

## TRANSCRIPT OF PROCEEDINGS

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Ref. H00WN062

### IN THE COUNTY COURT AT WIGAN

Darlington Street,  
Wigan

Before **DEPUTY DISTRICT JUDGE CAUSTON**

### IN THE MATTER OF

**DAVID GLENDINING (Claimant)**

-v-

**LIAM McCARTHY (Defendant)**

**MR K WARD** appeared on behalf of the Claimant  
**MR M SMITH** appeared on behalf of Defendant

### JUDGMENT

**5<sup>th</sup> MAY 2022, 12:16-12:31, 14:28-14:42**  
**(AS APPROVED)**

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JUDGE CAUSTON:

1. This matter relates to the assessment of costs in relation to personal injury road traffic claim by Mr Glendining against Mr McCarthy which was settled by way of a Part 36 offer that was accepted. It had dropped out of the portal, but Part 7 proceedings had not been started when it settled.

2. I am only asked to consider the disbursements in relation to the matter because the claimant obtained an orthopaedic report and a psychologist report, but did not obtain a fixed costs medical report from a GP which would normally be expected in a soft tissue injury claim.

3. In relation to that, I need to decide whether the claimant was in breach of the protocol in not obtaining a fixed costs medical report from a GP or a medical expert accredited by Medco.

4. The first issue really is was this a soft tissue injury where the provisions apply? Paragraph 7.8(a) provided that: "In a soft tissue injury claim the first report must be a fixed costs medical report from an accredited medical expert selected for the claim via Medco Portal". It then goes on to say at para.7.8(b):

"In a soft tissue injury claim, it is expected that only one medical report will be required and 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 and that report has first been disclosed to the defendant and where the claimant obtains more than one medical report, the first report must be a fixed costs medical report from an accredited medical expert selected via the Medco Portal."

It then goes on about further fixed costs medical reports from the disciplines concerned.

5. As I say, therefore, the first issue that I need to address is: Is this a soft tissue injury claim? I have been taken to the assessment of quantum from the claimant which said that:

"As a result of the accident, the claimant suffered from soft tissue whiplash injuries to the neck, forearm and left elbow. The claimant also suffered from psychological symptoms following the accident."

So in my judgment that is saying that the claimant suffered from soft tissue injuries and also psychological symptoms. There is a definition as to soft tissue injuries and it says under "Pre-Action Protocol 16A":

"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 claims where there is a minor psychological injury secondary in significance to the physical injury."

6. It is contended here that the solicitor would not necessarily have known that this was a soft tissue injury when the orthopaedic expert was instructed, but that is not really the test. I have to look at whether it was a soft tissue injury and also whether the psychological symptoms were secondary in significance and minor to the physical injuries.

7. In this case the orthopaedic report does refer to the neck pain, neck stiffness and then there is the right forearm and left elbow pain and it is that left elbow pain which is controversial because it was longer lived with about six months was the prognosis period for that. In relation to that, the orthopaedic surgeon says that the aetiology of this condition is degenerative in nature even to a tendinopathy. It was asymptomatic prior to the date of the accident.

8. In my judgment, therefore, the orthopaedic surgeon there is saying that this is a soft tissue injury affecting the tendons. It refers to tennis elbow and I have been taken to the NHS Patient information leaflet about golfer's elbow. I think it was unclear which side of the elbow was affecting the claimant, but, in any event, golfer's elbow is to do with the tendons and not being able to withstand the forces everyday life puts upon it and that is on the inside of the elbow but to me that is a soft tissue injury.

9. The orthopaedic expert then says that: "He has lost confidence driving, but comment upon this lies without his field of expertise and should an opinion wish to be sought, I suggest he is seen by a clinical psychologist". That is not a straightforward referral to a psychologist. He is just saying there that it is outside his field of expertise and should it be wished to obtain an opinion, he suggests a clinical psychologist. A GP expert might have just considered this to be travel anxiety.

10. The claimant then went to see the psychologist. It is quite a short report and it refers to the symptoms regarding the travel anxiety. What I read there on p.2 is not dissimilar to a lot of cases that I see at a stage three hearing where you have a soft tissue injury and then there is some travel anxiety which can be upsetting clearly to the claimant. I am not downplaying it, but it is at the end of the day travel anxiety. It is not a recognised psychological condition diagnosed as DSM-5. There is no post-traumatic stress disorder or any diagnosis of anxiety - if you like, anxiety disorder - it is simply travel anxiety. He says he constantly checks his rear view mirror pressing down on to the brakes; became physically tense as cars approach from behind particularly if he felt they were approaching too close; started to give a running commentary of his own driving during journeys; and became irritable and physically tense for the duration of travel; gets a sense of foreboding, etc. The claimant had not received any treatment or investigation for that, but the expert says symptoms will resolve within six to nine months. It was over a year and seven months, I think, the prognosis period for that so it was quite a lengthy period that the claimant was suffering from these symptoms. But the expert says: "They do not merit a psychiatric diagnosis as defined by the DSM-5".

11. As I say, that is very much similar to a lot of cases where there is travel anxiety which is not a recognised psychological symptom and really forms an aggravating feature of the soft tissue injury so, in my judgment, that does not go beyond the soft tissue injury to become more than a minor secondary injury; it is not severe; it is not a medical diagnosis of a psychological injury.

12. I have been taken to a case *Morsad* which is only persuasive as it is a first instance decision where it was decided that a claimant could argue that the case fell outside that definition of a soft tissue injury because of the psychological injuries. But I do note that in

that case there is reference to the claimant having had CBT which is really upper level; it is a higher level injury where you have treatment. There is no treatment in this case and it seems to me reading between the lines that this was more than a travel anxiety case and that is supported by the comment of the Judge in the transcript where the Judge said it was mostly to have been the usual travel anxiety". Well, that suggests to me that there is more than just travel anxiety. It is "mostly" so majority, but there is more than that and then there is the CBT. Therefore, reading between the lines it seems that there might have been a diagnosis in that case but even so it is only persuasive to me anyway and I do not find that this falls outside the definition of a soft tissue injury.

13. Therefore, the claimant has failed to comply with the pre-action protocol by obtaining the first report which is mandatory under para.7.8(a). So the claimant has failed to comply with the protocol by disclosing the first report and has simply gone ahead and disregarded the protocol and obtained an orthopaedic and psychologist report.

14. Therefore, I must now hear submissions as to why that was justified because following the case of *Greyson* the reports can be admitted but the claimant has not sought relief from sanction and the case of *Greyson* made clear that sanction may be in costs.

(Luncheon adjournment)

15. I have had a chance to consider the case further over the lunch break. I have already decided previously that the claimant was in breach of the protocol because this was a soft tissue injury claim. Under para.7.8(a) the first report has to be a fixed costs medical report from an accredited medical expert selected for the claim via Medco Portal. A further medical report, whether from the first expert or from an expert in another discipline, may be justified where it is recommended in the first expert's report and that report has first been disclosed to the defendant. That is to give the defendant an opportunity to object. The idea is to try to keep costs down.

16. So it has been established in the case of *Greyson v. Fuller* that reports that are not disclosed in accordance with the protocol can be admitted as evidence so the court has a discretion. If they are not admitted as evidence, then obviously no costs can be recovered for them. If they are admitted as evidence, then costs can be in theory recovered.

17. In the case of *Greyson v. Fuller*, it was established that it really goes to the issue of costs which is the sanction. So even if they are admitted as evidence, the costs may not be recoverable and, as Mrs Justice Foster said:

"The sanction of failing to recover costs is written through every part of the scheme as a default sanction for compliance failures."

She also says:

"The overall structure of the protocol is, as both parties acknowledge and submit, to provide a disciplined and self-contained process that achieves its aims of the speedy and proportionate resolution of lower value claims by imposing pre-eminently a financial discipline."

She says:

“That is clear from the general words at para.16 of the PDPACP and clear in the particular area of medical evidence under disbursement provisions. Central to the system is the fact that the default position is that restricted costs are payable. Any report obtained that is not the initial report will not be paid for unless it is ‘justified’, in other words, cogent reasons are given and accepted for its necessity in the process.”

She goes on to say at para.39:

“Where materials are not ‘justified’ - necessary for the claim - then the recovery of costs incurred in obtaining them in the usual way under the Protocol is in my judgment at risk. Otherwise, the claimant is entitled as a matter of course to costs as per the incorporated provisions.”

She continues further to say that the important features of the Protocol include the emphasis on proportion and cost effectiveness and streamlining the process.

18. It is true to say that the defendant did not respond to the stage 2 pack, but in my judgment that was not a valid pack anyway because it did not include the first report in accordance with the protocol.

19. So in terms of looking at whether these reports would have been admitted and whether they are recoverable, I need to consider whether they were necessary to claim; whether they were needed; whether they were “justified”. I would consider that it is for the claimant, the receiving party, to persuade me that the orthopaedic and indeed the psychologist report - which is the main issue in contention - was needed, justifiable and was necessary.

20. I cannot say what a GP would have done in terms of referrals, but this does seem to me to be what has been described by counsel as a bread and butter case which was a soft tissue injury with a large part of travel anxiety. But it was not a diagnosed condition, so that would have been an aggravating feature.

21. I do see a lot of GP reports that deal with travel anxiety and it is not necessary to obtain a psychologist report. It is normally within the remit of the GP to be able to see travel anxiety, to recognise it and to say that that is travel anxiety without it being referred to a psychologist. In this particular case, first, it was not a bony injury; it was a soft tissue injury; but, second, the orthopaedic expert, as I said earlier, it is not clear from his report but he definitely recommends a psychologist. He just says it is outside his expertise and if they wish to take further advice then go to a psychologist. It does not follow that a GP would have said that - we are one stage further in the process of the orthopaedic expert - so I do not accept that the GP would have recommended a psychological report.

22. Then when I turn to the psychological report, it does not seem to me that it is necessary for the determination of the claim. Although it might have been mentioned in counsel’s advice that has been disclosed, that is not unexpected given it was a report that was disclosed in the case. That does not mean it was necessary to obtain it. A GP report referring to travel anxiety would have sufficed. The actual report itself is very short. I recited it earlier in my

earlier judgment on the point about soft tissue injuries. It contains details about the travel anxiety which I have seen in very similar terms in a GP report and it is quite short. Page 2, the later symptoms, is very much similar to what one would see in a GP report but may be slightly expanded and obviously it does not find any psychological injury or any diagnosis of a psychological injury in accordance with DSM-5 as defined there. It is almost, as Mr Smith said, not really worth the paper it is written on. It does not really add anything, so I do not find that it is justifiable or necessary for the claim.

23. In terms of the actual breach of the protocol, I am asked to have regard to the *Denton* test and relief from sanctions. Although I am not strictly clear as to whether or not it applies to the self-contained code of the protocol, but assuming that it does then there has been no real reason given by the claimant for why this breach occurred and no first report was obtained or disclosed and why they went straight to the orthopaedic expert and then the psychologist. There is no statement from anybody to justify it.

24. I have heard submissions, obviously, on the point and it is said that effectively the solicitor was not medically qualified and unable to determine whether or not it was a bony or soft tissue injury. But I do not consider that to be a good reason for not following the protocol. It would be for the GP for the first report to look at that issue and decide whether or not further referral was necessary.

25. It is a serious breach to bypass or ignore the protocol and just obtain additional reports and not get your first report. As I say, there is no good reason for it. The court has to emphasise the importance of complying with the protocol and in the interests of the overriding objective saving costs which the protocol is designed to do.

26. In terms of prejudice, the defendant has been prejudiced by not being able to challenge the instruction of the two experts.

27. Therefore, I find that, although these reports might have been admissible (although in fact they were not justified so maybe they would not have been), it cannot be justified at this stage in terms of recovery of the costs where there has been a breach of the protocol like this. Therefore, I have to disallow the cost of the psychologist report.

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This transcript has been approved by the Judge