

# Interim Payments on Account of Costs in Clinical Negligence Cases

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Whilst clinical negligence practitioners are especially accomplished in ensuring that they properly advise their clients to claim an interim payment on account of damages when this best suits their client's needs, the opportunity of seeking an interim payment on account of costs often slips through the net.

## "Make Mine a Double"

The recent case of *IXM v Norfolk & Norwich University Hospitals NHS Foundation Trust* (QBD, 10 December 2020) provides some useful reminders on the relevant considerations and the approach to applications for interim payments on account of costs in complex clinical negligence litigation.

In that case, the Claimant had suffered a serious brain injury at birth and the value of the claim was said to be over £10 million. Whilst liability was admitted, quantum was likely to be fraught and would not be concluded for another year.

The Claimant, whose case was being funded under a Solicitor's Conditional Fee Agreement, claimed an interim payment on account of the costs of the quantum issue in the sum of £500,000, the Defendant argued that no more than £250,000 would be the reasonable sum to order.

Dealing with the application, the court referred to the guidance provided in *RXK v Hampshire Hospitals NHS Foundation Trust* [2019] All ER (D) 142 and emphasised that in assisting the court to achieve its aim, the party seeking an interim payment on account of costs, especially in a high-value clinical negligence claim, would be expected to properly adduce all the relevant information that the court would need in order to take into account the factors in CPR 44.2.

The Court appeared unhappy with the inadequate information provided by the Claimant and accepted the Defendant's figure, noting that there was some considerable uncertainty about the overall amount claimed in the costs bill, which was said to be lacking in detail, particularly with regards to the number of hours claimed and the rates used.

## "Early Doors"

The onus is on the party applying for the interim payment to satisfy the court that the grounds for making such an order are made out and that the amount sought can be justified on the evidence presented before the court.

In accordance with a duty on a solicitor to ensure that their client is kept updated and sufficiently informed as to the fees and costs estimates in their case, there should be a readily available and accurate source of information as to the client's costs to date and projected costs, which of course must be carefully thought out and reliable. In many cases the costs budget will be the starting point.

In any case where a Costs Management Order has been made, the court must have regard to the last approved budget of any party, from which a departure will be permitted in very limited circumstances.

In *MacInnes v Gross* [2017] 2 Costs LR 243, Coulson J set out the approach to be adopted to an application for a payment on account where there was an approved costs budget at [25]-[27]:

*"[The] approved costs budget is the appropriate starting point for the calculation of any interim payment on account of costs.*

*"CPR 3.18 makes plain that, where there is an approved or agreed costs budget, when costs are assessed on a standard basis at the end of the case, "the court will...not depart from such approved or agreed budget unless*

*satisfied that there is good reason to do so."*

*"The significance of this rule cannot be understated. It means that, when costs are assessed, the costs judge will start with the figure in the approved costs budget. If there is no good reason to depart from that figure, he or she is likely to conclude the assessment at the same figure ..."*

*"So, when making an interim payment on account of costs in a case with an approved costs budget, the days of the educated guesswork identified by Jacob J in Mars UK Limited v TeKnowledge Limited [1999] 2 Costs LR 44 are now gone. Instead, the court can be confident that there is a figure for costs which, because it has already been approved, is both reasonable and proportionate."*

Taking the approved or agreed costs budget as a 'starting point', in *MacInnes* the judge acceded to an allowance of 90% of the approved costs budget as an interim payment. The judge's emphasis on the confidence in budgeted costs has been fortified by the Court of Appeal in *Harrison v University Hospitals Coventry & Warwickshire NHS Trust* [2017] 1 WLR 4456, in which Davies LJ cited Coulson J in the *MacInnes* case with approval.

Of course, the costs budget includes incurred costs which are 'taken into account' and not 'approved' and subsequent cases have striven to apply that distinction.

In *Cleveland Bridge UK Ltd v Sarens (UK) Ltd* [2018] 2 Costs LR 233, an interim payment on account of costs was secured which amounted to 90% of the future costs and 70% of the incurred costs.

## "Put It on My Tab"

Any application for an interim payment on account of costs must first ensure that there is a costs order entitling the party to costs so that the interim payment has something to 'bite' on. So, when judgment is entered the court should be asked to make an order for costs to be payable to the Claimant on the issue of liability. However, if the interim payment is sought against the costs on the quantum aspect, the application must first seek a costs order down to a specific date and then an interim payment can be levied on account of those costs.

CPR 44.2(8) is an often-forgotten provision which is extremely helpful to an applying Party as an enabling provision:

*"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."*

The provision places an assumption quite favourable to the applying party and was held in the PIP Breast Implant Litigation [2015] 3 Costs LO 381 to be applicable to CFA cases where a payment on account of costs would not breach the indemnity principle.

## "One for the Road"

In *RXK*, Master Cook helpfully set out the jurisdictional basis for applications for interim payments made in circumstances where there is likely to be a substantial delay before quantum can be determined by the court. He confirmed that the discretion afforded to the court expressed in CPR 44.2(2) is a "very wide" one dependent upon there being a costs order in favour of the party seeking an interim payment.

Master Cook felt that the information which had been proffered by the Claimant in support of their application was somewhat lacking and it was only *"in answer to a question asked by [him]"* (see [9]) that it became apparent that the Claimant had the benefit of a public funding certificate and that some payments on account had been made by the Legal Services Commission.

The Master made it clear at [15] that a court will be conducting a balancing exercise and that:

*"a relevant consideration will be to preserve security for a Defendant and to ensure there is a limited risk of such costs having to be repaid although I accept ... that a Defendant who has overpaid costs to a Claimant's solicitor may seek to set off such costs against damages".*

A court will expect to be presented with sufficient information to enable it to apply the test at CPR 44.2 and take into account the relevant factors listed there.

In particular, Master Cook considered that the following information would be relevant:

1. information as to the type of funding arrangement;
2. whether any payments had been made under that funding arrangement;
3. whether any Part 36 or other admissible offers had been made and if so, the full details of that offer;
4. whether there had been any previous payments on account;
5. a realistic valuation of the damages likely to be awarded at trial;
6. a realistic estimate of the quantum of costs already incurred;
7. any other factor relevant to the final incidence of costs, such as the possibility of an issue-based costs order, any arguments over rates or relevant conduct; and
8. the likely date of the conclusive trial or trial window.

It is clear that an application for an interim payment on account of costs needs to be properly thought through and the supporting witness statement must amount to more than a *cri de coeur* for money. Working through the above considerations will also assist in cross-checking that the application has merit and that the amount being asked for is reasonable and can be substantiated.

Failing to properly present and evidence the arguments could jeopardise an otherwise reasonable application for an interim payment and result not only in a loss of a valuable opportunity to assist cash flow, but also an adverse costs order.

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