Radia v Marks [2022] EWHC 145 (QB): Adverse Credibility Findings Outside the Scope of an Expert's Duty

Introduction

1. There are relatively few reported cases of professional negligence against expert witnesses. Equally, *Radia v Marks* [2022] EWHC 145 (QB) is an interesting application of the scope of duty principles as re-stated in *Manchester Building Society v Grant Thornton LLP* [2021] UKSC 20 and the linked case of *Meadows v Khan* [2021] UKSC 21.

Factual Background

2. The claim against the Defendant, Dr Marks, came about after a campaign of disastrous litigation by Mr Radia.

3. Mr Radia had, from 2006-2017, worked for a global investment bank, Jeffries Ltd ("Jeffries"). In November 2009, he had been diagnosed with Acute Myeloid Leukaemia ('AML'), which resulted in his being admitted to hospital for an extended period of months. Mr Radia remained an in-patient until 16 April 2010 and had returned to work at Jeffries on a phased return basis in June 2010.

4. In short, the events that followed Mr Radia's return to work at Jeffries culminated in his commencing an Employment Tribunal claim in May 2015 for alleged disability discrimination ('the ET Claim').

5. In the course of those proceedings, Dr Marks was appointed as a single joint expert witness to report upon the effect of AML and its treatment upon the Claimant, specifically his mental and physical fatigue levels following his return to work. The letter of instruction sent to Dr Marks explained that it was agreed, between the Claimant and Jeffries, that the Claimant was disabled by reason of having suffered AML, but that there was disagreement on the effects of AML.

6. Dr Marks, in his report, addressed the likely effect of AML on the Claimant. Central to his conclusions on the likely fatigue suffered, was the fact that, by the end of the Claimant's treatment, he weighed just under 50kg and had therefore lost nearly 50% of his total body weight. In Dr Marks' view, this was highly material because '[*I*]*osing this much weight is always associated with fatigue'*.

7. Significantly, the Defendant's report recorded that the '*just under 50kg'* weight had come from the Claimant himself during consultation with the Defendant. However, in the course of the ET Claim, it became clear that the Claimant's medical records actually recorded that his weight following chemotherapy had been 81.5kg. Unsurprisingly, the Defendant was questioned on whether this information altered his conclusions regarding the likely fatigue allegedly suffered by the Claimant. It did.

8. Unfortunately for Mr Radia, the ET Claim ended very badly. The Tribunal concluded that he had been a dishonest witness and that his evidence had not been credible. There were several reasons for this conclusion:

    a. That, under cross-examination, the Claimant had persistently failed to answer questions, and was frequently evasive;

    b. The '*untruth*' regarding his weight following surgery;

    c. An allegation that, due to Jeffries' conduct, he had been forced to '*miss*' a family holiday to Mexico (it transpired at trial that he had been forced to fly out a few days late, but had stayed additional days at the end of the holiday to compensate for this);

    d. That he had given '*untrue evidence'* by exaggerating his absence from work for a knee injury, and when he had become aware of his disabled status.

9. Following the conclusion of the ET Claim, Jeffries brought costs proceedings against the Claimant, and succeeded in recovering just over £600,000. However, in the costs proceedings, the Tribunal found that the Claimant's dishonesty only justified an order for costs limited to 2 allegations; it was the fact that the multiple claims, taken as a whole, had no reasonable prospect of success, which justified the imposition of a whole costs order.

The allegations against the Defendant

10. Mr Radia commenced civil proceedings against Dr Marks in May 2018.

11. His allegations of breach of duty were summarised by Lambert J as 4 distinct allegations:

    a. That the Defendant had 'f*ailed to record accurately what he was told by the Claimant during the consultation'*;

    b. That he had neither read properly nor cross-checked the Claimant's medical records to confirm that what he reported accorded with those records;

    c. That he had given oral evidence at-odds with the contents of the written report;

    d. That he was in breach of duty by '*leaving the Employment Tribunal with the impression… that the Claimant had sought to deliberately mislead [Jeffries] … [and] causing the Employment Tribunal to find that the Claimant was dishonest*'.

12. The Claimant's case on causation and loss, broadly, was that but for the Defendant's breach(es) he would have avoided the circa £600,000 costs order made against him.

13. It should be emphasised that Lambert J found as a fact, after hearing evidence from the Claimant and Defendant, that the Claimant had in fact told the Defendant that his weight following chemotherapy was just over 50kg, and that this had been accurately recorded by the Defendant.

Scope of Duty

14. However, prior to determining whether the Defendant had accurately recorded his consultation with the Claimant, Lambert J held that the claim must fail in any event, because the nature of the loss suffered by the Claimant fell outside the scope of the Defendant's duty.

15. Lambert J considered that the claim fell outside established categories of negligence, and therefore it was necessary to consider the six-part test identified in *Manchester Building Society/Khan*. As the court stated: '*the question… is not whether the Defendant owed the Claimant a duty of care but whether the harm or loss claimed falls within the scope of that duty*'.

16. The first question in the 6-part test directed the court to identify the nature of the harm or loss asserted by the Claimant. Lambert J held that the loss/harm alleged was the ET's findings that the Claimant was a dishonest witness and had been dishonest in his interactions with Jeffries. This was in and of itself sufficient to dispose of the claim:

    …The issue therefore is whether the scope of the Defendant's duty to the Claimant extended to protect the Claimant from the risk of an adverse credibility finding, or a finding of dishonesty. Without hesitation, my answer to that question is that it did not [para 60].

17. 3 reasons in particular were given for this conclusion:

    a. The retainer letter was limited to a request to report on medical matters and not matters relating to the Claimant's credibility as a witness;

    b. An expert witness could not, by reason of their position, give evidence on the credibility of the witness; their evidence was admissible only to address matters within their expertise;

    c. To extend the duty of an expert witness to protecting a party's credibility could conflict with their overriding duty to the court and, in the case of a joint expert witness, their duty to the other party.

Other findings

18. Though that was sufficient to dispose of the claim, Lambert J also found that the Claimant's case on breach and causation had no merit.

19. On breach:

    a. As stated, it was found on the evidence that the Defendant had accurately recorded what the Claimant had told him at the consultation.

    b. It was held, unsurprisingly, that it was not a breach for an expert not to cross-check the medical notes for accuracy before submitting the report.

    c. Furthermore, it was not a breach for an expert witness to give evidence in response to cross-examination which may depart from their written report.

20. The Claimant's case on causation failed:

    a. In a narrow sense, because the Employment Tribunal had cited a number of reasons for finding the Claimant dishonest, and it was held that this would have been the case regardless of the weight discrepancy comments; and

    b. In a broader sense, because the dishonesty was not the reason for the bulk of the costs that the Claimant had been ordered to pay in the subsequent costs proceedings.

Future Implications

21. Whilst this was undoubtedly the right result on the facts, one might wonder whether the ambit of the court's reasoning on scope of duty is unduly wide.

22. It is certainly difficult to feel much sympathy for Mr Radia, who was found to be dishonest on multiple counts. Equally, Dr Marks was correctly vindicated, especially given the court's finding that he had correctly recorded what Mr Radia had told him in the consultation.

23. However, by dismissing the claim, not only on these grounds, but also on the basis that the harm suffered fell outside the scope of the expert's duty, the court appears to have closed the door to *any* claim where an expert's error has led to an adverse credibility finding and consequent loss for their client.

24. Re-imagine, for example, this case with slightly altered facts. Suppose that Dr Marks *had* in fact mis-recorded what Mr Radia told him in the consultation, that Mr Radia had not been dishonest in any other respect, and that the court's dishonesty finding had been based solely upon the expert's error. In such circumstances, why should the consequent loss that follows not be within the scope of the expert's duty? One might argue, that loss flowing from adverse judicial findings is precisely loss that ought to be within the scope of an expert witness's duty.

25. There is an important distinction between imposing a duty on experts to avoid adverse judicial findings (whether relating to credibility or otherwise) as a result of that expert's own errors and imposing a general duty on an expert to protect their client's

credibility at all costs. Arguably, the court considered the scope of duty question as if it were being asked to impose the latter duty.

26. If one were to recognise that adverse judicial findings caused by an expert's *error* fall within the scope of that expert's duty, the court's 3 reasons for excluding the loss from the scope of duty fall away:

    a. Whilst a retainer letter would be unlikely to specifically state that an expert should record accurately what a client tells them and avoid making errors in the report, this would almost certainly fall within the implied duty of reasonable skill and care.

    b. An expert is, of course, not competent to comment upon a party's credibility, and nor would such evidence be admissible. However, a court may base conclusions about the client's credibility on what they have told an expert. Imposing a duty on the expert to avoid such findings insofar as they are caused by the expert's own errors would not entail the expert expressing any conclusion on credibility.

    c. An unqualified duty to protect a party's credibility would, of course, conflict with an expert's duty to the court (and a co-party, in the case of a jointly appointed expert). However, a duty to avoid adverse findings caused by the expert's own errors would not. It is difficult to see how allowing recovery where an expert had made an obvious error, and that error had been proven to have caused adverse credibility findings, would conflict with an expert's other duties.

27. The case has effectively created a blanket immunity for expert witnesses vis-à-vis credibility findings. There is the potential, therefore, for the ruling to cause some rather hard results in the future.

28. Practically speaking, for as long as the case is not overturned or distinguished, it is very difficult to see how any party could sue an expert witness for losses caused by an adverse credibility finding. As this can now be dealt with conclusively as a scope of duty question, strike out applications in such claims ought to readily succeed.

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