Neutral Citation Number: [2021] EWHC 3492 (QB)

Case No: QB-2019-004539

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Before :

Master Brown

- -

Between :

NAX (A protected party, suing by his wife and litigation friend, JAX)

Claimant

- and -

MAX (1)
-and-
LIVERPOOL VICTORIA GENERAL INSURANCE GROUP LIMITED (2)

Defendants

- -
- -

Anthony Reddiford (instructed by **Lanyon Bowdler**) for the **Claimant**
Hugh Hamill (instructed by **Keoghs LLP**) for the **Defendant**

Hearing dates: 17 December 2020 and 14 January 2021

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Approved Judgment

Note: This judgment follows the handing down of the judgment in private only on 17 February 2021. In circumstances where the parties had referred to without prejudice material it was then inappropriate for the judgment to be handed down in public but agreed that the judgment would be published in public on the resolution of the claim. The claim to which this

judgment relates has now been compromised and that compromise has been approved by the Court by order of Master Davison, on 21 December 2021. This order also provides, with the agreement of the parties, that this judgment may now be handed in public. Accordingly, this judgment is now, on 21 December 2021, formally handed down in public.

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Master Brown :

1. At the first CMC in this case on 17 December 2020 the Claimant sought various orders in respect of costs, including an order for an interim payment of costs in the sum of some £183,000. These orders were resisted by the Defendants and this is my decision on the issues that arose. The decision is given in private as it contains extensive reference to Part 36 offers and I considered that if the decision were given in public it would not adequately protect the privilege attaching to such offers.

Background facts and issues arising in the claim

2. The claim arises out of an accident on 2 January 2017 when the Claimant suffered a head injury, multiple fractures to his right hip and femur, and injuries which led to a below-knee amputation of his right leg. Medical evidence in support of the claim has been disclosed in the form of reports from Mr Richard Roach (orthopaedic surgeon) dated 8 October 2017, Dr Simon Ellis (neurologist) dated 3 April 2018, Dr Roger Laitt (neuroradiologist) dated June 2019 and Dr J E Henderson Slater (neurological and prosthetic rehabilitation expert) dated 2 April 2018. Dr. Ellis considered that the Claimant had sustained moderate to severe brain injury; he is said have problems with concentration and communication and to lack capacity to litigate and to manage his financial affairs.

3. The Claimant was 23 at the date of the accident and is now aged 27. I was told that the underlying evidence suggests that he was riding a motorcycle along a road in Shrewsbury wearing a helmet. It is said that he cannot recall the immediate circumstances of the collision. The First Defendant, who was insured by the Second Defendant, was, I am told, turning into a side road from a main road when the collision happened. It appears that the helmet came off in the course of the collision. Primary liability was admitted on 23 November 2018.

4. In their Defence the Defendants admit that the Claimant suffered serious and life-changing injuries and make allegations of contributory negligence. No medical evidence has yet been served by the Defendants but they dispute the assertion that the Claimant has lost capacity.

5. The Claimant's solicitors were instructed shortly after the accident. The claim is funded on a CFA with an ATE ('After The Event') insurance policy with an indemnity for adverse costs orders and the Claimant's disbursements up to £100,000; such an indemnity, as I understand it, applies as between insurer and Claimant's litigation friend. It is said that the conditions necessary for payment as between solicitor and litigation friend will have been met if an award for an interim payment of costs is now made.

6. Proceedings were issued on 17 December 2019 close to the expiry of the primary limitation period. The Claim Form was served 8 April 2020. This was followed by the Particulars of Claim and a preliminary Schedule of Loss, which were served on 14 May 2020. Judgment has been entered for primary liability against the First and Second Defendants and directions have been given for trial in a window from 4 April 2022 and 24 June 2022.

7. The Defendants make two allegations of contributory negligence. First, it is said the Claimant failed to wear a properly fitted and/or properly adjusted and/or securely fastened motor-cycle helmet and that if he had done so, he would have suffered a lesser injury. Second, it is alleged that the Claimant failed to wear suitable protective footwear and if he had done so, he would have avoided the serious open fractures which he sustained to his feet and would have avoided the need for amputation.

8. The preliminary schedule seeks a sum close to £8 million. Claims are made for the costs of prosthetics, loss of earnings, care, case management and accommodation and the costs of a deputy. The costs of case management have been paid direct by the insurers and some heads contain a TBA element, An order has been made approving interim payments of £341,000 to date, a further £10,000 having been agreed after the hearing on 17 December 2020.

9. The costs budgeting documents suggest that sums have already been spent by the Defendants obtaining medical reports but Mr. Hamill told me that the Defendants had not received their finalised medical evidence. In any event a timetable has been set for the service of evidence leading to trial.

10. The claim has not yet been costs budgeted although costs budgets have been served. The Claimant's incurred costs as at 8 November 2020 were put at some £399,074 and the total costs are put at some £1,228,769 to which VAT is, I assume, to be added together with the costs of drafting the costs budget and the costs budgeting process (claimed at 1% and 2% respectively of the budget.) The incurred costs of the Defendants are put in their budget at some £174,392 and the total costs are put at some £494,819 plus the costs budgeting costs at 1% and 2% (it is perhaps to be assumed that no VAT will be claimed on these sums). These budgets, which have not been approved, will inevitably need some revision as the costs budgeting did not go ahead as originally listed and a time estimate for trial had been estimated by the Defendants at 10 days but has been agreed at 8 days.

Relevant provisions of the CPR

11. The relevant provisions of the CPR are at Part 44.2 and provide as follows:

Court's discretion as to costs

(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) …

(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.

(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.

Relevant Decisions

12. An order for an interim payment of costs was made by HH Judge Robinson in *X v Hull & East Yorkshire Hospitals NHS Trust* (unreported) in a clinical negligence case concerning a birth injury. The claimant had been born on 13 October 2007 and judgment on liability for 90% of the value of the claim was approved on 10 December 2012. HH Judge Robinson said as follows:

30. In my judgment, rules 44.2(1) and 44.2(2) are wide enough to allow the Court to make an order for costs of the kind sought by the Claimant:

(1) The discretion conferred by rule 44.2(1) relates to the questions whether costs are payable, the amount and when the costs are to be paid.

(2) Rule 44.2(2) sets out the general rule that the unsuccessful party pays the costs of the successful party.

31. Rule 44.6(c) gives the court power to order payment of costs "from or until a certain date only".

32. In this case, dealing only with quantum, the Claimant has, down to the date of the hearing before the Judge, been successful to the extent of securing payments on account of damages in the sum of £1.2m. Although there is much work still to be done, those experienced in cases of this nature can anticipate in broad outline what the shape of the final monetary award is likely to be, whether it be by judicial determination or, as is more likely, settlement at or following a Joint Settlement Meeting subject to judicial approval. There is likely to be a Periodical Payments Order in respect of care, case management and, probably, Court of Protection costs. All other heads of future loss will almost certainly be capitalised. There will be substantial past losses, not least care. Allowing for a 90% valuation, the final shape of the award is very likely to be in the region of a lump sum in excess of £3m with a PPO of in excess of £150,000 per annum at present day values.

33. Since there is not yet any Part 36 offer from the Defendant, it is a virtual certainty that the Claimant will be entitled to his costs to date. It seems to me that the orders for interim payments in respect of damages represent an example of the sort of triggering events anticipated by Moreland J to give rise to a right to receive a tranche of costs."

13. In his decision refusing permission to appeal, Irwin LJ rejected the contention that orders for interim payment of costs can only be made in exceptional circumstances. He went on to say:

"The critical facts here are: (1) there is an acknowledged 90% liability (2) the claim is very large and will far exceed the interim payments awarded (3) there will be an exceptionally long period before quantum can be finalised, for the reasons set out by the Judge (4) there has been no Part 36 offer and (5) the judge has assessed there is effectively no risk that the costs now sought will prevent future set-off of costs to be paid to the Defendant, whether against costs due, or damages due, to the Plaintiff.

….

Turning to whether this was a proper case for an order such as this, in my view it clearly was, for the reasons formulated by the judge. It must be right that in such a case a key consideration is to preserve security for a defendant, so that there is no appreciable risk of a need to repay costs paid on an interim basis. Subject to that principle, it seems entirely proper to me to order interim costs payments with a view to the cashflow of solicitors in very long-lasting litigation, where very significant liability has been conceded. That must particularly be so in the case of specialist solicitors who may be facing such problems in a range of cases.

[my underlining]

14. In *RXK v Hampshire Hospitals NHS Foundation Trust* [2019] EWHC 2751 (QB) Master Cook described the discretion conferred by section 51 of Senior Courts Act 1981 and expressed in CPR 44 (2) as a very wide one. He went on to say:

> *12….As Irwin LJ commented when refusing permission to appeal the meaning of "successful party" or "unsuccessful party" cannot be confined to a binary outcome of the whole case. But it in my view it is important to realise that what HHJ Robinson actually did when allowing the appeal from DJ Batchelor was to make a costs order down to the date of the hearing of the application for an interim payment on account before the District Judge, see paragraphs 23 and 43 of his judgment. This must be right as the wording of CPR 44.2 (8) provides that the court will make an interim payment on account of costs only where it has made a costs order which could be subject to detailed assessment. This is sometimes described as a "prospective" or "anticipatory" costs order, because it has been made before the conclusion of the proceedings, see the commentary in the White Book at 44.2.11.*
>
> *13. The application which should be made in these circumstances is for a costs order down to a specific date and an interim payment on account of those costs.*
>
> *14. Putting the matter this way makes it clear that the court will wish to take into account the factors listed in CPR 44.2 (4) and (5) and will normally expect to be presented with sufficient information to enable it to carry out that exercise. I do not consider there is a basis for asserting any kind of exceptionality test. The court will consider such applications on the basis of established principles.*
>
> *15. A relevant consideration will be to preserve security for a Defendant and to ensure that there is a limited risk of such costs having to be repaid although I accept, as did HHJ Robinson, that a defendant who has overpaid costs to a claimant's solicitor may seek to set off such costs against damages. Without being prescriptive relevant considerations may include:*
>
> *i) the type of funding agreement and details of any payments made under that agreement,*
>
> *ii) whether any Part 36 or other admissible offer has been made, and if so, full details of the offer,*
>
> *iii) details of any payments on account of damages made to date,*
>
> *iv) a realistic valuation of the likely damages to be awarded at trial,*
>
> *v) a realistic estimate of the quantum costs incurred to the date of the application,*
>
> *vi) any other factor relevant to the final incidence of costs, such as the possibility of an issue-based costs order, arguments over rates or relevant conduct.*
>
> *vii) the likely date of trial or trial window.*

The parties' positions

15. In the light of these decisions, Mr. Reddiford urged me first of all to make orders in the proceedings for costs- in effect, orders as to the costs of the action. If I were persuaded to make such orders then I should, he said, make orders for the interim payment of costs in respect of 70% of the costs which he said had been incurred under the terms of the orders he sought. He said that it was, as

a matter of principle, appropriate for me to make such an interim payment order unless there was a good reason not to do so. As to security for the Defendant's costs he said there were three forms of security: (1) the benefit of the costs order he asked me to make in the Claimant's favour; (2) the available indemnity under the ATE policy; (3) the Claimant's damages, which he said was adequate to meet any costs order in the Defendant's favour.

16. There have been a number of Part 36 offers made significantly before proceedings were issued. The first, I am told, was made on 16 January 2019, the relevant period for acceptance expiring on 8 February 2019: the Defendants offered "*to deal with liability on 85/15 basis in the Claimants favour, such that the Claimant [would] receive 85% of any damages assessed or agreed in respect of injuries which were caused or contributed to by reason of his failure to wear a properly secured helmet*". As the Claimant notes this offer relates only to damages arising from injuries caused if there was a failure to wear a properly secured helmet: it therefore would not cover any damages that were caused by the lower limb amputation and leaves open the allegation of contributory negligence with respect to suitable footwear. The second offer was made by letter or notice dated 4 July 2019, the relevant period for acceptance expiring on 29 July 2019: the Defendants offered to settle the issue of liability on a 75/25 basis in favour of the Claimant. The third offer was made by letter or notice dated 4 July 2019, the period for acceptance expiring on 29 July 2019: the Defendants offered to settle the whole of the Claimant's claim for damages in the sum of £1.5 million gross of interim payments and deductible benefits.

17. With these offers in mind, the Claimant seeks: (i) an immediate order of payment of his costs of the action up to 8 February 2019; (ii) an additional order for costs relating to quantum between 9 February and 29 July 2019; and (iii) a further order for outstanding costs of the action from 9 February 2019 which he said were to be costs in the case to be agreed or determined by the court at a later hearing. The first two costs orders should, it was contended, be payable on the standard basis subject to detailed assessment at the conclusion of the claim.

18. The witness statement of the Claimant's Solicitor asserts that the costs incurred by the Claimant prior to the expiry of the first Part 36 offer (on liability) were £213,103.49; and costs incurred thereafter up to the expiry of the first Part 36 offer on quantum were £96,054.06 (total costs to this date being £309,067.55 from which the figure of £213,013.49 was to be deducted). Of the latter category of costs it is said that roughly a quarter were in respect of liability, a quarter were on quantum and a half is said to be indivisible as between liability and quantum - reliance being placed on schedule prepared by a costs lawyer to this effect. A reasonable proportion of such costs is said to be 70%. Thus a claim is made for liability and quantum costs to 8 February 2019 of some £149,172 and for what are said to be quantum only costs in the period from 8 February 2019 to 29 July 2019 of £33,618.92 giving a total of £182,791.36.

19. Mr. Hamill said that the jurisdiction was discretionary. He contended that it was not appropriate in this case to make an order for costs of the action or for payment on account in view of the live issues in respect of liability, the early stage of the consideration of quantum issues and in the light of the Part 36 offers made. He said that the conditions necessary for the making of interim on account payments of costs had not been met.

Should I make an order for costs of the action?

20. In relation to this particular point, Mr. Hamill argued that it remained possible for there to be issue based or conduct based orders or some other order inconsistent with the orders now sought at the conclusion of this case. He said that the case was at too early a stage for me to make an order for

costs of the action in the Claimant's favour, the effect of which would fetter the wide discretion of the trial judge.

21. It seems to me that in terms of the evidence which is to be relied upon at trial, we are at early stage in this case. I have not seen any witness statements in the matter or a police report (although I assume one has been produced), and disclosure has not occurred. The medical evidence is also at an early stage, particularly and perhaps most significantly in relation the head injury. Dr. Ellis recommended a detailed neuropsychological evaluation "*in order to quantify and detail the neuropsychological deficits*." As I understand it, it is usual for a party bringing a claim for damages arising out of a head injury to rely on neuropsychological evidence; such evidence is often (if not generally) based on neuropsychometric assessment to determine with greater objectivity the extent of the disability. No such evidence has yet been served in this case. Notwithstanding the findings of Dr. Ellis as to the extent of the initial injury I am not sure that I can proceed on the basis that there is as yet a clear ascertainment of the extent and nature of the effects of the head injury, still less any prognosis. In any event in all the circumstances I am not satisfied that that I can dismiss as fanciful the possibility of exaggeration in relation to the head injury.

22. I should emphasize that there is no suggestion on the evidence before me that the Claimant had misled anyone such that I could conclude that there was any high risk there had been any conduct on his part that was open to the criticism which might justify conduct orders of the type provided for in CPR 44.2 (4) –(6).

23. Mr. Reddiford argued that even assuming that it were the case that something might emerge that would make the costs order orders he proposed inappropriate, the trial judge could set aside the orders he proposed I should make now, there having been a material change of circumstances (referring as I understood it to the jurisdiction considered in *Tibble*s *v SIG* [2012] EWCA Civ 518). I am not however persuaded that would be a proper way to deal with this matter, not least because I am not sure that it can be said with confidence that if anything did emerge it could be described as wholly a change of circumstances rather than the emergence of evidence, the nature of which could not be anticipated. Moreover such an approach would raise the potential for time consuming and expensive applications to set aside a final order made at the interlocutory stage: it seems to me that such a possibility should be avoided.

24. Mr. Reddiford also argued that I should be wary of accepting the possibility of slight risks as it would prevent this jurisdiction being exercised sensibly: in almost every case it would be open to a defendant to say that it is conceivable something might emerge which might make such an order inappropriate. I accept the force of this point. Indeed on the limited evidence available it is perhaps difficult to see, for instance, that there is any substantial risk that, for instance, an order may be made under the Criminal Justice and Courts Act 2015 s.57 (for fundamental dishonesty), as was canvassed. I would also accept that simply because judgment had not been entered in respect of liability generally, contributory negligence issues remaining, this should not, in principle and of itself, prevent me from making any order of the sort contended for. Nevertheless in cases where there are or remain issues of liability it seems to me there is greater potential for issues based or conduct based costs orders at the conclusion of the case.

25. Accepting Mr. Hamill's broader argument, I am not satisfied to the high degree of confidence necessary that I should at this early stage, and on the limited evidence available, make the final orders sought. I do not think I can be satisfied that a trial judge will not consider it appropriate to make a different order, or at least one which is not consistent with the order that I am asked to make.

The trial judge will be in a much better position to consider the factors set out in CPR 44.2 above which include conduct before but also during proceedings.

26. I might add that I am not sure that cases such as *X v Hull*, where it can be said that there is no effective risk that costs in relation to a distinct period will not be recovered, are that rare; indeed it is not uncommon for some agreement to pay costs on quantum when liability issues have been resolved as was the position in the recent case of *IXM v Norfolk & Norwich University Hospitals NHS Foundation Trust* [2020] 12 WLUK 162 (which I note was also birth injury case).

27. I should perhaps add that Mr. Reddiford relied upon the following passages of Serious Injury Guide of which both his solicitors and the Second Defendant are signatories:

> *"9.3. following resolution of liability the guide recognises an early commitment to pay an interim payment towards disbursements and a contribution towards base costs. See objective iv above."*
>
> *"iv, Considerations on Resolution of Liability*
> *A commitment to an early interim payment of disbursements (the subject matter of which has been disclosed) in addition to base costs related to liability once resolved."*

28. Mr. Reddiford argued, relying on the terms of this Guide, that contributory negligence is an issue of quantification not liability and that the terms of this Guide supported his claim for interim on account payment. I am not however satisfied that this Guide could be relied upon as the basis for making an order which I would not otherwise consider appropriate under the provisions of the CPR. It seems to me in any event that the refence to "*resolution of liability*" in the Guide was not meant to cover the situation here where primary liability only has been resolved.

If I were wrong about the making of an order for costs of the action should I make an order for interim payment; and if so, in what amount?

29. It was common ground that the period between the CMC and the date of the trial in this case (up to some 18 months) is within the range of what might be regarded as normal. Further, the period between the incurring of disbursements pursuant to the directions and an expected final order is likely to be a long way short of the period identified in *X v Hull*. Irwin LJ said the fact that there was an exceptionally long period before quantum can be finalised was a *"critical fact"* in that case. It seemed to me, even accepting that such an exceptional length of time may not be a pre-condition for the making of an order, the demands on cashflow are significantly less heavy here than the sort of case which Irwin LJ had in mind.

30. I have not seen the underlying funding documents. As indicated above, it is said that the terms of the CFA are such that if I were to make an order for costs, the Claimant or Litigation Friend would now be liable to pay to his solicitors the profit costs as well as disbursements which would be the subject of the order. However, as I understand it, the Law Society model CFA (which I understand to be widely used) provides that ordinarily liability to the solicitor for the payment of fees and disbursements costs arises on a '*Win*' and a '*Win*' is defined as occurring when the claim is "*finally decided in your favour"*. By way of exception to this, the model agreement provides: "*[if] on the way to winning or losing you are awarded any costs, by agreement or court order, then we are entitled to payment of those costs, together with a success fee on those charges if you win overall*. Whilst I do not doubt that there is currently a liability as between the Litigation Friend and

solicitors in respect of interim awards of costs, the general expectation on entering into a CFA is that the solicitors will wait until the conclusion of the case before getting paid their fees.

31. I note from the Claimant's costs budget that the disbursements appear to be funded by a disbursement funding loan. The fact that ATE insurance covers the risk of non-recovery of a claimant's disbursements would, it might be assumed, assist in securing such finance. Further, the Law Society Model CFA agreement provides the following as factors which might justify a success fee:

…

(d) the fact that if you win we will not be paid our basic charges until the end of the claim;

(e) our arrangements with you about paying expenses and disbursements.

32. The costs of ATE insurance and success fees are not of course, post LASPO[1], recoverable from defendants but success fees, subject to assessment, are recoverable by the claimant's solicitors from damages on conclusion of the claim. In *Simmons v Castle* [2012] EWCA Civ 1288 (see [15]) awards of General Damages were uplifted to compensate for the loss of the recoverability of the ATE premiums and success fees from defendants and it might be presumed that this uplift was intended to meet such payments.

33. Moreover, although the costs of funding are not generally recoverable from defendants as costs, this rule is mitigated by the general rule that judgment rate accrues on costs from the date of the final award of costs and before service of a Bill of Costs and ascertainment of the costs (the '*incipitur'* rule): the costs of funding may thus be met, at least in part, out of such an award, see *Simcoe v Jacuzzi UK Group plc* [2012] WLR (D) 35 [39] to [48][2]. Further, in an appropriate case (and I am not suggesting this is necessarily such a case[3]) an award of interest may be made at the conclusion of the case under CPR 44.2(6)(g) which might compensate a claimant for the costs of financing disbursements (see *Jones v Secretary of State for Energy and Climate Change [2014] EWCA Civ 363*).

34. In any event Mr. Reddiford's application was based not wholly upon any need for the payment and he relied, at least substantially, upon the terms of CPR 44.2(8): such an award should be made "*unless there is good reason not to do so*". He argued that in relation to costs incurred in respect of liability and quantum before any Part 36 offer had expired and in respect of quantum costs up the expiry of the third offer there was no good reason not to make the payment on account sought: per *Blakemore v Cummings* [2010] 1 WLR 983 [23], the Claimant should not be "*kept out of the moneys which will almost certainly be demonstrated to be due longer than is necessary"*.

35. However, in accordance with guidance of Irwin LJ it seems to me that there would be a good reason not to make such an order if the effect of doing so would be to diminish the security in respect of a potential future set-off of the Defendants' costs against costs or damages due to the Claimant.

36. It was, I think, suggested by Mr Reddiford, that the security under consideration was in respect of the potential need to repay costs paid on an interim basis. There was little argument on this

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[1] Legal Aid Sentencing and Punishment of Offenders Act 2012

[2] See too CPR 40.8 for the discretion to extend the period over which judgment rate interest is payable.

[3] Albeit I am not suggesting that this power is to be exercised in the ordinary case, *Nosworthy v Royal Bournemouth & Christchurch* Lawtel 30/04/2020

and since it makes no difference to the result, it is perhaps unnecessary for me to express a concluded view. However if, as I understand to be the position, I am concerned with a future set off in respect of the Defendants' costs it follows that I should therefore have regard to the entirety of the Defendant's costs when considering the extent of the current security (see *Chernunkhin v Danilina* [2018] EWCA Civ 1802, [57]). Moreover, if I were persuaded to make orders for costs of the action in the form suggested by the Claimant it would be because I had been satisfied that there was no effective risk of a contrary or inconsistent order: such orders could only be reversed on appeal. The risk with which I am concerned is not the risk that such orders would be reversed and the interim payment paid back but the risk that by making an order for interim payment it would diminish such security as may currently exist against the Defendants' incurred and future costs.

37. It was not suggested that was no risk in relation to the Part 36 offers and that the Claimant was bound to beat the offers: thus it seems to that I am required to proceed on the basis that there is the potential for a costs order in the Defendants' favour at a trial in the spring or early summer of next year on the basis of the offers made. Given the very early stage at which these offers were made, and applying the approach set out above, suggests a potential award of costs in the Defendants' favour of c.£450-500,000 (noting also the limited challenge in the Claimants' Precedent R to the Defendant's budget).

38. I should perhaps add that it occurred to me that in considering security I could not completely ignore the possibility of competing claims against any award for damages by the Claimant's solicitors including for a success fee, post LASPO. As the Law Society Model Agreement suggests solicitors can and do preserve the right to claim for costs against their client in respect of unrecovered costs (including those incurred after a Part 36 offer is rejected but the offer not beaten). However, although as Mr. Reddiford indicated there is no clear rule it seems to me, looking at this practically, that any order for set off against damages is likely to confer priority on the Defendants (as Mr. Hamill contended) and I can and should proceed on the basis that such claims are not to be taken into account in considering the issue of security in the context of this application.

39. I turn then to the matters which are relied upon as providing security.

Orders for costs in the Claimant's favour

40. Following the decision of Court of Appeal in *Ho v Adelekun* [2020] EWCA Civ 517 it remains the position that a costs order in a claimant's favour may be the subject of a set off under QOCS (see CPR 44 Part II). This decision is subject to appeal to the Supreme Court, an appeal which I understand is due to be heard in the course of the summer this year, but both counsel accepted that I should apply the law as it currently stands.

41. I have some considerable concern about the level of costs incurred in this case in the pre-action period and hence the sum that might be reasonably recoverable following detailed assessments of the costs orders it is proposed I should make (as to which see below). Such a concern would extend to the security that might be found in the costs order proposed by the Claimant. If I were to make an order for the interim payment of a sum in respect of the proposed order it would dimmish such security as existed in this order.

42. I should perhaps point out that if it were right that the order for costs of the action proposed could be set aside in the way suggested by Mr. Reddiford (see [23] above) it would undermine the security which is said to exist in such an order.

ATE insurance in respect of adverse costs

43. It is not clear to me that the indemnity under this policy would be available to the Defendants to meet their costs if, as I understand to be the case, the same indemnity were used to cover the Claimant's own disbursements (which I am told amount to some over £93,000 to date): on the face of it, it is difficult to see that there would be any or any substantial indemnity left to meet the Defendants' costs. Further, as Mr. Hamill indicated, ATE Insurance cover may not be adequate security for costs if there were a risk of the insurer avoiding cover (see *Premier Motorauctions Ltd v Price Waterhousecoopers LLP [2017] EWCA Civ 1872*). I was not addressed in detail on this point. But I understand it was not suggested that there was no risk of the policy being avoided in this case and I do not think at this stage I can exclude such a risk.

Damages

44. As Mr. Reddiford pointed out the concerns above may not matter if there were sufficient security in the likely damages award. The preliminary schedule dated 13 May 2020 claimed past losses and interest of some £378,000; to that Mr. Reddiford said should be added a sum of comfortably in excess of £100,000 in respect of General Damages. I was not however addressed in any detail on the schedule and the extent to which challenge may be made (as Master Cook anticipated at para.15 (v) of his decision). Mr. Reddiford's' argument was at a far more general level; he argued it must be assumed that there would be significant margin over and above the interim payments and the likely award of damages since interim payments are awarded on a conservative basis of a likely award and then only on the basis that a reasonable proportion of that sum is payable at the interim stage. On this basis he said there is likely to be sufficient margin to act as security in respect of a future set off.

45. Mr. Hamill argued that there were at least three difficulties with proceeding on the basis that the substantial security award lies in the likely damages award. First, the fact that there have been substantial interim payments on account of damages and everything appears to point to the continuation of such payments at a substantial level: as Mr. Hamill put it (implying no criticism of the Claimant's advisers) there is a substantial prospect that by the time of trial and allowing for updating of the schedule an award in his respect of past losses will have all have been spent. Second, in respect of the future loss, whilst a substantial award might be anticipated, much of it may take the form a periodical payments order (PPO) such that it would not then be available to meet the Defendants' costs. Third, whilst the schedule was for a large sum, the evidence in respect of quantification is at an early stage such that I cannot, for instance, take as established the assumptions upon which the schedule was calculated.

46. I accept, of course, the principles upon which interim payments on account of damages are awarded, albeit I note that a reasonable proportion can be a high proportion of the likely award and indeed a conservative assessment is not necessarily one that will not be made at trial. There are also good reasons why a defendant insurer should fund substantial attempts at rehabilitation at an early stage; and interim payments to fund such rehabilitation may be made out of likely awards not just in respect of past losses and General Damages but also future losses to the extent that they are likely to be capitalised (*Cobham Hire Services v Eeles* [2009] EWCA Civ 20 (at [43] [45]). Moreover, I do not think at this early stage I can exclude the potential for substantial challenge to the claim: by way of example only, it seems there may well be a substantial and serious issue as to whether the Claimant lacks capacity and requires the extensive case management and the care claimed. On the limited evidence available I think I have to allow for the possibility that there may be scope for substantial challenge to many of the associated items of claim for past losses including the costs

associated with the appointment of the deputy (put at £81,000) – not just as to principle but also as to amount. Indeed there are other heads of claim such as claims for the additional costs of taking holidays (put at £32,000 in respect of past loss alone) which may also be vulnerable to substantial challenge.

47. Recognising that there appears to be a strong basis for a substantial claim for costs of prostheses and associated costs such as maintenance, nevertheless given the early stage of the case and the very limited nature of the current evidence I would have some difficulty predicting the likely award of many of the other claims for losses with any degree of certainty. I could, as Mr. Reddiford argued, take some comfort from the level of Part 36 payment which might suggest a valuation of above £1.5 million (before potential deductions for contributory negligence). However there is the further difficulty that at least a substantial part of the future losses may not be capitalised but awarded by way of PPO. In the preliminary schedule it is asserted that the Claimant seeks to reserve the right to take any of his future losses by way of PPO and the submission is made (within the schedule) that it would be premature to express a concluded view on the form of compensation until either the parties agree and the Court approves, or otherwise. If a PPO were made in respect of future losses, it would not be immediately available to meet by way of set off the payment of an award of costs: the damages become payable over a lengthy period. Mr. Reddiford accepted the difficulties of proceeding on the basis that adequate security lies in an award made on this basis; at least that it would be a factor against making an interim award. He argued however that there are bound to be sufficient sums in respect of other claims for future loss which are not capitalised. But even if I disregarded the position taken in the schedule and proceeded on the basis that accommodation costs are generally capitalised (per *Eeles*), the evidential basis in respect of this head of claim it is not, to my mind, yet currently sufficiently certain to provide substantial security.

48. I should perhaps say that as I understood the position of the parties it was reasonable to suppose that the Claimant was at risk of a finding of a deduction up to 15% in respect of any failure to secure his helmet. So far as the issue concerning footwear was concerned, I was much less clear about this. It was contended by Mr. Hamill that a substantial deduction may be made taking the overall reduction to significantly over 25%. I did not hear anything like the sort of argument necessary for me to form any clear view on this. On the face if it there seemed to be a clear distinction between a legal obligation to wear a helmet, in contrast to the wearing of a footwear when riding a motorcycle which I was informed is a matter dealt within the Highway Code. In any event I understood Mr. Reddiford's contention to be that an overall finding of contributory negligence is unlikely to exceed 25%. I was however not quite sure of the approach taken by either advocate as to the proposed deductions: they should perhaps be considered separately in respect of the awards for separate injuries and not cumulatively. In any event I do not think I can rule out some not insignificant deduction for contributory negligence at any rate in respect of the allegations concerning the helmet.

The amount of costs claimed

49. Not least of my concerns is the amount of the interim payment sought given the narrow basis of the costs orders proposed.

50. Mr. Reddiford relied upon the decision *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm) in support of his argument that 70% of the costs incurred in the defined periods should be awarded now. In that case 80% of costs were awarded on an interim basis following a final order for costs on an indemnity basis. As to the test applicable to an interim payment of costs. Christopher Clarke LJ held:

> *What is a reasonable amount will depend on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment and thus an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment. Any sum will have to be an estimate. A reasonable sum would often be one that was an estimate of the likely level of recovery subject, as the costs claimants accept, to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad.* [23]

51. The costs in respect of which an interim payment are sought by the Claimant are costs which relate to work and disbursements many months before the issue of proceedings. The costs of Issue and Statements of Case phase are perhaps unlikely to be included within the sums caught by the costs orders proposed; similarly, the CCMC costs.

52. I have found it very difficult to form even a preliminary view as to the reasonableness of costs in the defined pre-action periods and thus set any range for the likely recoverable costs after detailed assessment. I have considered the matters set out in the document headed '*Note as to incurred costs phase by phase'* as against the work envisaged in Part D of Practice Direction 3E Costs Management for pre-action work (including work not just described in the first phase). There was time preparing the letter of claim and obtaining the medical evidence referred to above, and obtaining relevant records from a significant number of sources. There would have been consideration of the offers made. It may be also be that at some stage in these periods there was some preparation of preliminary witness statements. From what I understand of the accident it is perhaps difficult to see on the information before me that any substantial work related to the issue of primary liability, which appears to have been admitted at an early stage.

53. There is force, I think, in Mr. Hamill's argument that the cost the subject of this application appear highly excessive. Costs are asserted in the pre-action phase in the sum of about £54,000. This is on top of work on disclosure (some £96,000) and on witness statements (some £43,000) and considering offers (some £33,000): some of this work was done in the pre-action stage but it is difficult to form a clear view on this without considering the underlying documents; indeed it is unclear to what extent the work was carried out within periods covered by the proposed orders. All these costs seem to me to be vulnerable to heavy reduction on detailed assessment.

54. Further, I have some concern about whether and to what extent work between the expiry of the first offer and the third offer might be regarded as work on quantum or be as indivisible as claimed. It was said by the Claimant's solicitors that it would be disproportionate to incur significant costs on breaking down the work on an item by item basis as a number of items are said to have been "*mixed together*". But as Mr. Hamill suggested this assertion is perhaps surprising given the amount of costs that are claimed. The costs lawyer instructed on behalf of the Claimant is said to have looked at the work carried out and the figures advanced are based on her best estimates as to the extent to which the work relates to liability, quantum and otherwise. In short I am concerned, as Mr. Hamill argued I should be, about proceeding at this interim stage on the relatively bald assertions by the costs lawyer. In any event I would expect to see considerably more detail justifying the costs lawyer's conclusions and indeed the level of costs claimed in this period.

Conclusions

55. For the reasons given above I do not consider it appropriate at this stage to make what I consider to be final orders as to cost in this action. It follows that this application does not succeed.

56. Importantly, and in contrast to the position in *X v Hull*, there have been early Part 36 offers in this case. If the approach I have set out above (see [35] to [37] above) is the correct approach to the

second stage of the determination then I could not with an appropriate degree of certainty, bearing in mind also potential deductions for contributory negligence, conclude that there is sufficient security for the Defendant's costs in an immediate award of damages or otherwise as proposed by Mr. Reddiford. Put another way, if I were persuaded that the underlying costs orders sought should be made, the effect of making an interim payment would be to diminish the security which is to be found in those costs orders. In all the circumstances even if I were persuaded to have made the final costs orders, I would not therefore have been satisfied that it was appropriate to make an order for interim payment of costs.

57. I do not underestimate the difficulties or expense of funding disbursements in a claim such as this, whether the funding is by the solicitors themselves or a disbursement funding loan. But the period in this case between the incurring of disbursements (to the extent that experts require up-front payment) is not unusually protracted.

58. It is reasonable to anticipate that the costs of liability issues alone up to the date of expiry of the first offer would be modest given the work described (and it is difficult to see that any substantial costs were incurred in respect of the issue of primary liability). Even if I were to allow some quantum costs (noting the date of some of the reports served), the work done at this stage was preliminary in nature and I would have had in mind a modest fraction of the sum sought.