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Costs Article

Recovering Inquest Costs in Subsequent Civil Proceedings

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Introduction

1. The basic position is well-known: in principle, the costs of an inquest are recoverable in a subsequent clinical negligence claim. The leading case in this regard, also well-known, is *Roach -v- Home Office* [2010] QB 256.

2. Every case, though, will turn on its own facts (there had been no pre-inquest admission of liability in *Roach*, for example). Moreover, in the decade since *Roach* was decided the costs landscape has changed – most notably, in this context, by the introduction of the 'new' proportionality test in March 2013 – and the court's approach to 'inquest costs' has developed.

3. This short paper considers the development of the court's approach and attempts to delineate the various arguments open to those on both sides of the litigation fence.

First principles

4. The starting point is section 51(1) of the Senior Courts Act 1981 (as amended), which provides as follows:

> *"(1) Subject to the provisions of this or any other enactment and to rules of court, the costs **of and incidental to** all proceedings in –*
>
> *(a) the civil division of the Court of Appeal;*
>
> *(b) the High Court;*
>
> *(ba) the family court; and*
>
> *(c) the county court,*
>
> *shall be in the discretion of the court."*

[Emphasis added.]

5. The key phrase, emboldened above, is "*of and incidental to*": section 51(1) affords the court a broad discretion.

6. Further, it is long-established that costs incurred prior to proceedings are capable of being recovered as costs in subsequent proceedings. In *Société Anonyme Pêcheries Ostendaises -v- Merchants' Marine Insurance Company* [1928] 1 KB 750, 757, Lord Hanworth MR opined as follows:

> *"It appears to me, therefore, that there is power in the Master to allow costs incurred before action brought, and that if the costs are in respect of materials ultimately **proving of use and service in the action**, the Master has a discretion to allow these costs, which he probably will exercise in favour of the party incurring them, because they have been made use of during the course of the action."*

[Emphasis added.]

7. But the court's discretion under section 51(1) is not unlimited. In *Contractreal Ltd -v- Davies* [2001] EWCA Civ 928, Arden LJ held as follows at [41]:

> *"[The] authorities show that the expression "of and incidental to" is a time-hallowed phrase in the context of costs and that it has received a limited meaning, and in particular that the words "incidental to" have been treated as denoting **some subordinate costs to the costs of the action**. If [counsel for the landlord] was right in this action it would mean that the costs of some very substantial proceedings would be treated as costs of and incidental to other proceedings."*

[Emphasis added.]

8. The apparent difficulty posed by this passage in the present context is immediately apparent. Consider a case where the clinical negligence claim has settled immediately following the inquest, prior to the issue of proceedings. In that case, the costs of the coronial proceedings will not be subordinate to those of the clinical negligence claim.

9. What test, then, does the court generally apply in determining whether costs incurred before the relevant proceedings are recoverable? The answer lies in Sir Robert Megarry V-C's oft-cited judgment in In re Gibson's Settlement Trusts [1981] Ch 179, 186H. Sir Robert identified:

> "*three strands of reasoning, that of* ***proving of use and service in the action****, that of* ***relevance to an issue****, and that of* ***attributability to the defendants' conduct****.*"
>
> [Emphasis added.]

Pre-*Roach* authorities

10. The decision in Roach did not mark the first time the costs of an inquest had been recovered in subsequent proceedings. The pre-Roach authorities were helpfully reviewed by Master Leonard in *Douglas -v- Ministry of Justice* [2018] Inquest LR 71 at [48]-[51]. In the clinical negligence context, they are *Stewart -v- Medway NHS Trust* [2004] EWHC 9013 (Costs) and *King -v- Milton Keynes General NHS Trust* [2004] EWHC 9007 (Costs).

11. The issue in *Stewart* was whether the costs of attending the inquest by counsel, and the costs of preparing for such attendance, were recoverable. Legal aid had been granted for the purposes of a noting brief only. Notwithstanding this, Master O'Hare held at [11] that:

> "*it was reasonable for the claimants in this case to have sought to play a larger role, as they did, in that inquest. In other words,* ***to make submissions, and to cross-examine witnesses****. Of course, that cross-examination would always be under the control of the Coroner. I think it was reasonable for them to have had a* ***full say in the findings of fact made*** *by the Coroner's court.*"
>
> [Emphasis added.]

12. As the Master put it, "*Costs of an inquest can be of and incidental to other actions*" (*ibid.*).

13. In *King*, the claimants' solicitor attended the inquest and "*participated fully, asking questions of the witnesses and making submissions – both orally and in writing – as to the law*": see [6].

14. At [20]-[21], Master Gordon-Saker held as follows:

> *"In my judgment where, as here, a party in subsequent civil proceedings seeks to recover the costs that he has incurred in attending and being represented at an earlier inquest, he is not seeking to recover the "costs of the inquest". Rather he is seeking to recover the costs "of and incidental" to the subsequent proceedings. If the costs of attending the inquest were incidental to the subsequent proceedings then it seems to me that they are recoverable, provided that they were reasonably incurred, reasonable in amount and proportionate.*
>
> *"The logic of the distinction between a claim for the costs of the inquest* per se *and a claim for the costs of attending the inquest as costs incidental to subsequent proceedings can I think be illustrated in this way. As was conceded in the course of argument before me, the Defendant would face some difficulty in contending that in an appropriate case a party could not recover in subsequent proceedings the cost of a lawyer attending an inquest to take a note of the evidence. (In some cases a transcript might suffice, but in other cases it may be of importance to observe the demeanour, credibility and conviction of the witnesses.) The cost of a noting brief would be incidental to those subsequent proceedings and would not form part of the "costs of the inquest". The purpose of the noting brief is to obtain information and evidence for the subsequent proceedings; and it would have to be justified at assessment in those subsequent proceedings on that basis. But what if the lawyer attending the inquest not only took a note, but also asked questions? Does that transform the costs of his attendance from costs incidental to the subsequent proceedings to costs of the inquest? I think that the answer must be no, if the purpose – or at least a material purpose – of asking the questions is to obtain information and evidence for the subsequent proceedings."*

15. Accordingly, at [29] & [31] the Master concluded that:

> *"the costs of attending an inquest (and asking questions) can be recoverable as costs incurred in the subsequent proceedings if the purpose – or a material purpose – of attending is to **obtain evidence for the subsequent proceedings** … subject of course to the litmus tests of reasonableness and proportionality."*
>
> [Emphasis added.]

16. At [30], the Master distinguished and explained the decision in Contractreal, *supra*:

> *"The costs incurred in the proposed rent action in the Contractreal case were not incurred for the purpose of the service charge action. Thus they were not "incidental" to or, in the words of Arden LJ in Contractreal, "subordinate to" the actions in which a right to costs had arisen."*

The Decision in *Roach*

17. In Roach, the claimants were the parents of a man who had committed suicide in prison. They instructed solicitors and counsel to attend the inquest into his death and subsequently brought a claim against the Home Office for damages in negligence and under the Human Rights Act 1998. Master Hurst held (i) that held that the costs of attending an inquest could be recoverable as costs "*of and incidental to*" subsequent proceedings; and (ii) that the role of the claimants' legal representatives at the inquest had fallen into two equal parts *viz.* assisting the coroner and obtaining the evidence necessary to pursue the civil claim. He accordingly awarded the claimants one half of their inquest costs. The claimants appealed against the decision to award only half of the inquest costs and the Home Office cross-appealed on the ground that the court had no jurisdiction to award any of the costs.

18. The appeal was heard by Davis J together with an appeal in *Matthews -v- Home Office*, whereby the Home Office appealed against the decision of Deputy Master Rowley that the costs of attending the inquest in that case were recoverable.

19. Having considered the authorities, Davis J held as follows at [48]:

> *"Costs of attendance at an inquest are not incapable of being recoverable as costs incidental to subsequent civil proceedings. Nor does this give rise to any unprincipled approach because the relevant principles, as conveniently set out in In re Gibson's Settlement Trusts [1981] Ch 179, are available to be applied by costs judges in a way appropriate to the circumstances of each case. … **it was open in the instant case to the Home Office … to seek to avoid or minimise any potential liability for such costs here by admitting liability prior to the inquest**. … the inquests here in practice seem to have had the effect of causing the civil proceedings thereafter relatively speedily (and thereby in a way saving of some costs) to be compromised."*
>
> [Emphasis added.]

20. The decisions in *Stewart* and *King* were thus approved in a binding decision of the High Court, but Davis J raised – for the first time in the authorities – the prospect of a paying party's liability for costs being avoided or minimised by a pre-inquest admission of liability.

21. At [52], Davis J emphasised the fact-sensitive nature of decisions in this context:

> *"[It] remains a matter for the costs judge's evaluation and assessment to decide what amount of costs (if any) are allowable as costs of and incidental to the civil proceedings."*

(Notwithstanding an invitation to do so, His Lordship declined to provide any further guidance: see [62].)

22. Finally, at [60] the spectre of *Contractreal* again reared its head (this time through the lens of proportionality):

> *"There may well be cases … where the costs of antecedent proceedings claimed as incidental costs are so large by reference to the amount of damages at stake and/or the direct costs of the subsequent civil proceedings, if taken entirely on their own, that a costs judge will wish to consider very carefully the issue of proportionality."*

23. On the facts of *Roach*, the Home Office's cross-appeal (on the question of principle) was dismissed. The Home Office's appeal in *Matthews*, again on the question of principle, was similarly allowed. The claimants' appeal in *Roach* was allowed to the extent that the case was remitted to the costs judge for further consideration.

Post-*Roach* authorities

24. Since the High Court's decision in *Roach*, a number of further cases have come before the Senior Courts Costs Office.

25. In *Lynch -v- Chief Constable of Warwickshire Police* [2014] Inquest LR 247, Master Rowley allowed the costs of attendance during the evidence of witnesses. More significantly, however, he disallowed time spent: attending pre-inquest reviews; during the opening of the inquest and the coroner's summing up/questions to the jury; waiting for the jury; attending the reading of witness statements; and dealing with procedural/housekeeping and client care matters.

26. *Douglas*, *supra*, was a case where there had been an admission of liability after the third (of three) pre-inquest reviews. The claimant argued, however, that the costs of attendance at the inquest were still recoverable because there had been no admission as to breach of Article 2 of the European Convention on Human Rights, and that the inquest conclusion was a more important Article 2 remedy than damages.

27. Master Leonard allowed the cost of work relating to: disclosure and witness evidence of the defendants (but not the other parties); making submissions as to the conclusion; receiving the jury's conclusion; and

reviewing the conclusion. He disallowed the cost of work relating to: the apportionment of liability; procedural/housekeeping matters; the coroner's summing up; and waiting for the jury.

28. It accordingly seems that in an Article 2 case, there is scope for greater costs recovery even where liability has been admitted. But in a non-Article 2 inquest, it is unlikely that costs will be recoverable following an admission of liability.

29. Indeed, in *Powell -v- Chief Constable of West Midlands* [2018] Inquest LR 215, Master Gordon-Saker noted (at [57]) Davis J's emphasis on "*relevance*" in Roach and concluded as follows at [58]-[59]:

 "*It seems to me that the costs of attending the inquest to hear the evidence, to cross-examine the non-family witnesses and to obtain disclosure from the Defendant all easily fall within the Gibson's strands and are, in principle, recoverable. Insofar as work was done which was ancillary to that evidence gathering, it is also in principle recoverable. I have in mind corresponding with the coroner or attending a pre-inquest review if that was necessary to avoid limitation of the evidence that would be given.*

 "***I do not think that work done in securing a particular verdict is recoverable. I am not persuaded that the verdict would be relevant to the civil proceedings.*** *Any impact that it might have on settlement would be speculative. That the terms of settlement that were agreed included the Defendant accepting the verdict cannot justify the work done to secure the verdict, without hindsight. Accordingly housekeeping and procedural work done in relation to the inquest would not be recoverable save insofar as it was necessary for the obtaining of evidence.*"

[Emphasis added.]

Fullick: Slade J's three-stage approach

30. A key recent case is that of *Fullick -v- Commissioner of Police for the Metropolis* [2019] Costs LR 1231. This was an Article 2 case where two pre-inquest reviews took place prior to a seven-day inquest. The subsequent civil claim settled pre-issue. On assessment of the claimant's costs, Deputy Master Keens held that the pre-inquest reviews "*were instrumental in a number of different ways in getting [the claimant's] own pathology evidence heard at the inquest, [and] in compelling certain police witnesses to attend*" (see [13]). He further held that the inquest "*went a lot further than evidence gathering … very largely determining the issues and that is why settlement was capable of being reached without the civil proceedings having really needing to be progressed*" (see [15]).

31. The defendant's appeal to the High Court was heard by Slade J. At [46]-[47], Her Ladyship held as follows:

> *"[The] authorities emphasise the need to* ***[1] identify the issues raised in the civil claim and the relevance of matters in [the inquest]*** *to determine as a first question, whether any of those costs can in principle be claimed in the civil proceedings. Once the threshold of relevance has been passed, the costs judge will* ***[2] decide whether the costs claimed in respect of … the inquest, were proportionate to the matters in issue in the civil proceedings****. As for* ***[3] the amount of those costs****, those which are disproportionate may be disallowed or reduced even if they were reasonably and necessarily incurred.*
>
> *"It is trite but important to emphasise that each application for costs in a civil claim and related to an inquest must be determined on its own facts."*
>
> [Numbering and emphasis added.]

32. There are thus, on Slade J's analysis, three stages to the court's inquiry: (i) relevance; (ii) proportionality; and (iii) amount. Slade J dealt with stages (i) and (ii) in more detail at [69]:

> *"The reference by the Deputy Master to consideration of whether costs were proportionate to the issues is, in my view, of central importance to the assessment he was to make. The costs incurred by the claimants in connection with the inquest must be relevant to issues in the civil claim to be recoverable as costs in that claim. That requires identification of outstanding issues which are necessary to the civil claim in respect of which the claimants' case would be advanced by participation in the inquest. The assessment also required the identification of what it was* ***in that participation*** *which would assist with the civil claim. The value of that assistance would then be weighed against the cost of pursuing that particular point in the inquest."*
>
> [Original emphasis.]

33. On the facts of Fullick, the costs of the inquest – including the costs of attending the two pre-inquest reviews – were found to have been reasonably and proportionately incurred. It was relevant in this connection that the claim was "*not just about money*": see [65]. The appeal was, however, allowed to a limited extent in respect of hourly rates.

Conclusion

34. Although every case will turn on its own facts, in the clinical negligence context the following broad tactical points emerge from a review of the above authorities:

(a) For those representing claimants:

(i) Ensure that work done for an inquest is relevant to any contemplated civil proceedings by reference to outstanding issues in those proceedings, and further that participation in the inquest will assist with the civil claim.

(ii) Consider whether the costs of participating in the inquest will be proportionate to its utility.

(b) For those representing defendants:

(i) Consider making pre-inquest admissions of liability and/or offers of settlement.

(ii) At detailed assessment, focus on proportionality – under the new test in CPR 44.3(2) costs may be disallowed as disproportionate even where they were necessarily and reasonably incurred.

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