Injustice league

The initial QOCS cases on CPR 44.16(2)(b) have got interpretation off to a false start and risk restricting access to justice, write *Tom Hickman* and *Flora Robertson*

Recent decisions on the application of qualified one-way costs shifting (QOCS) in section II of CPR 44 raise issues of fundamental importance to access to justice, particularly in relation to claims against the state.

Many such claims – against police, immigration officers, or others exercising coercive powers – involve a personal injury (PI) element, but often involve associated claims such as false imprisonment, assault and misfeasance in public office and aggravated and exemplary damages claims.

If the recent judgments in *Jeffreys v Commissioner for Police* [2017] EWHC 1505 (QB) and *Howe v Motor Insurers Bureau* [2016] EWHC 884 (QB) are correct, then non-PI claims brought alongside a PI claim do not benefit from costs protection. The dramatic effect is that, unless a litigant benefits from legal aid conferring such protection, the risk of adverse costs will deter the claim. An individual will have to restrict their claim to include only the PI element.

Imagine a claim relating to serious allegations of false arrest and arbitrary detention in which the claimant can put forward only a small PI caused by handcuffing; or a claim for unlawful detention in which the claimant can advance only a claim for psychological harm.

This is an unprincipled and unsatisfactory situation, which results in courts being presented by partial and artificially limited disputes; and if, as we suggest, the intention of the rules is in fact to allow costs protection for such claims, then an important protection on access to justice is being denied.

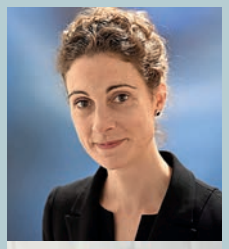
The QOCS regime

CPR 44.13 provides (emphasis added): "(1) This section *applies to proceedings which include* a claim for damages – (a) for personal injuries…"

CPR 44.14(1) then sets out the costs protection provisions, which are subject to CPR 44.16. CPR 44.16 then, confusingly, states: "(2) Orders for costs made against a claimant may be enforced up to the full extent of such orders with the permission of the court, and the extent to which it considers just, where – … (b) a claim is made for the benefit of the claimant *other than a claim to which this section applies*."

This still allows some protection because the court's permission is required for enforcement of a costs order where CPR 44.16(2) applies, but the matter is discretionary and so there is no certainty when a claim is begun that a claimant will not be required to pay adverse costs.

The issue is whether section II "applies" **only** to claims for PI, in which case all associated claims for the claimant's benefit fall within CPR 44.16(2)(b). Since CPR 44.16 states that it applies to claims that "include" a PI claim, not only to PI claims, it seems self-evident that CPR 44.14(1) does not take such claims back out of the QOCS regime.



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However, in attempting to give CPR 44.14(1) some meaning, the court in *Jeffreys* took a different approach.

The consequence is that the non-PI claims do not benefit from costs protection and so will be deterred unless a claimant has deep pockets. Indeed, the consequence is yet more dramatic because the natural reading of CPR 44.16(2), a reading adopted in *Howe*, is that even the PI element is taken outside the QOCS regime where a PI claim is combined with a non-PI claim.

This is because the QOCS protection is a protection against the enforcement of costs orders, not the making of costs orders, and 44.16(2) provides that costs orders can be enforced to their full extent where a claim is made for the benefit of a claimant other than a claim to which the section applies.

Jeffreys

Mr Jeffreys claimed against the police for damages for assault, false imprisonment, misfeasance in public office and malicious prosecution. He claimed to have suffered pain, distress, anxiety, loss of liberty and soft tissue injuries, and that the police had exacerbated his paranoid schizophrenia.

The claim was dismissed with costs. Enforcement was permitted to the extent of 70%, pursuant to CPR 44.16(2)(b), reflecting the non-PI element. On appeal, it was argued that CPR 44.16(2)(b) did not apply as mixed claims (PI/non-PI) were within section II of CPR 44.

Morris J disagreed. He reasoned that CPR 44.13 brings within the scope of QOCS "a wide range of proceedings, including proceedings where a claim for damages for personal injury plays a very minor and subsidiary part of the claims advanced".

He noted that CPR 44.13 refers to "proceedings" and 44.16 to "a claim", and to the apparent circularity of CPR 44.13 and 44.16(2)(b), and concluded that "a claim to which this section applies" had to mean "a claim for PI".

He concluded: "As a matter of construction... CPR 44.16(2)(b) applies in a case where, in proceedings the claimant has brought a claim for damages for personal injuries and has also brought a claim or claims other than a claim for damages for personal injuries."

While this appears to be a highly technical issue about the meaning of the rules, this disguises a major issue of principle concerning access to justice.

Not only was there no need for Morris J to interpret the rules in a manner that gravely restricts access to justice, but the decision appears to have been *per incuriam*. In *Wagenaar v Weekend Travel Ltd* [2015] 1 WLR 1968, the Court of Appeal held that there are claims which can be part of a single set of proceedings which fall outside CPR 44, despite the fact that the proceedings include a PI claim.

The court held that a part 20 claim between defendants was not within CPR 44. That itself demonstrates that there are claims on which CPR 44.16(2)(b) can bite, namely part 20 claims where they are made for the benefit of the claimant and possibly other claims as well, such as claims made against separate defendants.

Moreover, Vos LJ made comments which suggest Morris J was wrong to suggest that the intention of section II is that non-PI claims are outside the section: "I think the word 'proceedings' in CPR rule 44.13 was used because the QOCS regime is intended to catch claims for damages for personal injuries, where other claims are made in addition by the same claimant."

He also said: "CPR 44.13 is applying QOCS to a single claim against a defendant or defendants, which includes a claim for damages for personal injuries... but may also have other claims brought by the same claimant within that single claim."

Vos LJ gave the example of an ordinary road traffic claim including damaged property in addition to the claim for personal injury damages, and "the draftsman would plainly not have wished to allow such additional matters to take the claim outside the QOCS regime". If that is right, then the same reasoning surely applies to claims such as brought by Mr Jeffreys against state officials where personal injury is one element of the claim.

Howe

Mr Howe brought a claim for compensation from the MIB alongside a claim for a declaration as to the effect of the relevant regulations.

The MIB argued that the declaration sought brought the whole claim within 44.16(2)(b); that recovery was not restricted to a proportion of costs linked to the "disallowable" (non-PI) element; and that the judge should grant permission to enforce a costs order.

The judge rejected these submissions: "The claim for a declaration was inextricably linked with the claim for damages for personal injuries... *it would be wholly wrong of the court to take into account what is almost a technical pleading point so as to open the door to possible full recovery of the defendant's costs.*" The exercise of the judge's discretion was upheld on appeal ([2017] EWCA Civ 932.

However, both courts assumed, without deciding, that the declaration was not within CPR 44 part II. The point was not argued.

Conclusion

CPR 44.16(2)(b) introduces a high degree of uncertainty into the QOCS regime, a regime which is intended to introduce certainty to aid access to justice. It is appallingly unclear in its meaning and effect, and this infects the regime as a whole.

In the first cases considering this provision, the law has been set off on a false start, with the courts adopting an interpretation which unnecessarily restricts access to justice. But neither case is authoritative: *Jeffreys* is a High Court decision decided, it seems, *per incuriam*; in *Howe*, the point was not argued.

It is hoped that the Court of Appeal grapples with this issue soon and does so in the context of the recent important judgment of the Supreme Court in *Unison* [2017] UKSC 51 on importance of access to justice as a powerful interpretive principle.

It may also consider whether CPR 44.16(2)(b) is simply void for uncertainty and for failing to comply with section 1(3) of the Civil Procedure Act 1997, that requires the CPR to be "accessible, fair and efficient". ■