

Case No: SK170041

Neutral Citation: [2003] EWHC 2806 (QB)

**IN THE HIGH COURT OF JUSTICE**  
**QUEENS BENCH DIVISION**  
**(sitting at Liverpool Combined Court)**

Royal Courts of Justice  
Strand, London, WC2A 2LL  
Date: 26 November 2003

**Before :**

**THE HONOURABLE MR JUSTICE GAGE**

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**Between :**

**Elliot Thomas SMART**

**Claimant**

**- and -**

**East Cheshire NHS Trust**

**Defendant**

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**Mr Andrew Moran QC & Mr David Heaton** (instructed by **Alexander Harris**) for the Claimant

**Mr Alexander Hutton** (instructed by **Hill Dickinson**) for the Defendant

Hearing dates : 11 and 12 November 2003

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**Approved Judgment**

I direct that pursuant to CPR PD 39A paragraph 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.

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The Hon Mr Justice Gage

## **Mr Justice Gage:**

1. This is an application by the defendant for an order capping the costs of the claimant in a clinical negligence case. I am told that a number of such orders have been sought by the defendant's solicitors in clinical negligence cases. In some, district judges have made the orders; in others orders have been refused. The defendant seeks to make this application a test case. Although the suggestion is not accepted by Mr Alexander Hutton, who appears for the defendant, I gain the impression that the NHSLA, which stands behind the defendant, would like such orders to be the norm in clinical negligence cases.

2. There are three issues. The first issue is whether the court has jurisdiction to make a costs cap order. Secondly, assuming jurisdiction, what is the test that the court should adopt when deciding whether or not to exercise its powers to make such an order. Thirdly, should the court make an order in this case.

3. So far as the first issue is concerned Mr Andrew Moran QC, who represents the claimant, does not seek to dispute the existence of the power to make an order in respect of this first instance application. He reserves the right to dispute its existence elsewhere if the need should arise. The second and third issues are disputed. It is agreed by the parties, that should the defendant be successful on each of the three issues, I should direct that the matter be referred to a costs judge for final determination of the costs cap.

### **The Background:**

4. The claimant was born on 29 September 1993 and is now aged 10. On or before 16 November 1993 he suffered a non-accidental injury at the hands of his father. Late in the evening of 16 November 1993 he was admitted to the Macclesfield District General Hospital. The defendant is responsible for the management of that hospital. After treatment and tests the claimant was released home on 26 November 1993. On 27 November 1993 he suffered another serious non-accidental injury at the hands of his father and was re-admitted to the hospital. As a result of these injuries he suffered extensive brain damage to both the left and right hemispheres of the brain. It is pleaded in the Particulars of Claim that he suffers from spastic quadriplegia; he has severe visual impairment; he has delayed comprehension and speech; he will always be dependent upon others for day to day care and will never have gainful employment; his life expectancy is reduced. I was told that the most recent expert's report of Dr Harvey Marcovitch indicates a life expectancy of 40 years from the date of the incidents.

5. The claimant's case is that during his admission to hospital following the first incident of non-accidental injury the hospital failed to make such investigations and tests as would have revealed the extent of his injuries and thus lead to a diagnosis that they were non-accidental injuries. If the investigations and tests had been properly carried out it is alleged that the diagnosis of non-accidental injury would have been made and as a consequence the claimant would not have been discharged home on 26 November 1993. He would not thereby have been exposed to the subsequent assault by his father and the further non-accidental injury.

6. The defendant denied negligence and put causation in issue. The parties agreed that there should be a split trial with the issues of liability and causation being tried separately from damages.

7. As a result of negotiations between the parties liability and causation was compromised on the basis of an agreement that the defendant pay 52.5% of the value of the claimant's claim. The settlement was approved by Morland J on 22 September 2003. At the same time

Morland J gave directions for trial of the quantum issues. Those directions are comprehensive and include directions in respect of experts; service of witness statements; exchange of schedules of loss; and the date of trial.

8. By the time the matter came before Morland J the defendant had made an application for a costs cap order. In the circumstances, Morland J gave additional directions in respect of this application.

9. The issues on damages are the usual issues arising in the case of a claimant suffering from cerebral palsy. They include issues on condition and prognosis involving experts in paediatrics, orthopaedics and life expectancy; accommodation, educational psychology, and physiotherapy; care and assistance, speech and language therapy, computer and IT technology, employment, and occupational therapy. Three experts have been instructed jointly and there is provision for each side to call five further experts. Damages on a full liability basis are expected to be in the region of £2 million to £3 million. The hearing is expected to last approximately 7 days.

The First Issue:

10. As I have already said the claimant does not in this application seek to dispute the existence of the power of the court to make a costs cap order. However, in his submissions on the second issue Mr Moran QC made a number of submissions, to which I will refer later, which could be said to be relevant to the first as well as the second issue. Recognising that I had already decided that the court had jurisdiction to make a costs cap order in group litigation (*see AB and Others v Leeds Teaching Hospitals NHS Trust [2003] EWHC 1034 (QB)*) (the *NOGL*) Mr Moran delicately and diplomatically sought to distinguish group litigation from litigation involving no more than one or two claimants. Nevertheless, it was clear that some of his submissions went to the issue of whether the court had jurisdiction. Without intending any disrespect to the solicitors who argued the case before me in the *NOGL* the arguments presented by counsel on this application have been more detailed and in greater depth than those made to me in the *NOGL*. Nevertheless, having carefully considered the submissions made in this case I see no reason to change my view that the court has jurisdiction to make such orders.

The Second Issue:

11. The core submissions of the claimant and the defendant are as follows. The claimant submits that in cases other than those involving group litigation orders (GLOs) an order for a costs cap should only be made in exceptional circumstances and where the court is satisfied by evidence that there is a substantial risk that without such an order costs will be disproportionately and/or unreasonably incurred or be disproportionate and/or unreasonable in amount; and conventional case management and detailed assessment of costs may not be effective in managing and limiting the extent of costs. The defendant submits that the court may make an order in an appropriate case; that is any case where there is a significant danger that costs may become excessive or disproportionate and it is just to make such an order. Each side relied on subsidiary submissions to support its core submission. I shall deal with each separately.

12. For the claimant, Mr Moran QC, submits that the absence of any express power in the CPR to order a costs cap is significant. It accorded with the views expressed by Lord Woolf in Chapter 7 Costs, Section 11 of his report Access to Justice: Final Report. In that chapter Lord Woolf whilst indirectly referring to costs capping by inference postponed it for a future date after his recommendations had been "bedded down". Mr Moran submits that for this reason, assuming a power to make a costs cap order, the court should only do so in

exceptional cases. He also prays in aid the absence of any reference by the Lord Chief Justice to costs cap orders in the judgment of the Court of Appeal in Lownds & Home Office [2002] IWLR 2450. He further submits that the NOGL and The Ledward Claimants [2003] EWHC 2551 (QB) case, the latter a decision by Hallett J in which costs cap orders had been made in group litigation, were to be seen as decisions applying to GLOs and not to conventional ordinary litigation.

13. In support of his submission that costs cap orders should only be made in exceptional circumstances Mr Moran QC relies on decisions in the Administrative Court to which I will have to return (see R v Lord Chancellor ex parte CPAG 1998 2AER 755; R v London Borough of Hammersmith and Fulham ex parte CBRE 2000 ENVL R 544; and R v Prime Minister and Others ex parte CND 2002 EWHC 2712). His submission is that these authorities explain that pre-emptive costs orders, of which, in his submission, a costs cap order is a form, should only be made in exceptional circumstances.

14. Generally, Mr Moran QC, submits that the normal conventional rule in ordinary litigation has been, and still is, that costs should be dealt with after the trial rather than before it. There are good practical reasons for this namely that the course of litigation cannot easily be predicted so the ability to make an accurate assessment of prospective costs cannot readily be made. Further, the fact that there can be a detailed assessment of costs after a trial imposes sufficient discipline on solicitors not to incur unnecessary costs. In any event costs cap applications will themselves be a form of satellite litigation which will only serve to increase the overall costs and bring about a "nightmare scenario" of solicitors fighting to determine where the costs cap will fall.

15. For the defendant Mr Hutton relied heavily on the NOGL and Ledward Claimants litigation decisions. He referred to my decision in NOGL and in particular to passages in the judgment where, as he submits, I rejected the proposition that costs cap orders could only be made in exceptional circumstances. He relies on my obiter dicta expressing the view that such orders can be made in ordinary litigation as well as group litigation. He submits that once the power to make a cost cap order is assumed it is illogical to write in a requirement of exceptional circumstances before an order can be made in ordinary litigation. In response to Mr Moran QC's submissions on the Administrative Court cases, Mr Hutton submits that they deal with a public interest situation and have no relevance to the circumstances which I am considering.

16. Generally Mr Hutton submits that so far from being impractical costs cap orders can readily be made because the present budgeting provisions in the CPR and the Client Care Code in the Guide to the Professional Conduct of Solicitors require solicitors to make accurate assessments of past and prospective costs. Mr Hutton submits that a costs cap order provides for certainty in relation to costs, which will aid settlement and assist to limit the protracted proceedings post trial in respect of detailed assessment of costs.

17. The arguments on both sides have been attractively and persuasively deployed. In the NOGL case the fact that a costs cap order was not strenuously resisted made it unnecessary for me to give any general guidance as to the circumstances in which such an order could be made. Other than expressing the view, to which I adhere, that the court has jurisdiction to make an order in other litigation as well as GLOs I had no intention of providing any guidance as to how the discretion should be exercised in other actions. However, the situation in this case is altogether different and I shall state my views as to the test to be adopted when an application for a costs cap order is made in cases other than GLOs. I do so because, as I have already stated, applications for such orders have been made in a number of clinical negligence cases and no general pattern as to how they should be dealt with has emerged.

18. I start with Mr Moran QC's submission that the CPR makes no specific provision for a costs cap order either in GLOs or other litigation. Since I have already stated that in my judgment the court has jurisdiction to make an order this cannot be a determinative factor. In my opinion there is some force in Mr Hutton's submission that once jurisdiction to make an order is assumed it is illogical to make a distinction between GLOs and other litigation. However, there is also, in my judgment, considerable force in Mr Moran QC's submissions that the normal method of assessing costs is by detailed assessment at the end of the litigation. I am further impressed by the argument that the CPR provides a comprehensive corpus of rules and practice directions for managing the litigation and controlling costs making it, in general, unnecessary for a costs cap order to be made. In particular, I accept the significance of the statement by Lord Woolf CJ in *Lownds* that Rules 44.3, 44.4 and 44.5 are "redolent of proportionality" (see *Lownds @ pp 2451-2452*). I am less impressed by the submission that the making of such orders will cause difficulties and a "nightmare scenario" (Mr Moran QC's expression) of solicitors fighting to preserve the maximum leeway on costs for their clients. In my judgment costs cap orders can have a significantly beneficial effect in keeping costs within bounds and concentrating minds on keeping costs proportionate throughout the litigation. I am also of the opinion that if there is a provision in a costs cap order for the order to be reviewed in certain circumstances as well as a general liberty to apply the dangers arising from a cap being set too low can be avoided. I see nothing impracticable in allowing either side to apply where unforeseen circumstances have meant one or other side incurring unforeseen costs; or where the cap is so low that further necessary costs cannot be incurred without breaching it.

19. I turn to the Administrative Court decisions. Mr Hutton submits that they are not relevant to the considerations of a costs cap. He submits that they deal with a situation specific to judicial review namely where a claimant has no private interest in the result of the case but brings the claim in the public interest. He further points to the fact that *ex parte CPAG* was a case decided before the CPR came into effect.

20. It is correct that each of the three cases relied on by Mr Moran QC as supporting the proposition that orders should only be made in exceptional circumstances are public interest cases. However in *ex parte CPRE* Richards J not only decided that the advent of the CPR did not affect the principles expounded by Dyson J in *ex parte CPAG* but also that "a departure in advance from the ordinary rules with regard to costs and the ordinary exercise of the court's discretion with regard to costs at the end of the day should be made only in the most exceptional cases" (see paragraph 92 of Richards J's judgment). In *ex parte CND* the Divisional Court made a pre-emptive order limiting the claimants' potential liability for costs to £25,000. The court approved the principle of exceptional circumstances but decided that exceptional circumstances had been established in that case.

21. These authorities support the proposition that the court has jurisdiction to make pre-emptive orders for costs whilst stating that such orders should only be made in exceptional circumstances. It must be remembered that the circumstances in each case were that unless the court was prepared to make a pre-emptive order of "no order for costs" or, as in *ex parte CND*, a pre-emptive order limiting the potential liability for costs to £25,000, the claimants would not be able to pursue their claims: claims which were said to be in the public interest. In my judgment these cases whilst of assistance are not determinative of the way the court's discretion should be exercised when dealing with costs cap applications.

22. Having considered all these factors my conclusion is that whilst each case must be dealt with on its own facts the test for the court when exercising its discretion on whether to make a costs cap order in cases such as the instant one is closer to that proposed by Mr Moran QC than that proposed by Mr Hutton. In my judgment, the court should only consider making a costs cap order in such cases where the applicant shows by evidence that there is

a real and substantial risk that without such an order costs will be disproportionately or unreasonably incurred; and that this risk may not be managed by conventional case management and a detailed assessment of costs after a trial; and it is just to make such an order. It seems to me that it is unnecessary to ascribe to such a test the general heading of exceptional circumstances. I would expect that in the run of ordinary actions it will be rare for this test to be satisfied but it is impossible to predict all the circumstances in which it may be said to arise. Low value claims will inevitably mean a higher proportion of costs to value than high value claims. Some high value claims will involve greater factual and legal complexities than others. Clinical negligence cases, for example, will involve more complicated issues on liability than personal injury cases arising out of road traffic accidents. In my judgment, it would be quite wrong to attempt to set a specified ratio of costs to value for any particular type or class of case. I stress, in my opinion, each case must be considered on its own facts. In those circumstances, it seems to me very unlikely that it would be appropriate for the court to adopt a practice of capping costs in the majority of clinical negligence cases.

23. For the avoidance of doubt, I should add that these observations are confined to actions other than those where group litigation is involved. The latter raise entirely different factors and problems. Past experience shows that the costs in group actions have a tendency to spiral out of control. The generic issues are usually managed by one firm of solicitors acting for all potential claimants whether specifically instructed by those claimants or instructed by solicitors acting on behalf of other claimants. In my judgment the court has a clear duty in such cases to manage the litigation from an early stage in such a way that one or other party does not allow costs to spiral out of control.

#### The Third Issue

24. As originally presented the defendant's application was made on the simple basis that this was a claim for damages in what was described as "a complicated and high value case". A costs cap order was said to be justified by the fact that the defendant was aware that in such cases the level of costs "can be excessive and spiral out of control" (see paragraph 14 to exhibit AG1 to the witness statement of Anthony Gibbons dated 13 October 2003). As I have already stated Morland J gave directions including the supply by each side of estimates of costs required to prosecute and defend the claim until the end of the trial. The application was listed for hearing before me with 2 days reserved for oral argument.

25. The defendant in addition to submitting that the costs in actions such as this can become disproportionate submits that there is in the claimant's schedule of costs evidence that the costs are at risk of becoming disproportionate. Mr Hutton calculated that the total of the claimant's estimated costs on a worst case basis was just over £350,000 as against the defendant's costs estimated at £53,735. In addition, he calculated the claimant's estimate for the number of hours for solicitors work at 734 hours as against the defendant's estimate of 150 hours for solicitors working on the defence. Similarly, the claimant's solicitors estimate disbursements as £187,000 against the defendant's estimate of £25,000. He did not go into further detailed arguments since it had been agreed by the parties that if I considered an order should be made the matter would be referred to the costs judge to make it. Mr Hutton submits that for a claim which will be worth in the region of £1 to £1.5 million this indicates a real risk that the costs will be disproportionate.

26. Mr Moran QC submits that as originally presented the defendant's application came nowhere near demonstrating the pre-conditions for a costs cap order. He submits that there was originally, and still is, no evidence of any risk that costs could become excessive or disproportionate. He points to the fact that the defendant, backed by the NHSLA has been unable to provide examples of clinical negligence cases where costs have spiralled out of

control. He submits that the bald assertion that costs in clinical negligence cases have a tendency to become disproportionate does not fill the evidential gap. Mr Moran QC relies on the fact that in this case Morland J has made comprehensive directions for trial which will ensure that the issues will be limited to the specific matters covered by the directions. Further, the claimant's costs will, if not agreed, be the subject of detailed assessment after the trial. If costs have been unnecessarily and unreasonably incurred they will not be recovered from the defendant. The requirement for the claimant's solicitors to produce estimates by way of costed case plans to the Legal Services Commission is a further discipline which will ensure that costs are not unreasonably incurred. Finally, Mr Moran QC relies on the defendant's admission that Miss Nicola Castle, the solicitor having the conduct of the case on behalf of the claimant, is a competent and experienced solicitor and that it has no reason to criticise her firm's conduct of the case.

27. In my judgment this is not a case where a costs cap order should be made. I accept that there is a wide discrepancy between the defendant's estimate of its costs and that of the claimant and that on a worst case basis the claimant's estimates of costs is very high. However, it seems to me that solicitors acting for claimants in such cases will inevitably have more work to do in preparing and presenting the case than defendants' solicitors. Further there is a dispute as to what the claimant's costs will actually be. Miss Castle's estimate has been prepared taking account of a number of contingencies and unknown factors in order to cater for the inevitable uncertainties in this type of litigation. Miss Castle's figure on a realistic basis is much less than the £350,000 calculated by Mr Hutton. She puts it as in the region of £210,000. She has also placed before the court information coming from her firm which indicates that the range of hours worked by solicitors in 17 clinical negligence cases was 259 hours to 1644 hours with an average of 675 hours per case. Bearing in mind that the claimant's solicitors are experienced solicitors in this field I am not prepared to hold that there is a real and substantial risk that costs will be disproportionately or unreasonably incurred. In my view the discipline imposed by the prospect of a detailed assessment post trial is sufficient in this case to ensure that costs do not become disproportionate.

#### Further Observations

28. I wish to make some further observations with the view to assisting those who may have to deal with applications for costs cap orders in actions other than group litigation. First, when an application is made it must be supported by evidence showing a prima facie case that the test to which I have referred can be satisfied. In my opinion, it will generally not be good enough to assert that in the type of case being dealt with costs can spiral out of control. Secondly, the allocation and listing questionnaires if properly and carefully completed by parties will have attached estimates of costs incurred to date and the likely overall costs. In substantial cases these must be provided in accordance with the Practice Direction to Part 43 (CPD Section 6 Estimates of Costs, in particular 6.1 and 6.6). These should give a good guide to the costs of each party. In the instant case the allocation questionnaire only gave estimates for the liability costs but since there was a split trial no estimate was given for quantum costs. Thirdly, if such an application comes before the court it should be possible to deal with it at a comparatively short hearing. Nothing could be worse than a proliferation of applications occupying much court time and giving rise to costly satellite litigation (see for example comments by Morland J in *Giambrone v JMC Holidays* [2002] EWHC 2932 and in particular paragraphs [3] and [38]). In this case I have been told that the claimants costs in respect of this application are estimated at £50,000 and the defendant's costs at £9,534.75. Granted this application has been treated by the defendant as a test case I cannot conceive that an application for a costs cap giving rise to a total costs bill for both sides of £60,000 can possibly be proportionate or reasonable in the

average clinical negligence case. Fourthly, in my opinion, the benefit of the doubt in respect of the reasonableness of prospective costs should be resolved in favour of the party being capped. The order should include a provision for uplift in certain circumstances. In that way, although a detailed assessment at the end of the trial, if it is necessary to justify costs up to the cap, may take place, it ought to be possible to limit the issues on a detailed assessment and in many cases avoid a hearing altogether. In this way, a costs cap order may become a useful tool in the court's armoury for preventing, in an appropriate case, costs spiralling out of control and reducing the costs of post trial assessments.