## *Personal Injury: The statement of truth really matters*

**David Willink**

Contempt of court should lead to an immediate prison sentence: *Liverpool Victoria Insurance Company Ltd v Zafar* [2019] EWCA Civ 392.

Dr Zafar produces 5000 medico-legal reports per year. On this occasion, he reported on a claimant who had suffered one week of whiplash, and fully recovered thereafter. At the behest of the solicitor, the report (with the usual statements of truth and independence) was rewritten to say that the symptoms persisted, and gave a 6-8 month prognosis. These falsehoods were found to have been made recklessly rather than deliberately, as a result of the "industrialisation" of Dr Zafar's medico-legal practice; he had not cared whether or not the court was misled.

When the deception was uncovered, further falsehoods followed, again supported by statements of truth. Convicted of contempt of court, he was sentenced to six months' imprisonment, suspended for two years.

On appeal this was held to be unduly lenient; any sentence less than 9 months' immediate imprisonment was inappropriately light.

There is a special circle of hell reserved for guilty experts, because of the reliance placed on expert witnesses, and because of the corresponding importance of the overriding duty which experts owe to the court:

> "… an expert witness who recklessly makes a false statement in a report or witness statement verified by a statement of truth will usually be almost as culpable as an expert witness who does so intentionally. … To abuse the trust placed in an expert witness by putting forward a statement which is in fact false, not caring whether it be true or not, is usually almost as serious a contempt of court as telling a deliberate lie."

However, the court's conclusions apply to all such statements, whether by litigants, lawyers or experts:

> "… the deliberate or reckless making of a false statement in a document verified by a statement of truth will usually be so inherently serious that nothing other than an order for committal to prison will be sufficient. That is so whether the contemnor is a claimant seeking to support a spurious or exaggerated claim, a lay witness seeking to provide evidence in support of such a claim, or an expert witness putting forward an opinion without an honest belief in its truth."

One for all litigants and litigators to be aware of.

## *Civil Restraint order: Sartipy (aka Hamila Sartipy) v Tigris Industries Inc [2019] EWCA Civ 225*

**Dominic Bright**

This is a leading authority on the requirements for an extended civil restraint order.

*Power to make civil restraint orders*

CPR 3.11 provides that a practice direction may set out the: 1) circumstances in which a court may make a civil restraint order; 2) procedure where a party applies for a civil restraint order; and 3) consequences of a civil restraint order.

*Three kinds of civil restraint order*

Practice Direction 3C provides for three kinds of civil restraint order: 1) limited; 2) extended; and 3) general.

A limited order may be made 'where a party has made 2 or more applications which are totally without merit'. An extended order may be made 'where a party has persistently issued claims or made applications which are totally without merit'.

A general order may be made 'where the party against whom the order is made persists in issuing claims or making applications which are totally without merit, in circumstances where an extended civil restraint order would not be sufficient or appropriate'.

*"Totally without merit"*

A claim or application is totally without merit if it is bound to fail. That is, there is no rational basis on which it could succeed. It need not be abusive, made in bad faith, or supported by false documents.

*"Persistence"*

Persistence in this context requires at least three such claims, or applications. The Court of Appeal added seven further clarifications. The third and seventh are particularly important.

Only claims or applications where the party in question is the claimant, counterclaimant, or applicant can be counted. A defendant or respondent may behave badly, for example, by telling lies in evidence, producing fraudulent documents, or putting forward defences in bad faith, however, that does not constitute issuing claims, or making applications.

When considering whether to make a restraint order, the court is entitled to take into account any previous claims, or applications, which the court concludes were totally without merit. The court is not limited to claims or applications so certified at the time. In such cases, however, the court will need to ensure that there is sufficient information about the previous claim, or application in question.

## *Property: The Right to Rent: Discrimination in the Housing Market*

## *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department v Residential Landlords Association, Equality and Human Rights Commissions, Liberty [2019] EWHC 452 (Admin), 1 March 2019*

**Barbara Zeitler**

The Government's 'Right to Rent' Scheme, introduced in England under SS. 20 -37 Immigration Act 2014 (as amended by the Immigration Act 2016), makes it unlawful for a landlord to let a property to a person who, due to not having leave to remain in the UK, is 'disqualified' from renting a property. A landlord who knows or has reasonable cause to know that a person does not have the requisite immigration status commits an offence punishable by up to five imprisonment and/or an unlimited fine. These provisions,

which require landlords to carry out immigration checks on potential tenants, formed part of the 'hostile environment' introduced by the Government to encourage irregular immigrants to leave the United Kingdom.

The Joint Council for the Welfare of Immigrants ('JCWI'), with interventions from Liberty, the Equality and Human Rights Commission and the Residential Landlords Association, sought a declaration that the 'Right to Rent' Scheme was incompatible with Articles 8 and 14 European Convention on Human Rights (the right to respect of a person's home and the prohibition of discrimination) together with an order quashing the Home Secretary's decision to extend the scheme to other parts of the UK, at any rate not without further evaluation.

The JCWI had carried out tests, including a mystery shopping exercise, that indicated that landlords were favouring potential 'white British' tenants over persons from ethnic minorities or with other nationalities but with no restrictions on renting.

The High Court allowed the applications, holding that: the Scheme came within the ambit of Article 8 ECHR; the evidence showed that the Scheme encouraged landlords to discriminate against potential tenants on the grounds of nationality and ethnicity; the Government was responsible for the discriminatory effect of the Scheme; the Government had not come close to justifying the Scheme and the objective of immigration control was significantly outweighed by the discriminatory effect of the Scheme, which had little or no effect on controlling immigration. Further, the Court held that the extension of the Scheme to other parts of the UK without evaluating its efficacy would be irrational and a breach of the Public Sector Equality duty under s. 149 Equality Act 2010. The Court made a declaration of incompatibility.

## *Clinical Negligence: Bowman -v- Thomson (2019) EWHC 269 (QB)*

**Napier Miles**

The latest case on the issue of "expert shopping". In a clinical negligence case C obtained an expert urology report ("the old report")t but then lost confidence in the expert. At a subsequent CCMC, C obtained permission for an expert urology report ("the new report), from a different named expert. Some time later, and by complete chance, D found out about the old report and applied for its disclosure as a condition of C being allowed to rely on the new expert report. Both at first instance and on appeal (Dingemans J) the Court found that there was no justification (query no jurisdiction) to retrospectively vary the Order to attach such a condition. The approach in *Vasiliou v Hajigeorgiou [2005] EWCA Civ 235* to balancing legal privilege in an expert report with the court's interest in preventing expert shopping was right but there had to be a "principled" means of identifying a vehicle for ordering disclosure of a prior privileged report before disclosure should be ordered. Attempting to use general case management powers, or making a variation of an order "after the event", is not permitted.

The position would have been different if D, and thus the Court, had known of the existence of the old report before the Order was made. Then it would be standard practice to add a condition (assuming the old report had been obtained after the protocol had commenced: See Edwards Tubb -v- Wetherspoon (2011) EWCA Civ 136).

Dingemans J commented: "Both parties were clear that they did not want to encourage any routine questioning of parties about whether parties had obtained such prior expert evidence at case

management conferences because that would be likely to lead to greater cost, complication and expense for very little gain. I agree with both parties that that would be the likely outcome and that such an outcome would not be desirable."

However, given this decision there may be added incentive for a Defendant to make this “routine questioning” as otherwise, once an Order is made, they may have lost their chance.