

Costs Order Against Dental Expert Who Showed a Flagrant & Reckless Disregard for His Duties to the Court

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Having blanked his screen and left the ongoing court proceedings to pick up his son from school, the Claimant's expert witness in *Robinson v (1) Liverpool University Hospital NHS Foundation Trust (2) Mercier* (County Court at Liverpool, 9 September 2021), Dr Mercier, was initially oblivious of the court's direction that the Defendant trust would have 21 days to consider whether to pursue a third-party costs order ("TPCO") against the expert.

Background

The substantive proceedings arose from a dental negligence claim, in which the Claimant alleged that the Defendant Trust's oral/maxillofacial surgeon had negligently failed to remove an upper molar, at the same time as non-negligently removing two lower molars whilst the Claimant was under general anaesthetic ("GA").

Breach of duty turned on whether the surgeon had carried out any adequate examination of the Claimant prior to extraction, and whether he properly assessed the upper molar as being capable of restoration, such that it did not require removal.

The Claimant's case on this issue rested entirely on the expert evidence of Dr Chris Mercier, a General Dental Practitioner ("GDP"). He reached conclusions on key issues, without having had sight of an x-ray which was described as one of the central documents in the case.

Dr Mercier conceded in cross-examination that, as a GDP, he had never worked in a hospital setting, save to observe another practitioner on a few occasions, and he had no experience of the surgical removal of teeth under GA since 2000. He accepted that the Defendant's expert oral and maxillofacial surgeon was better placed to opine on the standards to be applied to an oral and maxillofacial surgeon.

The Claimant discontinued her claim after the conclusion of the evidence at trial and the Defendant subsequently applied for a TPCO for just over £50,000, which represented the costs incurred by the Defendant from the outset of the proceedings, which would have been avoided but for the conduct of Dr Mercier.

The Law

Under section 51(6) of the Senior Courts Act 1981, the Court has the power to order a party's legal or other representative to meet all or part of any wasted costs.

The case of *Ridehalgh v Horsefield* [1994] Ch 205 determined that when a wasted costs order is contemplated, a three-stage test is to be applied:

1. Had the legal representative of whom complaint was made acted improperly, unreasonably, or negligently?
2. If so, did such conduct cause the applicant to incur unnecessary costs?
3. If so, was it, in all the circumstances, just to order the legal representative to compensate the applicant for the whole or part of the relevant costs?

In *Phillips v Symes (A Bankrupt) (Expert Witnesses: Costs)* [2005] 1 WLR 2043, the court decided that an expert witness who causes significant expense to be incurred by his evidence given in flagrant reckless disregard of his duties to the court, could be added as a party to enable a party to apply for a wasted costs order against the expert pursuant to CPR

Costs orders against non-parties are "exceptional" in the sense that the case is outside the ordinary run of cases which parties pursue or defend for their own benefit and at their own expense. The ultimate question in any such exceptional case is whether in all the circumstances it is just to make the order (*Dymocks Franchise Systems (NSW) Pty Ltd v Todd (Costs)* [2004] 1 WLR 2807).

Once breach of the expert's duty to the court is established to the necessary degree, the Defendant must then prove "a causative link between the particular conduct of the non-party relied upon and the incurring by the [party] of the costs sought to be recovered under section 51" (see *Travelers Insurance Company Ltd v XYZ* [2019] 1 WLR 6075).

The Decision

Recorder Hudson did not hold back in expressing her disapproval of Dr Mercier's evidence:

- "The report itself reaches wholly unsustainable conclusions..."
- "I do not know whether Dr Mercier's difficulty is a sheer unwillingness to consider other propositions or a fundamental lack of understanding of the legal test."
- "It is in my view disingenuous to suggest that his opinion has remained the same throughout. His opinion fluctuates to whatever he feels will win the case."
- "Dr Mercier's evidence is simply absurd and his inability to recognise that is extremely concerning".
- "To allege negligence against another practitioner based on a current examination some 18 months after the fact is demonstrative of a gross lack of understanding of the seriousness of his role. It demonstrates a flagrant disregard of his duty to the court."
- "It is not clear to me that Dr Mercier has made any effort to understand the issues in this case."
- "I formed the view during trial that Dr Mercier was not making any efforts to assist the court, but instead wilfully sticking to his case theory irrespective of the questions asked or the evidence given. His evidence was grossly unhelpful and wholly unreliable."
- "Dr Mercier at no point referred in his evidence to the relevant legal test, and often his answers implied that he does not understand it."

Notwithstanding the catalogue of criticisms levelled at the expert, the Recorder ultimately decided the application solely on the basis advanced by the Defendant, namely:

"It should have been obvious to Dr Mercier at the outset, and at various stages throughout the proceedings, that he was not the appropriate expert to opine on the management and treatment afforded to the Claimant."

On this issue, Recorder Hudson readily concluded that Dr Mercier has shown a flagrant reckless disregard for his duties to the Court and that he did so from the outset in preparing a report on subject matter in which he has no expertise.

She then showed no hesitation in finding that, but for Dr Mercier's conduct, the claim would not have been brought and accordingly, that all costs claimed within the Defendant's cost budget were caused by "Dr Mercier's flagrant disregard for his duty to the court. A public body has been put to considerable expense in financing costly litigation that should not have been brought."

QOCS Avoidance?

This case follows shortly on from *Thimmaya v (1) Lancashire NHS Foundation Trust (2) Jamil* (County Court at Manchester, 30 January 2020), where HHJ Evans made a similar order for wasted costs against an expert witness who had failed comprehensively in the exercise of his duties to the court. The expert's failings in that claim led to the claimant discontinuing her claim at trial when it had become apparent that the expert could not articulate the test to be applied in determining breach of duty in a clinical negligence case.

Does this case represent a growing trend in TPCOs as a work-around the qualified one-way costs shifting ("QOCS") regime?

Earlier this year in *Walker v TUI UK Ltd* (County Court at Manchester, 14 January 2021), a TPCO application was refused where the Defendant failed to show that the single joint expert gastroenterologist in a holiday food poisoning claim had caused significant expense to be incurred in flagrant disregard of his duties to the court. DJ Obodai in that case reiterated that the threshold for making a wasted costs order is higher for experts than it might be for legal advisers, who have the ability to take tactical decisions as to how their client's case is advanced.

It seems, therefore, that whilst the decision in *Mercier* might be another in an increasing line of cases where Defendants are looking elsewhere to recover costs in a QOCS environment, it does not seem to represent any relaxation of the court's rigorous approach to TPCOs, which shall remain "*exceptional*" for the time being.

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