TRANSCRIPT OF PROCEEDINGS

Ref. G04MA141

IN THE COUNTY COURT AT MANCHESTER

1 Bridge Street
Manchester

Before DEPUTY DISTRICT JUDGE KUBE

IN THE MATTER OF

MISS BETUL MOESAID (Claimant)

-v-

MR JAMES CALDER (Defendant)

MRS S ROBSON appeared on behalf of the Claimant
MR A RAZZAQ appeared on behalf of the Defendant

JUDGMENT
27th AUGUST 2021
(AS APPROVED)

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JUDGE KUBE:

1. I have before me today a costs assessment hearing following an initial provisional assessment of a bill of costs which I undertook on 2 June 2021. The initial order for costs arose out of a settlement under the terms of the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents, also commonly referred to as the 'RTA protocol' or the 'RTA portal'.

2. I have heard today from Ms Robson for the claimant and Mr Razzaq for the defendant. I am grateful to them both for their submissions, which were very helpful and provided for a lively discussion.

3. The bill of costs which was submitted for the provisional assessment pertained to a single item which is a second medical report in a low value personal injury claim which proceeded in the RTA portal. An initial GP's report had been obtained by the claimant; the report, as I understand it, recommended a second report be obtained from a psychologist, which was obtained subsequently. The amount of the first report was, of course, limited by virtue of the protocol rules to the specified rate of £180. The subsequent medical report, however, was obtained in the amount of £1,850.

4. As part of the assessment process, the defendant had filed points of dispute. The points of dispute initially suggested that the reports had not been filed in accordance with paragraph 7.8B of the RTA protocol. Specifically, the breach alleged is that the first report had not been properly served before the second report was obtained and therefore rendering the second report irrecoverable.

5. At the initial provisional assessment which was conducted on the papers, the defendant's 7.8B point was rejected and the provisional assessment upheld, in effect, this meant the value of this second medical report was allowed.

6. At the commencement of this hearing, I was informed by the defendants, initially by a letter sent to the court office and then verbally again, that they felt that particular point might be further clarified by an appeal which is currently pending in the Court of Appeal relating to the claim of *Greyson v Fuller*, which may or may not overrule *Mason v Lang* and which may change the landscape of this. A stay was sought to await that decision.

7. After hearing submissions from the parties, I determined that I would proceed to hear the other issues that were being raised by the parties, by the claimant specifically, and that I would leave the point about 7.8B and the issue of this pending appeal until I had resolved those other points in the event that the 7.8B point might fall away.

8. Ms Robson made her submissions on behalf of the claimant and reminded me that this was not a reconsideration or appeal of the paper assessment, rather this was effectively a re-hearing of the original assessment. She went on to set out in some detail the structure of the RTA protocol and its status, as opposed to the more general civil procedure rules. She emphasised that, in effect, the RTA protocol was a self-contained set of rules dealing with these particular cases, which more or less effectively excludes the application of the CPR and that therefore the primary source of the relevant provisions must be the protocol, rather than the CPR. She referred me to a number of authorities at county court level, which were said to set out the fact that in effect the protocol is what it says on the tin: it is a self-contained process, and one which the court should be slow to interfere with because it has been established by a comprehensive process including liaising with relevant stakeholders.

9. During the course of the hearing, two arguments were effectively advanced on behalf of the claimant, one of which I had already dealt with earlier in the hearing, but which, in essence was an application for the defendant's points of dispute to be struck out on the grounds that they were at odds with the defendant's acknowledgement of service. The basis for this was that the defendant had ticked the box in the acknowledgement of service that it did not contest the making of a costs order, but simply the amount of the costs. Ms Robson's submission was that as the defendant was contesting the entirety of the bill of costs at this stage, the defendant should have opposed the granting of the costs order. I have already given my reasons earlier during the hearing, but nonetheless I shall simply reiterate here my decision that, in effect, the acknowledgement of service appeared to me to be a reasonable response to a general costs order (one which was not confined to one single item, but to all costs of the matter) and that accordingly the defendant was quite right, in my view, to tick the box stating they contested the amount of the costs rather than the costs order itself. The costs order in this case, as in many of this kind simply ordered payment of the claimant's costs generally – not limited to this second report. Hence the defendant could not be criticised for taking this approach to such a general costs order.

10. Having dealt with that point, Ms Robson came to her more substantial point, which was that in her submission this claim, albeit it may have started life in the portal as a soft tissue injury claim as defined in the pre-action protocol, in fact evolved into a case which was no longer a soft tissue injury claim, and that accordingly the restriction within paragraph 7.8B was no longer applicable to the costs of the second medical report, and that is, in effect, all this case is about; a second medical report and whether or not the cost of that should be allowed.

11. I should say at this juncture that Ms Robson provided a very detailed skeleton argument and very detailed and lengthy submissions today, all of which were helpful in shaping the background for me of the RTA protocol and its workings.

12. In effect then, the claimant's case is upon having sought the second medical report, it was found that the psychological injuries which the claimant had suffered far outweighed the soft tissue injuries, and I just rehearse at this point the injuries initially contained within the GP's report, ie, the first report, being neck pain and stiffness with a seven-month prognosis, pain, stiffness in lower back with a nine-month prognosis, a soft tissue injury to the right elbow with a five-month prognosis and general psychological symptoms with a three-month prognosis, and which, from what I have heard today, appear to mostly have been the usual travel anxiety.

At this point, I remind myself of the definition of what the soft tissue injury claim actually is, and that is defined specifically within the RTA portal which provides its own definitions even for things the CPR ordinarily caters for, again demonstrating, in Ms Robson's submission, that this is a self-contained procedure. A soft tissue injury claim is defined in paragraph 1.1(16A) of the protocol as:

> *"A soft tissue injury claim means a claim brought by an occupant of a motor vehicle where the significant physical injury caused is a soft tissue injury. Includes claims where there is a minor psychological injury, secondary in significance to the physical injury".*

13. So therefore it seems to me to follow that if the predominant injury becomes psychological to the point where it overshadows the physical injury, that would bring the

claim out of the scope of what a soft tissue injury claim is. Ms Robson did indicate to me that, of course, that did not remove the claim from the portal, it merely meant it was no longer in the portal in the category of soft tissue injury claim, but rather as a different sort of claim altogether. I do not want to do Ms Robson a significant disservice in shortening my summary of her submissions substantially, but that is, in effect, the nub of her case.

14. By the time of the second medical report which highlighted 12-to-17 month recovery for the psychological injuries after CBT, this was no longer a case where the physical injuries were the dominant feature but rather a case where psychological injury was really the most dominant factor of all, or certainly much more significant, to the point where that definition could no longer apply because the psychological injury was no longer secondary in significance to the physical injury.

15. I asked a number of questions to ascertain how this protocol worked in practice, and it was clarified to me that even if the claim was no longer a soft tissue injury claim, it would still proceed within the portal and, in fact, the only real difference was the restriction on a second medical report in the manner stated in 7.8B. There might be other restrictions but not that in 7.8B. Moreover, one could never know at the outset whether a claim would definitely be a soft tissue injury claim or not. The claim evolves over time.

16. Mr Razzaq, for the defendant, highlighted that prior to having sight of the medical reports, the defendant had offered a pre-medical report offer of £1,900, only increased substantially to £4,000 after the medical reports were sent over, and he emphasized that the effect of that was that the detail in the medical reports made clear how significant a case this was, but he also emphasized that in his view, with a view to the Judicial College Guidelines, that this was perfectly within the soft tissue injury claim territory. The offer amount, which was accepted ultimately by the claimant, which, if I have understood correctly, was the defendant's second offer, was slap bang in the range of what an ordinary soft tissue injury claim might settle for, and that the amount offered and the amount accepted did not indicate a claim with substantial psychological injury. Moreover, Mr Razzaq stated that the claimant had a choice of leaving the portal, albeit having re-read the protocol that is not my understanding, as I have already indicated, that something no longer being a soft tissue injury claim would not necessitate it having to leave the portal, it can stay there.

17. I should say at this juncture that I have summarised both parties' submissions extensively for the sake of time and also just to make clear what the effective points are on a very narrow issue. The question for me is whether a case changing over time from being a soft tissue injury claim to being a non-soft tissue injury claim because the definition can no longer be satisfied means that ultimately a second medical report is appropriate, even if it never satisfied 7.8B. In effect, that 7.8B does not matter, and hence it does not matter to me what the appeal decisions are that are being looked at at present, because it is not appropriate to what I am dealing with.

18. As I have set out, the claimant's position is certainly that the psychological injury became a predominant feature, and I cannot help but agree, this move from a claim where the longest physical injury might have been nine months, but (inaudible) pain and stiffness in the lower back – and I should say I am not seeking to suggest that that is not, in itself, something major for a person to live with for nine months, but nonetheless that is the longest injury on the list. One was moving from that to a point where there was psychological injury that would take well over a year to resolve, even after professional intervention, and certainly reconsidering the definition of soft tissue injury claim, it seems to me that for that reason the

psychological injury was no longer secondary in significance to the physical injury; if anything, it became the predominant feature of this case.

19. I do take Mr Razzaq's point that his client settled for an amount that might be more appropriate for a soft tissue injury. I am not going to undertake a detailed assessment of the soft tissue injury damages at this point, using the guidelines; I would only make the observation that a claimant might have accepted an offer for any number of reasons, such as instant access to money that they might otherwise have to wait a year or more to get, peace of mind or avoiding the stress of litigation, particularly in a case where they are suffering from psychological injury, and I cannot therefore take what was offered and accepted as determinative of the status of this claim. In my view, the status of this claim, ie, whether or not it was soft tissue injury or not, must be determined having considered all relevant facts of the case, and not necessarily purely what the offers were and what was accepted, and having done just that I believe that this claim was no longer a soft tissue injury claim. The difficult is that was a position that evolved over time and what the defendant is effectively arguing is that 7.8B nonetheless applies because, of course, it was a soft tissue injury at one point, and I think that must be what follows through from what the defendant has argued today.

20. Looking at 7.8B just briefly, it provides a code for when one might be allowed to obtain, in effect, a subsequent medical report, and in fact 7.8B stated that: "In a soft tissue injury claim it is expected only one medical report will be required. A further medical report, whether from the first expert instructed or from an expert in another discipline, will only be justified where it is recommended in the first expert's report" (which I understood that it was) "and that report" (which I take to mean that first expert's report, so the GP's report) "has first been disclosed to the defendant and that first report must be a fixed costs report from a MedCo expert".

21. What this rule does not deal with is what happens when the nature of the claim changes. What happens if somebody becomes more aware of an injury later on or, as in this case, the psychological injury that is predicted to only last three months becomes far more substantial to the point where, at its worst, it might last over a year longer than that initial three-month period?

22. The rule itself does not set out any kind of transitional provision that might apply where the nature of the claim changes, and I suppose the defendant's position, even in the points of dispute, appear to almost be that there must be a point in time where this is all considered.

23. There are two rival points here in my mind. The first is that perhaps this does not matter until one gets to the issue of costs and whether or not a second report will be paid for. Therefore, the nature of what this claim is must naturally be considered at the end of the case, not as one goes through it. There is a different stance as well. One might consider that this matters as the case progresses through the portal because an insurer might refuse to look at a second report. Indeed, in this case, Mr Razzaq stated in his view the insurer must have only looked at the first report, not the second, albeit, I should add, there is no witness statement before me from anybody from the insurance company which confirms that.

24. In my view, the first option, however, is the preferable one, and the reason I say that is because even if an insurer might refuse to look at a report, that does not necessarily mean the report was wrongly obtained. It simply means that there will then have to be a dispute as to whether or not that second report is appropriate. Such a dispute might then centre on whether or not a soft tissue injury claim is the subject of the matter, or not. However, that still takes

one beyond that second report having already been obtained, paid for, or at least become liable to be paid for, and having been disclosed.

25. It seems to me that because the rule simply states "In a soft tissue injury claim" it presupposes the claim started life and always was a soft tissue injury claim. There is the hypothetical point of "What if a claim becomes a soft tissue injury claim"? - I think that is highly doubtful – or what happens if it becomes one later in life? Does this restriction suddenly spring into existence? On its drafting, it might do. It is not a point I need to decide necessarily.

26. What seems to me to be the most appropriate way to interpret this provision is that one considers the matter as the whole to determine the type of claim, and one can only really do that once all of these reports have already been obtained. Based on the arguments that I have heard today, the most appropriate solution, to my mind, is that in truth this claim ceased to become a soft tissue injury claim due to the change in the medical position and it must follow that 7.8B no longer applied to that claim, because otherwise I would be reading into the words of 7.8B that it applied in a soft tissue injury claim "for as long as the claim is one" or "no matter what happens to that claim subsequently" and I am not prepared to imply those sorts of words and to imply different meanings to 7.8B (inaudible) clear standard meaning of what that provision says in natural ordinary language.

27. This was maybe, at one point in time, a soft tissue injury claim, but it became something else altogether, and for that reason I consider that 7.8B does not apply to restrict the second expert report, which was in truth the means by which this claim changed. It was that report which effectively outlined that the psychological injury was now the more dominant feature, and that is irrespective of whether or not what the claimant accepted as a settlement might have seemed appropriate for a claim where there was significant psychological injury.

This transcript has been approved by the Judge