Personal Injury Team

St John's CHAMBERS

The hole in the costs regime for claims no longer continuing under the road traffic accident pre-action protocol

Marcus Coates-Walker, Barrister, St John's Chambers

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Where a defendant makes an admission of liability but alleges contributory negligence (apart from a failure to wear a seat belt) a claim will no longer continue under the Protocol. If the parties settle before proceedings are issued, what are the fixed costs payable by the defendant? It will likely turn on the meaning of the phrase 'agreed damages'. Does it mean the sum before or after a deduction for contributory negligence is made?

The RTA pre-action protocol[1]

1. The Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (RTAs) ("the Protocol") applies where:[2]

   (a) a claim for damages arises from a RTA where the Claim Notification Form (CNF) is submitted on or after 31 July 2013;

   (b) the claim includes damages in respect of personal injury;

   (c) the claimant values the claim at no more than the 'Protocol upper limit'[3]; and

[1] This article focuses on the RTA Pre-Action Protocol. However, the issues and conclusions discussed apply equally to the Employers' and Public Liability Protocol.
[2] Paragraph 4.1 of the Protocol.

[3] The Protocol upper limit is: (i) £25,000 where the accident occurred on or after 31 July 2013; and (ii) £10,000 where the accident occurred on or after 30 April 2010 and before 31 July 2013. It is calculated on a full liability basis. It includes pecuniary losses, but not interest and vehicle related damages (Paragraphs 1.2 and 4.4 of the Protocol).

(d) if proceedings were started, the small claims track would not be the normal track for the claim.

2. In terms of value this means that claims where the damages are valued between £1,000 (the small claims limit for personal injuries) and the Protocol upper limit the Protocol will apply.

3. Claims will not continue under the Protocol for a variety of reasons, for example if liability is contested. Another such reason is where the defendant within the relevant period makes an admission of liability but alleges contributory negligence (other than in relation to the claimant's admitted failure to wear a seat belt).[4] In this scenario a claim will no longer continue under the Protocol and the issue of contributory negligence will be (i) agreed between the parties; or (ii) determined by a judge at a hearing.

4. In either case, the appropriate costs regime is CPR 45 IIIA fixed recoverable costs rather than CPR 45 III because the claim no longer continues under the Protocol,. The fixed costs where a claim no longer continues under the RTA Protocol are governed by Table 6B, which states:

(a) If parties reach a settlement prior to the claimant issuing proceedings under Part 7, fixed costs are determined by reference to the "*agreed damages*":

(i) If agreed damages are at least £1,000, but not more than £5,000, the fixed costs are the greater of: (a) £550; or (b) the total of (i) £100; and (ii) 20% of the damages.

(ii) If agreed damages are more than £5,000, but not more than £10,000, the fixed costs will be the total of: (a) £1,100; and (b) 15% of damages over £5,000.

(iii) If agreed damages are more than £10,000 but not more than £25,000, fixed costs will be the total of (a) £1,930; and (b) 10% of damages over £10,000.

(b) If proceedings are issued under Part 7, but the case settles before trial, fixed costs are determined by reference to the stage at which the case is settled:

(i) If the case settled on or after the date of issue, but prior to the date of allocation under Part 26, fixed costs will be the total of: (a) £1,160; and (b) 20% of the damages.

[4] Paragraph 6.15(1) of the Protocol.

(ii) If the case settled on or after the date of allocation under Part 26, but prior to the date of listing fixed costs will be the total of: (a) £1,880; and (b) 20% of the damages.

(iii) If the case settled on or after the date of listing but prior to the date of trial fixed costs will be the total of: (a) £2,655; and (b) 20% of the damages.

(c) If the claim is disposed of at trial, fixed costs will be the total of: (a) £2,655; and (b) 20% of the "*damages agreed or awarded*"; and (c) the relevant trial advocacy fee.

(d) Trial advocacy fees are determined by reference to the "*damages agreed or awarded*":

(i) If not more than £3,000 the trial advocacy fee will be £500.

(ii) If more than £3,000 but not more than £10,000 the trial advocacy fee will be £710.

(iii) If more than £10,000 but not more than £15,000 the trial advocacy fee will be £1,070.

(iv) If more than £15,000 the trial advocacy fee will be £1,705.

5. The regime governing recoverable fixed costs in these cases may look comprehensive, but there is a hidden hole into which parties may fall if they are not careful.

Practical example

6. For example, let us focus on a situation in a personal injury claim where the defendant makes an admission within the relevant period but also alleges contributory negligence. As a result, the claim will no longer continue under the Protocol. Let us also imagine that the parties reach a settlement prior to the claimant issuing proceedings under Part 7 on the following terms: (i) the claimant's injuries are worth £1,500; but (ii) the claimant should be attributed with 50% liability and therefore is only paid £750 by the defendant.

7. In this scenario, what are the fixed costs payable by the defendant to the claimant? The claim has been settled prior to Part 7 proceedings being issued and therefore falls within Section A of Table 6B. Fixed costs will be determined by the amount of 'agreed damages'. The meaning of this phrase goes to the heart of the issue of what fixed costs are payable to the claimant.

The meaning of "agreed damages"

8. The answer is not clear. It requires an analysis of the particular phrase 'agreed damages' and the context in which it is used.

9. Arguably, in our example above, unless you agree damages at £1,500 you cannot know what constitutes 50%. In other words, the amount a claimant is actually paid can only be calculated with reference to the amount of damages that were initially agreed.

10. However, a useful starting point is to look at the ordinary meaning of that phrase. What would the ordinary person on the street believe it to mean? Would they expect "agreed damages" to be the amount of money that should be paid to the claimant? Probably. Would they expect it to include an amount of money which will be deducted for contributory negligence? Probably not.

11. Further guidance can be taken from how CPR Part 45 Section II deals with this issue. CPR 45.9(2)(d) states that this section applies if a claim had been issued for the amount of the agreed damages, the small claims track would not have been the normal track for that claim. In other words, if proceedings had been issued for the agreed damages and the small claims track would not have been the normal track for the claim then fixed costs apply pursuant to Section II of Part 45.

12. One argument that has therefore been used is based on CPR 26.8(2), which states that contributory negligence will not be considered by the court when assessing the financial value of a claim for the purposes of allocation to a track. Using this logic it could be argued that the 'agreed damages' in our example above should be £1,500 rather than £750.

13. Support for this argument can be seen in CPR 45.29F which sets out how defendants' costs are assessed. CPR 45.29F(3) and (4) state that for the purpose of assessing the costs payable to the defendant by reference to the fixed costs in Table 6B "value of the claim for damages" and "damages" shall be treated as references to the value of the claim which is the amount specified in the claim form, excluding any contributory negligence.

14. However, a distinction can quite easily be made between: (i) considering the *financial value* of a claim in order to determine the appropriate track (at this stage the issue of contributory negligence has yet to be explored); and (ii) the *actual amount of damages* which has been agreed between the parties having settled upon an appropriate split of liability (this is likely to be after negotiation and consideration of any contributory negligence).

15. Further, there must be some sense in assessing claimants' and defendants' costs in these circumstances in different ways. Claimants' fixed costs should be assessed on the basis of the appropriate amount of damages for their injuries, which has either been agreed between the parties or awarded by the court. In other words, the end result of the case (subject to the correct interpretation of 'agreed damages'). On the other hand, it would only seem fair to assess defendants' fixed costs on the basis of the value of the claim they are asked to defend. A defendant will obviously approach a case valued at £100,000 in a different way (and incur more cost) compared to a case valued at £10,000.

16. The argument based on CPR 26.8(2) was rejected in the County Court cases of *Parveen v Farooq (*HHJ Stewart QC, Liverpool County Court, 30 June 2009, unreported) and *Lisbie v SKS Scaffolding* [2011] EWHC 90203 (Costs). These are old County Court cases, which pre-date the Protocol. However, the rationale behind them is still sound. In both cases it was held that 'agreed damages' should be given its usual meaning in the absence of any specific definition in the rules. The usual meaning of 'agreed damages' was the actual amount of compensation recovered not the value of the claim. One should not seek to give an artificial meaning equivalent to the value of the claim before any deduction for contributory negligence.

17. Further assistance is provided in PD45 2.3(c) which states that fixed recoverable costs are to be calculated by reference to the amount of agreed damages which are payable to the receiving party. In calculating the amount of these damages where the parties have agreed an element of contributory negligence, the amount of damages attributed to that negligence must be deducted. It would be a very strange situation if the guidance to Section II in PD45 2.3(c) was not equally applicable to Section IIIA in the absence of any rule to the contrary.

18. Finally, Sections C and D of Table 6B curiously use the phrase "*damages agreed or awarded*". The use of the words "agreed" and "awarded" in the same phrase suggest that they were intended to be synonymous. The word "awarded" describes something that has been given or paid to the claimant. In other words, by using "agreed" and "awarded" together in the latter sections of Table 6B it must have been intended for "agreed" to describe the same, namely the actual money given to the claimant.

19. On balance, the combination of (i) a common sense look at the ordinary meaning of 'agreed damages'; (ii) how other parts of the CPR inform this issue; and (iii) how judges have grappled with the interpretation so far, indicates that 'agreed damages' are likely to be interpreted as the sum which is actually paid to the claimant. In other words, after a deduction for contributory negligence.

So what costs regime applies?

20. If it is the case that 'agreed damages' means the sum paid to the claimant after a deduction for contributory negligence what happens in respect of costs? Let us revisit our practical example. If the parties have agreed that the claimant's injuries are worth £1,500 and that a 50% apportionment should be made for contributory negligence then the agreed damages are £750.

21. As the parties have settled prior to the issuing of proceedings under Part 7, costs fall to be assessed in accordance with Section A of Table B. However, this is where we find the hole in the costs regime. This situation is not provided for in Section A because the 'agreed damages' are less than £1,000.

22. So what costs regime applies? First, we can rule out those that will not apply. CPR Part 45 Section II does not apply, because if the claim had been issued for the amount of the agreed damages (£750), the small claims track would have been the normal track for the claim (CPR 45.9(2)(d)). CPR Part 45 Section III does not apply because the claim no longer continues under the Protocol. Finally, CPR Part 45 Section IIIA does not apply for the reasons given above. That leaves two options:

    (a) *Costs to be assessed on the standard basis*: In theory, in the absence of a specified costs regime, costs should be assessed on the standard basis. However, in a case worth £750, assessing costs on the standard basis would seem inappropriate. Especially when much more valuable claims are regulated by fixed recoverable costs regimes.

    (b) *Small claims fixed costs*: Arguably the most logical answer is that a less generous regime (such as small claims fixed costs) should apply where the agreed damages are lower than those claims which are governed by Sections II, III and IIIA.

Conclusion

23. This issue shows that what is likely to be a simple drafting error has led to a not insignificant hole in the costs regime for claims which no longer continue under the Protocol.

24. At face value the numbers may seem small, but the consequences have the potential to be quite stark. For instance, if the small claims fixed costs regime was deemed applicable in our practical

example, the claimant would be restricted to costs of £70-£80[5]. Compare this to the relevant part of Table 6B Section A where the claimant would be entitled to the greater of (a) £550; or (b) the total of £100 and 20% of the damages.

25. Nothing is certain, but it does seem that the phrase 'agreed damages' will be interpreted as meaning after a deduction for contributory negligence. The cases which have dealt with this issue may only be County Court decisions, which pre-date the Protocol, but their analysis is sound. In addition, an assessment of the ordinary meaning of the phrase and the surrounding parts of the CPR shows that this interpretation is likely to be correct.

26. As to which costs regime will apply in this circumstance, that is a very good question. At best, we can make a logical guess that it might be the small claims fixed costs regime. But only time will tell. It will be interesting to see how the court deals with it when this issue arises and they are faced with making a decision as to how best fill the hole in the regime.

27. So what should parties do in the meantime? Each case obviously turns on its own particular nuances. However, claimants should generally be aware of falling into the trap of accepting a contributory negligence apportionment and potentially facing small claims fixed costs. On the other hand, defendants may tactically want to push for a settlement on the basis of a contributory negligence finding which reduces the 'agreed damages' below £1,000. In this instance, it may help defendants settle with the claimant for a lower figure of costs as there is a real threat that small claims fixed costs will apply if left to the determination of the court.

28. The saving grace is that this issue will only arise in certain circumstances. First, the likely damages need to be sufficiently modest to be at risk of falling below £1,000 after a contributory negligence deduction. Second, the issue only arises if the parties settle prior to the claimant issuing proceedings under Part 7. Strangely, once proceedings are issued under Part 7, fixed costs in CPR Part 45 Section IIIA are no longer determined by reference to the 'agreed damages'[6]. So perhaps, claimants are best advised to simply issue proceeding under Part 7 to avoid any risk of falling into this hole at all.

29. However, it is worth noting that the interpretation of 'agreed damages' may also impact the level of costs recoverable within the CPR Part 45 Section IIIA regime itself. The level of (i) costs in cases

[5] Fixed costs for legal fees in small claims such as this are restricted by virtue of CPR 27.14(2). The claimant will still be entitled to disbursements such as court fees, witness expenses and expert fees.

[6] Subject to Section D "Trial advocacy fees" which is determined by reference to "Damages agreed or awarded". However, the main issue discussed in this article does not arise in respect of Section D. Any cases with 'agreed or awarded damages' of less than £1,000 would be captured by the "Not more than £3,000" section which provides for a trial advocacy fee of £500. The impact on trial advocacy fees is set out at paragraph 29.

where parties settle prior to issuing Part 7 proceedings; and (ii) trial advocacy fees, are subject to the interpretation of 'agreed damages'. In other words, if the value of the claimant's injuries as a result of the accident is accepted to be £15,000, the meaning of 'agreed damages' will determine whether the claimant receives: (1) the total of (a) £1,930; (b) 10% of damages over £10,000; and (c) £1,070; or (2) the total of (a) £1,100; (b) 15% of damages over £5,000; (c) £710. That would equate to a potential difference in costs of £1,315 based on the meaning of two words. The hole in the costs regime is therefore certainly something parties should keep in mind.

Marcus Coates-Walker
St John's Chambers

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Marcus.coates-walker@stjohnschambers.co.uk