tort would also be likely to succeed because the practitioner should have explained that success was not guaranteed or certain so as to allow the patient to make an informed decision about consent.

- Fourthly, in such cases, the contractual measure of damages could be more generous than it would be in tort. In the tort of negligence, damages are intended to compensate the claimant for the consequences of that negligence, i.e. to put him back in the position (so far as monetary compensation ever can) that he would have been had the negligence not occurred. The patient's position post the negligence is contrasted with what it would have been in the absence of negligence. With contract, damages are intended to put the claimant in the position that they would have been had the contract been properly performed. In many cases, it may not make any difference. However, if the provider has contracted to achieve a particular outcome, or warranted that it would be obtained, contractual damages will be based upon his position post the breach of contract contrasted with the outcome that the provider was

contractually obliged to achieve, e.g. a vasectomy or sterilisation case. A Claimant is entitled to elect the measure of damages (contract or tort) that is most favourable.

- Fifthly, if a provider is privately retained and, as a result of the breach, his services were valueless, he could be debarred from recovering his fees or ordered to repay fees received, see Paras 13-070 (medical practitioners) and 11-327 (solicitors) of Jackson & Powell on Professional Negligence 8th Edition. This is to be regarded as either damages for wasted expenditure or a restitutionary remedy where there has been a failure of consideration. Query what the position would be if some benefit had been received from the services provided (would the Court apportion and order a partial refund or take the view that no refund should be made because damages compensate the Claimant for the breach that has occurred).

- Sixthly, there are sometimes cases in which a provider, that is a corporate entity, may deny owing any duty of care in tort (or being vicariously liable for the negligence of a medical practitioner engaged by it to provide medical services to the patient). To avoid arguments about whether the provider owed a non-delegable duty of care and/or is vicariously liable for the medical practitioner's negligence, it would be sensible to: (a) sue them both; and (b) to include a contractual claim against the provider. In practice, they may well have separate insurers and/or either defend the claim jointly or claim contribution and/or indemnity against one another. It is important to bear in mind that the patient may have a contractual relationship with the provider but not necessarily with the medical practitioner (albeit that practitioner may owe the patient a duty of care in tort).

- Seventhly, sometimes defendants in clinical negligence claims deploy "limited resources" arguments to justify delays that have occurred in treatment and/or the failure to carry out certain treatments or tests. Apart from its relevance to establishing breach of duty, this can make it more difficult to prove causation. One can understand this in the context of claims against NHS providers where there is huge demand for limited resources. It is more difficult for a private provider to successfully advance such arguments. There will usually be express or implied agreement as to when surgery or treatment is to be performed. Evidentially, the patient may be insured or willing to pay for any further necessary treatment or tests. The contractual position is part of the factual matrix in which the issues of breach of duty and causation have to be considered.

My conclusion would be that there is very little downside to pleading a concurrent contractual claim and there could well be advantages in doing so.

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1 Chancery Lane, London, WC2A 1LF

Tel: +44 (0)20 7092 2900
Email: clerks@1chancerylane.com

www.1chancerylane.com