England and Wales Court of Appeal (Civil Division)

Committal of an Expert Witness for Contempt of Court

Liverpool Victoria Insurance Co. Ltd v. *Zafar* [2019] EWCA Civ 392

Liverpool Victoria Insurance appealed against the sentence imposed on Dr Zafar for contempt of court arising from a report he provided in an action for whiplash injury in a car crash. Dr Zafar was a GP who provided expert evidence in around 5,000 civil cases a year. In each case he took about 15 minutes to examine the patient and write his report. The complaint of contempt of court arose from a case where having initially reported that the claimant had fully recovered from the minor injury sustained in a car accident, he amended his report at the request of the claimant's solicitor, without any further examination of the claimant. His revised report bore the date of his examination of the claimant but gave a much more pessimistic prognosis, for which there was no basis in his notes of the original medical examination. In this respect the report reflected what Dr Zafar was told by the claimant's solicitor, but gave no indication of the source of the information. It included the following declarations:

> Wherever I have no personal knowledge, I have indicated the source of factual information. I have not included anything in this report, which has been suggested to me by anyone, including the lawyers instructing me, without forming my own independent view of the matter…..
>
> I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.

The alteration of the report came to light because a paralegal mistakenly sent the original report to the appellant's lawyers.

Garnham J found the complaint of a civil contempt of court proved, and committed Dr Zafar to prison for six months, suspended for two years: *Liverpool Victoria Insurance Co Ltd v Khan and others* [2018] EWHC 2581 (QB). The insurance company appealed on the ground that the penalty (not strictly speaking a 'sentence', although the Court of Appeal does use the term) was unduly lenient.

Held, allowing the appeal, the deliberate or reckless making of a false statement in a document verified by a statement of truth would usually be so inherently serious that nothing other than an order for committal to prison would be sufficient. That was so whether the contemnor was a dishonest claimant, a lay witness, or an expert witness putting forward an opinion without an honest belief in its truth. A false statement made by an expert for financial reward would be even more serious, but even where the expert did not stand to gain financially a false statement was a serious contempt of court because of the reliance placed on expert witnesses by the court and the importance of the expert's overriding duty to the court. Without seeking to lay down an inflexible rule, an expert witness who recklessly made a false statement in a report or witness statement verified by a statement of truth would usually be almost as culpable as an expert witness who did so intentionally. To abuse the trust placed in an expert witness by putting forward a statement which

was in fact false, not caring whether it were true or not, was usually almost as serious a contempt of court as telling a deliberate lie.

The Respondent had made a number of false statements without making any attempt to check their accuracy or to qualify them in any way. He had made the declarations quoted above, and signed the statement of truth, when the contents of the revised report had included (without attribution) something suggested to him by the solicitor and had to that extent not been based on his own independent view; and when the opinions which he expressed did not represent his 'true and complete professional opinions' and were not his 'completely independent opinion'. In all the circumstances, his culpability came close to that of an expert witness who had deliberately made false statements.

The Respondent's culpability was significantly increased by his attempts to cover up what he had done. He had told a direct lie in one his witness statements and further recklessly false statements in another.

Commentary

In addition to dealing with the specific issue raised by the present case, the court gave the following general guidance on the appropriate approach to sentencing in such cases.

An order for committal to prison would usually be inevitable where an expert witness commits this form of contempt of court. As to the appropriate period of imprisonment, the court must have in mind that the two year maximum term had to cater for a wide range of conduct, and must seek to impose a term which sat appropriately within that range.

The fact that only a comparatively modest sum was claimed in the proceedings in which the false statement was made did not remove the seriousness of the contempt. A contempt of court by an expert witness would, however, be even more serious if the relevant false statement supported a claim for a large or grossly exaggerated sum.

In considering mitigating factors such as a contemnor's positive good character and professional reputation, it had to be remembered that it was the professional standing and good character of the expert witness which enabled him or her to act as an expert witness, and thus to be in a position to make false statements of this kind. Breach of the trust placed in an expert witness by the court must be expected to result in a severe sanction being imposed by the court in addition to any other adverse consequences. The fact that an expert witness had brought ruin upon himself or herself, and/or faced proceedings by a professional disciplinary body, would not in themselves be a reason not to impose a significant term of committal.

The court must also give due weight to the impact of committal on persons other than the contemnor. In particular, where the contemnor was the sole or principal carer of children or vulnerable adults, such considerations might, in a borderline case, enable the court to avoid making an order for committal. In a case in which nothing less than an order for committal could be justified, the impact on others might provide a compelling reason to suspend its operation.

Where the expert had admitted the contempt, the timing of that admission was important. Consistently with the approach taken in criminal cases, a maximum reduction of one-third would only be appropriate where conduct constituting the contempt of court had been admitted as soon as proceedings were commenced. Thereafter, any reduction should be on a sliding scale down to about 10% where an admission was made at trial.

The appropriate term would usually have to be served immediately and powerful factors, such as the severe effect of committal on others, would be needed to justify suspension. The fact that the relevant false statement was made recklessly rather than intentionally would not in itself usually be such a factor.

Although cases in which the Court of Appeal would interfere with a decision of this nature were rare, the order made by Garnham J was wrong in two respects. First, the term of committal should have been significantly longer than six months. The Respondent could not have appealed successfully against a term of 12 months, nor would a term of less than nine months have been appropriate. Secondly, the term should have been ordered to be served immediately, there being no powerful factor in favour of suspending it.

The judge found that in putting forward his revised report Dr Zafar was motivated initially by a desire to keep his report-writing factory running at full capacity. He had, therefore, been at least indirectly motivated by a concern for financial profit. He had persisted in the conduct which constituted his contempt of court, putting forward false statements on three different occasions, on one of which he had acted with deliberate dishonesty by claiming that someone else had altered his report. He had not maintained that deliberate untruth for very long, but had then recklessly put forward the untrue explanation that his original report had been made in error. Having regard to the terms of his declarations and his statement of truth, the recklessness which the judge found had come close to the borderline between reckless and dishonesty. The judge had given undue weight to the fact that the Respondent's conduct was in most respects reckless rather than intentional. In the circumstances of this case there was little difference in culpability between those two states of mind.

Although the sentence fell to be reversed, a more severe sentence would not be imposed because it would be unfair to impose on the defendant the adverse consequences of the guidance the court had just given. It was sufficient to declare that the original sentence (penalty) imposed was unduly lenient.

Although classed by the trial judge as a civil contempt, the form of contempt involved is thought to be more appropriately classified as criminal: see Arlidge, Eady & Smith on *Contempt of Court* (4th ed. 2013) para. 11.66. However it is classified, the principles applied are also applicable in criminal cases, and Etherton MR's judgment gives an indication of how seriously the courts will review expert reports where the declaration the expert is required to sign proves to be untrue, even if the expert did not make a deliberately false statement in the body of the report (at [59] – [62]).

At first sight, it is puzzling that either the trial judge or the Court of Appeal could entertain any doubt as to Dr Zafar's dishonesty. Was it not patently dishonest to sign a declaration that the facts were within his own knowledge and that the revised report represented his 'true and complete professional opinion', when he must have known full well that both statements were false? The reason why this was not a sufficient basis for a finding of dishonesty appears to be that the proceedings were brought under the Civil Procedure Rules, r. 32.14, which deals with proceedings for contempt against a person who makes 'a false statement *in a document verified by a statement of truth* without an honest belief in its truth'. The statements which Dr Zafar must have known to be false formed part of the statement of truth itself, as prescribed by Practice Direction 35.3.3. Although arguably a statement of truth forms part of the document it verifies, the Court appears to have assumed that the *actus reus* of the contempt was the making of the false statement about the

claimant's symptoms and prognosis. In this the trial judge found Dr Zafar to have been recklessly indifferent to the truth rather than positively dishonest; but taking the false statement of truth into account the Court of Appeal found Dr Zafar's level of culpability to be virtually equivalent to dishonesty.

What is called a statement of truth or, in Criminal Practice Direction 19B.1, a 'Statement of Understanding and Declaration of Truth' contains much more than a simple declaration that the statements in the body of the report are true. CPR 32.14 does not define the scope of contempt but rather creates a procedure for dealing with a particular type of contempt of a civil court *(Montgomery v Brown* [2011] EWHC 875 (QB) at [19]). The relevant form of contempt is defined by common law and is committed wherever a person interferes with the administration of justice by misleading the court. Even if proceedings under CPR 32.14 must relate to a false statement in the body of the report, there is no reason why a false statement forming part of the declaration of truth cannot constitute contempt.

The terms of the declaration that an expert in a criminal case is required to sign under the Criminal Procedure Rules 2015, r. 19.4 are set out in Criminal Practice Direction 19B.1 and include the following:

> 6. I have shown the sources of all information I have used.
>
> 7. I have exercised reasonable care and skill in order to be accurate and complete in preparing this report.
>
> 8. I have endeavoured to include in my report those matters, of which I have knowledge or of which I have been made aware, that might adversely affect the validity of my opinion. I have clearly stated any qualifications to my opinion.
>
> 9. I have not, without forming an independent view, included or excluded anything which has been suggested to me by others including my instructing lawyers.

An incompetent expert who honestly but wrongly believed that he or she had used reasonable care and skill would not be guilty of contempt of court by signing this declaration. Where, however, the expert knows that the care and skill employed fall short of a reasonable standard, to sign such a declaration would be a serious breach of the trust which, as Etherton MR stressed, the courts place in expert witnesses. Similarly, it would be a serious breach of trust to fail to disclose factors which adversely affected the validity of one's opinion (for example that it was based on an ostensibly scientific method that has not been validated) or to fail to state a necessary qualification to one's opinion (for example, that a finding 'consistent with' an incriminating fact was equally 'consistent with' an entirely different scenario). Sins of omission of this kind may well be more common than outright lies or recklessly false statements in the body of the report. If the court's trust in the expert's declaration blinds it to serious weaknesses in the prosecution or defence case, this is surely an interference with the administration of justice and therefore a contempt of court.

Applying the principles in *Zafar* to a criminal case, would a breach of trust of this kind merit immediate imprisonment? The length of the committal which the Court of Appeal thought should have been imposed reflected in part the attempted cover-up as well as the inclusion of a false statement in the body of the report. On the other hand the court treated what was at stake in the proceedings as a factor affecting the seriousness of the contempt, and arguably a false conviction, or indeed an acquittal, for even a moderately serious criminal offence is a more serious matter than a

financial loss to an insurance company. It would be prudent for expert witnesses to assume that if they knowingly present a misleading report to the court they could face a significant period of imprisonment.

An alternative approach potentially available in the present case would have been to pursue a charge of perverting the course of justice. According to Archbold Criminal Pleadings and Practice, 2019, [28-1] (applying *R v Vreones* [1891] 1 Q.B. 360, CCR; *R v Andrews* [1973] Q.B. 422, CA), the common law offence of perverting the course of justice "is committed where a person or persons;

(a) acts or embarks upon a course of conduct,
(b) which has a tendency to, and
(c) is intended to pervert,
(d) the course of public justice."

In *R v Selvage and Morgan* [1982] Q.B. 372 the Court of Appeal confirmed that the course of public justice "relates to judicial proceedings, *civil or criminal*, whether or not they have yet been instituted but which are within the contemplation of the wrong-doer whose conduct was designed to affect the outcome of them." (at p.379, emphasis added). It is clear that Dr Zafar's actions in signing the revised statement occurred in contemplation of potential civil proceedings.

A possible hurdle in the present case might have been created by the Court of Appeal's apparent indecision over whether "the contemnor may have acted dishonestly, or recklessly in the sense of not caring whether the statement was true or false" (at [58]). Notwithstanding the above contention that the Dr Zafar's decision to sign a statement of truth which he knew to be untruthful was patently dishonest (and therefore demonstrative of an intention to pervert the course of justice), it is suggested that, in any event, his subsequent attempt "to cover up what he had done by telling a direct lie in his witness statement of August 2013…" (at [63]) would provide sufficient evidence of his relevant intention.

The maximum sentence available on conviction for an offence of perverting the course of justice is life imprisonment. Although even the most serious examples of the offence are unlikely to attract a sentence approaching the maximum, the Court of Appeal held in *Attorney General's Reference (No.17 of 2008)* [2008] EWCA Crim 1341 that "where a person is convicted of perverting the course of justice it will be only the most exceptional of cases that does not result in an immediate sentence of imprisonment." (at [12]). Whilst the Sentencing Council is yet to publish Definitive Guidelines for the offence of perverting the course of justice it is suggested that an immediate custodial sentence consistent with the approach taken by the Court of Appeal in respect of the contempt of court in the present case would have been consistent and appropriate. In a case of outright fabrication of scientific evidence, much more severe sentences might be considered appropriate. In *R v Weiner* [2011] EWCA Crim 1249 at [15], it was said that 'Any case of perverting the course of justice which wrongly exposes another to the risk of arrest, imprisonment and wrongful conviction is to be viewed as particularly serious'. Moreover, the involvement of a police officer in planting false evidence is treated as particularly serious because it undermines the administration of justice (*Attorney-General's Reference nos. 6,7 and 8 of 2000,* [2002] EWCA Crim 264). The same can be said of fabrication of evidence by scientists engaged by the police. Although the sentences imposed in those cases (12 and 7 years respectively) reflect particular

aggravating circumstances, there is no reason to treat the fabrication of scientific evidence any less seriously than the planting of evidence.

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