Manchester Building Society
One Year On: Part 3

This is the third in a series of reflections on *Manchester Building Society v Grant Thornton* [2021] UKSC 20 a year on from the judgment being handed down.

In Part 3 we look at an unusual case concerning a medico-legal expert.

INTRODUCTION

In Part 1, we revisited the key points arising from *Manchester Building Society*. In summary, the central analytical framework involves asking six questions: the actionability question, the scope of duty question, the breach question, the factual causation question, the duty nexus question and the legal responsibility question. In asking the scope of duty question, the court will look at the purpose of the duty which is in turn informed by working out the risk which the duty was meant to guard against. The 'advice' and 'information' labels based on *SAAMCO* were disapproved of. The *SAAMCO* counterfactual, which asks whether the losses claimed would have been suffered if the defendant had been right, was reduced to a checking mechanism which would not be useful in every case.

We then reflected on our experience since *Manchester Building Society* was decided and made some general observations based on caselaw.

In Part 2 we considered the approach adopted by the court in recent claims against solicitors.

THE *RADIA* CASE

In *Radia v Marks [2022] EWHC 145 (QBD)*, the Claimant was an investment banker. He contracted cancer and was off work for an extended period. His ability to work was impaired when he went back. He brought disability discrimination proceedings against his employer. They failed. The Employment Tribunal found that he had lied in his evidence. It awarded adverse costs. An appeal to the Employment Appeal Tribunal was also unsuccessful. The Court of Appeal refused permission. The Claimant brought two further proceedings against the employer. These largely foundered as well.

The Claimant then sued the doctor who had acted as a single joint expert in the original tribunal proceedings. He said that the doctor should have picked up a discrepancy between what he had noted down in consultation about the Claimant's weight and the weights identified in his medical records. He maintained that it was confusion over this which had led the tribunal to conclude that he was lying. The immediate problem with this was that the tribunal had found that he had lied about several other things as well as his weight. The claim unsurprisingly failed.

Interestingly, in light of our recent note on the topic, the Judge began by stressing that it would be an abuse for the Claimant to use the proceedings to make a collateral attack on the tribunal's findings of fact and, therefore, that she had to proceed on the basis that it was entitled to make them. With that out of the way, the Judge turned to consider scope of duty.

She accepted that this was a novel case which fell outside established categories of negligence. Therefore, what she described as the *"six-point plan"* identified in *Manchester Building Society* applied. At first glance, it appears that she went on to adopt a more holistic approach, but a careful reading of her judgment suggests that she considered at least most of the relevant considerations encompassed by the six tests.

After observing that it was not in dispute that pure economic loss was justiciable or that the doctor owed duties to both parties to the tribunal proceedings, the Judge directed herself, "*The question for me therefore 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"*. The harm, she found, was the tribunal's finding of dishonesty. She found "*without hesitation*" that it was not within the scope of the doctor's duty to protect the Claimant from the risk of an adverse credibility finding.

In reaching this conclusion, she started with the letter of instruction. This sought the doctor's expert opinion on the course of the Claimant's illness, his treatment and its side effects. Therefore, the Judge concluded, he was under a duty to advise on these matters for the purpose of assisting the tribunal in its decision making and the parties in their assessment of the merits. The Judge did not make any finding about the risk which the duty was meant to guard against, but this would presumably be that the tribunal would proceed on a misapprehension as to the Claimant's condition and/or that the parties would draw the wrong conclusions on the merits.

She continued that the doctor had not been asked to advise on credibility and nor could he have been. It was not a matter within his sphere of expertise. She acknowledged that a medico-legal report might highlight inconsistences which informed the tribunal's conclusions on credibility but that was a side effect. It did not extend the scope of duty to protecting a party or witness from adverse findings. This was all the more so in the case of a single joint expert.

These findings disposed of the claim but the Judge went on *obiter* to reject the Claimant's case on breach and causation.

PART 4

In Part 4, we revisit an important decision of the Privy Council in a negligent valuation case.

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