JD02/10/19

SC-V1

IN THE COUNTY COURT AT WEYMOUTH SITTING AT SOUTHAMPTON

CLAIM NO: D12YJ638

B E T W E E N :

DEBORAH TALBOT

Claimant

-and-

SOUTH WESTERN AMBULANCE SERVICE, NHS FOUNDATION TRUST

Defendant

JUDGMENT

---

1. The hearing yesterday was convened for one day to review at the Defendant's (paying party) request, the provisional paper only assessment carried out as long ago as 23rd May 2018 by District Judge Williams (now His Honour Judge David Williams) sitting at the County Court in Weymouth. The matter was transferred from Weymouth to Southampton since it was perceived that the matter could be listed more expeditiously before me.

2. It appears that the Defendants seek to review the entirety of the decision of the District Judge save for point 1. I am carrying out a review of that paper assessment unless it be misunderstood, I am not sitting in any Appellate capacity whatsoever. The receiving party wishes to uphold the entirety of the approach of District Judge Williams and urges upon me not to disturb his approach or his conclusions. The case itself has many curious and bizarre features and it is necessary briefly to set out some of the background.

3. The Claimant, who was born on 10th May 1964 was employed by the Defendants as an emergency care assistant, predominantly assisting paramedics and on 3rd February 2014, in the course of her employment,

she was injured negotiating a side door exit in an ambulance when she felt her back "jar". As an inherent part of the structure of the ambulance there is a built-in step which could break the gap between the ambulance chassis and the ground level, which was said to be some eighteen inches in distance. The Claimant appears to have jumped down and felt her back jar.

4. The Claimant sustained a soft tissue injury in her lower back. She had an acceleration for a few months of an underlying depression and chronic fatigue syndrome. On 23rd January 2017 the Claimant issued proceedings for damages limited to £10,000 against the Defendants.

5. Ordinarily on the above stripped out analysis of the facts this was a classic case that should have been brought within the low value personal injury claims (Employers Liability and Public Liability, Protocol) and if that was its natural habitat then the portal costs under Section S111 of CPR 45 would be engaged.

6. The claim never touched the portal and it is interesting to see why since points 2 and 3 of the points of dispute raised by the Defendants maintain that the Claimant acted unreasonably in not starting the claim in the portal. I note that District Judge Williams rejected these submissions and specifically found fixed portal costs were not appropriate.

7. The parties compromised the action and a consent order was placed before District Judge Bloom-Davis compromising that the Claimant would receive £4,500 and the Defendants agreed to pay the reasonable costs of the Claimant subject to a detailed assessment if not agreed. That wording as to Costs is very important for what follows. Prior to this the Claim was allocated to the fast track and the Defendants obviously agreed to pay the Claimant's costs but instead of a conventional summary assessment of those costs theywere to be subject to a detailed assessment. Within the consent order there is no reference to fixed costs and of course I remind myself that this case never entered or went near the portal. It is suggested that the wording of that order, the draft of which emanated for the Defendant's solicitors, may suggest that the parties had contracted out of fixed costs by the terms of their compromise and that is certainly the approach of His Honour Judge Wulwik in the case of **Adelekun v Lai Ho** heard at the Country Court at Central London under claim number AO6YQ205. That case has been put before me and we have spent some time looking at the reasoning of the learned circuit judge. I gather that this is subject to appeal to the Court of Appeal for which permission has been granted. I treat this case like so many others that have been put before me as not necessarily binding upon me but illustrative of approach of other judges at first instance. I have however been referred to a number of authorities in this case which I have read and spent some time reading, some assist me a great deal, some of course are binding upon me.

8. Thus far we had a case that was allocated to the fast track which ordinarily should have warranted a summary assessment of costs but was put into

a detailed assessment regime and there was no reference in the consent order to fixed costs.

9. One has to ask and indeed answer why this case never went near the portal. The reasons for that become clearer as one delves into the background. The Claimant first consulted her solicitors Thompsons some thirteen months after the accident in May 2015. The Claimant sustained injury on 3rd February 2014 and sadly on 21st May 2014, and this is fundamental to understanding the approach of the Claimant's solicitors, she had been admitted to hospital having suffered a stroke. She presented with upper limb weakness and the diagnosis was:

> "Functional dissociative syndrome, possibly secondary to recent injury."

And then there is a reference to:

> "... Functional neurological symptoms."

The case was handled at Thompsons by a Mr Seymour and the file note indicates that he decided very early on to treat the matter as one for the multi track rather than engage in the portal. He quickly, on 5th August 2015, sent a letter of claim which I gather the Defendants acknowledged on 8th September 2015.

10. Interestingly the Defendants did not raise any concern that the case did not enter the portal. They admitted breach of duty but maintained the Claimant should accept 50% contributory negligence. I pause to consider this because the MOJ portal at paragraph 613(1) would have been engaged and the case would have exited the portal because the issue of contributory negligence had been raised. That is a very important fact.

11. Given the fact thereafter the Claimant presented with the complication of neurological problems (the stroke) and contributory negligence had been immediately raised by the Defendants, to shoehorn this into the portal would have been wholly inappropriate. I have re-read the witness statement of Mr Nicholas Seymour dated 24th May 2019. Fundamental to his approach was the issue of causation raised by the hospital that the stroke may have been caused by the back trauma and the discharge note of 28th May 2014 speaks for itself. One cannot in my judgment fault Mr Seymour's approach contained in paragraph 5 of his witness statement. He really did not need the Defendants to raise the live issue of contributory negligence because he had identified this risk in paragraph 7 of his witness statement.

12. Mr Seymour valued the claim at more than £25,000. The issue of the stroke had been investigated and of course contributory negligence had been raised. Simply, as it presented to him, this was not a portal case. Proceedings were ultimately issued under part 7 and the defence raised no challenge to the portal issue as Mr Seymour's successor Mr Robert Laughton noted in his witness statement. He filed a statement dated 24th

May 2019 and we have spent some time considering how he approached the matter. I note in particular what he says at paragraph 8 of his statement. The Defendant reminded me that even at this late stage when issuing the claim in January 2017 when it became clear the stroke was unrelated and that liability was admitted in full (in fact this occurred in October 2016) the claim should have simply entered the MOJ portal at that stage and it was difficult to see on the Defendants' case why the Claimant issued a part 7 claim. In other words the decks have been cleared, contributory negligence had gone, the stroke was no longer an issue and the claim was clearly less than £25,000. The Defendants complained bitterly that there should have been a review by any case handler and that part 7 was inappropriate.

13. The Claimant maintained that this simplistic and hindsight-laden approach is unrealistic. Of course the claim had been through the pre-action Protocol for personal injury claims, why then should the Claimant subject her claim to a second pre-action process. The disclosure issued had already been aired with a Pre Action Disclosure Application and three medical experts had already delivered their reports. I have read those reports. By this time of course much in the way of legal costs had been generated.

14. Any experienced personal injury specialist, and I encompass both Mr Lawton(who succeeded Mr Seymour as case handler) and Mr Seymour in that category, will know exactly when they see a case as to what does and does not fit the glove of the portal. The MOJ scheme is enormously valuable and successful for non-complex personal injury claims and these are usually very easy to identify and they of course engage the fixed cost regime. The event of the stroke suffered by the Claimant so proximate to the back injury and the issue of causation clearly needed to be investigated. The Defendants maintain that the case could of and should of gone into the portal but if the stroke was linked to the back injury it could have come out of the portal. That of course ignores the fact that the Defendants had raised contributory negligence and did not abandon that for some considerable time.

15. The Defendants argue with some vigour that the portal Protocols stand alone and are strict. I do not think anyone would disagree with that. The portal Rules clearly take precedence and they represent an all-embracing code. I certainly accept the approach in paragraphs 1 to 5 inclusive of Ms Roberts' skeleton argument. The portal Protocols are to my mind anterior and superior if I read C15A009 in the preamble to the employer's liability Protocol. They govern a party's behaviour and the recoverability of costs.

16. I am reminded of the court's punitive powers under CPR 45.24 to limit costs to no more than portal costs where the Protocol has either been breached or ignored. I have to consider if this Claimant has acted unreasonably.

17. The apex of the submission that the Defendants make is that the Claimant acted unreasonably and thus in breach of the Protocol when she issued

the part 7 proceedings on 23rd January 2017. I have been referred to **Patel v Fortis Insurance Limited [2011]** a decision of Recorder Morgan which whilst not binding upon me is illustrative of approach. One has to understand that breaching the Protocol is a drastic step. A very powerful point is made in the Defendants' skeleton argument at paragraph 14.

18. I have to consider and survey all this and look at the concept of hindsight which is very important because there is repeated reference in the authorities or other first instance decisions to say that of course hindsight is not at all that is open to the court. And if it is not open to the court it is not open to the Claimant or the Defendant. If I accept that there was a breach of the Protocol I have to consider the date when that occurred i.e. when the Claimant issued proceedings and whether the Claimant acted unreasonably in how she proceeded. I have read **Tennant v Cottrell 11/12/14** and the appeal before His Honour Judge Gregory in **Raja v Day & MIB** dated 2nd March 2015 which I have found quite helpful. It is also interesting to note in **Dawrant v Part & Parcel Network** Judge Parker QC equated hindsight with speculation and described both of them appropriately as a trap. Hindsight can be a very dangerous thing but it is not open to the court to look at hindsight and speculate.

19. Of course, I have to survey what Mr Seymour did. He held a reasonable belief as to the value and complexity of the claim. His decision and decision-making process were in my judgment on the possibly unique presentation of the specific factual matrix of this case leads me to the conclusion he was entitled to engage the pre-action Protocol for personal injury claims and treat it sensibly as a multitrack claim with a genuine belief that it had a value of £25,000.

20. I cannot be satisfied that CPR 45.24(2)(b) is engaged. I accept the submissions of the Claimant on this point. Specifically, rather than find the Claimant acted unreasonably, Mr Seymour acted appropriately and reasonably and did not breach the Protocol. Accordingly, I endorse the approach and view of District Judge Williams (as he then was) on this oral review. In my judgment there is much force in the Claimant's approach that it would be quite unrealistic to expect the Claimant to have to switch to a separate Protocol, in fact that may have escalated costs set against the fact that the Claimant had already expended a great deal in costs and would lose the ability to recover them. I do not lose sight of the fact the Defendants themselves had not complied with the pre-action Protocol and its conduct caused additional costs. I have in mind the pre-action disclosure application.

21. I am reinforced in my view because of course contributory negligence was a constant feature and although three medical experts obviously in different fields were engaged, given the presentation of the Claimant, it seems to me it was wholly unsuitable to place this within the MOJ portal. I fully accept the submission made on behalf of the paying party that the number of experts would not of itself disengage the portal but here the fact of the stroke and causation made it unsuitable for the portal. To my mind this needed to be investigated thoroughly.

22. These factors do not stand alone. Any file handler has a duty or at least an obligation to keep the matter under review. Mr Seymour started from a high point multitrack with a value of over £25,000 and I am satisfied that he did keep it under review, after all he issued the claim limiting its value to less than £10,000 and the inevitable allocation to the fast track. The Defendant says this review was inadequate even to issue, as a part 7 claim, was erroneous. They say that the stock take by Mr Lawton was inadequate at the time of the issue of proceedings but I reject that. He could not go back to the portal once the part 7 claim had issued but he was reasonably in all of the circumstances to issue it under part 7. I do not accept that it was a huge risk to have issued a part 7 claim in these circumstances.

23. I cannot also overlook the fact that the Defendants appeared to have been passive in all of this. They never once seemed to raise the question this ought to have gone into the portal or badger Mr Seymour or for that matter Mr Lawton to make sure that it did. Much has been said in the hearing of a potential windfall for the Claimant in terms of costs but these appear(subject to further argument) to be reasonable costs. The Defendant seemed to take the view that the Claimants themselves would get a windfall in costs but all the Claimants are looking for is reasonable costs to reflect their outlay on a case as it presented to them with some complexity.

24. I now turn to the consent order itself. I have read what Mr Lawton has said in his witness statement about this and that of Mr Richard Johnson on behalf of the Defendants dated 19th March 2019. Mr Johnson on behalf of the Defendants says this:

> "In signing a consent order agreeing to pay reasonable costs subject to detailed assessment I did not intend that the Claimant should have a costs windfall by taking this out of the fixed costs regime."

25. The difficulty for him is that he drafted the order saying a detailed assessment and reasonable costs. He did not reserve his position in any preamble in the order as to fixed costs. Fixed costs were completely alien to this because of course the case had never entered the portal. Much has been said about the decision of the learned circuit judge in **Adelekun v Lai Ho**. Although this is not binding upon me because His Honour Judge Wulwik was not sitting as a judge of the High Court it does have quite a unique flavour to it possibly on all fours with the present case before me.

26. The starting point of any consent order is that the parties are in agreement and they have both agreed that the Claimant is entitled to her reasonable costs subject to the detailed assessment. In my judgment costs are at large. There is no room for either party to say that there was some form of unilateral mistake on their part as to what they were entering into because nobody has applied to set aside the consent order. It is of course an order of the court and it binds the parties. In any event, the paying party was still entitled to put the argument that fixed costs should apply hence the argument before District Judge Williams and subsequently

before myself. I am led to the inevitable conclusion that paragraphs 29, 30 and 31 of the skeleton argument advanced by the Claimant is unanswerable.

27. For those reason I cannot find that the Claimant had acted unreasonably even at the point when a stocktake was taken and by virtue of the terms of this consent order which are binding upon both parties and which has not been disturbed costs are subject to a detailed assessment and are at large before me. I will now propose to deal with the balance of the bill.

Dated this 21st day of September 2019

.....

DISTRICT JUDGE STEWART