Thimmaya v Lancashire NHS Foundation Trust: The incompetent expert

Introduction

1. As all legal practitioners know, good experts win cases.
2. Conversely, bad experts can not only lose cases, but sometimes they can cause a bad case to enter or remain in existence, wasting time, effort and money. Such was the case in *Thimmaya v Lancashire NHS Foundation Trust*, where, in a judgment that will understandably alarm the medico-legal world, the County Court decided that a third party costs order should be made against the Claimant's expert witness, in the sum of £88,801.68.
3. In this note, all references in the form [x] are references to paragraph x in the *Thimmaya* judgment.

Facts

4. The relevant facts of *Thimmaya* were straightforward:
    4.1. The Claimant had brought a clinical negligence claim against the Defendant NHS Trust. As to breach of duty, she relied on the expert evidence of Mr Jamil, Consultant Spinal Surgeon ([1]).
    4.2. In cross-examination at trial (carried out in March 2019), Mr Jamil *"was wholly unable to articulate the test to be applied in determining breach of duty in a clinical negligence case"* ([2]). He even accepted that he did not know what the test was ([2]). Given this collapse by her key witness, the Claimant then discontinued her claim ([2]).
    4.3. By the time of the third-party costs hearing, Mr Jamil *"accept[ed] with hindsight that he was not fit at the time of the trial to give expert evidence, due to his mental health problems"* ([5]). However, he maintained that he did not appreciate this at the time ([5]). He further maintained that he was aware of the *Bolam/Bolitho* test ([5]), but that cross-examination had triggered an adverse psychiatric reaction, since opposing counsel had reminded him of an interrogator who had interrogated him in Iraq ([5]).
    4.4. In November 2017, Mr Jamil had taken sick leave from his clinical practice before retiring in 2018 ([3]). However, he had maintained his medico-legal practice ([3]). He had not told the Claimant's legal advisors of his sick leave ([12]).
    4.5. In the High Court case of *ZZZ v Yeovil District Hospital NHS Foundation Trust* [2019] EWHC 1642 (QB), (conducted in-between the *Thimmaya* trial and the third party costs hearing) Mr Jamil again appeared as an expert witness and again similarly failed to explain, when challenged, the test for breach of duty in clinical negligence cases ([9]).

The Judgment

5. The judge's analysis was succinct and lucid:
    5.1. The judge accepted that the jurisdiction to make a third party costs order in this case mirrored the jurisdiction to make a wasted costs order, in that she had to be satisfied that Mr Jamil had engaged in *"improper, unreasonable or negligent conduct"* ([13]).
    5.2. The judge further accepted that this test would only be satisfied in exceptional cases ([14]).

5.3. The judge found that, at the time of cross-examination, Mr Jamil did not know the relevant test for breach of duty ([8]). His explanation that counsel had reminded him of a previous interrogator was rejected, because he had failed to give that same explanation at earlier times (and indeed had given a different explanation in *ZZZ v Yeovil*) ([9] – [10]).

5.4. Due to Mr Jamil's mental health difficulties, *"he was unable to concentrate and unable to engage properly with cross-examination"* ([12]).

5.5. Mr Jamil should have taken sick leave from his medico-legal practice at the same time he took sick leave from his medical practice, in November 2017 ([12]).

5.6. The judge said she had no evidence that any other expert would have given supportive evidence for the Claimant had Mr Jamil withdrawn in November 2017 ([16]). She further revealed that on initially reading the trial bundles, she had considered the Claimant was unlikely to succeed in the claim ([16]). She thus found that, on the balance of probabilities, Mr Jamil had caused the Defendant to incur all the costs that it had in fact incurred after November 2017 ([17]).

5.7. In conclusion, Mr Jamil had *"failed comprehensively in [his] duties [to the court] from November 2017 onwards"* ([19]) in a manner that was improper, unreasonable or negligent ([13]), and such failure had caused the Defendant to incur *"significant unnecessary costs"* ([19]).

5.8. The judge thus ordered Mr Jamil to pay the costs incurred by the Defendant after November 2017, which were said to be £88,801.68 ([21]).

Discussion

6. This judgment will understandably alarm medico-legal experts. However, in the author's view, this judgment constitutes nothing more than a sensible application of existing legal principles to facts which were truly exceptional.
7. In the author's view, the crucial point in this case was that Mr Jamil knew that he had mental health difficulties, and he knew that those difficulties were such that he could no longer continue his clinical practice. In such circumstances, it is difficult to understand why he thought he could nevertheless continue his medico-legal practice. It is also unimpressive – and arguably telling – that he failed to tell the Claimant's legal advisors of his sick-leave, even though they had specifically asked him in 2017 whether he was suitable to continue reporting ([6]).
8. Accordingly, this was not an expert who simply had an unforeseeable bad day in cross-examination or who otherwise 'got it wrong'. This was an expert who should have known (from November 2017 onwards) that he was unfit to act as an expert and yet had continued to act regardless.
9. Furthermore, experts can take reassurance from the fact that the Defendant further tried – and failed – to hold Mr Jamil responsible for its pre-November 2017 costs as well. The judge was clearly unimpressed with Mr Jamil's general conduct as an expert, finding that his reports were poorly written and poorly argued ([6]); doubting that he was sufficiently qualified to opine on the Claimant's specific circumstances in any event ([14]); and even bluntly characterising him as *"not very good"* ([6]). However, none of these failings the judge considered sufficiently exceptional so as to warrant a third-party costs order for costs incurred prior to November 2017. It was the specific fact of knowledge of his mental health difficulties that rendered his poor conduct sufficiently 'exceptional', and that line was only crossed in November 2017.

10. Finally, the judge also agreed that *"the jurisdiction to make wasted costs orders is not intended as a punitive jurisdiction"* and she was *"not to fine Mr Jamil to mark the Court's displeasure at his conduct"* ([18]).

Conclusions

11. *Thimmaya* stands as a stark reminder of the court's power to make third party costs orders. There is no reason in principle why such orders cannot be made against expert witnesses, and in *Thimmaya* such an order was duly made.
12. Aggrieved litigants will likely seek to exploit this case to pursue similar costs orders against poor experts in their own cases. However, in the author's view, this strategy will have little tangible success. Not only is *Thimmaya* a County Court decision that sets no binding precedent in any event, but (for the reasons set out above) it will likely be interpreted as a case where the facts were truly exceptional. Crucially, it offers no support for the proposition that an expert who merely conducts his/her work poorly – by producing poorly reasoned reports for example – should be held liable in costs.
13. In the author's view, the true message from *Thimmaya* is that if experts have medical difficulties which affect their ability to work, then they should take appropriate action – including notifying the solicitors and ceasing to act if appropriate. The author suggests that the burden this actually places on good, sensible experts is minimal.

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