TRANSCRIPT OF PROCEEDINGS

Ref. G05MA392

IN THE COUNTY COURT AT MANCHESTER

1 Bridge Street West
Manchester

Before DISTRICT JUDGE CARTER

IN THE MATTER OF

MR ALI ABDULMALIK (Claimant)

-v-

MR J CALDER (Defendant)

MS S ROBSON appeared on behalf of the Claimant
MS M WALTON appeared on behalf of the Defendant

JUDGMENT
2nd FEBRUARY 2022
(AS APPROVED)

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DISTRICT JUDGE CARTER:

1. This is my judgment in relation to the oral reconsideration of a provisional assessment of costs that I carried out. The claimant in this case is represented by Mrs Robson of counsel, the defendant by Ms Walton of counsel.

2. I have been provided with limited documentation. I have before me copies of the CNF and medical reports that were filed with the original bills and points of dispute. I had, of course, had the original bundle when I carried out my provisional assessment. In addition, there is a witness statement from a Mr Sherlock dealing with (inaudible) in relation to the fee for the relevant medical reports that I do not think is contentious and what is described as a bill bundle which does not include much of great relevance.

3. In addition, and of greater assistance, I have skeletons from both the claimant and the defendant. I am grateful for those skeletons which have been of great assistance.

4. I have been provided with a number of authorities which I have read and considered.

5. The original provisional assessment that I carried out dealt in effect with one point. This was a claim arising out of a road traffic accident that occurred in 2019 and was settled whilst in the portal. The bill came before me in August 2021. The primary issue between the parties related to the fee for a psychologist's report prepared by Dr Latif.

6. On consideration of the points of dispute and the replies from the claimant, I provisionally assessed the bill and disallowed the fee for the psychologist's report. In my note to that decision, I said:

> "Paragraph 7.8(b) requires the first report to be disclosed before consideration of the second report. This did not happen. The psychological report was obtained before the first report discloses falls outside para.7.8(b) and therefore the report was not justified. At that point this was a soft tissue injury claim. Report fee disallowed."

The claimant sought an oral reconsideration of that provisional assessment and that is the matter I have heard this morning and give judgment this afternoon.

7. What can be taken from the skeletons provided to me is the following. There are two main issues between the parties: Firstly, whether the claim qualifies as a soft tissue injury claim such as it would fall within para.7.8(a) of the pre-action protocol (p.2780 in the White Book) or whether it is a different type of claim and therefore falls within para.7.8; and, secondly, whether the provisions of para.7.8(b) have been complied with such as to make this report a recoverable expense.

8. Despite it being a relatively straightforward issue, this is a matter that has raised a considerable degree of argument. As I say, I am grateful to both counsel for the way in which they have addressed the matter. It seems to me the correct way to approach this case is to determine, firstly, whether the claim is a soft tissue injury such that it falls within para.7.8(a) and para.7.8(b) of the pre-action protocol and then to consider whether the provisions of para.7.8(b)(2) have been complied with.

9. The claimant's position is set out in para.8 onwards of Ms Robson's skeleton. She identifies the definition in para.1 of the pre-action protocol at para.16(a) as being as follows:

> "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 and includes a claim where there is a minor psychological injury secondary in significance to the physical injury."

She asserts that that is hybrid definition, a mixture of medicine and law. It defines a soft tissue injury claim rather than a soft tissue injury. What she says is that, at the time of the initial medical report, this was a soft tissue injury claim because the original claim as set out in Dr Effy's report identified a fairly typical whiplash type claim with a degree of psychological sequelae -see his report at section 11 giving a three-month prognosis.

10. It is clear at the time of that report that the psychological evidence was, in fact, a secondary minor psychological injury secondary in significance to the physical injury. But what she says is that because there was not a recovery within the three months identified by Dr Effy, it became necessary to obtain the psychological report of Dr Latif which was obtained in June or July 2020; and, by that stage, because of the extent of the ongoing psychological symptoms being suffered by the claimant that became the more significant element of the claimant's injuries. She says at para.9 of her skeleton:

> "The psychological symptoms clearly outweighed the whiplash injuries and took the claim out of the definition of a soft tissue injury claim."

She then refers to the defendant accepting in the points of dispute that this was no longer a soft tissue injury claim.

11. The defendant's point of view is different. They assert that the court should not look at the nature of the injury at the time that it has evolved all the way through the course of the various developments in relation to the nature of the injury and should look back at what the situation is before the second report is obtained. At para.15 of her skeleton, Ms Walton says:

> "Whether or not a claim is a soft tissue injury claim for the purpose of para.7.8(b) must necessarily mean whether it would be categorised as a soft tissue injury claim before a second report is obtained. It is at that point, and only at that point, a claimant will have to consider whether they are required to comply with para.7.8(b) or not."

Any other interpretation, she says, would render the rule obsolete.

12. Ms Robson has provided me with an authority called *Moesaid v. Calder* in which she appeared for the claimant in August of last year before Deputy District Judge Kube here in Manchester. That was a case, it seems, where the para.7.8(b) issue was not specifically dealt with because the Deputy District Judge took the view that the definition of soft tissue injury claim has to be looked at when one considers the matter as a whole and one can only do that once all these reports have already been obtained. He went on to say at para.26:

> "Based on the arguments 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 para.7.8(b) no longer applied to that claim, because otherwise I would be reading into the words of para.7.8(b) 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 para.7.8(b)."

I note in passing that a lot of the submissions in relation to the second point I am asked to deal with have revolved around the ability of the court of to infer or to imply additional words into the pre-action protocol.

13. In the same way that Deputy District Judge Kube dealt with the matter, it seems to me I have to determine, first of all, whether this falls within para.7.8(b) as a soft tissue injury claim.
14.
15. It is accepted that initially this was a soft tissue injury claim. But by the time that the report was sought from Dr Latif, it was clear, in my mind, that the matter was no longer a straightforward soft tissue injury claim and that the psychological sequelae were substantial enough that it no longer fulfilled the criteria of para.16(a).

16. It is important, it seems to me, to bear in mind the chronology in relation to these reports. The GP examination took place in December 2019; the report is dated 7th January 2020 and the CNF was served on 10th January 2020. At that stage, as I say, on the face of the GP report, the matter was a soft tissue issue claim and would have been subject then to para.7.8(b). However, the psychological report was provided in July 2020. At that stage, it seems to me that the injury was no longer a soft tissue injury claim.

17. The complaint of the defendant is that the GP report was disclosed on 1st September 2020 at a time when the psychological report had already been obtained. What the defendant complains is that, if at that point the matter was a soft tissue injury claim (as was apparent from the GP report) the provisions of para.7.8(b) then come into play. The claimant's position is that, by the time it was clear in 2020 that there were ongoing problems, this was no longer a soft tissue injury claim.

18. The purpose of para.7.8(a) and (b) is to limit the amount of medical evidence provided in relation to soft tissue injury claims (i.e. what is often called whiplash type claims). Para.7.8(b) notes it is expected only one medical report will be required and further medical reports, whether from a first expert or from an expert in another discipline, are only to be justified in certain circumstances. That is because a soft tissue whiplash type injury claim is going to predominantly be dealt with by a GP report which can deal with minor psychological symptoms.

19. I consider that the court must look at the nature of the claimant at the relevant point in time when the provisions of paras.7.8(a) and 7.8(b) come into play. It is not as simple, in my view, as either saying either one looks at the nature of the case at the end of the case and looks back to determine whether it is "a soft tissue injury claim" nor is it as simple as saying what is the position at the time the CNF is filed. Both those, it seems to me, fail to appreciate that any symptoms of the claimant can change over time.

20. If one, however, looks at the position of the claimant at the time of the compliance with the filing or sending of the GP report, then it becomes clear that at that stage this was not an injury that was a "soft tissue injury claim with some limited psychological sequelae". I accept that when the GP report is sent that is what it says, but the rules within the pre-action protocol do not limit the determination of the claim simply to the nature of the injury as set out in the medical report.

21. If the first medical report simply identified a whiplash type injury with limited psychological symptoms it may be arguable that, should the symptoms change, para.7.8(b) would come into play. But that does not seem to me to be a realistic reading of the protocol.

22. In addition, I take into account that when identifying the further medical report in para.7.8(b) one is still looking at a soft tissue injury claim and one is looking either for a further report from the first expert or from an expert in another discipline. That in itself seems to anticipate, in my view, that what may be happening is that there is some issue arising out of the soft tissue claim and not a situation where the claim itself has changed its nature from being a soft tissue injury claim as defined into a psychological claim with some limited soft tissue injuries.

23. The consequence seems to me that, when the first report was disclosed, this was no longer a soft tissue injury claim as defined by para.16(a) and the provisions of para.7.8(b) do not apply. Therefore, when I provisionally assessed the bills and made a determination that it was a soft tissue injury claim that was in fact mistaken and, at the relevant point in time, this claim was no longer a soft tissue injury claim but was subject to the general provisions under the protocol for medical reports under para 7.8.

24. If I am wrong, however, in my determination that this was not a soft tissue injury claim, one has to then turn to the second point that has been raised in front of me which is the interpretation of para.7.8(B). Much of the discussions in the skeleton arguments relate to how the court should interpret the pre-action protocol; whether the CPR assists and whether the court can imply further terms.

25. With respect to both counsel, that seems to me to be overcomplicating matters. This is a straightforward reading of a provision within the pre-action protocol and the court, in my view, is quite capable of doing that irrespective of arguments about statutory interpretation. Paragraph 7.8B(2) reads as follows:

> "A further medical report , whether from the first expert instructed or from an expert in another discipline, will only be justified where:
>
> (a) It is recommended in the first expert's report; and
> (b) That report has first been disclosed to the defendant."

There is then a provision which does not affect us.

26. What the claimant says is that para.2(b) should be read as merely identifying the order in which reports are disclosed. The defendant says, well, no, you cannot instruct or obtain your further medical report until the first report has been disclosed to the defendant. Ms Walton identifies a potential inconsistency because she says, if the claimant's interpretation is right, one can serve one's first medical report then immediately serve the second medical report and that complies with the provision. That, she says, would be an absurdity.

27. It is, in my view, not open to this court to interpret the rules in a purposive manner. I have to look at what the rules provide and decide whether or not in the circumstances the steps taken by the claimant complied with them.

28. It is accepted that the further medical report was recommended in the first expert's report. It is accepted that the GP report was disclosed to the defendant first of all; that is

what “first” means, in my view. The provision is there to enable parties upon receiving the GP report to either, as Ms Walton identified, seek a stay of the process or to carry out further discussions in relation to the claim.

29. It may well be that if a claimant served the first medical report and then immediately served the second medical report without giving a defendant time to consider the first medical report that, although it may comply with para.7.8B(2), arguments could be made that the fee should not be recoverable. What para.7.8B(2) does is sets a condition precedent before being entitled to recover the medical report fee. Only in those circumstances would it be justified; it does not say it is immediately payable. So the situation Ms Walton identifies would still be subject to the control of the court.

30. But there is not any requirement that the further medical report be obtained after the first report has been disclosed simply that the first medical report recommends a further report and that that first report has been disclosed to the defendant first in time. That is the only way that paragraph could be read and, in those circumstances, the mere fact that a claimant’s solicitors have decided to get the report prior to service of the GP report, in my view, does not take it outside the provisions of para.7.8B(2)

31. It may, of course, be a risk to the claimant’s solicitors to do so in circumstances where they have not yet served the GP report and it may be that if they take that step, ultimately, they might not in certain circumstances get the fees for that additional report, but that is a matter for them. The fact they have obtained it before serving the GP report does not, in my interpretation of the rules, have any bearing. The only requirement is, as I say, that the first medical report recommends a further medical report and that that report is first disclosed to the defendant.

32. In those circumstances, even if I am wrong and this is a soft tissue injury claim, I am satisfied that the provision of the report does in fact comply with para.7.8(b) of the pre-action protocol. Therefore, I am satisfied that my initial provisional assessment of the issue of the cost of the psychological report was incorrect and that my provisional assessment should be varied to allow the expert’s fee in relation to the medical and psychological reports.

This transcript has been approved by the Judge