

Counterclaiming for personal injuries? - QOCS protection all the way?

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The recent decision of HHJ Freedman in *Ketchion v McEwan* addressed the question of whether, when a Defendant in an RTA claim counterclaims for personal injuries, he is entitled to QOCS protection in both the counterclaim and the main action, despite the Claimant's not pursuing personal injuries in the main action.

The judgment took into account the judgments in *Wagenaar v Weekend Travel Ltd*, *Howe v Motor Insurance Bureau (no. 2)* and *Cartwright v Venduct Engineering Ltd* and concluded (in the light of *Cartwright*) that the claim and counterclaim were the same set of proceedings.

As the proceedings included a claim for personal injuries (in the counterclaim) the judge concluded that the QOCS protection applied to them, stating that

Whilst, on one view, it may seem unjust that the defendant can avoid payment of costs in the main action, purely as a result of bringing Part 20 proceedings for damages for personal injuries, it seems to me that that is an inevitable result of the wording of CPR44.13 and 44.14."

Whilst the Claimant's claim succeeded (and the counterclaim failed) the Defendant was protected by QOCS in respect of both his failed counterclaim and the failed defence to the main action.

Where next?

A judge in another action before the County Court is not, of course, bound by any previous decision of a County Court and may come to a very different conclusion as to the effect of *Wagenaar* and *Cartwright* than was reached in *Ketchion*. It is likely to take a decision of a higher court to clarify the issue.

Where the Defendant wishes to make a claim for damages for personal injuries then this should be included as a counterclaim. The effect, if this decision is followed, will be that the entire action will be subject to QOCS.

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